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

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

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This is a Key-Numbered Volume

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

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

JUDGES

OF THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

FIRST CIRCUIT

Hon. OLIVER WENDELL HOLMES, Circuit Justice.....Washington, D. C.
Hon. WILLIAM L. PUTNAM, Circuit Judge.....Portland, Me.
Hon. FREDERIC DODGE, Circuit Judge.....Boston, Mass.
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Hon. CHARLES M. HOUGH, Circuit Judge .....New York, N. Y.
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Hon. JULIUS M. MAYER, District Judge, S. D. New York .....New York, N. Y.
Hon. AUGUSTUS N. HAND, District Judge, S. D. New York.....New York, N. Y.
Hon. MARTIN T. MANTON, District Judge, S. D. New York .....New York, N. Y.
Hon. JOHN R. HAZEL, District Judge, W. D. New York.....Buffalo, N. Y.
Hon. HARLAND B. HOWE, District Judge, Vermont.....St. Johnsbury, Vt.

THIRD CIRCUIT

Hon. MAHLON PITNEY, Circuit Justice.....Washington, D. C.
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Hon. JOHN B. McPHERSON, Circuit Judge.....Philadelphia, Pa.
Hon. VICTOR B. WOOLLEY, Circuit Judge.....Wilmington, Del.
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Hon. THOS. G. HAIGHT, District Judge, New Jersey.....Jersey City, N. J.
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Hon. OLIVER B. DICKINSON, District Judge, E. D. Pennsylvania.....Philadelphia, Pa.
Hon. CHAS. B. WITMER, District Judge, M. D. Pennsylvania.....Sunbury, Pa.
Hon. CHARLES P. ORR, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.
Hon. W. H. SEWARD THOMSON, District Judge, W. D. Pennsylvania.....Pittsburg, Pa.

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Hon. JAMES E. BOYD, District Judge, W. D. North Carolina.....Greensboro, N. C.
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Hon. HENRY CLAY McDOWELL, District Judge, W. D. Virginia.....Lynchburg, Va.
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Hon. BENJAMIN F. KELLER, District Judge, S. D. West Virginia....Charleston, W. Va.

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Hon. DON A. PARDEE, Circuit Judge.....Atlanta, Ga.
Hon. A. P. McCORMICK, Circuit Judge[1].....Waco, Tex.
Hon. RICHARD W. WALKER, Circuit Judge.....Huntsville, Ala.
Hon. ROBERT LYNN BATTS, Circuit Judge[2].....Austin, Tex.
Hon. HENRY D. CLAYTON, District Judge, N. and M. D. Alabama....Montgomery, Ala.
Hon. WM. I. GRUBB, District Judge, N. D. Alabama.....Birmingham, Ala.
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama[3].....Mobile, Ala.
Hon. ROBERT T. ERVIN, District Judge. S. D. Alabama[4] .....Mobile, Ala.
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Hon. EMORY SPEER, District Judge, S. D. Georgia.....Macon, Ga.
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Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
Hon. WALLER T. BURNS, District Judge, S. D. Texas.....Houston, Tex.
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas[6].....Austin, Tex.
Hon. DUVAL WEST, District Judge, W. D. Texas[7].....San Antonio, Tex.

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

SEVENTH CIRCUIT

Hon. JOHN H. CLARKE, Circuit Justice .....Washington, D. C.
Hon. FRANCIS E. BAKER, Circuit Judge.....Goshen, Ind.
Hon. CHRISTIAN C. KOHLSAAT, Circuit Judge.....Chicago, Ill.

[1] Died November 2, 1916.
[2] Appointed February 5, 1917, to succeed A. P. McCormick.
[3] Died November 12, 1916.
[4] Appointed January 23, 1917, to succeed Harry T. Toulmin.
[5] Died December 20, 1916.
[6] Resigned December 12, 1916.
[7] Appointed December 21, 1916, to succeed Thomas S. Maxey.

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

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Hon. WALTER H. SANBORN, Circuit Judge.....St. Paul, Minn.
Hon. WILLIAM C. HOOK, Circuit Judge.....Leavenworth, Kan.
Hon. WALTER I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
Hon. JOHN E. CARLAND, Circuit Judge.....Washington, D. C.
Hon. KIMBROUGH STONE, Circuit Judge[8].....Kansas City, Mo.
Hon. JACOB TRIEBER, District Judge, E. D. Arkansas..... Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
Hon. ROBERT E. LEWIS, District Judge, Colorado.....Denver, Colo.
Hon. HENRY THOMAS REED, District Judge, N. D. Iowa.....Cresco, Iowa.
Hon. MARTIN J. WADE, District Judge, S. D. Iowa.....Iowa City, Iowa.
Hon. JOHN C. POLLOCK, District Judge, Kansas.....Kansas City, Kan.
Hon. PAGE MORRIS, District Judge, Minnesota.....Duluth, Minn.
Hon. WILBUR F. BOOTH, District Judge, Minnesota.....Minneapolis, Minn.
Hon. DAVID P. DYER, District Judge, E. D. Missouri.....St. Louis, Mo.
Hon. ARBA S. VAN VALKENBURGH, District Judge, W. D. Missouri...Kansas City, Mo.
Hon. THOMAS C. MUNGER, District Judge, Nebraska.....Lincoln, Neb.
Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska .....Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, N. M.[9].....Santa Fé, N. M.
Hon. CHARLES F. AMIDON, District Judge, North Dakota.....Fargo, N. D.
Hon. RALPH E. CAMPBELL, District Judge, E. D. Oklahoma.....Muskogee, Okl.
Hon. JOHN H. COTTERAL, District Judge, W. D. Oklahoma.....Guthrie, Okl.
Hon. JAMES D. ELLIOTT, District Judge, South Dakota.....Sioux Falls, S. D.
Hon. TILLMAN D. JOHNSON, District Judge, Utah .....Ogden, Utah.
Hon. JOHN A. RINER, District Judge, Wyoming.....Cheyenne, Wyo.

NINTH CIRCUIT

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

[8] Appointed December 21, 1916. [9] Appointed February 5, 1917.

*

CASES REPORTED

CASES ON REHEARING

CASES IN THE UNITED STATES CIRCUIT COURTS OF APPEALS IN WHICH REHEARINGS HAVE BEEN GRANTED OR DENIED

EIGHTH CIRCUIT.

Leonard v. State Exch. Bank of Elk City, Okl., 236 F. 316. Rehearing denied Jan. 26, 1917.

German American State Bank v. Larimer, 235 F. 501. Rehearing denied Nov. 13, 1916.

NINTH CIRCUIT.

Eggers v. Krueger, 236 F. 852. Rehearing denied Nov. 15, 1916.

Hanley v. Pacific Livestock Co., 234 F. 522. Rehearing denied Jan. 8, 1917.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

ST. LOUIS MERCHANTS' BRIDGE TERMINAL RY. CO. v. SCHUERMAN.*

(Circuit Court of Appeals, Eighth Circuit. October 17, 1916.)

No. 4664.

1. COMMERCE ⟸8(6)—MASTER AND SERVANT ⟸250¼, New, vol. 15 Key-No. Series—INJURIES TO SERVANT—ACTIONS—WHAT LAW GOVERNS.

Where the defendant railroad company was engaged in interstate commerce, a servant injured while engaged in interstate commerce may sue under the federal Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665), and that act and the federal Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531 (Comp. St. 1913, §§ 8605–8612), will govern the company's liability.

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⟸8(6).]

2. MASTER AND SERVANT ⟸111(1)—DUTIES—SAFETY APPLIANCE ACT.

The duty of a railroad to comply with the federal Safety Appliance Act is absolute, and it is no excuse that the company exercised reasonable care and effort to comply with the law.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 215, 255; Dec. Dig. ⟸111(1).]

3. MASTER AND SERVANT ⟸204(2), 228(2)—INJURIES TO SERVANT—ASSUMPTION OF RISK—CONTRIBUTORY NEGLIGENCE.

Safety Appliance Act, § 2 (Comp. St. 1913, § 8606), declares that after a fixed date it shall be unlawful for any common carrier to haul or permit to be used on its line any car in moving interstate traffic not equipped with automatic couplers, while section 8 (section 8612) declares that any employé of any common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of the act shall not be deemed to have assumed the risk although continuing in the employment after the unlawful use had been brought to his knowledge. Federal Employers' Liability Act, § 3 (Comp. St. 1913, § 8659), declares that, in all actions brought against any common carrier by railroad to recover damages for personal injuries, the fact that the employé may have been guilty of contributory negligence shall not bar recovery, but damages shall be diminished in proportion to the amount of negligence attributable to such employé, but no employé who may have been injured or killed shall be held to have been guilty of contributory negligence, where the violation of any statute enacted for the safety of any employés contributed to the death of such employé. Section 4 (Comp. St. 1913, § 8660) declares that an employé shall not be held to have assumed the risk of his employment in any case where the violation by such common carrier of any statute enacted for his safety contributed to his injury or death. Plaintiff, a switchman, who went between the cars because the automatic coupler was broken, was injured when his foot caught in a frog and other cars

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

*Rehearing denied December 4, 1916.

passed over him. *Held* that, as plaintiff would not have been in a position of danger had the coupling been in proper order, his action for damages cannot be defeated on the ground of contributory negligence or assumption of risk.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 545, 671; Dec. Dig. ⊂⊃204(2), 228(2).]

4. JUDGMENT ⊂⊃248—CONFORMITY—PLEADING AND PROOF.
In a negligence action, recovery can be had only on the case pleaded and proven.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 434; Dec. Dig. ⊂⊃248.]

5. MASTER AND SERVANT ⊂⊃112(4)—INJURIES TO SERVANT—RAILROAD COMPANY.
A railroad company is not liable for an accident due to an unblocked frog, though it may be liable where a switchman caught his foot in a frog which had been originally blocked but had been allowed to fall into disrepair.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 221; Dec. Dig. ⊂⊃112(4).]

6. MASTER AND SERVANT ⊂⊃264(4)—INJURIES TO SERVANT—ACTIONS—EVIDENCE—VARIANCE.
The petition of a railroad switchman alleged that, because of a defect in a coupler, he went between the cars, fixed the coupler with his hands, and gave the signal to back the other cars, but that, when he attempted to step from between the cars, his foot was caught in an unblocked switch or frog, or open space between two rails, and he was injured when the cars ran him down. Averments that the railroad company had negligently failed to block the switch were stricken. *Held* that, as allegations in the petition as to the condition of the frog or switch contained in the recital of the accident were not stricken, evidence thereof was admissible despite the rule that the proof must be restricted to the allegations.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 865; Dec. Dig. ⊂⊃264(4).]

7. APPEAL AND ERROR ⊂⊃1053(7)—REVIEW—HARMLESS ERROR.
In such case, the admission of evidence concerning the frog was harmless, where the court charged the jury that there was only one question, and that was the condition of the coupler, and that if the couplers on the cars were intact and in good order there could be no recovery.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4183; Dec. Dig. ⊂⊃1053(7); Trial, Cent. Dig. § 977.]

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

Action by William J. Schuerman against the St. Louis Merchants' Bridge Terminal Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

W. M. Hezel, of St. Louis, Mo. (T. M. Pierce and G. T. Priest, both of St. Louis, Mo., on the brief), for plaintiff in error.

W. H. Douglass, of St. Louis, Mo. (William H. Bartley, Jr., of St. Louis, Mo., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The defendant in error was the plaintiff below and the plaintiff in error was the defendant and they will be

styled as in the District Court. The defendant, the St. Louis Merchants' Bridge Terminal Railway Company, was engaged in interstate commerce at the time here in question between St. Louis, Mo., and East St. Louis, Ill., and the plaintiff, William J. Schuerman, was in its employ as a switch foreman and was employed in switching cars engaged in interstate commerce. On the night of January 13, 1914, he was directed to switch, among others, two cars, a Merchants' Despatch Transportation Company car, hereafter for brevity called an M. D. & T. car, and a Missouri Pacific car. These cars, with many others, were standing on a siding. The train crew went in on the siding from the north where the Missouri Pacific car was standing further south than the M. D. & T. car, and they cut loose the cars to the south of the Missouri Pacific car and drew the balance of the cars to the north until they had passed the switch and then backed down upon the Frisco track. They then detached the other cars from the Missouri Pacific car, drew them back to the switch, and replaced them on the side track. They there detached the cars to the rear of the M. D. & T. car and went north with it and two other cars in advance of it to the switch and then backed down the Frisco track to couple the M. D. & T. car onto the Missouri Pacific. Both these two cars had been equipped with automatic couplers, the Missouri Pacific with what is known as a Tower and the M. D. & T. with what is known as a Janney coupling. Both were equipped with a single lever projecting to the left of the car as one stood facing the end of the car. It was not the custom in detaching and coupling cars to open the coupling on both cars, but at this yard it was the custom to open the north coupling on the south car at the place where it was desired to detach or couple the cars. In this way the north coupling was supposed to be open on the Missouri Pacific car and the south coupling on the M. D. & T. was supposed to be closed. The plaintiff testified that, as they were about to make the coupling:

"I found the knuckles closed. I tried to open the knuckle on the Missouri Pacific with the lever that is on the side of the car, and I found that the knuckle wouldn't open very well, so by working the lever with one hand—and they got what they call a little pit or a nipple, I don't know what they, that's what we call it among railroad men—by working that back and forth, that little thing that holds the lock, it lets the knuckle get open. So I opened this knuckle, gave a sign to back up, and these cars hit and the coupling didn't make. I then went in between them and opened the knuckle on the M. D. T. car, gave a signal to back up, and when these cars hit again the coupling didn't make. So I was wondering what the trouble was. I stepped in between them, then, and looked and found that the lock pin that locked this knuckle was half broken off, that the knuckle lock worked itself in behind the knuckle; that wouldn't allow the knuckle to close. The bottom half was broken off. So then I had to take this pin and knuckle and everything out and set it on the ground, fix this knuckle lock and pick this knuckle back up and put this up in the car and fix it in position that part of this knuckle lock would hold it together enough that I could get this car out there. After I done that, I turned right around and went back to this Missouri Pacific, which was about four or five feet away, and had to go through that same thing again of opening that knuckle. After doing that and opening this knuckle, I started out and gave the signal. As I gave the signal, why, I went to make the second step, and I noticed that this foot had wedged itself in down between the two rails, so the only thing now to my mind then is to give a stop sign. As I did, I throwed myself down, and I went to

use this right foot of mine to try to kick this left foot loose before the wheels caught it, but the first kick I got, the wheels ran on up on both feet and the car stopped there."

It appears that in the last effort to make the coupling the plaintiff, in attempting to leave his place of danger between the cars and after he had given the signal to back up, found his foot caught in the frog and was unable to get it out, and the train backed down cutting off the front portion of the left foot and severely injuring the right foot and ankle. The case was tried to a jury who returned a verdict for the plaintiff, upon which judgment was rendered, and the defendant sued out this writ of error.

It is doubtful whether there is anything in the brief of plaintiff in error amounting to a specification of errors as required by the second subdivision of the second paragraph of rule 24 of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii), but this question is not raised by defendant in error, and under the head of "Points and Authorities," apparently under the third division of the second paragraph of rule 24, we find what we assume to be the errors relied on as follows:

"I. The District Court erred in refusing to give, at the close of the whole case, the following instruction requested by the defendant: 'The court instructs the jury that under the pleadings and the evidence the plaintiff is not entitled to recover and your verdict must be for the defendant.' For the reason that neither under plaintiff's nor defendant's testimony did any defective condition of the coupler contribute in whole or in part, in any legal sense, to the injury. The plaintiff's act was the sole cause of the accident.

"II. The District Court erred in admitting in evidence on behalf of the plaintiff, over the objections and exceptions of the defendant, testimony by plaintiff that at the place where the accident happened the blocking of the switch point or the space between the rails had become worn so as to leave an opening in which plaintiff's foot, or feet, were caught when he was attempting to come out between the cars. There was no allegation of worn or defective blocking in the petition and it is elementary that a plaintiff must stand or fall under the specific allegations of his petition.

"III. The District Court erred in refusing to give the following instruction requested by the defendant: 'The court instructs the jury that, though you find and believe from the evidence that the coupler of either of the cars in question was defective, yet if you find and believe from the evidence that the coupler of either car, or both of said cars, were adjusted by the plaintiff while all the cars were standing still and that the plaintiff after said adjustment signaled for a come-back movement while still wholly or in part between the cars, and the cars attached to the engine were moved backwardly and plaintiff ran upon or over, then the court instructs the jury that said signal so given was the proximate cause of the accident and your verdict must be for the defendant.' For the reason that it affirmatively and without contradiction appears that the defective condition of the couplers, as stated by the plaintiff in his testimony, did not contribute to the injury, but, on the contrary, the negligent conduct of the plaintiff was the sole cause of the injury."

[1] We shall briefly consider these three alleged errors. This suit was brought under the Employers' Liability Act law of April 22, 1908, 35 Stats. 65 (Comp. St. 1913, §§ 8657–8665), and under what is known as the Safety Appliance Act of March 2, 1893, 27 Stats. 531, as amended by the Act of April 1, 1896, 29 Stats. 85 (Comp. St. 1913, §§ 8605–8612), and the Act of March 2, 1903, 32 Stats. 943 (Comp. St. 1913, §§ 8613–8615).

As at the outset of the trial it was admitted that the defendant was engaged in interstate commerce, and that the plaintiff at the time in question was employed by the defendant in interstate business, there seems to be no doubt that the suit was properly brought under the Employers' Liability Act, and that it and the Safety Appliance acts must determine the question of the liability of the defendant. Southern Railway Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72.

[2, 3] The Act of March 2, 1893, 27 Stats. 531, contained the following provision:

"Sec. 2. That on and after the first day of January, eighteen hundred and ninety-eight, it shall be unlawful for any such common carrier to haul or permit to be hauled or used on its line any car used in moving interstate traffic not equipped with couplers coupling automatically by impact, and which can be uncoupled without the necessity of men going between the ends of the cars."

"Sec. 8. That any employé of any such common carrier who may be injured by any locomotive, car, or train in use contrary to the provision of this act shall not be deemed thereby to have assumed the risk thereby occasioned, although continuing in the employment of such carrier after the unlawful use of such locomotive, car, or train had been brought to his knowledge."

And the said Employers' Liability Act of April 22, 1908, 35 Stats. 65, contained the following provision:

"Sec. 3. That in all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this act to recover damages for personal injuries to an employé, or where such injuries have resulted in his death, the fact that the employé may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employé: Provided, that no such employé who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé.

"Sec. 4. That in any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injuries to, or the death of, any of its employés, such employé shall not be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employés contributed to the injury or death of such employé."

These statutes have been the subject of numerous decisions by the Supreme Court of the United States.

It has been held that the duty to comply with the Safety Appliance Act is absolute and that it is no excuse that the railroad company has used reasonable care and effort to comply with the law. St. Louis, Iron Mountain & Southern Ry. v. Taylor, 210 U. S. 281, 28 Sup. Ct. 616, 52 L. Ed. 1061; C., B. & Q. Ry. v. United States, 220 U. S. 559, 31 Sup. Ct. 612, 55 L. Ed. 582; C., R. I. & P. Ry. v. Brown, 229 U. S. 317, 33 Sup. Ct. 840, 57 L. Ed. 1204; Delk v. St. Louis & San Francisco R. R. Co., 220 U. S. 580, 31 Sup. Ct. 617, 55 L. Ed. 590. It will be observed that section 8 of the original Safety Appliance Act, 27 Stats. 532, abolished the defense of assumption of risk as against persons in the situation of plaintiff; that the Employers' Liability Act substituted the law of comparative negligence for the common-law rule of contributory negligence, and contributory negligence ceased to

be an absolute bar to actions under that law but simply went in mitigation of damages. By the proviso to section 3 contributory negligence ceased to be admissible in mitigation of damages if the company had violated the Safety Appliance Act and such violation had caused the injury.

Section 4 of this act reiterated the provision in the Safety Appliance Act abolishing the defense of assumption of risk. In Atlas Portland Cement Co. v. Hagen, — C. C. A. —, 233 Fed. 24, the court attempted to point out the distinction between the doctrine of assumption of risk and the doctrine of contributory negligence and called attention to the fact that the doctrine of assumption of risk always arises on contract, express or implied, while the doctrine of contributory negligence always arises in tort. While the Safety Appliance Act abolishes assumption of risk, it does not abolish that of contributory negligence. Schlemmer v. Buffalo, etc., Ry. Co., 220 U. S. 590, 31 Sup. Ct. 561, 55 L. Ed. 596; Same v. Same, 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681. But the proviso in the third section of the second employers' liability law provides that if suits are under the Employers' Liability Act and the Safety Appliance Law there is no defense of contributory negligence. Grand Trunk Ry. Co. v. Lindsay, 233 U. S. 42, 34 Sup. Ct. 581, 58 L. Ed. 838, Ann. Cas. 1914C, 168. It may be conceded that, under both the Safety Appliance Act and the Employers' Liability Act, if the negligence of the employé was the sole cause of the accident, he cannot recover as against the company; but it is now elementary that there may be several concurring or co-operating causes of an accident, and, without stopping to review the innumerable authorities upon proximate cause, we are of the opinion that, if the plaintiff had not been compelled to go between the cars to effect this coupling, he would not have been injured, and that the statutes expressly provide that under the circumstances neither the defense of assumption of risk nor contributory negligence will be available to the defendant. It may be remarked in passing that the only cases cited by plaintiff in error on this subject either affirmed judgments against the company or reversed the case for the refusal to submit the same to the jury.

[4-7] Turning now to the second point: The evidence showed the point of the switch had been blocked, but the blocking had become worn by the flanges of the cars, and in attempting to leave the place between the cars plaintiff's foot became caught and held him there until he was injured. It is claimed the plaintiff in his amended petition charged that this place had been negligently left unblocked, and this was stricken out by the plaintiff upon a motion being made to strike it by the defendant, and it inferentially so appears. It is clear that plaintiff could only recover on the case alleged and in support of which some evidence was offered.

The Supreme Court has held that no action will lie against a railroad company for an accident due to an unblocked frog. Southern Pacific v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391; Kilpatrick v. Choctaw, Oklahoma & Gulf Ry., 195 U. S. 624, 25 Sup. Ct.

789, 49 L. Ed. 349. If the allegation claimed was in the petition, it stated no cause of action, and the plaintiff wisely struck it out after it was attacked by the defendant. There never was any controversy in this case as to what would have been the applicable law if the company had blocked the point in question if it allowed the blocking to be out of repair. The Supreme Court said in Southern Pacific Co. v. Seley, supra:

"It was not pretended in the present case that the frog in which Seley had put his foot was defective or out of repair. The contention solely is that there is another form of frog, not much used, and which, if used by the defendant, might have prevented the accident."

If the facts as shown upon the trial, namely, that the point of the switch had been blocked but the blocking had been allowed to get out of repair, had been alleged, this portion of the petition might have stated a good cause of action; but this is aside from the question. It is, of course, an elementary rule that the evidence must correspond to the allegations and be confined to the point in issue; but this does not mean that every explanatory fact must be alleged or be inadmissible. It was essential for the plaintiff to show that he had been injured and the sustaining of this injury was not willful on his part. The amended bill upon which the case was tried expressly alleged:

"That after plaintiff had opened the couplers of said cars he attempted to step out from between them, when his left foot was caught in an unblocked switch or frog or open space between two rails."

No motion was ever made to strike this allegation from the petition; but, when the same facts were set up as a special ground of negligence, that portion of the petition was so attacked. On the trial it was shown that the point in question had been blocked, but the blocking had become worn and plaintiff's foot caught in it and he could not pull it away. When the court came to charge the jury, it said:

"Now, there is but one question in here, practically, as I see it. That is the question of the condition of this coupler."

And again:

"If, from all the evidence in this case, you believe that the couplers on the two cars mentioned here in the evidence were intact, complete, perfect order, then there can be no recovery here. If they were not, then there can."

If therefore there was any error in the admission of the evidence, and we think there was not, it was wholly cured by the charge submitting the case upon the single question of the condition of the couplers.

The third point raised is substantially submitted upon the same argument offered in support of the first one, and for the same reasons is not well taken.

There is no error, and the judgment of the District Court is affirmed.

KNAUER et al. v. UNITED STATES.

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

No. 4517.

1. CRIMINAL LAW ⟸1186(4)—REVIEW—TECHNICAL ERROR—INDICTMENT.
Under Rev. St. § 1025 (Comp. St. 1913, § 1691), which provides that no indictment shall be deemed insufficient by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, an indictment is sufficient which contains a sufficient accusation of crime, and alleges facts which are sufficient in law to sustain a conviction, and which furnish the accused with such description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against future proceedings for the same offense.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3215; Dec. Dig. ⟸1186(4).]

2. CONSPIRACY ⟸43(6)—CONSPIRACY TO VIOLATE LAW OF UNITED STATES—INDICTMENT.
In an indictment for conspiracy to violate the laws of the United States, the conspiracy itself is the gist of the offense, and the law to be violated need not be set out with the particularity required if its direct violation were charged.

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

3. MONOPOLIES ⟸31—ANTI-TRUST ACT—CONSPIRACY IN RESTRAINT OF TRADE—INDICTMENT.
An indictment for conspiracy in restraint of interstate trade or commerce, under Sherman Anti-Trust Act July 2, 1890, c. 647, § 1, 26 Stat. 209 (Comp. St. 1913, § 8820), need not aver that defendants were engaged in interstate commerce, nor the doing of an overt act, nor that the conspiracy was successful.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

4. INDICTMENT AND INFORMATION ⟸59—DESCRIPTION OF OFFENSE.
When the definition of an offense, whether it be by common law or by statute, includes generic terms, it is not sufficient that an indictment charge the offense in the same generic terms, but it must aver the particulars.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 180, 181; Dec. Dig. ⟸59.]

5. INDICTMENT AND INFORMATION ⟸125(5½)—DUPLICITY—CONSPIRACY.
A charge in a single count of a conspiracy to violate two or more laws of the United States does not render the indictment duplicitous.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 381; Dec. Dig. ⟸125(5½); Conspiracy, Cent. Dig. § 81.]

6. CRIMINAL LAW ⟸1149—INDICTMENT AND INFORMATION ⟸163—MOTION FOR BILL OF PARTICULARS—DISCRETION OF COURT.
A motion by the defendant in a criminal case for a bill of particulars is addressed to the discretion of the court, and its action thereon is not reviewable.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3039–3043, 3058; Dec. Dig. ⟸1149; Indictment and Information, Cent. Dig. § 525; Dec. Dig. ⟸163.]

7. MONOPOLIES ⟸29—ANTI-TRUST ACT—"COMBINATION IN RESTRAINT OF TRADE."

The National Association of Master Plumbers was formed prior to 1890, and at once took measures to prevent manufacturers and dealers in plumbers' supplies from selling direct to consumers, by resolving not to patronize such manufacturers and dealers as refused to agree to such restrictions, and by adopting a system of espionage. This policy was continued after 1890, and so extended as to bind the members to restrict their purchases to manufacturers and dealers who sold only to members of the association, excluding all other customers, although they might also be master plumbers. Members were listed in a book issued and distributed by the association. *Held* that, on the enactment of the Sherman Anti-Trust Act, the association became an illegal combination in restraint of interstate trade, and that any member who thereafter joined or affiliated with it, with knowledge of its illegal purposes and methods, was guilty of a criminal offense under section 1 of the act.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 19; Dec. Dig. ⟸29.

For other definitions, see Words and Phrases, First and Second Series, Combination in Restraint of Trade.]

8. MONOPOLIES ⟸31—ANTI-TRUST ACT—PROSECUTION FOR CONSPIRACY IN RESTRAINT OF TRADE—EVIDENCE.

On the trial of members of the association for criminal conspiracy in restraint of interstate trade, the official record of the proceedings of the association, showing the resolutions passed declaring its purposes, and the methods adopted for carrying them out, was admissible in evidence.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 20; Dec. Dig. ⟸31.]

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

Criminal prosecution by the United States against Robert Knauer and others. Judgment of conviction, and defendants bring error. Affirmed.

Louis C. Boyle, of Kansas City, Mo. (Clark McKercher and George H. Calvert, both of Washington, D. C., on the brief), for plaintiffs in error.

Claude R. Porter, U. S. Atty., of Centerville, Iowa (G. Carroll Todd, Asst. Atty. Gen., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

SMITH, Circuit Judge. Thirty-six persons, members of the National Association of Master Plumbers, among them Robert Knauer, Hugh B. McCarten, John P. Cunningham, and George H. Wentz, were indicted by the District Court of the United States for the Southern District of Iowa, charged with a conspiracy in violation of section 1 of the Sherman Act which is as follows:

"Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprison-

ment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stats. 209.

The defendants were all tried, found guilty, and Knauer, McCarten, Cunningham, and Wentz were sentenced, and sued out a writ of error in this court. It thus appears that the plaintiffs in error were defendants in the District Court, and the defendant in error was the plaintiff there, and they will be so styled here. The record contains more than 2,300 pages, and there are more than 660 pages in the printed arguments. All this has been read and carefully considered, but it is manifest that the case must be treated in this opinion in a more condensed form.

The first and second assignments of error complain of the overruling of demurrers to the indictment and the similar overruling of the motion to quash it. The indictment covers 26 pages of the printed record, and we cannot, therefore, set it out in full here. It in substance charged that from the 4th day of June, 1911, to the finding of the indictment 240 manufacturers and wholesale dealers in plumbing supplies, who are named, and the particular places where they were engaged in business are given, were engaged in interstate commerce in such plumbing supplies; that the defendants were engaged during all of said period in a conspiracy in restraint of such interstate commerce in plumbing supplies, the place of business of each of the defendants is given, and that each of them was a member of the National Association of Master Plumbers; and when he held any office therein, or in the State Association of Master Plumbers subordinate to the National Association, or in local associations so subordinate, those facts are set forth. The indictment further alleges that:

"Each of said local associations has throughout said period been affiliated: (1) With other similar associations of master plumbers in all the principal towns and cities of the United States; (2) with a certain association in each state called the State Master Plumbers' Association for that state, composed of members whose qualifications for membership have consisted in their being members in good standing of the several local associations of said state, wherever such local associations existed, and in their being willing to be subordinate to said State Associations; and (3) with still another association called the National Association of Master Plumbers of the United States, composed of all the members of all said local and state associations, and to which all said local and state associations have been subordinate. The prime object of all said local and state associations, and of said National Association of Master Plumbers of the United States, throughout said period of time, as said defendants have each well known, has been to secure to the members thereof all the business in the United States growing out of the furnishing and installing of plumbing supplies, and this to the absolute exclusion of all others engaging in or endeavoring to start or carry on such business, and thereby unlawfully to monopolize that business.

"To this end said members of said local and state associations and said National Association of Master Plumbers of the United States have, at all times during said period, concertedly conducted their business strictly upon a plan involving the purchasing of such plumbing supplies only from manufacturers and wholesale dealers who have refrained from selling or furnishing such plumbing supplies to master plumbers and retail dealers not members of such associations, and refusing to deal with manufacturers and wholesale dealers who have made or endeavored to make sales to master plumbers and retail dealers not members of said association; and as a part of, and for in-

suring adherence to and the success of, said plan of business, said members and associations have established and maintained a system of espionage over the business of said manufacturers and wholesale dealers and that of all persons and concerns not members of such associations; have systematically gathered and disseminated among themselves information touching acts of such manufacturers and wholesale dealers in the carrying on of their said business which were not in accord with said prime object of said associations, and particularly touching sales of such plumbing supplies to persons and concerns not members of any of said associations; in many instances have taken upon themselves to notify such manufacturers and wholesale dealers of their said 'unethical' acts in a way to imply a threat of refusal to deal with, that is to say, a boycott, and have often in fact boycotted, the manufacturers and dealers so offending; and have busied themselves in the procuring of the passage of local laws and ordinances pertaining to the licensing of plumbers and the installing of plumbing, and in the administering of such local laws and ordinances in such manner as wrongfully to favor such associations and their members as against persons not members of such associations; and those things have been done, notwithstanding the proportion of the business so carried on by said members of said associations has very greatly exceeded the proportion carried on by others, whereby said members of said associations have been in a position where, by such concerted action, they could, as they have well known, bring financial ruin to manufacturers and wholesale dealers failing to conduct their business in accord with said prime object of said associations—all to the great humiliation of said manufacturers, wholesale dealers, and others who were not members of said association, and the serious and inexcusable oppression of many worthy persons less prosperous than themselves who have been ambitious to engage in, but who have been by said conspiracy prevented from engaging in, the business of master plumbers in competition with said members of said association, as well as to the great detriment of the general public, and to the scandal and disgrace of their own profession.

"So far as the purchasing of said plumbing supplies from manufacturers thereof and wholesale dealers therein has been concerned, each of said defendants, throughout said period of time, has, in every way in his power, and in ruthless disregard of the rights of others, conducted his business upon the unlawful and oppressive plan aforesaid, well knowing the character and effect thereof, and intending to accomplish said prime object of said associations, and so have put an undue, unwarranted, and unreasonable restraint upon the interstate trade and commerce in this indictment above described, particularly in said Central division of said Southern district of Iowa, and have prescribed and enforced a rule for governing, and one which has in fact governed, said trade and commerce, and unlawfully have engaged, as aforesaid, in a conspiracy in restraint of trade and commerce among the several states contrary to said act of Congress and against the peace and dignity of the United States."

The defendants, apparently without withdrawing the plea of not guilty theretofore entered, filed on October 29, 1914, a general demurrer to the indictment, and on November 23, 1914, filed a general and special demurrer, which we assume was a substitute for the original demurrer. It was elaborate, but in substance was upon the grounds: First, that the indictment did not state facts sufficient to constitute a crime against the United States; second, that it is duplicitous; third, the specific purposes and acts charged as constituting a conspiracy are not charged against the defendants; fourth, that the indictment is insufficient, vague, uncertain, indefinite, and informal. The ways in which the indictment is deemed insufficient, vague, uncertain, indefinite, and informal are then set forth in detail, and would cover five pages of this opinion. The defendants also filed a motion to quash the indictment substantially upon the same alleged grounds.

These demurrers and the motion to quash were overruled by the court.

[1] It is provided by section 1025 of the Revised Statutes that:

"No indictment found and presented by a grand jury in any District or Circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant."

The question in its last analysis is: Does the indictment contain a sufficient accusation of crime, and do its averments furnish the accused with such a description of the charge against them, as will enable them to make their defense and avail themselves of their conviction or acquittal for protection against future proceedings for the same offense? And it has been held that the indictment must be sufficient to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to sustain a conviction if one should be had. United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; Dunbar v. United States, 156 U. S. 185, 191, 15 Sup. Ct. 325, 39 L. Ed. 390; Rosen v. United States, 161 U. S. 29, 34, 16 Sup. Ct. 434, 480, 40 L. Ed. 606; New York Central Railroad v. United States, 212 U. S. 481, 497, 29 Sup. Ct. 304, 53 L. Ed. 613; United States v. Bennett, 16 Blatchf. 338, 24 Fed. Cas. 1093, 1097; Hume v. United States, 55 C. C. A. 407, 118 Fed. 689, 696.

[2] In all charges of conspiracy, the conspiracy itself is the gist of the offense, and where a conspiracy is charged to violate the laws of the United States, if the conspiracy be specifically alleged, it is not necessary to allege the details of the law of the United States to be violated with the accuracy it would be if the charge were directly of the violation of the law of the United States, and not of the conspiracy to violate it. Williamson v. United States, 207 U. S. 425, 446, 28 Sup. Ct. 163, 52 L. Ed. 278.

[3] The act in question does not require that the defendants should have been engaged in interstate commerce. If they were all engaged exclusively in intrastate commerce, and they formed a conspiracy to restrain the trade of the manufacturers and wholesalers who were engaged in interstate commerce, that would make them guilty. Loewe v. Lawlor, 208 U. S. 274, 301, 28 Sup. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815; Nash v. United States, 229 U. S. 373, 379, 33 Sup. Ct. 780, 57 L. Ed. 1232; Patterson v. United States, 138 C. C. A. 123, 222 Fed. 599, 618. This is substantially what is charged here. It is not necessary to their guilt that the conspiracy should be successful. Under the ancient law of conspiracy, no overt act was at all necessary to make out the guilt of the defendant.

On March 2, 1867, Congress passed a law (section 30, c. 169, 14 Stat. 471, 484), which is substantially re-enacted in section 5440 of the Revised Statutes and section 37 of the Criminal Code (Act March 4, 1909, c. 321, 35 Stat. 1096 [Comp. St. 1913, § 10201]). In its last revision this reads:

"Sec. 37. If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner

or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than ten thousand dollars, or imprisoned not more than two years, or both."

The defendants are not charged under that section, but under section 1 of 26 Stat. 209. The act in question does not contain the clause that if "one or more of such parties do any act to effect the object of the conspiracy," nor any similar words. Under these circumstances an overt act by any of the defendants was unnecessary under this section of the Sherman Law. Nash v. United States, 229 U. S. 373, 378, 33 Sup. Ct. 780, 57 L. Ed. 1232; Brown v. Elliott, 225 U. S. 392, 32 Sup. Ct. 812, 56 L. Ed. 1136; Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614.

But the further consideration of that question is not essential here, as there are a number of acts done by one or more of the parties to effect the object of the alleged conspiracy.

[4] It is an elementary principle of criminal pleading that when the definition of an offense, whether it be by common law or by statute, includes generic terms, it is not sufficient that the indictment charge the offense in the same generic terms as in the definition, but it must state the species—it must descend to particulars. United States v. Cruikshank, 92 U. S. 542, 558, 23 L. Ed. 588; United States v. Hess, 124 U. S. 483, 8 Sup. Ct. 571, 31 L. Ed. 516.

[5] It is claimed that the indictment is duplicitous, in that it charges a conspiracy to violate more than one section of the Sherman Law in a single count. "The court will never be keen to hold an indictment bad for duplicity." 5 Ruling Case Law, 1081. Without intimating that we think such a thing possible under the Sherman Law as an indictment being duplicitous because it charges in one count a violation of two or more sections of the act, we are satisfied that a charge in a single count of a conspiracy to violate two or more laws of the United States is not duplicitous. Joplin Mercantile Co. v. United States, 131 C. C. A. 160, 213 Fed. 926, 929, Ann. Cas. 1916C, 470; John Gund Brewing Co. v. United States, 124 C. C. A. 268, 206 Fed. 386. Without more, we are of the opinion that the demurrers and motion to quash were all properly overruled.

[6] The indictment was returned June 4, 1914. On July 7, 1914, the defendants were all arraigned and pleaded not guilty. By agreement of parties the case was then set for trial on December 8, 1914. At that time the case was upon application of defendants continued until February 8, 1915. On February 9, 1915, the case not having been reached because the trial judge had not reached Des Moines, the defendants filed a motion for a bill of particulars. This was supported and resisted by affidavits. This motion was submitted upon the arrival of the judge on February 10th. It was overruled, "both as to its merits and for the further reason that the same was filed without leave, and after this case had been twice peremptorily set for trial, and the defendants had demurred to and pleaded not guilty to the indictment herein." This application was addressed to the discretion of the trial court, and its action thereon is not subject to review. Dunlop v. United States, 165

U. S. 486, 491, 17 Sup. Ct. 375, 41 L. Ed. 799. See Rinker v. United States, 81 C. C. A. 379, 151 Fed. 755, 759; Morris v. United States, 88 C. C. A. 532, 161 Fed. 672, 681. Nothing need be added on this subject. The matter was discretionary with the trial court, and not only is no abuse of the discretion shown, but the long delay in filing the motion until the case was substantially reached a second time for trial fully justified the action of the trial court.

[7] The sixth assignment of error is to the overruling of a request for instructed verdict at the conclusion of all the evidence, and the seventh assignment is that there is no competent evidence to sustain the verdict. In Eastern States Lumber Association v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788, it appeared that there was a combination of retail lumber dealers to distribute to the members of the association names of wholesale lumber dealers who made prices to consumers. The court said:

"A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself, and may do so because he thinks such dealer is acting unfairly in trying to undermine his trade. 'But,' as was said by Mr. Justice Lurton, speaking for the court in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 440 [30 Sup. Ct. 535, 54 L. Ed. 826], 'when the plaintiffs in error combine and agree that no one of them will trade with any producer or wholesaler who shall sell to a consumer within the trade range of any of them, quite another case is presented. An act harmless when done by one may become a public wrong when done by many acting in concert, for it then takes on the form of a conspiracy, and may be prohibited or punished, if the result be hurtful to the public or to the individual against whom the concerted action is directed.' When the retailer goes beyond his personal right, and, conspiring and combining with others of like purpose, seeks to obstruct the free course of interstate trade and commerce and to unduly suppress competition by placing obnoxious wholesale dealers under the coercive influence of a condemnatory report circulated among others, actual or possible customers of the offenders, he exceeds his lawful rights, and such action brings him and those acting with him within the condemnation of the act of Congress, and the District Court was right in so holding."

The defendants contend that the National Association of Master Plumbers was organized for legitimate purposes, and that if it deviated from such purposes and engaged in an illegal enterprise as charged there is no evidence that the defendants and particularly Cunningham and Wentz ever joined in the proceedings to convert this organization from its legitimate purposes to the illegal ones charged. Very considerable reliance in this regard is placed upon Ryan v. United States, 132 C. C. A. 257, 216 Fed. 13. This makes it important to ascertain from the evidence whether the National Association of Master Plumbers immediately after the passage of the Sherman Law was a legal organization which was diverted to an illegal purpose, or whether it was illegal from the passage of the act of 1890. The official proceedings of the National Association of Master Plumbers were introduced in evidence, and it appears therefrom that:

"For some time prior to the close of 1882, the Master Plumbers' Association of New York had been deeply impressed with a conviction of the necessity of taking some concerted action looking towards protection against the injury resulting to the trade through the facilities to purchase, at and below trade price, afforded to the outside public by manufacturers and dealers in plumbing materials.

"A full attendance of the association was held on December 1st, which subsequently resolved itself into a committee of the whole. The subject of 'protection to the trade' was made the order of the day (General Locke being called to the chair), and was carefully discussed; the result being that a committee of ten was appointed to devise such measures as would be best calculated to secure the needed protection.

"This committee, at a subsequent meeting, was discharged, owing to the want of such discretionary power as would enable it to act efficiently. A new committee of twenty-one, afterwards enlarged to twenty-five, was then created in its place, with Mr. T. J. Byrne as chairman, having a fuller scope of action for the performance of the duties entrusted to it. This committee met on the 10th of January [1883], at the Astor House, New York City, and organized by electing officers and appointing several subcommittees, and issued an invitation to the Association of Master Plumbers of Brooklyn to unite with them, which was heartily responded to. The committee immediately realized that to insure success it would be necessary to seek the co-operation of the trade throughout the country generally, and accordingly the following circular, issued by the joint protection committees of the New York and Brooklyn Associations, was prepared by the secretary and sent broadcast all over the United States.

" 'Association of Master Plumbers of the City of New York.

" '11 West 24th Street.

" 'Geo. D. Scott, President. F. Reynolds, Secretary.

" 'New York, January 25, 1883.

" 'To the Master Plumbers of the United States—Gentlemen:

" 'The necessity of adequate protection against influences having an injurious bearing on our business has at last aroused considerable attention and created widespread discussion among the trade; and, as a result, the Association of Master Plumbers of the City of New York, together with that of the City of Brooklyn, have decided to take prompt and vigorous measures with a view to the termination of so deplorable and unsatisfactory a condition of affairs.

" 'The associations, therefore, of the two cities, through their respective presidents, have appointed two committees to work in concert—the New York one consisting of twenty-five and the Brooklyn one of eleven members—for the purpose of devising and considering the most efficient means for the better protection of our interests and also the immediate adoption of such plans as may best conduce to that end.

" 'It would scarcely be flattering to their intelligence to remind master plumbers of the obvious abuses which have crept into their business, or the many disadvantages under which it labors from various causes. Yet the best method of grappling with and suppressing evils so manifold and deep-lying must be matter of serious and deep consideration to those directly concerned.

" 'Realizing, then, that the time for action has arrived we are instructed to communicate with you confidentially to enlist your approval and co-operation.' "

It appears that:

"The responses to this appeal were of so encouraging a character as to warrant the committee in taking active measures to ensure the formation of master plumbers associations in the principal cities and towns throughout the different states, with a view to paving the way for holding a national convention of the craft in the near future, and the ultimate formation of a national association, sufficiently strong in numbers and united in sentiment, to command proper consideration from manufacturers and dealers."

Subsequently it appears the following was issued:

" 'To the Master Plumbers of the United States:

" 'Committee Rooms of the Association of Master Plumbers of the Cities of New York and Brooklyn.

" 'February 26, 1883.

" 'Gentlemen: The address lately issued to the Master Plumbers of the United States by the committee on protection of the New York and Brooklyn

Associations, for the purpose of eliciting an expression of the feelings of those interested in the questions to which it referred, has met with a response so cordial, so unanimous, and so far exceeding our most sanguine hopes, as to warrant them in laying before you a few practical suggestions as to the mode whereby our rights may be best protected. * * * And now on this all important question of protection of our trade interests, which is really the pivot of the position we are striving for as an organization, it was necessarily alluded to only in guarded terms in our late circular; nevertheless it evoked so universal and heartfelt approval that we are more than confirmed in the belief that this question can only be satisfactorily solved by a general convention of the trade.'"

Under these circulars the first meeting of the National Association of Master Plumbers took place. On taking the chair Mr. Mead addressed the assembled delegates.

"Mr. Wade: I desire, Mr. Chairman, to amend the address by striking out the word 'protection' and substitute the words 'trade interests.' * * * I simply wanted to say, Mr. Chairman, that we in Chicago have made up our minds to change the word 'protection' as it occurs there to the words 'trade interests,' thus giving a broader field to work upon. And we think that the change would be for the interests of all of us, of all plumbers throughout the United States. * * * I am probably as radical as any man in this convention in favor of protection. I have worked hard and faithfully for it. I have correspondence here with me to show that we have carried our point in Chicago. We have established a careful policy, and that policy we will always use. We have brought our men to their knees. Now, we don't desire that our enemies should know what we are going to do here in this convention, and if we use the word 'protection' they will know just what we are about; but if we should use the words 'trade interests' they won't know exactly what it means. I believe in fighting our enemies without gloves. Let us establish our policy, and then let them come to us, instead of our going to them."

The question was subsequently put on the amendment to strike out the word "protection" and insert the words "trade interests," and lost. Subsequently at the same meeting, on motion of Mr. Boyd, a committee of 10 was appointed to formulate a plan for protection between the dealers and master plumbers throughout the United States. At a later hour it was said:

"It must be thoroughly a national association spreading from the Atlantic to the Pacific and from the north to the south. Gentlemen, the question of protection directly falls to the ground and is done when you have a national association that is broad enough so that we can send forth an edict to any firm of materialmen in any city, in any state, and that edict goes forth that you shall protect in the different cities every one that sends an honest complaint, until you shall be able to say to any dealer: 'Until you protect the men in the plumbing business in your city by preserving the proper discount, we shall not buy one jot or tittle of your materials."

The next year, in 1884, the National Association met at Baltimore, and they adopted the following resolutions:

"Whereas, the manufacturing and wholesale firms in plumbing materials persist in selling to consumers to our injury and detriment, placing us towards our customers in the light of extortionists, causing endless trouble; and

"Whereas, the system of protecting us from this wrong which draws in its wake other wrongs, is ineffective; it is absolutely necessary to perfect such a system, by united action, which will remove these evils from which we have suffered for years: Therefore, be it

"Resolved, that we withdraw our patronage from any firm manufacturing or dealing in plumbers' material selling to others than master plumbers.

"Resolved, that the manufacturers of gas fixtures selling to consumers shall not receive the patronage of any master plumber.

"Resolved, that the master plumbers shall demand of the manufacturers and wholesale dealers in plumbing materials to sell goods to none but master plumbers.

"Resolved, that this association shall keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers.

"Resolved, that any manufacturing or wholesale dealers dealing in wrought iron pipe, who sell to consumers, shall not receive our patronage.

"Resolved, that a committee be appointed by this association in every state and county, for the purpose of reporting to the proper officer at its head in the state any violation of these resolutions.

"Resolved, that these measures are just and necessary to our welfare and a rigid enforcement is demanded.

"Resolved, that this convention indorse the above, and urge upon the National Association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction."

In 1885 the Association met at St. Louis. At this meeting President Young was authorized to use such measures as he deemed prudent in presenting the Baltimore resolutions properly before the manufacturers. The secretary reported that he had sent copies of the Baltimore resolutions to the manufacturers and jobbers throughout the country for their signatures, and that the responses were almost universally prompt and favorable, and the following resolution was adopted:

"Whereas, the National Association of Master Plumbers, in convention assembled at Baltimore, June 25, 1884, in view of the numerous false relations which have sprung up between the manufacturers, plumbers, and consumers, whereby confusion and injustice have been produced, after much thought and discussion, passed a resolution whereby their relative rights and duties have been more clearly defined; and,

"Whereas, the manufacturers, with but few exceptions, have adopted the resolutions as their rule of conduct: Now, therefore, in justice to ourselves and in honor toward the manufacturers, we recommend the following:

"Resolved, that it is the plain duty of this association to maintain and enforce the integrity of the Baltimore resolutions, and that all members of the craft, in self-defense, be requested to withdraw further patronage from dissenting manufacturers, and stand by those who stand by us."

At the same meeting it appears that:

"300 Baltimore resolutions sent to manufacturers and dealers in plumbers' material.

"1000 arguments and Baltimore resolutions as an address sent out by the Executive Committee.

"300 pamphlets sent to the manufacturers and dealers asking for signatures for the Baltimore resolution."

The following recommendation was unanimously adopted:

"We find that the 'Baltimore resolutions' have been a benefit to the trade throughout the country during the past year, but, believing that our cause will be more advanced by allowing local associations certain discretions in the government of their own affairs, therefore we respectfully recommend that each local association shall make the necessary arrangements for the dealers and manufacturers of their own locality, and that the national association shall protect them where such agreement has been approved by the executive committee."

At the fourth meeting, which was held at Deer Park in 1886, the Baltimore resolutions were interpreted as follows:

"Resolved, that any firm manufacturing plumbing materials selling to others than master plumbers, that we withdraw our patronage from such firm.

"Resolved, that the master plumbers shall demand of the manufacturers and wholesale dealers in plumbing materials to sell goods to none but master plumbers.

"Resolved that this association keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers.

"Resolved, that any manufacturing or wholesale dealers dealing in wrought-iron pipe who sell to consumers shall not receive our patronage.

"Resolved, that it is not the intention of the foregoing resolutions to prevent the interchange of patented or any other plumbing materials between manufacturers and wholesale dealers in such goods, or their sale or exchange for the export trade.

"Resolved, that no local association shall make any other agreement with manufacturers or dealers than the above.

"Resolved, that a committee be appointed by this association in every state and county, for the purpose of reporting to the proper officer at its head in the state any violation of these rules.

"Resolved, that these measures are just and necessary to our welfare, and a rigid enforcement is demanded.

"Resolved, that this convention indorse the above, and urge the National Association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction."

President James Allison said:

"The Baltimore resolutions are our own creatures, not our masters, and the plain, common-sense course to be pursued in regard to them is—instead of wrangling over our opinions—to review our experience calmly and dispassionately, weigh the good and evil carefully, and, while we remember that the standard of power in good government is the will of the majority, we must not forget that exact justice to one is not to be secured at the cost of injustice to another."

At this convention the executive committee reported:

"Your committee would also recommend that such localities where experience has proven that our members cannot at all times live up to the letter of the Baltimore resolutions without serious injury to themselves, that discretionary power be allowed to the local associations, provided no action of theirs shall conflict with the spirit of these resolutions, and also provided that the approval of the executive committee first be obtained thereto."

And:

"We would also recommend that the manufacturers and dealers in plumbers' supplies who have signed the Baltimore resolutions and carried out their spirit, and are in sympathy with the honest endeavors of the plumbing fraternity in raising the standard of their trade, deserve our co-operation and support, and we recommend them to the patronage of our fellow tradesmen."

At the National Association meeting held in Chicago in 1887 the following resolution was adopted:

"Resolved, that the National Association, through its executive heads, appoint a member of this organization in every city and town in the United States under its jurisdiction for the purpose of keeping a record of all dealers or manufacturers, or master plumbers, violating any of the protective resolutions of this association, said committee to report to the chairman on protection."

In the language of the Supreme Court in Grenada Lumber Co. v. Mississippi, 217 U. S. 433, 441, 30 Sup. Ct. 535, 54 L. Ed. 826, "whether it would be an illegal restraint at common law is not now for our determination." But when the Sherman Law was passed in 1890 the National Association of Master Plumbers had been organized for the 'protection' of master plumbers against the competition of the manufacturers and wholesalers, and had pledged members not to buy of such manufacturers and dealers as sold to consumers, and this had been declared "the pivot of the position we are striving for as an organization." On the day that the Sherman Law became effective this organization became illegal under the decision of Eastern States Lumber Ass'n v. United States, 234 U. S. 600, 34 Sup. Ct. 951, 58 L. Ed. 1490, L. R. A. 1915A, 788.

It is not our purpose to in any way limit the power of the members of the association to withdraw as soon as it became manifestly an illegal association. In other words, we would not deprive any member of his locus pœnitentiæ; but in 1899, after the passage of the Sherman Law, at New Orleans the National Association of Master Plumbers adopted what is known as the "New Orleans resolution" as follows:

"That we, the master plumbers of the United States, in convention assembled, do hereby assert our rights to be protected in conducting our business as plumbers and business men, and in the future will purchase our supplies from those who sell only to members of the national association of master plumbers and manufacturers and jobbers in accord therewith."

As there were about twice as many master plumbers outside the association as inside, though generally speaking the individuals outside had rather a smaller business than those inside, still the business of those outside was so considerable that many of the manufacturers and dealers decided to resist the attempt, which was apparently successful in cutting from the list of their customers the consumers, and now sought to extend this to two-thirds of the plumbers. This resulted in a conference in New York, at which an agreement known as the "New York agreement" was made. This agreement was perhaps more nearly like the Baltimore plan than the New Orleans plan, and was agreed to by the National Association of Master Plumbers in 1900 at Baltimore. Conflicts arising under this agreement, in 1902, at Atlantic City, what was known as the "Cleveland resolution" was adopted, as follows:

"That members of the National Association of Master Plumbers are requested to confine their purchases of plumbing goods to manufacturers and jobbers who are willing to assist in improving the condition of the plumbing business, and who sell plumbing goods in localities where there are members of the National Association of Master Plumbers only to recognized master plumbers whose names appear in the National Directory of Master Plumbers, published under the supervision of the National Association of Master Plumbers."

It thus satisfactorily appears that the National Association was called for the purpose of doing what is now a violation of law, and such purpose was "the pivot of" its position. Instead of withdraw-

ing when it became illegal, members by remaining such, and continuing without objection when the association increased the already illegal restraint, became guilty under the Sherman Law without proof of any individual participation in any overt act. The institution, if the law had been as it now is, would have been illegal from its inception, and all who joined it with knowledge of its purposes, and remained members after the Sherman Law was passed, and made no effort to withdraw, or have the association withdraw, from its illegal course, are subject to conviction for conspiracy under the law. It seems needless to say that we do not mean that any person could be punished for joining this association prior to the passage of the Sherman Law, nor do we mean that a person could be punished who did not know of the illegal lines it was pursuing subsequent to the passage of that law, nor could any one in any way be deprived of his locus pœnitentiæ; but one who was a member when the act of July 2, 1890, was passed, or who subsequently became a member, and who knew the illegal purpose of the association, and never withdrew from it or repudiated its illegal methods, is guilty under the act in question.

The case is not analogous to Ryan v. United States, 132 C. C. A. 257, 216 Fed. 13, because in that case a society was created for a wholly lawful purpose and diverted to an illegal one, while in this case the very pivot of the association was the illegal conspiracy as soon as the Sherman Law was passed. As it appears that all of the defendants were members of the National Association of Master Plumbers, there was sufficient evidence to permit a conviction of all of them, and the motion to direct a verdict was correctly overruled.

We might add that the National Plumbers' Association issued two books, one, known as the "Brown Book," which contained a list of manufacturers and wholesalers "in accord" with the Association, and the other, known as the "Red Book," which contained originally a list of members of the National Plumbers' Association and all other known master plumbers. Subsequently, having upon the advice of the Department of Justice suspended the publication of the Brown Book, the Red Book was changed so as to contain the names of members of the National Plumbers' Association and no others. It is manifest that the Brown Book was to furnish the members of the National Master Plumbers' Association the names of those who would yield to the Association on the question of sales to consumers, and later on sales to others than members, and was as long as it existed the strongest evidence of the conspiracy charged; but, no sooner was the Brown Book abolished, than the Association approached the subject from the other side, and, being no longer able to notify members who were "in accord," they by the restriction of the Red Book to the members of the Association notified those "in accord" who they could sell to. The Red Book identified the parties referred to in the Cleveland resolutions as those "whose names appear in the National Directory of Master Plumbers published under the supervision of the National Association of Master Plumbers."

The motion to direct a verdict was correctly overruled, and the

seventh assignment of error must be treated in the same manner by this court.

[8] Assignments 8 to 14 are to the admission of the testimony quoted by this court and similar evidence. No objection was made to this evidence on the day it was offered. The importance we have assigned to this class of evidence in consideration of the sixth and seventh assignments shows its admissibility in the view of this court. There are nearly 20 other assignments of errors based on rulings on admitting evidence. Suffice it to say that most of the evidence was clearly admissible. In cases where the evidence is not manifestly admissible, it appears to be without legal prejudice, and finally the court by its charge, to which no exceptions were taken, took from the jury most of this evidence.

Without expressing any opinion as to its applicability, we may add that Revised Statutes, § 1011 (Comp. St. 1913, § 1672), contains the following:

"There shall be no reversal in the Supreme Court or in a Circuit Court upon a writ of error * * * for any error in fact."

Without more, after the most careful study of all the record, we can find no error, and the judgment of the District Court as to all the defendants who sued out the writ of error is affirmed.

HOOK, Circuit Judge. I concur in the affirmance, because of the practical construction and use by the Association of its paper constitution and resolutions. This was not sporadic or exceptional, but was so general and persistent as to disclose an unlawful purpose of the organization, of which the complaining defendants must have been cognizant.

FRANKFURT-BARNETT CO. v. WILLIAM PRYM CO., Limited.

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

No. 287.

1. SALES ⟸152, 163—CONSTRUCTION OF CONTRACT—DELIVERY IN INSTALLMENTS.

A contract between merchants for the sale of goods to be delivered in "reasonable installments," as required by the buyer, binds the buyer to make his demands at reasonable times and in reasonable amounts, and the seller to make delivery in reasonable times as demanded.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 357, 386–388; Dec. Dig. ⟸152, 163.]

2. ACCORD AND SATISFACTION ⟸16—CONTRACTS ⟸317—DISCHARGE AFTER BREACH—SUBSEQUENT AGREEMENT—COMPLETE PERFORMANCE.

After breach, a contract can only be discharged by a release under seal or an accord and satisfaction; an accord, unless followed by full performance, or unless clearly so agreed, is not sufficient.

[Ed. Note.—For other cases, see Accord and Satisfaction, Cent. Dig. §§ 116–122; Dec. Dig. ⟸16; Contracts, Cent. Dig. §§ 1508–1527; Dec. Dig. ⟸317.]

3. CONTRACTS ⊂⊃316(1)—BREACH—WAIVER.
A waiver of a breach of contract to be effective must have been intended as such and so understood by the other party or such action as to create an estoppel.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382, 1480; Dec. Dig. ⊂⊃316(1).]

4. CONTRACTS ⊂⊃316(1)—BREACH—WAIVER.
Acceptance of performance of a contract after breach may operate as a waiver of the right to treat the contract as terminated by the breach, but is not a waiver of the right of action to recover damages therefor.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1382, 1385, 1480; Dec. Dig. ⊂⊃316(1).]

5. SALES ⊂⊃179(1)—DISCHARGE AFTER BREACH—NEW AGREEMENT.
Plaintiff and defendant entered into a contract for the sale and purchase of goods to be delivered by defendant in installments as required by plaintiff. Several months afterward, after a number of installments had been demanded and not delivered, defendant promised within a short time to make further deliveries pursuant to the contract, and plaintiff agreed to accept the same. *Held*, that such agreement did not supersede the original contract nor operate as a discharge or waiver by plaintiff of his right of action for the previous breaches.
[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 456, 459, 467, 468; Dec. Dig. ⊂⊃179(1).]

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

Action at law by the Frankfurt-Barnett Company against the William Prym Company, Limited. Judgment for defendant, and plaintiff brings error. Reversed.

This action was commenced in the Supreme Court, state of New York, on October 17, 1914, and upon motion of defendant was removed by that court to the United States District Court, on the ground of diversity of citizenship. The plaintiff is a corporation organized under the laws of the state of New York and having its principal place of business in the borough of Manhattan, city of New York. The defendant is a foreign corporation organized under the laws of the Empire of Germany and is doing business and has an office in the borough of Manhattan, city of New York.

The facts appear in the opinion.

Sidney Rosenbaum, of New York City, for plaintiff in error.

Huntington, Rhinelander & Seymour, of New York City (Origen S. Seymour and Leverett J. Luce, both of New York City, of counsel), for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is an action brought to recover damages in the sum of $15,000 alleged to have been occasioned by the failure to perform a contract. The complaint states that in April, 1914, the plaintiff and defendant entered into an agreement, whereby it was agreed that the defendant should sell and deliver to plaintiff in the borough of Manhattan, city of New York, in reasonable installment deliveries as required by plaintiff, 7,000 great gross of metal dress fasteners, known as Sonomer Fasteners, in assorted sizes, and that plaintiff should accept the same from the de-

fendant and pay therefor 65 cents for each great gross. It is averred that during the months of April, May and June, and down to July 21, 1914, the plaintiff repeatedly demanded deliveries of the fasteners in assorted sizes, aggregating 4,000 great gross; but that defendant delivered only 1,137 great gross, and that of those so delivered 747 great gross were of one size only, so that the defendant failed and refused to make its deliveries in any reasonable quantity or in any reasonable assortment of sizes as it had agreed. The complaint then went on to state that during the months of July and August and down to September 17, 1914, plaintiff continued to demand deliveries of the fasteners from the defendant as provided in the contract, but that defendant wholly failed to make the deliveries, although frequently promising that the deliveries would be made, and that no deliveries had been made since July 21, 1914. The undelivered balance under the terms of the contract amount to 5,887 great gross, and the plaintiff avers that it has duly performed all the terms of the contract on its part to be performed and paid for all fasteners delivered to it, excepting for 599 great gross for which the amount of $389.35 was to be paid. It is also averred that during the months of August and September, 1914, and down to the commencement of the action, there was no market in New York where fasteners of the kind and in the quantities agreed to be delivered by defendant under the contract could be purchased.

In its answer the defendant, after making various admissions, declared that the contract related to fasteners not at the time in existence, but which were to be manufactured in Germany and shipped from that country to defendant, and that the contract was conditional upon the fasteners arriving from Germany, which was well known to the plaintiff before and at the time of making the contract. Then it is averred that on August 1, 1914, the European War broke out, and that this prevented the shipment of fasteners from Germany to this country. The answer goes on to say that on September 17, 1914:

"It was then agreed by and between the plaintiff and defendant, in full settlement, accord, and satisfaction of any and all contracts and disputes then existing, or alleged to exist, between them, and in consideration of each waiving its claims under the said agreement, that the defendant would deliver to the plaintiff a reasonable and substantial amount of such fasteners out of the next shipment which the defendant should receive from abroad (which the defendant was then notified by its broker in Rotterdam, Holland, that it was to receive), such reasonable amount to be determined by the defendant taking into consideration the demands of its other customers, and that the plaintiff would receive the said fasteners and pay for the same in cash upon delivery at the rate of 65 cents for each great gross; and, further, that upon the defendant notifying the plaintiff that such shipment had been made from abroad, and that the defendant would deliver part thereof to the plaintiff, the plaintiff would then pay to the defendant forthwith the said sum of $389.35, and that thereafter the defendant would deliver to the plaintiff reasonable and substantial amounts out of subsequent shipments, if any, to be received by the defendant, but not exceeding total of 6,000 great gross, and that the plaintiff would receive and pay therefor in cash upon delivery at price of 65 cents per great gross."

The answer continues as follows:

"On or about September 25, 1914, the defendant notified the plaintiff that such shipment had been made from abroad and that within the next few days it would deliver to the plaintiff 126 great gross of fasteners of the size 'O'

white, and 126 great gross of fasteners of the size 'O' black, and demanded payment of said sum of $389.35; but the plaintiff refused to pay the sums or any part thereof, and has not paid the same, and the plaintiff notified the defendant that it would not accept the said fasteners."

The plaintiff put in a reply in which it denied the above allegations contained in the answer as to a new contract having been made on September 17, 1914, and went on to aver that:

"On or about the date mentioned therein, the defendant, being in default in deliveries of fasteners to the plaintiff, assured the plaintiff that on or before the 26th day of September, 1914, defendant would receive a shipment of fasteners from Europe, and would thereupon make to the plaintiff a large delivery of a full assortment of sizes of fasteners, pursuant to the contract, and plaintiff agreed to pay cash for same upon delivery."

As the defendant moved for judgment upon the pleadings, it admitted the truth of the facts alleged in the reply.

The defendant demanded a bill of particulars, and it was furnished by plaintiff.

The cause having duly appeared upon the day calendar of the court for trial, the defendant, pursuant to section 547 of the New York Code of Civil Procedure, made a motion in open court for judgment on the pleadings dismissing the complaint and in favor of the defendant on its counterclaim. The District Judge dismissed the complaint "upon the merits as revealed by the complaint, but without passing upon or seeking to prevent the right of plaintiff to maintain suit upon the modified agreement of September 17, 1914."

Judgment was also entered upon the pleadings in favor of defendant and against the plaintiff on the counterclaim for $389.35.

The District Judge, assuming without deciding that the complaint set forth an enforceable agreement and a breach of the same, thought that the reply established the proposition that all failures or refusals by defendant to deliver fasteners before September 17, 1914, had been waived, and that a new modified contract came into existence on that date, whereby defendant was to deliver a "full assortment of sizes" on or about September 26, 1914. No opinion was expressed as to whether the plaintiff is entitled to damages for a failure or refusal of defendant to deliver, on or about September 26th, a full assortment of sizes of fasteners.

As to the judgment on the counterclaim, the court said:

"Taking all these pleadings together, the one thing that is plain and plainly admitted is that on or before September 17, 1914, and ever since, the plaintiff has owed the defendant the sum of $389.35. The fact that plaintiff may hereafter sue defendant for breaches of the contract as modified on September 17th is no reason why it should not pay what it now owes."

The contract into which these parties entered was a contract between merchants, and time is the essence of such contracts. As the Supreme Court, in Norrington v. Wright, 115 U. S. 188, 203, 6 Sup. Ct. 12, 29 L. Ed. 366 (1885), held an agreement regarding the delivery of the goods is ordinarily to be regarded as a warranty or condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. Under this contract, however, the goods were not to be delivered all at one time, but in install-

ments. Such contracts are sometimes referred to as involving divisible promises. There is authority for saying that, where the installments extend over a considerable period of time, a default either in delivery or in payment does not necessarily and in all cases discharge the contract, although it necessarily gives rise to an action for damages. See Simpson v. Crippin, L. R. 8 Q. B. 14; Mersey Steel & Iron Co. v. Naylor, 9 App. Cas. 434; Freeth v. Burr, L. R. 9 C. P. 208. Anson on Contracts (Huffcut's 2d Ed.) §§ 386, 387. But in Norrington v. Wright, supra, the Supreme Court came to the conclusion that such contracts are entire and a failure to make the delivery of a single installment gives the other party the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once.

[1] But the April contract which the parties in this case made, while it provided for delivery in installments, did not fix specifically the date upon which the deliveries were to be made. It provided for "reasonable installment deliveries as required by plaintiff." And the defendant contended that the contract was indefinite for failure to designate a time for delivery. The contention was without merit. If a contract fails to fix the exact time for delivery, the law fixes it for the parties by presuming that a reasonable time was intended. The law was so declared in the Court of Appeals of New York in Eppens, Smith & Wiemann Co. v. Littlejohn, 164 N. Y. 187, 58 N. E. 19, 52 L. R. A. 811 (1900).

It is our understanding that under a contract like the one made in April the plaintiff would have to make his demands within reasonable times and in reasonable amounts, and that defendant would have to make deliveries in reasonable times as demanded.

This brings us to inquire whether there was a September contract which put an end to the April contract on which this suit was brought. The April contract is not alleged to have been in writing, and the agreement made in September appears to have been in parol. We do not therefore have to inquire whether a contract in writing can be varied or waived by a parol contract which modifies its terms. It has been held in Massachusetts and in some other states that executory parol agreements cannot vary or modify the terms of a written contract. See Adams v. Nichols, 19 Pick. (Mass.) 275, 31 Am. Dec. 137; Walker v. Greene, 22 Ala. 679; Rucker v. Harrington, 52 Mo. App. 481; Romaine v. Judson, 128 Ind. 403, 26 N. E. 563, 28 N. E. 75. The question whether a contract required to be in writing under the statute of frauds can be varied by parol was to some extent considered in Thomson v. Poor, 147 N. Y. 402, 408, 42 N. E. 13; the Court of Appeals saying that the subject is "involved in distressing perplexity." But upon the pleadings in the case under consideration the question was not before the court below and is not before us upon the appeal and has not been referred to by counsel.

The law relating to the discharge of contracts is dependent upon whether the matter relied upon as a discharge occurs before, at the time, or after performance becomes due. Leake on Contracts (6th Ed. with Canadian Notes) p. 575.

The authorities establish the proposition that a contract may be discharged at any time before performance is due by a new agreement validly made. Thus in Goss v. Lord Nugent, 5 Barn. & Ad. 58, Lord Denman, C. J., said that:

"After the agreement has been reduced to writing, it is competent for the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul the former agreement, or in any manner to add to or subtract from or vary or qualify the terms of it, and thus to make a new contract."

So in Swain v. Seamens, 9 Wall. 254, 19 L. Ed. 554 (1869), Mr. Justice Clifford, speaking for the Supreme Court of the United States, uses similar language and says that in cases not within the statute of frauds and which fall within the general rules of the common law that:

"It is held that the parties to an agreement, though it is in writing, may, at any time before the breach of it, by a new contract not in writing, modify, waive, dissolve, or annul the former agreement, if no part of it was within the statute of frauds."

And to the same effect is the earlier case in the same court of Emerson v. Slater, 22 How. 29, 41, 16 L. Ed. 360 (1859), where the court held that parol evidence was admissible to show that the parties had, subsequently to the date of the contract, and before a breach of it, made a new oral agreement, on a new and valuable consideration, enlarging the time of performance, and varying its terms. In Leake on Contracts (6th Ed.) p. 576, it is laid down that:

"A contract may be discharged at any time before the performance is due by a new agreement validly made."

So in Huffcut's Anson, p. 340, note, it is said:

"A bilateral contract may before breach be discharged or varied by substituting a new one for it."

In the case at bar the defendant seeks to substitute for the contract of April a new contract made after breach and on September 17th.

[2] The rule governing the subject is stated in Chitty on Contracts (15th Ed. 1912) p. 809, as follows:

"A contract not under seal, whether verbal or written, may before breach be discharged by parol, but after breach the discharge must, whether the contract be under seal or not, be by release under the seal, unless it operate as an accord and satisfaction."

It is not claimed in this case that there is a release under seal.

In Leake on Contracts (6th Ed. with Canadian Notes) p. 576, that writer says:

"The claim or right of action arising upon a breach of contract can no longer be satisfied by a performance or tender of the debtor without the agreement of the creditor to accept it in satisfaction; but it may be discharged by an accord and satisfaction made with the creditor, or by a release given by him, or by a judgment recovered by him."

In the case under consideration, the question does not arise whether the breach of the original contract has been cured by performance or

tender of full performance because there has been no full performance, and no tender of full performance.

This brings us to inquire whether there has been an accord and satisfaction. The defendant in its answer declares that the September agreement was in full settlement, accord, and satisfaction of any and all contracts and disputes then existing between the parties. An accord and satisfaction is, of course, a good plea in actions upon simple contracts. But an accord is not a bar to an action on the original obligation unless it has been followed by satisfaction. The general rule is that to amount to a bar the accord must be fully performed, unless the agreement or promise, instead of the performance thereof has been accepted in satisfaction. 1 Corpus Juris, 530, 531. The creditor derives no satisfaction from the promise without the performance. If it is claimed that the creditor intended to accept the promise as a satisfaction and not the performance, then that intention must be clearly shown. Henderson v. McRae, 148 Mich. 324, 111 N. W. 1057; Overton v. Conner, 50 Tex. 113. "Accord," says Sir William Blackstone (3 Bl. Com. 15), "is a satisfaction agreed upon between the party injured and the injuring, which, when performed, is a bar to all actions upon this account." In Paytoe's Case, 9 Co. 79, it is said:

"And every accord ought to be full, perfect and complete; for, if divers things are to be done and performed by the accord, the performance of part is not sufficient, but all ought to be performed."

And Chitty on Contracts (16th Ed.) p. 798, states, "The general rule is that accord without satisfaction is no bar." He reiterates the statement on page 801 saying:

"Every accord ought to be full, perfect, and complete; for, if divers things are to be performed by the accord, performance of part is not sufficient; or, if a thing is to be performed at a day to come, tender of refusal is not sufficient without actual satisfaction and acceptance."

And see Kromer v. Heim, 75 N. Y. 574, 31 Am. Rep. 491. In Goodrich v. Stanley, 24 Conn. 613, 622, the court after examining the authorities lays it down that the mere circumstance that there was an accord with mutual promises does not have the effect of extinguishing the original obligation. It adds that:

"Where it is claimed that it is so extinguished, it ought most explicitly to appear that such was the intention of the parties."

In the case at bar no such intention to accept the promise rather than the performance has been made "most explicitly" to appear, and there is nothing whatever to suggest in the least degree that such an intention existed.

Before leaving the subject of accord and satisfaction, we may notice the fact that in New York the technical distinction between a satisfaction before or after breach seems to have been disregarded, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. See McCreery v. Day, 119 N. Y. 1, 9, 23 N. E. 198, 6 L. R. A. 503, 16 Am.

St. Rep. 793 (1890). But this fact is without importance in this case, as the September agreement was not followed by actual performance.

[3] It is said that the September agreement operated as a waiver of defaults up to that date. The term "waiver" implies that the right or privilege waived must be in existence at the time of the waiver. In this case it is assumed to have been the original contract. But the question of waiver is mainly a question of intention. Gardner v. New London, 63 Conn. 267, 28 Atl. 42. It involves the notion of an intention on the part of one having a right to relinquish it. There can be no waiver unless so intended by one party and so understood by the other, or one party has so acted as to mislead the other and is estopped thereby. 40 Cyc. 261. In Bennecke v. Insurance Co., 105 U. S. 355, 26 L. Ed. 990 (1881), the Supreme Court said:

"A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule when there is a direct and precise agreement to waive the stipulation. A fortiori is this the rule when there is no agreement, either verbal or in writing, to waive the stipulation, but where it is sought to deduce a waiver from the conduct of the party. Thus, where a written agreement exists and one of the parties sets up an arrangement of a different nature, alleging conduct on the other side amounting to a substitution of this arrangement for a written agreement, he must clearly show not merely his own understanding but that the other party had the same understanding. Darnley (Earl) v. London, Chatham & Dover R. Co., Law Rep. 2 H. L. 43."

Do the facts as we must accept them on the pleadings show that the plaintiff intended to waive his rights to damages for the failure to deliver pursuant to the April contract? Not unless it is to be found in the September agreement to accept "a large delivery of a full assortment of sizes of fasteners, pursuant to the contract." There is no express waiver; but a waiver does not need to be express, but may be shown by acts and conduct from which an intention to waive may reasonably be inferred. And unless a waiver is under seal, or arises from conduct creating an estoppel, it must be supported by an agreement founded upon a valuable consideration. Emerson v. Slater, supra; Hastings v. Lovejoy, 140 Mass. 261, 2 N. E. 776, 54 Am. Rep. 462; Underwood v. Farmers' Joint-Stock Ins. Co., 57 N. Y. 500; Atlantic Coast Line R. Co. v. Bryan, 109 Va. 523, 65 S. E. 30. We find in this record no evidence of an intention to waive the plaintiff's right of action to recover damages for the breach of the April contracts.

[4] The difficulty in this case has grown out of the failure to distinguish between a waiver of the right to treat a breach of a contract as a discharge of the contract, and a waiver of the right to recover the damages occasioned by the breach. The two rights are distinct and must not be confused. In Page on Contracts, vol. 3, § 1519, that writer correctly says that waiver of the right to treat a breach of contract as a discharge of contract liability may take place without a waiver of the right to maintain an action for damages, and the weight of authority is that it is not such a waiver. And in section 1510 the same writer states that acceptance after breach is not a waiver of a right of action for damages is apparent when it is considered that the

party not in default is often constrained by his necessities to take what he can get under his contract when he can get it.

[5] The September agreement as set forth in the reply did not supersede the April contract. That remained unchanged. But the plaintiff by agreeing that defendant might deliver in September the fasteners which he was bound to deliver in April, May, and June simply waived his right to terminate the contract and to decline to receive any deliveries in September or at any time thereafter, provided the defendant made the subsequent deliveries as then promised. There certainly was no intention on plaintiff's part to do more than that, and he still had his right of action for the damages he had suffered by the failure to deliver as promised in the April agreement. Such we believe to be the law in this country generally, and it is the law of the state of New York where this contract was made.

In Granniss & Hurd Lumber Co. v. Deeves, 72 Hun, 171, 25 N. Y. Supp. 375 (1893), Judge Van Brunt, speaking for the court, said:

"Undoubtedly the defendant had the right to terminate the contract if the plaintiff was not proceeding with that diligence which the terms of the contracts required; but this was not his only remedy. He had a right to let the plaintiff go on and complete his work, and then he had the right to say: 'I will pay you for the work you have done, but I want the damages you have caused me in not doing my work as you agreed to do it.'"

The court understood that to be the principle decided in Dunn v. Steubing, 120 N. Y. 232, 24 N. E. 315 (1890).

In Crocker-Wheeler Co. v. Varick Realty Co., 104 App. Div. 568, 88 N. Y. Supp. 412, 94 N. Y. Supp. 23 (1905), the parties had entered into a contract for the installation of an elevator in a building. The contractor did not complete the contract within the prescribed time. The owner did not exercise the right to terminate the contract, but permitted the contractor to go on and complete the work. The court held that the owner thereby waived the right which it otherwise might have asserted to plead the delay in the performance of the contract as a defense to an action for the agreed price of the elevator; and it was also held, and that is the portion of the decision with which we are particularly concerned, that the owner did not thereby waive its right to counterclaim, in an action brought by the contractor to recover the agreed price of the elevator, the amount of any actual damages which it had suffered by reason of the delay in performance.

This doctrine was again announced in Beyer v. Henry Huber Co., 115 App. Div. 342, 100 N. Y. Supp. 1029 (1906); and in Reading Hardware Co. v. City of New York, 129 App. Div. 292, 113 N. Y. Supp. 331 (1908); as well as in General Supply & Construction Co. v. Goelet, 149 App. Div. 80, 133 N. Y. Supp. 978 (1912).

It is said that the September agreement was a new contract and superseded the April contract. We do not so understand it. The September agreement was that defendant would make "to the plaintiff a large delivery of a full assortment of sizes of fasteners pursuant to the contract" out of a shipment which it was to receive from Europe on or before September 26, 1914. Such was the promise made by the defendant, according to the reply, and we are not at liberty under the

circumstances of this case to go beyond the reply. As the contract of April already bound it to deliver the fasteners in reasonable installments and in assorted sizes as plaintiff demanded and as plaintiff had demanded, prior to July 21st, 4,000 great gross in assorted sizes, and had only received 1,113 great gross, the greater part of which were of one size, we are at a loss to see wherein defendant promised anything it was not already under obligation to render under its original contract of April; and in that case the agreement is without consideration, and therefore was a mere nudum pactum at the time it was made. Carpenter v. Taylor, 164 N. Y. 171, 58 N. E. 53; Vanderbilt v. Schreyer, 91 N. Y. 392; Goldsborough v. Gable, 140 Ill. 269, 29 N. E. 722, 15 L. R. A. 294; McCarty v. Hampton Building Ass'n, 61 Iowa, 287, 16 N. W. 114; Runkle v. Kettering, 127 Iowa, 68, 102 N. W. 142; Widiman v. Brown, 83 Mich. 241, 47 N. W. 231.

After the plaintiff agreed that defendant might make deliveries in September, it might have revoked its consent at any time in so far as it had not been acted upon. Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13 (1895).

We are aware that some of the courts have said that an agreement to set aside an earlier contract by a later one in which the promisor agrees to do the same thing he contracted for in the first contract is supported as to consideration by the abandonment of the first contract. Connelly v. Devoe, 37 Conn. 570; Rogers v. Rogers, 139 Mass. 440, 1 N. E. 122. In Connelly v. Devoe, the court in sustaining the second contract calls attention to the fact that at the time it was made there was no actionable breach of the original contract. In Rogers v. Rogers, the court in sustaining the second contract says:

"If we assume that the original agreement was sufficiently definite to constitute a valid contract, as it was a continuing contract, the parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract as to future orders and deliveries, unless it appeared that the first contract had been broken by an absolute refusal on the part of the defendant to perform it, and that the new contract was not intended to be a discharge of the breach. * * * If the parties agreed that these orders should be filled at the prices stipulated for in the new contract, without considering whether the new agreement would of itself be a discharge of these partial breaches, performance of the new agreement would operate as a discharge, or an accord and satisfaction, unless it appeared that such was not the intention of the parties. Such a substituted agreement prima facie takes the place of the original agreement as to everything remaining unperformed."

But in the view we take of the case at bar there was no express and no implied agreement that the April contract should be set aside. It was, as already pointed out, a mere consent to receive deliveries in September.

The claim that the plaintiff was in default having withheld $389.35 due for fasteners actually delivered and accepted is without merit. At the time this money was withheld, it was manifest that defendant had failed to perform its contract and was likely to continue doing so. In holding on to this money as security against damages it might expect to recover in an action for the breach, the plaintiff lost none of

its rights. Sperry & Hutchinson Co. v. O'Neill & Adams, 185 Fed. 231, 107 C. C. A. 337.

It is clear to us that the complaint should not have been dismissed; and we may point out that, if the theory of the court below had been correct that there was a new contract which superseded the earlier one, there could have been no judgment on the counterclaim, because the court held that no suit had been brought on the new contract under which it was agreed that that sum should be paid when delivery was made under the alleged substituted agreement.

We may also point out that, if the complaint was defective in not stating what would be a reasonable time within which to deliver the fasteners, the defect was cured by the answer which stated that on September 17th all parties agreed that the delivery of a large quantity of assorted sizes on or before September 26, 1914, would satisfy the contract.

Judgment reversed.

WARD, Circuit Judge, concurs in the result.

GARLAND v. SAMSON et al.

(Circuit Court of Appeals, Eighth Circuit. September 16, 1916. Rehearing Denied November 6, 1916.)

No. 4656.

1. WORDS AND PHRASES—"REPAIR"—"IMPROVEMENT."

The word "repair," as defined by Webster: "Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc."—is applied by courts in the construction of statutes and contracts. The word "improvement," defined by the same authority as "a valuable addition or betterment as a building, clearing, drain, fences, etc., on land," is a broader word than "repair," but includes the latter and is also practically applied by the courts.

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

2. LANDLORD AND TENANT ⟸29(1)—LEASES—VALIDITY AND CONSTRUCTION—EFFECT OF SUBSEQUENT LEGISLATION.

Defendants leased a large hotel building from plaintiff's grantor for a term of years. The lease required them to operate a first-class hotel on the premises, and they agreed to "accept the premises * * * in the condition which they are now in and hereby further covenant and agree to keep the same on the inside of said building in good repair, and to make all improvements and repairs which may be necessary during the term of this lease at their own cost and expense." For the latter purpose they were to be allowed a credit of $3,000 on rent. The lessor covenanted to keep in repair the exterior of the building during the term of the lease in as good condition as it then was. The building was then equipped with outside fire escapes in compliance with the state law, which however also required interior standpipes, or in their absence outside standpipes, and the building had neither. The statute imposed the duty of providing such equipment, under penalty on both "proprietor and lessee." During the term of the lease a law was enacted (Laws Minn. 1913, c. 569, § 8; Gen. St. 1913, § 5120) requiring stairways as fire escapes on the outside of such buildings, to be supplied within six months, instead

of ladders as were on the leased building, and making it a misdemeanor for any one to lease such a building without first complying with its provisions. Defendants remained in possession for nearly a year after the passage of such act without making any demand for the installation of such fire escape, and then abandoned the lease refusing to pay rent for the latter part of their occupancy. In an action to recover the rent, *held*, that the lease when made was valid, the obligation to construct the inside standpipes being by its terms imposed on defendants; that, assuming that it did not also impose upon them the duty of building the outside stairways required by the subsequent statute as "improvements," such statute did not make prior valid leases invalid and unenforceable, and that the direction of a verdict for defendants was error.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 85; Dec. Dig. ⟸29(1).]

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

Action at law by William Garland against C. C. Samson and H. J. Tremain. Judgment for defendants, and plaintiff brings error. Reversed.

William D. Mitchell, of St. Paul, Minn. (Pierce Butler and George Hoke, both of St. Paul, Minn., on the brief), for plaintiff in error.

William H. Oppenheimer, of St. Paul, Minn. (Edmund S. Durment, Albert R. Moore, and Charles C. Haupt, all of St. Paul, Minn., on the brief), for defendants in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The defendants, C. C. Samson and H. J. Tremain, owned the Willard Hotel in St. Paul, Minn., and its furnishings. They then deeded the premises to H. C. Suttle and took a lease on the property and its furniture of him dated October 13, 1910. The lease was for five years with the privilege of ten from November 1, 1910. It provided for the payment of $1,200 a month rent, payable on the 15th of each month. It contained the following provisions:

"Said lessees hereby agree to accept the premises herein let and demised in the condition which they are now in and hereby further covenant and agree to keep the same on the inside of said building in good repair, and to make all improvements and repairs which may be necessary during the term of this lease at their own cost and expense.

"Provided, however, that said lessees shall be allowed the sum of three thousand dollars ($3,000.00) during the first year of this lease in the making of such repairs and improvements as may be agreed upon between the parties hereto, and that as such improvements are made, said lessees shall be entitled to reduce the rent to be paid by such sum or sums as said improvements shall actually cost, not to exceed in the aggregate the sum of three thousand dollars ($3,000.00). * * * The said lessees hereby covenant and agree that they will at all times during the operation of this lease operate a first-class hotel in the premises herein demised. * * * And the lessor, for himself, his heirs, personal representatives and assigns, hereby covenants and agrees to and with said lessees that he will at his own cost and expense keep in repair the exterior of the building now located on the premises hereinbefore described in as good condition as they are now, in and for the full term of this lease."

On October 6, 1913, H. C. Suttle and wife sold and conveyed the hotel property to the plaintiff, William Garland, and thereby the plain-

tiff succeeded to the rights of Suttle under said lease. This suit was brought to recover the rent reserved and payable from February 15, 1914, to January 15, 1915, for $14,400 and interest.

Several defenses were pleaded in the case, but the allegations of the complaint were admitted, and the defendants assumed the burden of proof. The case was determined upon the matters stated in the third count of the answer, which set up the failure to supply the building with statutory fire protection as required by the laws of Minnesota. The case was tried to a jury, and at the close of all the evidence all parties moved for a directed verdict. The motion of the plaintiff was overruled, and that of the defendants sustained, and the jury accordingly returned a verdict for the defendants, judgment was entered on the verdict, and the plaintiff sued out this writ of error.

The case has been argued and submitted wholly upon the effect of the statutes of Minnesota with reference to fire protection. Section 2365 of the Revised Laws of Minnesota classifies public and quasi public buildings and embraces in the second classification hotels and other structures of more than two stories high with ten or more sleeping rooms where sleeping accommodations are furnished to the public. Section 2367 is as follows:

"2367. Each six thousand feet of area, or fractional part thereof, covered by a building in class two, shall be provided with a one and three-fourths inch inside standpipe, and sufficient one and one-fourth inch hose connected therewith on each floor, and constantly furnished with sufficient water pressure from waterworks or pump which can be put into instant action; or for each such area there shall be a two and one-half inch metallic standpipe, with metallic ladder attached above the first story, located upon the outside of the wall, extending above the roof, and so situated as to be accessible from the roof, and from each story above the first, with valves and male hose connections at every story and on the roof, and female hose connection at base of the pipe, of such size and pattern as to allow connection with the equipment of the local fire department. There shall also be provided for each eighty-five hundred feet of such area, or fractional part thereof, at least one efficient chemical fire extinguisher on each floor containing sleeping apartments. If, for lack of waterworks or steam to operate pumps, the inside standpipe be not practicable, then, in addition to the fire extinguishers, there shall be placed in the hallway on each floor containing sleeping apartments one barrel of water and two pails, labeled 'For fire purposes only,' for each twenty-five hundred feet of area, or fraction thereof, on such floor. A red light shall be kept burning all night at the head of each stairway above the first floor, and at or near each approach to a stationary fire escape. In each sleeping room above the first floor the following printed notice shall be conspicuously posted: 'Exit in case of fire. Upon leaving this room, turn to the (here insert "right" or "left") and by passing (here insert distance in feet) you will reach a red light which indicates (here insert "fire escape" or "stairway").'"

"2372. The proprietor and lessee of every building in any of the classes hereinbefore mentioned shall equip the same in the manner prescribed, and every failure so to do shall constitute a misdemeanor. Every fire warden, marshal, chief of fire department, chief of police, and building inspector of an incorporated place, or, where no such officer exists, the town and county boards, shall enforce the provisions of this chapter. Every person who shall fail to comply with any such provision within thirty days after written notice so to do from any such officer shall be guilty of a gross misdemeanor. All fines collected hereunder shall be turned into the school fund of the county in which the conviction occurs.

"2373. In cities of the first, second, and third classes, every building maintained or held out to be a hotel, or place where sleeping accommodations are

furnished to the public, shall be provided with more than one exit from each story directly to the ground, and such exits must always be kept in good repair, free from any obstruction, and ready for immediate use. If any such building in any city be not provided with suitable metal fire escapes on two sides or two ends, or a side and an end, then every outside sleeping apartment shall be equipped with a three-eighths inch hempen rope, plainly visible and securely attached therein, of length and strength sufficient to reach the ground, and to sustain five hundred pounds weight.

"2374. Every person owning, keeping, maintaining, or managing any building of the character mentioned in section 2373 which is not constructed, equipped, and maintained in accordance therewith shall be guilty of a misdemeanor, the minimum punishment whereof shall be a fine of twenty-five dollars, or imprisonment for thirty days. He shall have no lien in any form upon property belonging to or in the possession of any lodger or boarder therein, and shall not be entitled to maintain any action for board, lodging, or accommodations."

The Legislature in 1905 also enacted the following:

"Section 1. Every building or structure kept, used or maintained as, or advertised as, or held out to the public to be an inn, hotel or public lodging house, or place where sleeping accommodations are furnished to the public, whether with or without meals, shall have and be provided with, at each end of all halls from every story or floor higher than three stories, a suitable fire escape, reaching to within twelve (12) feet of the ground, and shall have and be provided with a way of egress to such fire escape, which way of egress and fire escape shall at all times be kept free and clear of any obstruction, and in good repair and ready and suitable for immediate use, or in lieu thereof in any and all buildings or structures kept, used or maintained as, or advertised as, or held out to the public to be an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, there shall be supplied and kept at all times, in plain sight, and securely attached therein and thereto, in every bedroom or sleeping apartment on the second floor or above the second floor a manilla rope, with knots not more than 15 inches apart, at least five-eighths of an inch in diameter, and of sufficient strength to sustain a weight and strain of at least five hundred pounds; and every owner of any such building or structure, in this section described, who shall fail to comply with the provisions of this section shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than five dollars, nor more than twenty-five dollars, and in default of payment thereof shall be imprisoned for not less than ten days. Provided this act shall not apply to hotels or lodging houses which are already provided with ample outside iron fire escapes, or to fire proof buildings.

"Sec. 2. Any person or persons keeping, maintaining, controlling or managing any building or structure kept, used or maintained as, or advertised as, or held out to the public to be an inn, hotel, public lodging house or place where sleeping accommodations are furnished to the public, whether with or without meals, shall supply and shall keep at all times, and in plain sight, and securely attached therein and thereto, in every bedroom, or sleeping apartment, on second floor or above second floor, a manilla rope, with knots not more than 15 inches apart, at least five-eighths of an inch in diameter, and of sufficient strength to sustain a weight and strain of at least five hundred pounds, and on failing to supply such ropes such person or persons shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than five dollars, nor more than twenty-five dollars, and in default of payment thereof, may be imprisoned not less than ten days.

"Sec. 3. All inns, hotels, public lodging houses and places of twelve sleeping rooms or more where sleeping accommodations are furnished to the public, whether with or without meals, in the state of Minnesota shall be subject to the provisions of this act, except as already herein provided."

The balance of this law is devoted to providing for the inspectors and deputies and describing their duties, and the like. This was the

state of the law at the time of the making of the lease here in question. The building was occupied under the lease until April 18, 1914, and for more than 2½ months of the time for which recovery is sought in this case.

Let us first inquire whether this lease was invalid when made, and then whether it was subsequently invalidated by later legislation.

It is strenuously insisted that, under the facts of this case, while Suttle and Garland may have been the proprietors of the soil, they were not the proprietors of the hotel; but we find it unnecessary to pass upon that question. The law in question, section 2372, imposed a duty to equip the hotel upon "the proprietor and lessee." To use the language of another branch of the law, the duty of the proprietor may have been a nondelegable one in the sense that nothing he could do could free him from the criminal responsibility imposed by law if the hotel was not properly equipped with fire escapes, yet the fact remains that the Legislature cannot have assumed that the plaintiff and the defendants could literally personally install the instrumentalities required. It must have contemplated that the parties responsible would let a contract to install the fire protection required.

Now let us see what these parties agreed to:

1. The said lessees hereby agree to accept the premises herein let and demised in the condition in which they are now in.

2. The lessees agree to keep the same on the inside of said building in good repair and to make all improvements and repairs that may be necessary during the term of this lease at their own cost and expense. For this latter agreement they would receive $3,000 in credit on the rent.

3. And the lessor for himself, his heirs, personal representatives, and assigns, hereby covenants and agrees to and with said lessees that he will at his own cost and expense keep in repair the exterior of the building now located on the premises heretofore described in as good condition as they are now in and for the full term of this lease.

4. That the said lessees hereby covenant and agree that they will at all times during the operation of this lease operate a first-class hotel in the premises herein demised.

It will be observed that, while the lessor only agreed to keep the exterior of the building in repair, the lesses agreed to keep the interior in repair and to make all improvements. There is no reason to believe that these words were used in other than their ordinary meaning.

[1] The word "repair," as defined by Webster's New International Dictionary, means:

> "Act of repairing; restoration or state of being restored, to a sound or good state after decay, waste, injury, etc.; supply of loss; reparation; mending."

With this meaning the word has been practically applied by the courts in the construction of statutes and contracts. This is true in Minnesota. Kingsted v. Wright County Co-op. Co., 116 Minn. 131, 133 N. W. 399; Minneapolis Plumbing Co. v. Arcade Inv. Co., 124 Minn. 317, 145 N. W. 37. And the term has generally been so construed. Woodbury Company v. Tackaberry Co., 166 Iowa, 642, 148

N. W. 639; the dissenting opinion of Mr. Chief Justice Deemer in Ross v. Sheldon (Iowa) 154 N. W. 499; Fuchs v. City of Cedar Rapids, 158 Iowa, 392, 139 N. W. 903, 44 L. R. A. (N. S.) 590; Farraher v. City of Keokuk, 111 Iowa, 310, 82 N. W. 773; Pittsburg & Birmingham R. Co. v. Pittsburg, 80 Pa. 72; Stephens' Ex'rs v. Milnor, 24 N. J. Eq. 358; County of Brown v. County of Keya Paha, 88 Neb. 117, 129 N. W. 250, Ann. Cas. 1912B, 790; Platte County v. Butler County, 91 Neb. 132, 135 N. W. 439; Wattles v. So. Omaha Ice & Coal Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am. St. Rep. 554; Wyoming Coal Mining Co. v. Stanko, 22 Wyo. 110, 135 Pac. 1090, 138 Pac. 182; Weaver v. Templin, 113 Ind. 298, 14 N. E. 600; Bettenbrock v. Miller (Ind.) 112 N. E. 771; Romack v. Hobbs, 13 Ind. App. 138, 41 N. E. 391; Id., 32 N. E. 307; Board of Commissioners of White County v. Gwin, 136 Ind. 562, 36 N. E. 237, 22 L. R. A. 402; Dwight v. Ludlow Manufacturing Co., 128 Mass. 280; Todd v. Inhabitants of Rowley, 90 Mass. (8 Allen) 51; State v. White, 16 R. I. 591, 18 Atl. 179, 1038; Gulf City Street Railway & Real Estate Co. v. Galveston, 69 Tex. 660, 7 S. W. 520; Martinez v. Thompson, 80 Tex. 568, 16 S. W. 334; Hazlewood v. Pennybacker (Tex. Civ. App.) 50 S. W. 199, 202; Verdin v. St. Louis, 131 Mo. 26, 33 S. W. 480, 36 S. W. 52; Id., 27 S. W. 447; Parker-Washington Co. v. Meriwether, 172 Mo. App. 344, 158 S. W. 74; Noel v. Town of Lees Summit, 166 Mo. App. 114, 148 S. W. 194; Mayer v. Morehead, 106 Ga. 434, 32 S. E. 349.

On the other hand, the word "improvement" is defined by Webster's New International Dictionary as: "A valuable addition or betterment, as a building, clearing, drain, fences, etc., on land." The word "improvement" is a broader word than "repair," but includes the latter. This word has been practically applied by the courts in accordance with this definition in Minneapolis Plumbing Co. v. Arcade Inv. Co., 124 Minn. 317, 145 N. W. 37; N. W. Lumber & Wrecking Co. v. Parker, 125 Minn. 107, 145 N. W. 964; Arnhold v. Klug, 97 Kan. 576, 155 Pac. 805; Parker v. Wulstein, 48 N. J. Eq. 94, 21 Atl. 623; Bettenbrock v. Miller (Ind.) 112 N. E. 771; Meyer v. City St. Improvement Co., 164 Cal. 645, 130 Pac. 215; South Park Commissioners v. Wood, 270 Ill. 263, 110 N. E. 349; Kohn v. City of Missoula, 50 Mont. 75, 144 Pac. 1087; Walker v. Tillis, 188 Ala. 313, 66 South. 54, L. R. A. 1915A, 654; O'Neill v. Lyric Amusement Co. (Ark.) 178 S. W. 406; A. Leschen & Sons Rope Co. v. Moser (Tex. Civ. App.) 159 S. W. 1018; City of Roswell v. Bateman, 20 N. M. 77, 146 Pac. 950; In re Howard Laundry Co., 203 Fed. 445, 121 C. C. A. 555.

[2] It thus appears that the term "improvement" is a much broader one than that of "repair"; that the construction of new fire protection is not included in the term "repairs," but if such protection is permanently added to the real estate it is an improvement. The grantor or plaintiff made no agreement at all as to making any improvements. The only persons who made any agreement as to improvements were the defendants, and but for the fact that in the agreement the landlord contracted to make all repairs upon the exterior of the building,

and the lessees agreed to keep the same on the inside in good repair, and immediately followed this by the agreement "to make all improvements and repairs that may be necessary during the term of this lease at their own cost and expense," as the repairs thus contracted to be made manifestly referred to inside repairs and not to outside ones which the lessor had agreed to make, we are in some doubt whether the word "improvements" should not be limited to inside improvements. But for this doubt we would hold that the lessees contracted to make all improvements including the exterior fire escape steps. A portion of the court would so hold; but, in view of the fact that we all reach the same conclusion on other grounds, we do not pass upon that question.

At the time this lease was made the outside fire escapes were in accordance with the law. The only possible additional requirement as to the outside was an alternative one. It required an interior standpipe and provided that in the absence of such inside standpipe there should be an exterior one. The parties had a right, as between themselves, to contract as to which of them should comply with the fire protection laws, and at the time of the making of the lease there was no contemplation of a violation of the law, but an arrangement by which the lessees agreed to do all things necessary to make the building suitable for hotel purposes as then required by law. There was nothing illegal about the contract as made, and therefore nothing to invalidate the lease at that time.

Very great stress is placed by the lessees upon Leuthold v. Stickney, 116 Minn. 299, 133 N. W. 856, 39 L. R. A. (N. S.) 231, Ann. Cas. 1913B, 405, but the most casual reading of that case will show it has no application. In that case the landlord leased an apartment which was not equipped with any fire escapes as had been then by law required for more than four years. The tenant demanded they be placed on the building, and the landlord failed or refused to comply with this demand. The tenant remained in the apartment about a month, paid the rent up to the then present time, and moved out. He was sued for the balance of the rent after he vacated the premises, and the court held there could be no recovery. How different is this case? The tenant had contracted to make at least all interior improvements which included all the fire protection not already provided by the landlord and retained possession of the hotel property for more than 2½ months and refused to pay any rent for the period and got a verdict presumptively because he had failed to make the improvements he had contracted to make he could occupy the hotel until evicted and refuse to pay rent for the period he occupied it. We know of no law under which he would be entitled to do this.

We have said nothing as to whether this is a case upon which the landlord is entitled to the independent judgment of this court upon this question (Northwestern Terra Cotta Co. v. Caldwell, 234 Fed. 491, —— C. C. A. ——), because the Supreme Court of Minnesota has never passed upon the question here involved.

We turn now to the act of April 28, 1913. This act required stairways in place of ladders as fire escapes upon the outside of the build-

ing. Owing to their location, there is doubt, as already indicated, as to which parties, under the contract, were bound to erect them, though both were probably so bound under the statute; but there is no decision of the Supreme Court of Minnesota construing this statute. This law provided that it should be complied with within six months after the passage of this act; that is, by October 28, 1913. The lessees remained in possession until April 18, 1914, or five months and twenty days, and no application was ever made for the installation of the fire escapes. The law provided:

"Any person, firm or corporation * * * who shall let a building used for such business without having first complied with the provisions of this act, shall be guilty of a misdemeanor." Gen. St. Minn. 1913, § 5120.

This was a prospective statute, especially as it was a criminal one. Of course, we are aware that there are decisions that when a building is rented especially for a legal business, and the state in the execution of its police power declares that business illegal, this operates to avoid the lease. This has especially been held where buildings were leased for saloon purposes and the state enacted prohibitory liquor laws, but the Legislature of Minnesota did not declare the hotel business illegal, but required hotel buildings to be equipped with certain fire protection, and only made it illegal to let a building not so provided. In this case the landlord did not rent the building after the law was enacted. The Legislature did not expressly declare existing leases void where the law was not complied with but by imposing a penalty made future ones invalid. It is a maxim especially applicable to statutory construction, Expressio unius est exclusio alterius. St. Avit v. Kettle River Co., 216 Fed. 872, 133 C. C. A. 76. And when a statute expressly punishes the future letting of property not equipped with fire protection as required by it by plain implication, all prior leases, legal when made, remain valid and enforceable.

In Wilder Mfg. Co. v. Corn Products Co., 236 U. S. 165, 172, 35 Sup. Ct. 398, 400 (59 L. Ed. 520, Ann. Cas. 1916A, 118), after stating the facts and some propositions of law applicable thereto, the court said:

"And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so or some remote aid to the accomplishment of a wrong which might possibly result —doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in Connolly v. Union Sewer Pipe Co., 184 U. S. 540 [22 Sup. Ct. 431, 46 L. Ed. 679]."

And on page 174 of 236 U. S., page 401 of 35 Sup. Ct. (59 L. Ed. 520, Ann. Cas. 1916A, 118), the court said:

"It is true that there are no words of express exclusion of the right of individuals to act in the enforcement of the statute or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that, 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' Farmers' & Mechanics' Bank v. Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Barnet v. National Bank, 98 U. S.

555, 25 L. Ed. 212; Oates v. National Bank, 100 U. S. 239, 25 L. Ed. 580; Stephens v. Monongahela Bank, 111 U. S. 197, 4 Sup. Ct. 336, 337, 28 L. Ed. 399; Tenn. Coal Co. v. George, 233 U. S. 354, 359 [34 Sup. Ct. 587, 58 L. Ed. 997]."

We have not closely followed the line of the briefs, which were substantially three times as long as the record, but have said enough to show that the court below erred in sustaining the motion for directed verdict, and the case is reversed and remanded, with directions to set aside the verdict and grant a new trial.

RAMEY LUMBER CO., Limited, v. JOHN SCHROEDER LUMBER CO.

(Circuit Court of Appeals, Seventh Circuit. June 15, 1916. Rehearing Denied October 3, 1916.)

No. 2307.

1. CONTRACTS ⟸9(1), 10(4)—VALIDITY—CERTAINTY—MUTUALITY.
A contract by a company, which owned and operated a sawmill and also bought lumber from other mills, to sell all the lumber of certain grades it should "manufacture or own" during the season, is not void for uncertainty as to the quantity sold nor for lack of mutuality.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10–15, 17, 19, 20, 37; Dec. Dig. ⟸9(1), 10(4).]

2. CONTRACTS ⟸9(1)—VALIDITY—CERTAINTY.
If the intention of a contract be clear, the mere uncertainty of the amount involved does not invalidate it.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 10–15, 17, 19, 20; Dec. Dig. ⟸9(1).]

In Error to the District Court of the United States for the Eastern District of Wisconsin.

Action at law by the Ramey Lumber Company, Limited, against the John Schroeder Lumber Company. Judgment for defendant, and plaintiff brings error. Reversed.

In June, 1910, plaintiff in error, herein termed "plaintiff," and defendant in error, herein termed "defendant," entered into a written contract signed by the plaintiff, and, on behalf of defendant, by one J. McCauley, manager of the Chicago branch of the defendant's business. This contract involved a large amount of lumber, something over 1,000,000 feet, and was fully executed. In November, 1910, plaintiff wrote defendant:

"In the matter of next season's stock from this and adjoining localities it begins to look as if there could be considerable of the better grade secured as we have investigated the situation some and from the present outlook there will be a fair amount produced by the various small mills.

"The mills that we have in mind will have as good lumber as our own, and it will be well manufactured and properly handled and with our assistance it should prove very satisfactory.

"Since this subject has been mentioned to you we conclude that the manner of handling this for you will be agreeable to both interests as we feel that your interests can be protected as to quality and grade and the cost will be a minimum base.

"We would like very much to be taken into consideration when you give this section attention and this will include the better stocks on the Clearwater as we are now considering the stock from one of the best mills over there and one that cuts the same stock as ours.

"This arrangement looks to us as if it will yield us a fair margin and save you much expense in the handling of sundry stocks that you might secure."

To this defendant replied on November 17, 1910:

"Your favor of the 4th received and contents carefully noted.

"As advised your Mr. Spencer, we will be in the market next season for all of the factory pine of a certain type and character that we can get hold of at a reasonable market value. We see no reason why we could not handle a percentage, if not all, of the available stocks in your territory, and, as advised you personally, we expect to give you consideration along this line when we are contemplating making contracts for next season's cuts in your district."

On January 6, 1911, defendant wrote:

"Yours of the 30th received and contents carefully noted.

"We note that you will have at your own mill around two million feet and the contracts that you now control will give you an output of about three and one-half million feet for the season of 1911.

"It will not be our policy to send our men into your locality, or interfere with you at all, if you control that business and we control the outputs through you; that is, we want to arrange for a contract with you covering all the stock that you will manufacture and all of the stock that you will contract for. In this way it will give us the assurance that whatever stock you contract for we will control, and certainly we would not put our men in the same territory to buy stock in competition with you, when we have a contract with you to control all of the output. This would depend of course as to whether or not you would be able to control this output. In making such an arrangement with any one we expect to work in harmony with them, otherwise we would not want to contract with them at all.

"Now in reference to prices for product of 1911, we would prefer deferring price proposition until the writer visits the West, which will be within a few weeks. In this connection, we can afford to pay you as much as any one in the same kind of business that will pay you for your stock. You can appreciate that a small factory would pay you a higher value than we could, but you would have to give them the stock as they want it. We take the stock as you want to deliver it and pay you for it as loaded. As you state you have had offers along other lines, kindly advise us what you consider the values are for this season."

On January 24, 1911, plaintiff wrote the defendant as follows:

"Price would be $18.00 for the D and $30.00 for the C.

"As soon as the time arrives for you to take up the matter of thick shop lumber for the coming season we would be glad to hear from you as this subject is being agitated considerable now and we want to learn from some one about what we can depend upon for this coming year.

"We are logging as hard as possible and expect to put in a much larger cut than we did last season and our timber is running much better than last year."

On January 25, 1911, defendant, through McCauley, wrote:

"It is nearing the season for the contracting of factory plank in your district. Last year we had the matter up with you in reference to your company looking after what factory plank would be produced in your district for our account. Will you kindly advise if you are still contemplating purchasing factory plank in that district in excess of your own production. We prefer to have some one like ourselves in the territory to take care of the small contracts and would pay you a profit for handling rather than to contract for the outputs ourselves, providing we would not have to pay you too much for this service."

To this, plaintiff replied:

"We will have considerable shop lumber other than that we manufacture at our mill, possibly two million feet, as we have contracted with two or three small mills and are arranging for the cut of as many more for their cut of shop and we may have in all about 3½ millions this season, including our own.

"Of course if your policy is to send your own men into this locality and offer the same price as that you would pay us our opportunities would be very much curtailed but if you do not do this we feel that the greater por-

tion of the shop on this line as well as on the Clearwater line can be secured by us. This would have no reference to anything the Craig Mt. Lumber Co. produced.

"The better way in our opinion to handle this stock that we will have will be at a price f. o. b. loading point with all expenses included and we would pay you for the loading, shipping and grading. * * *

"It will be agreeable for us to represent you entirely in the above named districts provided this can be done without your men's interfering in any way other than with the exception above noted.

"Please indicate your best proposition as to prices covering our stock for this coming season and we can very soon advise you of our conclusions in the matter. * * *

"Please advise us promptly as to your conclusions regarding the manner of our handling this shop lumber in the districts named and also the best prices you care to offer us for the stock. * * * We will be glad to see your Mr. McCauley whenever he comes west and we hope his trip may be made soon."

On March 25, 1911, the contract was entered into between plaintiff and defendant, the latter acting through said McCauley, which contract was as follows:

"Memorandum of agreement entered into this 25th day of March, A. D. 1911, by and between Ramey Lumber Co., Ltd. (a corporation), of Vollmer, Idaho, party of the first part, and John Schroeder Lumber Co. (a corporation) of Milwaukee, Wis., party of the second part: Witnesseth, that in consideration of the covenants and promises made herein by the party of the second part the said first party hereby agrees to sell to said second party all the western pine shop lumber said first party will manufacture or own during the season of 1911, consisting of 5/4, 6/4 and 8/4 stock at the following prices loaded on cars in the rough:

"For 5/4 and 6/4 stock that will grade No. 3 $11.50 for No. 2 $17.00 for No. 1 $25.00 and for C. & better $32.00 and for 8/4 No. 3 $11.50 and for 8/4 No. 2 $19.00 and for 8/4 No. 1 $27.00 and for 8/4 C & better $34.00.

"Said first party agrees to grade and ship all the above named stock as soon as said stock is dry enough to ship without any additional expense to said second party.

"All the lumber sold under this agreement shall be manufactured in a workmanlike manner and inspected carefully in accord with the rules of the Northern Pine Manufacturers' Association and in the event that complaints are made as to the said grade then the said association's conclusions shall be final.

"All the above named lumber is to be loaded out as it comes from the piles, that is to say, that all lumber grading No. 3 and better to be loaded in same car as comes from the piles.

"Said second party agrees to purchase and receive the above named lumber as it is loaded by said first party and to pay therefor the above named prices in the following manner. By sight draft attached to each invoice for each car of lumber as shipped with bill of lading attached thereto. Less 2 per cent.

"The receipt of one dollar ($1.00) as a valuable consideration for the execution and delivery of this agreement is hereby admitted.

"In witness whereof the said parties hereto have set their hands and seals by their proper authorized agents this 25th day of March, A. D. 1911.

"Ramey Lumber Co., Ltd.,
"By W. J. Ramey, Pres.
"John Schroeder Lumber Co.,
J. McCauley."

"Witness: R. L. Spencer.

Defendant denies that it approved the contract, and denies McCauley's authority to execute it.

In pursuance of the contract, plaintiff, a manufacturer of lumber near Vollmer, Idaho, shipped to defendant, a dealer in lumber at Chicago and Milwaukee, to the address of Minnesota Transfer, 32 cars prior to August 1, 1911, which were accepted and paid for. Thereafter 20 cars were shipped

before receipt of request, but delivered after defendant had requested that shipments be delayed, and the defendant, on August 29, 1911, repudiated the contract. This suit was thereupon instituted and the cause submitted to the court without a jury. By the special finding of facts made at defendant's request it appears that plaintiff, prior to such repudiation, had manufactured, and had taken and received, lumber theretofore bought by it from the surrounding mills, until it had on hand, on and prior to August 29, 1911, 1,455,919 feet of lumber found by the court to comply with the contract specification, and 903,600 feet of rejected lumber, in addition to the amount covered by the 32 and 20 car shipments—or a total of 3,373,775 feet, besides certain Snyder lumber not inspected—all of which, plaintiff claims, except 7,500 feet, was applicable on the contract.

The court found as matter of fact that it was defendant's intention to sell the lumber in transit to avoid freight charges and handling expenses; that the lumber was shipped faster than defendant could resell the same to its customers; and that some part of the shipment of 32 cars became subject to demurrage and was by defendant reshipped to its Milwaukee yards, at an expense of several thousand dollars. The court further found that the 20 carloads rejected by the defendant were afterwards sold by the plaintiff, after using due diligence, for $2,351.97 less than the sum which should have been payable therefor under the contract, being $6.40 per thousand, on an average, less than the contract price, and that the lumber was up to grade; and that the remainder of the lumber was sold by the plaintiff between December 26, 1911, and July 18, 1912, at a heavy loss.

The court further found that western pine shop lumber of the grade specified in the contract between plaintiff and defendant, had, during the months of August and September, 1911, particularly on August 29, 1911, an established market value; that the market price of each of the several grades of lumber mentioned in the contract during that time was $1.75 per M less than the price specified in the contract on each such grade, and that the market prices remained the same as last above set forth up to July 1, 1912, increasing during the spring and summer of 1912; that western pine shop lumber such as that here in question should be manufactured during the months of March, April, May, June, and July of each year.

The total amount of lumber so manufactured and owned was largely in excess of the amount found by the court to be up to specifications on inspection. As to this, it is the contention of plaintiff that the blue disfiguration which led to its rejection had arisen since its manufacture, by reason of the delay in disposing of the same. On the other hand, it is in evidence that that lumber was not up to the specification of the contract at the time it was manufactured.

The court found as conclusions of law: (1) That defendant was estopped to deny the authority of McCauley to execute the contract in suit; (2) that said contract was void for want of certainty and mutuality as to all of the lumber for the season of 1911 owned by plaintiff, except the 32 carloads which were delivered and accepted, and dismissed the complaint.

Plaintiff assigns for error that the court held:

(1) The contract to be void for want of certainty and mutuality.

(2) That defendant was ignorant of conditions as to volume of lumber which plaintiff could produce.

(3) That certain of the lumber was not up to contract quality.

(4) That said lumber was being shipped too rapidly.

(5) That the difference between the contract price and the market price, when the lumber should have been taken, was only $1.75.

(6) That the lumber applicable on said contract, exclusive of the 52 cars shipped, was only 1,455,919 feet.

Other facts appear in the opinion.

Fred C. Ellis, of Milwaukee, Wis., for plaintiff in error.

Frank M. Hoyt and Alex. L. Strouse, both of Milwaukee, Wis., for defendant in error.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). The District Court properly held that McCauley had authority to execute the contract. The sharp decline in the price of lumber seems to have been the only excuse for the suggestion. The correspondence appearing in the record, some of which we have recited, leaves no basis for this defense.

The lumber was on hand, owned by plaintiff, at the time of the repudiation of the contract, and ready to be delivered. Defendant had accepted a part thereof which was shipped to it July 31, 1911. On August 5, 1911, defendant directed all shipments to be made to it at Minnesota Transfer until further notice. On August 9, 1911, objection was made by letter to drafts made on the Chicago office instead of the Milwaukee office. On the same day further directions were given by mail as to shipments. On August 14, 1911, defendant wired to discontinue shipments until instructed. Plaintiff replied that to stop shipments would be a great damage to it. On August 16, 1911, defendant notified plaintiff it should assume all collection charges. August 16, 1911, defendant complained of the rush of cars of lumber, and renewed orders to stop shipments. On August 18th, further complaint was made on this score. Plaintiff replied to these requests that it did not receive notice in time, and that it had stopped, but complained that it would suffer injury therefrom. Then came a repudiation. It will be recalled that in the letter of January 6, 1911, the right to ship whenever ready was held out as an inducement, and the contract requires defendant to purchase, receive, and pay for the lumber so loaded. On September 8, 1911, defendant hints at the lack of authority of McCauley to execute the contract. We find in the record nothing to warrant the action of defendant in repudiating the contract. The plaintiff had this large amount of lumber on hand, and was anxious to avail itself of the opportunity to obtains cars before they would be required for grain shipment. So far as the record shows, it was in good faith carrying out its part of the contract.

[1] As to the defenses of uncertainty and want of mutuality, we are unable to concur in the decision of the trial court. The contract did not lack mutuality of obligation. While defendant promised to buy of plaintiff all the lumber of a certain quality that plaintiff might own during the season, plaintiff bound itself, if it did manufacture or acquire any such lumber, to sell all of it to defendant and to no one else. Thus plaintiff deprived itself of the right to sell lumber to whom it pleased. The promise to restrict its freedom by giving up its right to sell to others was real and definite. It was the substantial and contemplated consideration for defendant's promise to buy all that plaintiff might own during the season. There was the mutuality of obligation essential to a bilateral contract; there was the consideration essential to the validity of any contract. Conley Camera Co. v. Multiscope & Film Co., 216 Fed. 892, 133 C. C. A. 96; Burgess Sulphite Fiber Co. v. Broomfield, 180 Mass. 283, 62 N. E. 367. That the plaintiff did not bind itself to acquire or manufacture any such lumber is immaterial. Its promise to deal with defendant was the valid consideration for the obligation by defendant—a consideration that made the undertaking of the other party binding and enforceable.

[2] With regard to the question of uncertainty, a contract is void (save for the possibility of reformation in equity) because of uncertainty, only when it is so worded that the intention of the parties cannot be deduced therefrom. If the intention be clear, the mere uncertainty of the amount involved does not invalidate the obligation, however it may affect the possibility of proving damages for a breach. In the present case the preliminary negotiations demonstrate that defendant wanted to secure all such lumber that it could possibly obtain, without limit, and without binding plaintiff absolutely and under all circumstances to deliver any lumber. The parties had a right to make such a contract, even though the amount that would be deliverable thereunder was not specified, and was in a sense optional with the vendor; and this they did, in terms which are clear and certain.

The contract expresses without uncertainty the intention of obtaining all the lumber plaintiff might acquire and manufacture during that season. That plaintiff might take advantage of market conditions, and buy or refrain from buying heavily, was of the very essence of the agreement. Inasmuch as it gave a valuable consideration for this right, this case is distinguishable from Crane v. Crane, 105 Fed. 869, 45 C. C. A. 96; Tweedie Trading Co. v. Parlin & Orendorff Co., 204 Fed. 50, 122 C. C. A. 364; Oakland Motor Co. v. Indiana Automobile Co., 201 Fed. 499, 121 C. C. A. 319; and Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C. C. A. 284.

Moreover, there were definite limitations on the amount that could and must be tendered. While plaintiff had the option either to manufacture and to buy from others, or to refrain therefrom, it was absolutely obligated to sell all that it manufactured or owned during the season. When the contract was executed, the maximum amount that would be deliverable thereunder, while unknown to the parties, and in that sense uncertain, was, under the finding of facts, the amount of specific grades of a definite kind of lumber that could be manufactured between March and July of the year 1911 either by plaintiff or others. So much thereof as plaintiff might own within a definitely limited time, the season of 1911, was the amount that it had obligated itself to sell. This would necessarily have become certain during the season, even if the time limit for plaintiff's ownership included, not merely the manufacturing season, but also the short period thereafter within which delivery must be made.

No claim, however, is made for any lumber not owned by plaintiff prior to defendant's repudiation of the obligation. The amount then owned, and as to which, by reason of plaintiff's ownership, both parties were bound, the one to sell, the other to buy, was necessarily certain, and the amount of lumber, in respect to which damages are claimed, was thus definitely fixed at the date of defendant's repudiation.

We therefore conclude that the plaintiff is entitled to recover as its damages the loss it incurred from defendant's nonacceptance of the 20 carloads, and on account of the 1,455,919 feet on hand at time of repudiation of the contract. As to the 903,600 feet rejected as not grading up to contract, we conclude that the fact of its discoloration

warranted the finding that it never was of the grade deliverable under the contract, and that no damages are predicable thereon.

Plaintiff telegraphed defendant on September 18, 1911, as follows:

"Railroads insist upon disposition of the twenty cars immediately and unless you pay for them we will dispose of them to the best advantage possible, charging you with any loss in consequence and proceed to collect this loss from you through courts."

The 20 cars were shipped, as above stated, before plaintiff received notice not to ship, and were later delivered but rejected. In such case, the plaintiff might sell the 20 car lot and collect the loss from defendant, based on the difference between the selling and contract prices. The court found that plaintiff, after due notice, sold the 20 cars, and realized thereon $2,351.97 less than the contract price, and that plaintiff used due diligence in making the sale; and as to the 1,455,919 feet it found that, at the time of repudiation of the contract, its market price was $1.75 per M less than the contract price.

Giving to the findings of facts the weight properly accorded thereto, we find the recoverable loss to plaintiff through defendant's unjustified repudiation of the contract is, as to the 20 carloads, $2,351.97, with interest thereon at 6 per cent. per annum from August 29, 1911, and as to the 1,455,919 feet applicable on the contract, $1.75 per M, or $2,547.85, with interest thereon at same rate from November 17, 1914. The said sums, aggregating $4,899.82, together with interest as stated, under the facts as found, we find to be the amount for which the District Court should have entered judgment for the plaintiff.

The judgment is therefore reversed, and the cause remanded, with direction to the District Court to enter a judgment in favor of plaintiff for $4,899.82, together with interest as above stated to date of entry of judgment, and costs.

WESTERN UNDERWRITING & MORTGAGE CO. v. VALLEY BANK OF PHŒNIX et al.

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

No. 2675.

1. PLEDGES ⇐16(2)—PAROL EVIDENCE—ADMISSIBILITY.

Where the property and securities of a defendant bank were transferred to another bank under a written instrument providing that the transferee should discharge the debts and obligations of defendant, evidence of a parol agreement, whereby defendant agreed to indemnify the transferee should the assets be insufficient to discharge all debts and liabilities, is admissible to show that the instrument was not a sale but a pledge; equity looking to the substance and not the form.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. § 25; Dec. Dig. ⇐16(2); Evidence, Cent. Dig. § 2136.]

2. SALES ⇐6—INSTRUMENT—CONSTRUCTION.

By written agreement, defendant bank transferred its assets to another bank, which agreed to discharge the debts and liabilities of defendant bank. Individuals named as parties of the second part, who signed the contract guaranteed at the end of three years, should the assets be in-

sufficient to discharge all debts and liabilities, to indemnify the transferee; it being further agreed that, should the guarantors pay any such deficiency, the transferee would deliver to them all assets not reduced to cash. About a year later, the defendant bank executed a note for a large sum and delivered it to the transferee bank as evidence of the indebtedness then existing, and subsequently, the indebtedness having been reduced, a note for a lesser amount was given. *Held*, that the contract was not one of sale, but was a conveyance to enable the transferee to pass title to the assets of the defendant bank and dispose of them for the payment of debts, and therefore, defendant bank being bound to reimburse its transferee, one who subsequently purchased the stock of defendant bank cannot complain of the execution of the notes.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 14; Dec. Dig. ⟸6.]

3. BANKS AND BANKING ⟸45—STOCKHOLDERS—RIGHTS OF.

Where defendant bank, which was in difficulties, transferred its assets to another institution, which agreed to pay its debts and liabilities, one who subsequently purchased stock of the defendant bank could not, the debts having exceeded the assets, reclaim assets remaining before he had paid the amount of indebtedness for which defendant was liable to its transferee.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 61; Dec. Dig. ⟸45.]

Appeal from the District Court of the United States for the District of Arizona; William H. Sawtelle, Judge.

Bill by the Western Underwriting & Mortgage Company, a corporation, against the Valley Bank of Phœnix, a corporation, and another. From decree dismissing the bill, complainant appeals. Affirmed.

In Equity. Suit by appellant as minority stockholder in the Union Bank & Trust Company, in behalf of itself and other stockholders similarly situated, for the cancellation and return of a certain promissory note issued by the Union Bank & Trust Company to the Valley Bank of Phœnix, appellees; for a decree declaring null and void a certain transfer of assets, securities, and choses in action from the Union Bank & Trust Company to the Valley Bank of Phœnix; and for an accounting. The cause was tried before the District Court, sitting without a jury, and, the plaintiff having introduced all its evidence, defendant the Valley Bank of Phœnix moved for dismissal of the action upon the ground that the evidence was not sufficient to sustain the allegations of the complaint or to entitle plaintiff to any relief, which motion was granted by the court and the action dismissed. Plaintiff appeals.

The appellees are corporations organized and existing under and by virtue of the laws of the state of Arizona and engaged in a general banking business in that state. On January 27, 1912, the Union Bank & Trust Company, being financially embarrassed, entered into a written contract with J. F. Cleveland, John P. Orme, George H. N. Luhrs, and J. M. Swetnam, as parties of the second part, and the Valley Bank of Phœnix, as party of the third part, whereby it was agreed that the Valley Bank would undertake to pay all the debts and liabilities of the Union Bank & Trust Company specified in a schedule attached to the contract and marked "Exhibit A," in consideration of which the Union Bank & Trust Company delivered to the Valley Bank all its cash on hand, furniture, negotiable paper, bonds, stocks, and all other choses in action; the parties of the second part guaranteeing, at the end of three years, to indemnify the Valley Bank should the assets so transferred be insufficient to discharge all the debts and liabilities. It was further agreed that, should the guarantors pay any such deficiency, the Valley Bank would deliver to them all of said assets then in its hands not reduced to cash.

In the month of May, 1913, there was had an adjustment and statement of account between the Union Bank & Trust Company and the Valley Bank

in connection with the contract of January 27, 1912, at which adjustment and statement it was found by representatives of both of the appellees and the guarantors on the contract that there still remained unpaid and owing to the Valley Bank from the Union Bank & Trust Company, on account of such expenditures in its behalf made by the Valley Bank, after deducting all moneys collected theretofore by the latter, the sum of $164,432.46; and at the time of the adjustment, or shortly thereafter, the note of the Union Bank & Trust Company in the sum of $164,432.46, payable and due on the 27th day of January, 1915, was delivered by it to the Valley Bank.

On December 30, 1913, the Union Bank & Trust Company, as party of the first part, entered into a contract with the Valley Bank, as party of the second part, in which it was recited that, under the terms of the contract of January 27, 1912, there was yet an indebtedness owing from the first party to the second party in the sum of $103,000, which exceeded the probable value of the securities then held by the second party under said agreement of January 27th in the estimated amount of $75,000. Under the new agreement, the Union Bank & Trust Company transferred to the Valley Bank certain property therein specified, in consideration of which the latter agreed to release the former from all claims and demands whatever. It was therein provided, however, that such release should in no way affect the rights and privileges then held and possessed by the Valley Bank against the guarantors, arising out of or by virtue of the said contract and agreement of January 27, 1912. This transaction was consented to by the guarantors aforesaid.

On March 5, 1914, appellant, as minority stockholder, brought this suit against the appellees, alleging, among other things: That in the month of February, 1913, one J. K. Tennant, who at that time was the president of the Union Bank & Trust Company, represented to complainant that the outstanding debts and obligations due and owing from the Union Bank & Trust Company had been liquidated by and under the terms of the contract of January 27, 1912, with the Valley Bank, and that the Union Bank & Trust Company was a going corporation in a solvent condition, and solicited from complainant the transfer by it to the Union Bank & Trust Company of negotiable securities for the purpose of being handled and invested by the latter in the state of Arizona. That on the 26th day of March, 1913, the Union Bank & Trust Company issued in the name of complainant 472 shares of the preferred stock and paid to complainant the sum of $17,636 in money, and thereupon complainant, by proper indorsements and assignments, transferred, set over, and assigned unto the Union Bank & Trust Company first-mortgage notes and mortgages and delivered said assignments to the latter. It is alleged that the transaction in May, 1913, by which a note in the sum of $164,432.46 in favor of the Valley Bank was issued, was wholly void for the reason that the board of directors were unauthorized to execute the said note; that the meeting of said board was neither called nor held in conformity with the by-laws of said the Union Bank & Trust Company; that said note was given wholly without any consideration passing from the Valley Bank to the Union Bank & Trust Company. It is further alleged: That said promissory note was without consideration for the further reason that under the terms of said contract of January 27, 1912, there could exist no liability on the part of the Union Bank & Trust Company or on the part of the individuals acting thereunder as guarantors until such liability, if any there existed, should be ascertained at the expiration of three years from the date of said contract, and that, in the execution and delivery by said board of directors of said promissory note, said board of directors acted fraudulently and without authority and in a manner so as to greatly injure the complainant and other stockholders similarly situated, as stockholders of said the Union Bank & Trust Company, and greatly depreciate the value of the stock so by it owned to the extent of 472 shares of preferred stock, as in the complaint set forth, and such stock had thereby become and then was greatly depreciated in value. That the board of directors of the Union Bank & Trust Company, at a meeting of said board on the 30th day of December, 1913, purporting to have been called for the purpose by resolution of the board of directors and not of the stockholders of the Union Bank & Trust Company, entered into a certain contract with the Valley Bank, under and by the terms of which, and purporting to act in

behalf of the Union Bank & Trust Company, the directors thereof again transferred, assigned, and set over unto the Valley Bank all of the property and assets then owned by the Union Bank & Trust Company, included in which assignment were all of such portions as then remained in the hands of the Union Bank & Trust Company of the assets by said the Union Bank & Trust Company acquired by purchase from the complainant. And that the transfer of assets by the board of directors of the Union Bank & Trust Company to the Valley Bank, so by said board of directors made on the 30th day of December, A. D. 1913, was void for the reasons: that by the terms of said resolution an attempted transfer of all of the assets of the Union Bank & Trust Company was made by said board of directors thereof, without action or authority given by the unanimous consent of the stockholders thereof, or by the consent of any stockholders had or obtained at a stockholders' meeting; that said transfer was void for want of consideration moving from the Valley Bank to the Union Bank & Trust Company.

The Valley Bank filed its answer on February 23, 1915, denying the various allegations of the complaint, and pleading a verbal contract which it alleged was entered into simultaneously with the execution of the written contract of January 27, 1912, and under the terms of which the transfer of assets provided for in the written contract was simply in the nature of a pledge and not a sale.

The complainant thereafter moved the court to strike from the answer all that portion concerning the verbal agreement, upon the ground that the defendant should not be permitted to plead a parol contract for the purpose of altering the terms of the written contract of January 27, 1912, admitted by the defendant to exist. This motion was denied by the court.

Upon the trial before the District Court, sitting without a jury, the plaintiff having introduced all its evidence, defendant the Valley Bank moved for dismissal of the action upon the ground that the evidence was not sufficient to sustain the allegations of the complaint or to entitle plaintiff to any relief, which motion was granted by the court and the suit dismissed on April 14, 1915.

From the decree dismissing the suit plaintiff brings this appeal, alleging that the lower court erred: In denying its motion to strike from the answer of the Valley Bank all that portion relating to the parol agreement of January 27, 1912; in granting the motion of said defendant to dismiss, which ruling, it is alleged, was necessarily predicated upon the assumed existence of a parol contract alleged by defendant, by way of an affirmative defense, to have been executed contemporaneously with the written contract of January 27, 1912, without proof by the defendant that the written contract was not plain and unambiguous as to its terms, and without proof of any new or other consideration for the making of the parol contract; in granting the motion of said defendant to dismiss, which ruling, it is alleged, necessarily construed the contract of January 27, 1912, to be a contract of pledge and not a contract of sale.

George J. Stoneman and Reese M. Ling, both of Phœnix, Ariz., and E. J. Henning, C. A. A. McGee, A. J. Morganstern, and E. E. Hendee, all of San Diego, Cal., for appellant.

C. F. Ainsworth and Jos. H. Kibbey, both of Phœnix, Ariz., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] It is contended by the appellant that the court below, in dismissing the action, necessarily based its judgment upon the agreement of January 27, 1912, as modified by the parol agreement set up in the defendant's answer as an affirmative defense. Assuming that this is so, we do not think the objection is a ground for reversing the judgment. In Jones on Evidence, § 446, the author says:

"It has long been the settled rule that in courts exercising equitable jurisdiction it is admissible to prove by parol that instruments in writing apparently transferring the absolute title are in fact only given as security."

In Peugh v. Davis, 96 U. S. 332, 336 (24 L. Ed. 775), the Supreme Court had before it a deed absolute in form, but claimed to have been executed as security for a loan of money, and the question was whether evidence, written or oral, was admissible to show the real character of the transaction. The court said:

"That court (a court of equity) looks beyond the terms of the instrument to the real transaction; and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties. As the equity, upon which the court acts in such cases, arises from the real character of the transaction, any evidence, written or oral, tending to show this, is admissible. The rule which excludes parol testimony to contradict or vary a written instrument has reference to the language used by the parties. That cannot be qualified or varied from its natural import, but must speak for itself. The rule does not forbid an inquiry into the object of the parties in executing and receiving the instrument."

In Brick v. Brick, 98 U. S. 514, 516, 25 L. Ed. 256, the rule declared in Peugh v. Davis was followed with respect to a pledge of a certificate of stock as security for a loan of money; and in Cabrera v. American Colonial Bank, 214 U. S. 224, 230, 29 Sup. Ct. 623, 626 (53 L. Ed. 974), in which it was claimed that a bill of sale was an absolute conveyance and accomplished the payment of certain debts to a bank, the court said:

"The face of an instrument is not always conclusive of its purpose. In equity, extrinsic evidence is admitted to show that a conveyance absolute on its face was intended as security. The rule regards the circumstance of the parties and executes their real intention, and prevents either of the parties to the instrument committing a fraud on the other by claiming it as an absolute conveyance, notwithstanding it was given and accepted as security. In other words, the real transaction is permitted to be proved."

[2] But aside from the parol agreement set up in the answer, we are of opinion that the written agreement of January 27, 1912, bears on its face the conclusive evidence that the assets therein transferred to the Valley Bank were transferred as security for a debt, and not an absolute sale. The conditions of the agreement were secured by guarantors. What were the conditions for which this security was given? To secure the payment to the Valley Bank of *any deficiency* that might remain *unpaid* after applying all of the cash received and collected and all of the securities collected and reduced to cash upon the amount of the *indebtedness* of the Union Bank & Trust Company which the Valley Bank should be able or be obligated to pay under the terms of the contract; and the guarantors further agreed that they would repay to the Valley Bank all costs and expenses which the Valley Bank might incur in reducing the assets to cash or in collecting the moneys due on such securities and evidences of indebtedness as were collectible.

Then follows the promissory note dated May 17, 1913, executed by the Union Bank & Trust Company for the sum of $164,432.46 and delivered to the Valley Bank as evidence of the *indebtedness then existing* and due the Valley Bank from the Union Bank & Trust Company. If the agreement of January 27, 1912, was a sale, and not a pledge to

the Valley Bank of the securities therein mentioned, why was this note given more than a year later as evidence of the *indebtedness* of the Union Bank & Trust Company at that time? Manifestly it had no place in an agreement of sale, but it did have a place in dealing with an *indebtedness* arising from payments to be made to the creditors of the Union Bank & Trust Company.

Then follows the agreement of December 30, 1913, when the *indebtedness* of the Union Bank & Trust Company to the Valley Bank had been reduced to $103,000, but which at that time exceeded the probable value of the securities then held by the Valley Bank in the estimated sum of $75,000. The agreement further provides for the transfer of other securities to meet this *unsecured indebtedness* and a continuance of the personal security of the guarantors for the indebtedness then existing.

Looking now at the provision of the agreement of January 27, 1912, transferring to the Valley Bank the assets therein mentioned *absolutely,* we must now construe that provision, not as a sale, but as a transfer intended to enable the Valley Bank to deal with the assets of the Union Bank & Trust Company with power to convey title.

[3] We find that the allegation of the complaint that in March, 1913, complainant purchased 472 shares of the preferred stock of the Union Bank & Trust Company upon representation made by the president of the latter corporation that the outstanding debts and obligations due and owing from the Union Bank & Trust Company to The Valley Bank had been liquidated under the terms of the contract of January 27, 1912, and that the Union Bank & Trust Company was a going corporation and was in a solvent condition, is not supported by the testimony; and we are of opinion that the evidence which does support the allegations of the complaint shows that the assets transferred to the Valley Bank under the written agreements referred to were transferred as security for an indebtedness, and not as a sale; that such transfer was legal; and, under any theory of this case, the complainant cannot recover assets remaining in the Valley Bank until it has first repaid to that bank the amount due as a deficiency on account of the debts of the Union Bank & Trust Company paid by the Valley Bank.

It follows that the decree of the lower court must be affirmed, and it is so ordered.

LEW MOY et al v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 18, 1916.)

No. 4480.

1. CONSPIRACY ⇐43(6)—INDICTMENT—SUFFICIENCY.

An indictment under Penal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201) denouncing the offense of conspiring to violate the laws of the United States, charged that defendants conspired to bring and cause to be brought from Mexico by land into the United States, in violation of Act May 6, 1882, c. 126, 22 Stat. 61, § 11, as amended by Act July 5, 1884, c. 220, 23 Stat. 117 (Comp. St. 1913, §

4298), Chinese persons not entitled to enter and remain, and that they were to be taken to Wyoming and elsewhere in the United States. *Held* that, as there need not be that definiteness or detail of averment necessary in a charge of the offense which was the subject of the conspiracy, the indictment was sufficient, though giving the mere outlines of the plot, for the matter might have been general in the minds of the conspirators.

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

2. CRIMINAL LAW ⊂⊃423(9)—PROSECUTION—EVIDENCE.

In a prosecution for conspiring to bring or cause to be brought into the United States, in violation of Act May 6, 1882, § 11, as amended by Act July 5, 1884, Chinese persons not entitled to enter, the conspiracy is not at an end the moment that the Chinese persons are transported across the international boundary, and acts and statements of one co-conspirator done or uttered thereafter in facilitating the purpose of the conspiracy, which was to evade the immigration officials, are admissible against others.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1000, 1001; Dec. Dig. ⊂⊃423(9).]

3. WITNESSES ⊂⊃199(1) — PRIVILEGED COMMUNICATIONS — ATTORNEY AND CLIENT.

Communications made in good faith to an attorney at law for the purpose of obtaining his official advice or assistance are privileged, though no fee is paid.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 749; Dec. Dig. ⊂⊃199(1).]

4. WITNESSES ⊂⊃199(1)—PRIVILEGED COMMUNICATIONS—STATEMENTS TO ATTORNEY.

Communications made in good faith to an attorney at law to obtain his official advice or assistance are privileged, though the attorney afterwards declines to act.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 749; Dec. Dig. ⊂⊃199(1).]

5. WITNESSES ⊂⊃199(2)—PRIVILEGED COMMUNICATIONS—STATEMENTS TO ATTORNEY.

Appellant, who with others was charged with conspiring to bring or cause to be brought into the United States from Mexico Chinese persons not authorized to enter, lived in a state distant from the place of trial, and shortly before trial, at the suggestion of his codefendant, consulted the attorney representing his codefendant for the purpose of employing him as local counsel. Appellant made communications to such attorney relative to the charge, but after conversations such attorney declined to act. *Held* that, notwithstanding his declination and the fact that no fee was paid, the communications were privileged, and it was error to require the attorney to disclose them; the rule not being changed by the fact that appellant's codefendant afterwards pleaded guilty on the advice of such attorney.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 750; Dec. Dig. ⊂⊃199(2).]

In Error to the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Lee Moy and Sam Hee were convicted under Penal Code, § 37, of conspiracy to commit an offense by bringing into the United States Chinese persons not lawfully entitled to enter or remain in the country, and by aiding and abetting therein, in violation of Act May 6, 1882, § 11, as amended by Act July 5, 1884, and they bring error. Reversed and remanded.

Mahlon E. Wilson, of Salt Lake City, Utah (T. S. Taliaferro, Jr., and W. A. Muir, both of Rock Springs, Wyo., and J. C. Wood, of Salt Lake City, Utah, on the brief), for plaintiffs in error.

Summers Burkhart, U. S. Atty., of Albuquerque, N. M.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. Lew Moy, Sam Hee, and Hop Lee were indicted for a conspiracy to commit an offense against the United States (Penal Code, §37) by knowingly bringing and causing to be brought from Mexico by land into the United States Chinese persons not lawfully entitled to enter or remain in the latter country, and by aiding and abetting therein (23 Stat. 117, § 11). Hop Lee pleaded guilty. Lew Moy and Sam Hee were tried, convicted, and sentenced. They prosecuted this writ of error.

[1] Complaint is made of the indictment. In a case of this kind there need not be that definiteness or detail of averment necessary in a charge of the offense which is the subject of the conspiracy. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545. The outlines of the plot or concert may well be as general in the minds of the conspirators as the prohibitions of the particular statute which they conspire to violate. It is said that the means to be employed are not set forth in the indictment. But the precise means may not have been a part of the concerted agreement or understanding. They may not have been predetermined, but left to the exigencies of the criminal enterprise as it progressed. It was expressly averred that the Chinese persons to be brought into the United States were not entitled to enter or to remain, that they were to be brought from Mexico and by land, and that they were to be taken to Rock Springs, Wyoming, and elsewhere in this country. The indictment was sufficient to inform defendants of the crime charged, and to protect them from a second prosecution for the same offense.

[2] It is also urged that the conspiracy was at an end the instant the Chinese whose illegal entry was procured and facilitated were brought across the international boundary, and therefore the trial court erred in admitting in evidence the subsequent acts and declarations of one conspirator against the others. This is too narrow a view of the crime charged. Successfully to consummate the unlawful introduction of the prohibited aliens required more than the mere bringing of them across the line. It was necessary to evade the immigration officials by transporting them into the interior and concealing their identity. The subsequent assistance by defendants to that end may well have been an essential part of the unlawful project. It is not necessary that each conspirator participate in each step or stage of the common general design. One of them may do one thing; another, another. Some may take major parts, while the participation of others may be in a minor degree. It may be said here that the evidence against the defendants was sufficient for the consideration of the jury.

[3-5] A serious question arises on the admission of the testimony of an attorney at law to conversations with defendant Sam Hee. Hee,

who lived in Wyoming, went with an attorney of that state to attend the trial at Santa Fé, N. M. On his way he stopped to see his codefendant, Hop Lee, who lived at Las Vegas, N. M. Hop Lee had employed a firm of attorneys at Las Vegas of whom Mr. Clark was a member. At his suggestion defendant Hee went to see Mr. Clark for the purpose of employing him as local counsel, if his Wyoming attorney, who had gone on to Santa Fé, had not already secured assistance there. After the conversations which ensued the employment was tendered, but Mr. Clark declined it. Against objections that they were privileged the trial court required Mr. Clark to testify regarding them and to narrate what Hee said. The testimony was prejudicial, not only to Hee, but also to his codefendant, Moy. Their defenses were so intricately related that injury to one necessarily injured the other. It is unimportant that Mr. Clark, when he talked with Hee, had already decided to advise his client, Hop Lee, to plead guilty. Besides, the decision had not then been communicated to Lee, nor was Hee advised of it. Whatever was in Mr. Clark's mind, the situation was peculiarly one inviting Hee's trust and confidence. Mr. Clark was an attorney at law, practicing in the state where the trial was to be had. It was properly desirable for defendant Hee, who lived in a distant state, to have the aid of local counsel, especially Mr. Clark, who was already counsel for one of his codefendants. The subject of their conferences was manifestly of a character covered by the immunity from enforced disclosure. The statements made were not by way of confession, nor in casual discourse with an outsider. In questions of this kind consideration should be given to the attitude, the intent and belief, of the person seeking advice or assistance. For example, communications have been excluded when made to a detective who falsely pretended to be an attorney at law. People v. Barker, 60 Mich. 277, 27 N. W. 539, 1 Am. St. Rep. 501. See also State v. Russell, 83 Wis. 330, 53 N. W. 441.

Communications made in good faith to an attorney at law for the purpose of obtaining his professional advice or assistance are privileged. The payment of a fee is not essential, Alexander v. United States, 138 U. S. 353, 11 Sup. Ct. 350, 34 L. Ed. 954. Nor does it matter that after the communications the attorney declines to act. Strong v. Dodds, 47 Vt. 348; Sargent v. Hampden, 38 Me. 581; Thorp v. Goewey, 85 Ill. 611; Cross v. Riggins, 50 Mo. 335; Denver Tramway Co. v. Owens, 20 Colo. 107, 36 Pac. 848. There is some diversity of opinion upon this question, but the above is better sustained by sound principle. It is in accord with the common custom of those who seek professional advice. The man who goes to the lawyer does so as a client, and the lawyer who listens to him does so professionally. The communications preliminary to actual retainer or engagement are frequently necessary, and they should be unconstrained and without apprehension of disclosure. That this should be so is of public interest, and is essential to the intelligent and honorable practice of the law. Various obstacles to a definite contractual relation may appear from the communications—prior inconsistent duty to others, ethical professional standards, time and opportunity, disagreement as

to compensation, and so on—but generally the preliminary conference must be had, and the disclosures made are within the spirit of the immunity. The fair and reasonable operation of the admitted general rule requires that liberality of construction.

The sentences of both Moy and Hee are reversed, and the cause is remanded for a new trial.

LAMAR-WELLS CO. v. HAMILTON CO. et al.

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

No. 2919.

1. SUNDAY ⊜30(3)—OFFICIAL ACTS—PETITION—SERVICE.
   Service of subpœna and copy of a petition may be made on Sunday in an involuntary bankruptcy proceeding.
   [Ed. Note.—For other cases, see Sunday, Cent. Dig. §§ 75–78; Dec. Dig. ⊜30(3).]

2. BANKRUPTCY ⊜86—PROCEEDINGS—SERVICE.
   In an involuntary bankruptcy proceeding against a corporation, service of subpœna and copy of petition was made on one named as president of the corporation. At the time of service such person was no longer president of the corporation, though he was a stockholder and director. The subpœna and petition were delivered to the president, and the stockholders adopted a resolution conferring on the president power to use his best judgment as to the proceedings. When the bankruptcy matter was called for hearing, and the corporation was adjudicated a bankrupt, the president was in attendance and made no objections as to the mode of service or the adjudication. *Held*, that the service on the director and stockholder, who referred the matter to the president, was sufficient to warrant the court in assuming jurisdiction, adjudicating the corporation a bankrupt, and appointing a receiver for its property.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 130; Dec. Dig. ⊜86.]

3. APPEARANCE ⊜24(5)—DEFECTS IN SERVICE—WAIVER.
   In such case, the corporation, by reason of the failure of its president to object, acquiesced in the mode of service, and is estopped from subsequently attacking the process.
   [Ed. Note.—For other cases, see Appearance, Cent. Dig. § 126; Dec. Dig. ⊜24(5).]

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

In the matter of the Lamar-Wells Company, alleged bankrupt. On petition of the Hamilton Company and others, the Lamar-Wells Company was adjudicated a bankrupt, and it petitions to superintend and revise a decree of the District Court. Petition denied.

The following is the opinion of Meek, District Judge:

It appearing to the court that the Lamar-Wells Company, in the above-entitled cause, had prepared and filed in this court a request for findings of fact and conclusions of law by the court, the following findings of fact and conclusions of law are made herein.

Findings of Fact.

On January 14, 1916, the Hamilton Company, of Dallas, Tex., American Art Works Company of New Jersey, and J. J. Moran, of Dallas, Tex., credi-

tors of the Lamar-Wells Company, through their Attorneys, Davis, Johnson & Golden, of Dallas, filed an involuntary petition in bankruptcy against the Lamar-Wells Company, a corporation, in the District Court of the United States for the Northern District of Texas, at Ft. Worth.

(2) Subpœna was issued by the clerk of the United States District Court for the Northern District of Texas and placed in the hands of a deputy United States marshal, commanding the Lamar-Wells Company, a corporation, J. I. Campbell, president, to appear and answer said petition in bankruptcy on the 29th day of January, A. D. 1916, which subpœna was duly served by the deputy marshal on Sunday January 16, 1916, by delivering to the said J. I. Campbell a copy of said subpœna on a railroad train between Ft. Worth, Tex., and Mineral Wells, Tex., in said Northern district.

(3) Said J. I. Campbell, upon whom subpœna was served, had continuously been president of the Lamar-Wells Company from the time of its organization to November 11, 1915. On that date, to wit, November 11, 1915, Otis Malcolm was elected president of said company, and was president of same at time of service of said subpœna upon J. I. Campbell. At the time of the service of the subpœna on J. I. Campbell, said Campbell was a member of the board of directors and stockholder in said company.

(4) J. I. Campbell, after being served with subpœna as president of the Lamar-Wells Company, and upon the day and date of such service, delivered the said subpœna to said Otis Malcolm, president of said company, at the building occupied by the Lamar-Wells Company in Mineral Wells, Tex., and said president, Otis Malcolm, on and after the date of such service, to wit, January 16, 1916, was advised of the nature of the action brought, and of the date set for the hearing of same.

(5) That on the 21st day of January, 1916, Otis Malcolm, acting as president of the Lamar-Wells Company, called a meeting of the directors of said company, for the purpose of considering the action to be taken by the company in regard to the bankruptcy proceedings filed against it, at which meeting a motion was duly adopted not to resist the bankruptcy proceedings.

(6) That on or before January 29, 1916, appearance day fixed by said subpœna served upon the said J. I. Campbell, as president, the Coshocton Glass Company, a corporation, and a creditor of the Lamar-Wells Company, filed exceptions to said involuntary petition in bankruptcy, as filed upon application, and a hearing of these exceptions was set down for February 11, 1916, at Dallas, Tex.

(7) That on February 7, 1916, a called meeting of the directors and stockholders of the Lamar-Wells Company was held by order of its president, Otis Malcolm, at which meeting a motion was duly made and adopted in the following form, to wit: "To use best judgment as to proceedings against the bankruptcy filed against the company and to withdraw the former motion made to not resist the bankrupt proceedings." The president testified that the course to be pursued in this matter was left to his judgment by the board of directors.

(8) That on February 9, 1916, notice was served upon the Lamar-Wells Company, by serving Otis Malcolm, its president, that on February 11, 1916, at 10 o'clock a. m., in the city of Dallas, Tex., before the judge of the United States District Court for the Northern District of Texas, there would be called for hearing and disposition the following matter, to wit: (1) Demurrers filed by McGown & McGown, attorneys for the Coshocton Glass Company; (2) the application and petition of the petitioning creditors, seeking to have a receiver for the properties of said company appointed; and (3) the matter of adjudication of the Lamar-Wells Company, a bankrupt. In response to said notice Otis Malcolm, president of the Lamar-Wells Company, attended the hearings before the judge at Dallas, February 11, 1916, and was in the courtroom, and was in consultation and communication with George Q. McGown, attorney for Coshocton Glass Company, during the progress of said hearings; that Attorney George Q. McGown presented his exceptions and demurrers to the petition filed by the petitioning creditors, which exceptions were by the court overruled. Whereupon petitioning creditors asked that the matter of adjudicating the Lamar-Wells Company a bankrupt be considered. This was done. Otis Malcolm, president of the Lamar-Wells Company, was in the

courtroom at the time and heard the proceedings taken in the premises. It being made to appear that the subpœna had been issued, served, and returned into court, and that no answer had been filed by the alleged bankrupt, and that the time within which it might answer had expired, the court thereupon signed an order adjudicating the Lamar-Wells Company a bankrupt upon the involuntary petition of said three creditors aforementioned. At no time during this proceeding did Otis Malcolm, the president of the Lamar-Wells Company, though present and hearing the various steps taken in said proceedings, suggest in any way that the service had upon the company, as shown by the return made by the marshal, upon J. I. Campbell, as president, did not speak the truth, or that at said time said J. I. Campbell was not president of the alleged bankrupt company, and that he, Otis Malcolm, was then president. The said Otis Malcolm did not suggest to the court that he was not present for the purpose of entering his appearance on behalf of the company at that time. Further proceedings were had in the presence and hearing of the said Otis Malcolm as follows: Application for the appointment of a receiver was presented by the attorneys for the petitioning creditors, which said application was by the court granted. The court asked that the name of a proper person for appointment as receiver be suggested. Thereupon the name of Glen S. Johnson, of Mineral Wells, was proposed, and the court, being satisfied that said Johnson was a competent and proper person, thereupon appointed him receiver of the properties and assets of the bankrupt corporation.

(9) That on February 16, 1916, the Lamar-Wells Company filed a motion to vacate said order adjudicating it a bankrupt, and to quash the officer's return upon the subpœna, showing that the Lamar-Wells Company had been served by serving J. I. Campbell as president of said Lamar-Wells Company, when he was not in fact president, and further showing that the service was had on a Sunday.

(10) The petitioning creditors, named herein, answered the motion of the Lamar-Wells Company to vacate the orders of adjudication and reference, setting up the matters and things hereinabove stated; that is, that Otis Malcolm was present in court when the orders of adjudication and reference were made; that the Lamar-Wells Company had actual knowledge of said petition being filed, and that J. I. Campbell, a former president of the company had been served; and that the said J. I. Campbell was in fact at the time of said service upon him a director and stockholder in said company.

(11) The petitioning creditors further answered, upon oath made on information and belief, that the Lamar-Wells Company was not resisting bankruptcy proceedings, but that resistance was being urged by creditors of the Lamar-Wells Company, in its name; that after the petition was filed certain properties of the Lamar-Wells Company had been sold under execution and bid in by stockholders; and that after the petition was filed property of the value of $12,000 was transferred by the Lamar-Wells Company to one of its stockholders. The defendant interposed exceptions to this answer, which were overruled by the court. After the petition was filed on January 14, 1916, some of the property of the Lamar-Wells Company was sold under execution issued out of a state court, and also property of the value of about $12,000 was sold and transferred by the Lamar-Wells Company to one of its stockholders.

(12) The court thereupon ordered the marshal to amend and correct the returns made by him, showing service on the Lamar-Wells Company, by serving subpœna upon J. I. Campbell, a stockholder and director of said company.

Conclusions of Law.

[1] (a) Service of subpœna and of copy of petition in an involuntary bankruptcy proceeding may be made upon a Sunday.

[2] (b) Service of subpœna and copy of petition in an involuntary bankruptcy proceeding, had upon a stockholder in and director of the alleged bankrupt corporation, is held to constitute service upon and notice to said corporation sufficient to warrant the court in assuming jurisdiction, and to support the ruling of the court in adjudicating said corporation bankrupt, appointing a receiver of its properties, and in referring the matter for administration in

bankruptcy in due course, where it appears that the stockholder and director so served forthwith on the day and date of said service advised the president of the alleged bankrupt corporation of such service, and delivered to said president the papers so served upon him, and where it further appears that the president of the alleged bankrupt corporation was present in the court room in person at the time said bankruptcy matter was called for hearing and said corporation was adjudicated a bankrupt and a receiver appointed to take charge of the property, assets, and business of the bankrupt, and where it further appears that said president of said corporation entered no objection to the actions and rulings of the court, and where it further appears that on a day preceding the hearing in court, at a meeting of the directors and stockholders of the alleged bankrupt corporation, called by order of its president, a motion was made and duly adopted conferring upon said president authority and power to use his best judgment as to the proceedings in involuntary bankruptcy filed against the corporation of which he was president.

[3] (c) Under the seventh and eighth findings of fact above made, Otis Malcolm, the president of the Lamar-Wells Company, is held to have acquiesced in the jurisdiction assumed by the court upon the service had upon J. I. Campbell, and to have exercised his judgment in favor of permitting said corporation to be adjudged bankrupt without contest. Said corporation is now estopped to deny that it was the best judgment of Otis Malcolm, its president, not to resist the bankruptcy proceedings filed against it, but to acquiesce in said corporation being adjudicated bankrupt, and in the appointment of a receiver to take charge of its property, assets, and business.

J. W. Stitt, of Ft. Worth, Tex., for petitioner.

John Davis, of Dallas, Tex., for respondents.

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

PER CURIAM. We find no reversible error in the rulings of the court below complained of in this case, and therefore the petition to superintend and revise is denied.

LEE LINE STEAMERS v. PAGE.

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

No. 2835.

1. SHIPPING ⊂=165—CARRIAGE OF PASSENGERS—DUTY OF CARE.

While a steamship company is not liable for its failure to land a passenger at a regular stop, to which she had engaged transportation, where because of stress of weather it was dangerous so to do, nevertheless it is the duty of the company to inform the passenger that the boat could not stop at such place, and not to deceive her as to the landing, and thus induce her to debark at a place other than her destination, and, having done so, is liable for damages proximately resulting from its breach of dtuy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 534–537; Dec. Dig. ⊂=165.]

2. SHIPPING ⊂=166(5)—CARRIAGE OF PASSENGERS—PROXIMATE CAUSE.

Through stress of weather a steamship company was unable to make a landing at a regular stop, which was a passenger's destination, and on making a landing at another point deceived the passenger into debarking there under the belief that it was her destination. The passenger, a woman used to outdoor work, being unable to procure a conveyance, started to walk back to her destination. After traversing about two-thirds of the

distance she met her husband, and the two proceeded a few miles to their home. The passenger was caught in a rainstorm, and as a result of exposure suffered injuries, including a miscarriage. *Held*, that it could not be determined as a matter of law that the company's breach of duty was not the proximate cause of the resulting injuries.

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

3. CARRIERS ⊂⇒277(1)—CARRIAGE OF PASSENGERS—DAMAGES.

For the failure of a common carrier to carry passengers to the right destination, consequential damages, where no independent cause intervened to produce the injury, may be recovered.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1082; Dec. Dig. ⊂⇒277(1).]

In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge.

Action by Hannah Page against the Lee Line Steamers. There was judgment for plaintiff, and defendant brings error. Affirmed.

McKellar & Kyser, of Memphis, Tenn., and Stephens, Lincoln & Stephens, of Cincinnati, Ohio (Charles H. Stephens, of Cincinnati, Ohio, of counsel), for plaintiff in error.

Milton J. Anderson and Ike W. Crabtree, both of Memphis, Tenn., for defendant in error.

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

SESSIONS, District Judge. Plaintiff is a colored woman and lives with her husband and children at Edmondson, a little place in Arkansas about six miles back in the country from Scanlan Landing on the Mississippi river. On Monday, February 1, 1915, she and two of her children, aged 15 and 17 years, respectively, purchased tickets and took passage on one of defendant's boats from Greenville, Miss., to Scanlan, which was a regular stopping place for the boat. She had previously written her husband to meet her and the children at Scanlan with a conveyance to carry them and their luggage to their home at Edmondson. The boat was due to reach Scanlan some time between Wednesday noon and Thursday noon. Plaintiff's husband went to Scanlan Wednesday, and, finding that the boat had not arrived, sent the conveyance back to Edmondson, but arranged with the owner thereof for its return upon request by telephone. Thursday morning, while plaintiff's husband was waiting at Scanlan Landing, the boat passed that place without stopping and proceeded about 1½ miles upstream to a landing called Womack. The officers of the boat claimed that a strong wind then blowing made it dangerous to attempt to land at Scanlan.

According to the testimony of plaintiff and her two children, which must have been believed by the jury, she was not notified that the boat would not stop at Scanlan; but after passing that landing, and when approaching Womack, she was told by the porter that the latter landing was Scanlan and was the place where she was to disembark. At first she expressed doubt as to the place being Scanlan; but, after being

again assured by the porter that it was, she and her children left the boat at Womack. When they discovered that they had not landed at Scanlan, the boat had departed. After making such discovery they started on foot for Scanlan, carrying a heavy suit case and two other parcels of luggage. They lost their way, and traveled four or five miles before reaching Scanlan. Plaintiff's husband had then left for home. No conveyance was available, and they proceeded on their way, walking toward their home at Edmondson. They were caught in a rainstorm and were thoroughly drenched. They stopped for shelter at a house two or three miles from Edmondson, and there found plaintiff's husband. After the storm had subsided, and plaintiff had changed her clothing, they walked the remaining distance. Plaintiff caught a severe cold, and was sick when she reached home. Her condition became worse, and three days later she suffered a miscarriage. She was ill in bed for about three weeks, and claimed that she was still sick and suffering at the time of the trial, and that her health was permanently impaired.

The trial judge instructed the jury in substance that the officers of the boat were justified in not stopping at Scanlan if it was dangerous so to do, but that it was their duty to notify plaintiff that the boat would not stop, and to permit her to remain upon the boat or to land at such other place as she might desire, and that, if they failed so to do, plaintiff was entitled to recover for any injury which she had suffered as the direct and proximate result of such neglect of duty. Plaintiff had a verdict for $2,000. Subsequently a motion for a new trial was denied. Defendant brings the case to this court on writ of error.

[1] The instruction to the jury that defendant could not be held liable for its failure to land the plaintiff at Scanlan, if because of stress of weather it was dangerous so to do, was correct. But it is not open to serious controversy that defendant owed a duty to plaintiff to inform her that the boat would not stop at Scanlan, and not to deceive her as to the place where the boat actually landed, and thus to induce her to land at a place other than the destination named in her ticket, and that the defendant must respond in damages for any injuries which plaintiff has suffered, and which are directly and proximately attributable to its breach of duty in that regard.

[2] Hence the important question is whether the injuries for which plaintiff claims damages can fairly and rightfully be imputed and charged to defendant's wrongful acts. This question, and also the related one of plaintiff's contributory negligence, were properly left to the decision of the jury. Upon this record, it cannot be said, as matter of law, either that plaintiff was guilty of negligence which contributed to her injuries, or that her exposure, illness, and miscarriage were not brought about by the acts of defendant's servants in putting her off the boat at the wrong place, and in not only failing to inform her, but deceiving her, as to the true situation. Assuming plaintiff's story to be true, as we must, she was deceived into landing at Womack, believing it to be Scanlan, and suddenly found herself in a strange and lonely place, some distance from where her husband was

to meet her. There was no one at the landing from whom she could make inquiry. The nearest house was at the levee, about one-half mile distant. No conveyance could be obtained. Under such conditions, the natural thing for her and the children to do was to walk to Scanlan. This they did. Upon reaching Scanlan, and not finding her husband, it was not unnatural for them to continue their journey toward home on foot. Plaintiff had always been strong and healthy, and able to do outdoor work. Hence it cannot be said that she could reasonably have anticipated the ill consequences which followed. She could not prevent the rainstorm, and whether she could have avoided the consequent wetting and exposure was a question of fact. When she finally found shelter, she took the precaution to put on dry clothing. Having traversed more than two-thirds of the distance to her home, and her husband then being with her to assist in carrying the luggage, she was not necessarily at fault in walking the remaining two or three miles. It can scarcely be doubted that her subsequent illness was due largely to the fatigue and exposure of her trip from Womack to Edmondson. And it is fairly inferable that her anxiety of mind, caused by finding herself in a strange place, together with her lack of information as to her whereabouts and the direction to be taken and the road to be followed, and the consequent loss of way and increased distance traveled, all contributed materially to her injuries.

[3] A few cases, such as Pullman Palace Car Co. v. Barker, 4 Colo. 344, 34 Am. Rep. 89, and Hobbs v. Railway Co., 10 Law Rep. (Q. B.) 111, support the contention of defendant that, in an action growing out of the failure of a common carrier to carry its passenger to the right destination, what are termed consequential damages cannot be recovered. These decisions have been much criticized and have not been generally followed. The great weight of authority is to the effect that, in cases where it does not appear that an adequate and independent cause has intervened to produce the injury complained of, and where, as here, the evidence warrants the finding of a causal connection between the wrongful act of defendant and such injury, plaintiff's right of recovery and the reasonable amount of damages, if any, to be awarded, are questions of fact to be determined by the jury. Among the many cases so holding are the following: Brown v. Railway Co., 54 Wis. 342, 11 N. W. 356, 911, 41 Am. Rep. 41; Sloane v. Southern Cal. Ry. Co., 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193; Malone v. Railroad, 152 Pa. 390, 25 Atl. 638; Terre Haute & Indianapolis R. R. Co. v. Buck, 96 Ind. 346, 49 Am. Rep. 168; Yazoo & M. V. R. Co. v. Hardie, 106 Miss. 436, 64 South. 1; L. & A. Ry. Co. v. Rider, 103 Ark. 558, 146 S. W. 849; Moss v. D. & M. Ry. Co. (Mich.) 154 N. W. 140; Moss v. D. & M. Ry. Co., 182 Mich. 40, 148 N. W. 204; Duffiny v. D. & M. Ry. Co., 186 Mich. 40, 152 N. W. 1029.

The judgment of the lower court is affirmed.

SOLA v. CINTRON & ABOY et al.

(Circuit Court of Appeals, First Circuit. November 17, 1916.)

No. 1169.

1. APPEAL AND ERROR ⊜784—MODE OF REVIEW—APPEALS.
In view of Judicial Code, § 274a, as added by Act March 3, 1915, c. 90, 38 Stat. 956, declaring that, though a suit at law should have been brought in equity or a suit in equity should have been brought at law, the courts shall order amendments to the pleadings as shall be necessary to conform them to the proper practice, and Act Sept. 6, 1916, § 4, declaring that no court having power to review shall dismiss a writ of error solely because appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, an appeal from the Supreme Court of Porto Rico in a case turning upon questions of law only will not be dismissed, because review should have been sought by writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3126, 3127; Dec. Dig. ⊜784.]

2. COURTS ⊜387(4)—PRECEDENCE—PORTO RICO—LOCAL LAWS.
A decision of the Porto Rico Supreme Court that under its Civil Code (sections 1110–1112) one who signs a note as a principal debtor is governed by the form, and cannot show himself to be a surety, relating to a matter of the local law, will not be disturbed by a reviewing court, unless clearly erroneous.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1037; Dec. Dig. ⊜387(4); Appeal and Error, Cent. Dig. § 3397.]

Appeal from the Supreme Court of Porto Rico.

Action by Cintron & Aboy and others against Celestino Sola. From a judgment for plaintiffs, defendant appeals. Affirmed.

Joseph B. Jacobs, of Boston, Mass. (Cay. Coll Cuchi, of San Juan, Porto Rico, on the brief), for appellant.

Hugo Kohlmann, of New York City (S. Mallet-Prevost, of New York City, on the brief), for appellees.

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

PER CURIAM. [1] The questions arise out of a contract made in Porto Rico, in which the defendant was in fact a surety, which fact was not shown on the face of the contract. The case came up as on an appeal in equity. It is contended that review should have been sought by writ of error, rather than by appeal; but, as the case turns upon questions of law only, this objection may be disregarded, as merely formal and without substance. However important may be the distinction between appeals and writs of error in cases involving fact, or a difference between legal and equitable rights, in the present case, which involves only a question as to the legal effect of a document, we must disregard the objection as merely technical. The enactment of section 274a of the Judicial Code by the Act of March 3, 1915, before the taking of this appeal, confirms our view that this objection should

be regarded as merely formal and without substance. Furthermore, section 4 of the act of September 6, 1916, providing that no court having power to review shall dismiss a writ of error solely because appeal should have been taken, or dismiss an appeal solely because a writ of error should have been sued out, though, in view of section 7, not directly applicable to the present appeal, is confirmatory of our view that in a case where the only difference between the two modes of seeking review is formal, and where none of the substantial reasons for distinction between writs of error and appeals exist, we may properly disregard the objection. We therefore proceed to consider the case on its merits.

[2] The case has reference to a contract to which Sola was in truth a surety, as was shown by a parol proof, if the same had been accepted; but the fact that he is a surety does not appear on the face of the contract. The case is told by Sola, who is the appellant, as follows:

"On May 31, 1910, Sola & Son, a mercantile partnership, and Celestino Sola, who was not a member of the aforesaid partnership, made a promissory note for $6,000, payable on the 30th of March, 1911, to the order of Don Antonio Maria Sorba. When the note became due, on March 30, 1911, or at some time subsequent thereto, Don Antonio Maria Sorba saw Marcelino Sola, manager and one of the partners of the firm of Sola & Son, and both agreed to renew the note for one year—Celestino Sola having no knowledge of the said agreement—and interest was paid up to December, 1911. On June 4, 1912, after maturity, the note was indorsed over to Mateo Rucabado; and at some later date the note was indorsed over to the plaintiffs, but this latter indorsement was not dated. The sum of $6,000 secured by the note was loaned by Sorba to the mercantile partnership of Sola & Son for the benefit of that firm, and Celestino Sola signed the note. When the note fell due, Marcelino Sola, as a member of the firm of Sola & Son, applied for and obtained from Antonio Maria Sorba a renewal of the note for a period of one year, without the knowledge or the consent of the defendant, giving the creditor to understand that the same surety would continue. The renewals were granted without making them appear in a new document; but Don Marcelino Sola, one of the partners of Sola & Son, paid the interest up to December, 1911. At the date of the renewal of the note the firm of Sola & Son had been dissolved. On the 3d day of June, 1912, Antonio Maria Sorba made out a proof of claim in bankruptcy against the firm of Sola & Son, Limited, a different legal entity from Sola & Son. The limited partnership was adjudicated bankrupt. Said Antonio Maria Sorba, in the proof of claim, made oath that the firm of Sola & Son, Limited, owed him $8,000, and that one consideration of said debt was the note for $6,000, due on March 30, 1911, and another note for $2,000, due in April, 1911. The $6,000 to which he referred in the proof of claim was the same note which was subsequently transferred to the plaintiffs. Subsequently, fearing that if he proved the $6,000 note against the estate of Sola & Son, Limited, he would be prejudiced in recovering against Celestino Sola, he proved his claim against the estate of Sola & Son, Limited, merely for the $2,000. Suit was brought in the district court of Humacao, for Porto Rico, in which the plaintiffs alleged in their complaint that the defendant made a joint and several note payable to the order of Sorba, which was indorsed by him to Mateo Rucabado, on June 4, 1912, and subsequently, no date being given, indorsed to the plaintiffs. The defendant filed a demurrer setting forth that the complaint was ambiguous, unintelligible, and uncertain, setting forth, also, among other facts, that there was no date in the indorsement of Rucabado to the plaintiffs, and that the complaint did not set forth facts sufficient to constitute a cause of action. The court overruled the defendant's demurrer, and the defendant filed an answer, alleging as matter of defense the matters as substantially alleged in the demurrer."

The appellant then proceeds as follows:

"After a trial the district court found for the plaintiffs in the amount of $6,000 and interest from the date of the complaint. The defendant filed an appeal from the whole decision of the district court, and the plaintiffs also appealed, but only on the question of the date from which interest should be allowed. The Supreme Court of Porto Rico found for the plaintiffs, and the defendant duly appealed to this court."

The appellant maintained in the Supreme Court, and still maintains, that Celestino Sola was a surety, and that the oral testimony clearly shows that all the parties concerned knew and understood that fact, and understood that the money advanced by Sorba was advanced to the partnership for partnership purposes, and that the defendant was merely an accommodation maker. This, of course, conceded that such facts were shown by the oral proofs; but the court sustained Celestino Sola for the reasons which we will state.

The following extracts, from the opinion of the Chief Justice of the Supreme Court of Porto Rico, represent the findings of that court in matters of law and fact, including the construction of the sections of the Civil Code hereinafter referred to. The opinion said:

"And it cannot be contended that the evidence introduced at the trial shows that the debt was contracted for the sole benefit of Sola & Son, and that the defendant was only surety for the fulfillment of the obligation, for, even if true, the fact would remain that Celestino Sola, without profiting by the money received on the note and without actually being a debtor, was willing to assume that character when he signed the note as solidary debtor in order that Sola & Son might secure the money from Sorba, who would not have lent it except under that condition. That Celestino Sola did not profit by the loan is immaterial; he agreed to be a solidary debtor in order to accommodate Sola & Son, and that agreement was expressed in the promissory note when the defendant signed it as solidary debtor. The law of the contract was established in the note as the last expression of the intention of the parties, and Celestino Sola must submit to it.

"Under the theory which we have set forth, the conclusion is reached that defendant, Celestino Sola, is not the surety of Sola & Son, but a solidary debtor of Antonio Maria Sorba jointly with Sola & Son. This being the case, the first ground of the appeal, based on section 1752 of the Civil Code, which provides that the extension granted to the debtor by the creditor without the consent of the surety extinguishes the security, is without merit; therefore it is unnecessary to discuss the question argued at length by both parties, as to whether the said section is applicable as well to simple or common surety as to solidary surety."

"This being a case of a solidary obligation, sections 1110, 1111, and 1112 of the Civil Code are applicable, and their pertinent parts read as follows:

" 'Section 1110. Novation, compensation, confusion or remission of the debt, made by any of the joint creditors, or with any of the debtors of the same class, extinguishes the obligation.

" 'Section 1111. A creditor may sue any of the joint debtors, or all of them, simultaneously.

" 'Section 1112. The payment made by any of the joint debtors extinguishes the obligation.'

"Plaintiffs, Cintron and Aboy, the indorsees of the promissory note under consideration, have exercised the right given them by section 1111 in bringing their action against one of the solidary debtors, Celestino Sola. The obligation had not been extinguished in any of the ways prescribed by said sections 1110 and 1112. As to the extension of time granted by Sorba to Sola & Son, it cannot be regarded as a novation extinguishing the obligation, for there was no change of subject-matter or principal conditions; and as to

novation consisting in the substitution of one debtor for another, there is no evidence of such substitution."

It is true that the civil law is not everywhere apart from the common law, as understood in the United States, on this topic. Especially this is true in Louisiana, as shown by authorities cited by the appellant; but the law of the locality of the contract is especially governed by the Civil Code of Porto Rico, and the construction of that Code by the Supreme Court of Porto Rico. By that law, as thus construed, a party who signs in any form as principal is governed by the form, although perhaps he might elsewhere show that he was only a surety. The case falls within the rules of Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538, which likewise construed the local statutory laws.

There were some incidental questions which were raised in this case, but none of them were material to this decision.

The judgment is affirmed, with interest at 6 per cent., and costs.

GENERAL FILM CO. OF MISSOURI v. GENERAL FILM CO. OF MAINE.

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

No. 4637.

1. CORPORATIONS ⊕=648—FOREIGN CORPORATIONS—DOING BUSINESS WITHOUT A LICENSE.

Only the state can take advantage of the failure of the corporation doing business therein to comply with the local laws regarding licensing, etc., and another corporation cannot on that ground appropriate the foreign corporation's name and pirate its business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2516; Dec. Dig. ⊕=648.]

2. TRADE-MARKS AND TRADE-NAMES ⊕=73(2)—UNFAIR COMPETITION—RIGHT OF COURTS.

A foreign corporation engaged in business in the state of Missouri without taking out a license. Thereupon, for the purpose of pirating its business, complainant corporation was organized under the same name; the secretary of state issuing a certificate of incorporation. It was the duty of the secretary of state to determine whether the corporate name applied for conflicted with the name of any other corporation authorized to do business in the state. *Held* that, as a corporation adopts its own name, complainant could not, though the name of the foreign corporation had not been registered, obtain the right to use the name of such corporation for the purposes of unfair competition, and such use may be enjoined by the courts, notwithstanding the approval of complainant's name by the secretary of state.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⊕=73(2).]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Bill by the General Film Company of Missouri, a corporation, against the General Film Company of Maine, a corporation, which filed a cross-bill. From a decree for defendant on its cross-bill, complainant appeals. Affirmed.

William R. Gilbert, of St. Louis, Mo. (S. H. West, Roscoe Anderson, and A. L. Levi, all of St. Louis, Mo., on the brief), for appellant.

John S. Wright, of Kansas City, Mo. (Armwell L. Cooper and Hadley, Cooper, Neel & Wright, all of Kansas City, Mo., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The General Film Company of Maine is one of the largest corporations engaged in the business of producing and selling moving picture films. Its trade extends throughout the country. St. Louis, Mo., has been one of the centers of its operations. From that branch it supplied an extensive trade in several adjoining states. By the law of Missouri a foreign corporation cannot do business in that state without taking out a license. A violation of the statute is punishable by fine, and the statute also provides that the corporation shall not be permitted to maintain any action upon any contract made in the state during the default. The General Film Company of Maine failed to comply with this statute, although it was doing an extensive business in the state. Some citizens of St. Louis, who had been engaged in the business of supplying moving picture films under a proper name, discovered that the General Film Company of Maine had failed to comply with the statutes of Missouri, and, for the purpose of pirating its business, organized the General Film Company of Missouri. Its capital stock was only $5,000 at first, but it now has been increased to $25,000. It has engaged in the same lines of business as the older company, and by its method of conducting business has deceived the public, and caused it to believe that the General Film Company of Missouri is in fact the General Film Company of Maine.

The General Film Company of Missouri, after its incorporation, filed its bill in equity, alleging its incorporation, and right to use its corporate name, and setting forth that the General Film Company of Maine was doing business in the state in violation of local law and to the prejudice of the plaintiff. It asked an injunction restraining the defendant from the use of the name "General Film Company." The defendant filed its answer, admitting its failure to comply with the local law respecting foreign corporations, and denying the other allegations of the bill. It also filed a cross-bill, setting up the fraudulent purpose of the incorporation of plaintiff, and the fraudulent and piratical manner in which its business was carried on. To this cross-bill the plaintiff demurred. A stipulation was filed in court, signed by counsel for both parties, that the cause should be submitted upon the bill, answer, cross-bill, and demurrer; "the intention and desire of both parties being that all matters involved in this controversy may be taken up and submitted at one hearing and fully disposed of by the court in its decision, except that neither party hereby waives its right to appeal to a higher court from such decision or decree." The demurrer was overruled, and a decree entered in favor of the defendant upon its cross-bill, enjoining the plaintiff from using the name "General Film

Company," or any name of similar import. To review that decree the plaintiff brings the present appeal.

[1] The plaintiff seeks to secure rights which may be properly asserted only by the state of Missouri. That state alone could complain of the fact that the General Film Company of Maine was doing business in the state without having complied with the statutes in regard to foreign corporations. The plaintiff cannot clothe itself in the panoply of the state as a shield for the fraud which it is seeking to accomplish.

[2] It is claimed, however, with much skill, that it is the duty of the secretary of state, in issuing certificates of incorporation, to determine whether the name of the corporation conflicts with the name of any other corporation authorized to do business in the state. It is said that the secretary of state in issuing to the plaintiff its charter exercised this administrative power, and thereby approved of the name selected by the plaintiff, and it is urged that a court cannot deprive the plaintiff of the name which it thus obtained legally from the secretary of state. This argument has often been made in the courts, and has generally been condemned. Plaintiff's name was chosen by the plaintiff itself. It was chosen for the purpose of perpetrating a fraud upon the defendant. The approval of that name by the secretary of state of Missouri was permissive, and not mandatory. He had no equitable powers. His authority was confined to comparing plaintiff's name with the names of other corporations licensed to do business in the state, and ascertaining whether there was such similitude as would be likely to confuse and mislead. He had no power to consider the course of trade of different corporations, and determine whether plaintiff's name was chosen for the fraudulent purpose of unfair trade competition. It was held by the Supreme Court in Herring-Hall-Marvin Safe Co. v. Hall Safe Co., 208 U. S. 554, 28 Sup. Ct. 350, 52 L. Ed. 616, that even an individual, when he comes to use his own name in trade, must have a proper regard for the rights of another individual or corporation that has previously used the same name. The second comer, using the common name, cannot do so unless he accompanies it with such warnings and safeguards as will prevent the public from being deceived, and the business of the first user of the name from being injured. The doctrine which underlies this use of the common names of individuals applies with much greater force to corporate names. A corporation chooses its own name. It does it with a view to the business in which it is presently to engage. It is therefore charged with the duty of not selecting a name for fraudulent purposes. It is the duty of courts of equity to enforce the observance of this rule. Plaintiff, however, says that it got its name from the state, and may therefore use it, and that defendant cannot now use its name in the state because the secretary of state will not grant it a license on account of the similarity of its name to the name of plaintiff. The complete answer to that contention is that plaintiff selected its name to accomplish a fraudulent purpose. A court of equity cannot be stayed in its duty to protect property rights by means of such a subterfuge as the plaintiff has practiced. The organization of corporations under mod-

ern laws is a simple performance. It is controlled wholly by the men who seek that form of business organization. This being the case, the act of taking out a corporate charter, although it invokes the authority of the state, cannot be made use of for purposes of fraud. If it is made use of for that purpose, the fact that the charter was obtained from the state cannot deprive a court of equity of its power to prevent fraud and protect property rights. The most solemn decrees of courts will be set aside when they are procured by fraud. Much more will the voluntary acts of individuals in forming a corporation. Charles S. Higgins Co. v. Higgins Soap Co., 144 N. Y. 462, 39 N. E. 490, 27 L. R. A. 42, 43 Am. St. Rep. 769; Bender v. Bender S. & O. F. Co., 178 Ill. App. 203; Celluloid Mfg. Co. v. Cellonite Mfg. Co. (C. C.) 32 Fed. 94; United States Light & Heating Co. of Maine v. United States Light & Heating Co. of New York et al. (C. C.) 181 Fed. 182; Peck Bros. & Co. v. Peck Bros. Co., et al., 113 Fed. 291, 51 C. C. A. 251, 62 L. R. A. 81.

The decree is affirmed.

BRANSFORD v. REGAL SHOE CO.

In re HORRELL & CRISS.

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

No. 2921.

1. CONTRACTS ⟸170(1)—CONSTRUCTION BY PARTIES.
   Ordinarily the courts will give effect to the construction of a contract by the parties.

   [Ed. Note.—For other cases, see Contracts, Cent. Dig. § 753; Dec. Dig. ⟸170(1).]

2. BANKRUPTCY ⟸140(1)—TITLE OF TRUSTEE—GOODS CONSIGNED FOR SALE.
   Claimant consigned a stock of shoes to the bankrupt corporation under an agreement that title should not pass to the bankrupt, and that at the expiration of the period of consignment the bankrupt should purchase all goods then on hand at the invoice prices and terms. A few days after the expiration of the time limited, the parties entered into a further contract that the original contract should be extended for another period, and at the expiration of that time contracted for a second extension. *Held* that, as the parties may change or modify a contract by a subsequent one, and the modification may be changed by a subsequent contract, there was a sufficient consideration for the renewals, and title did not pass to the bankrupt; bankruptcy occurring before the expiration of the last period of renewal.

   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸140(1).]

Petition to Superintend and Revise from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

In the matter of the bankruptcy of Horrell & Criss. Petition for reclamation by the Regal Shoe Company, opposed by F. M. Bransford, trustee in bankruptcy. On certificate from the referee, an order denying the petition was reversed, and petition granted, whereupon F. M.

Bransford, trustee, petitions to superintend and revise the order. Petition denied.

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

Horrell & Criss, a mercantile corporation, doing a retail clothing and shoe business in the city of Ft. Worth, Tex., was adjudged a bankrupt on the ——— day of ———, 1915, on its voluntary petition. A receiver was appointed and, having qualified, took charge of the bankrupt stock of merchandise, including a stock of shoes shipped to the bankrupt by Regal Shoe Company, of Boston, Mass. Later a trustee of the bankruptcy estate, being appointed and having qualified, took possession of the stock of merchandise, including the stock of shoes. Regal Shoe Company intervened and claimed title to the shoes, and asked that they be returned to it by the trustee. The trustee denied this claim of title. Pending settlement of the issue thus made, the shoes, on account of prospective rapid deterioration in value, were sold for an agreed price, and the sum so realized is the present subject of controversy. After hearing, the referee in bankruptcy found from the evidence that title to the shoes had passed to the bankrupt, and so entered an order denying the prayer of the Regal Shoe Company for the proceeds resulting from their sale. That company seeks this review.

On August 7, 1911 the Regal Shoe Company entered into a written contract with Horrell & Criss wherein the former agreed to consign to the latter certain shoes not to exceed in value the sum of $5,000. This contract was to be in force for a period of 18 months from its date. Horrell & Criss agreed not to permit any of the merchandise so consigned to be removed from its store until sold or returned to Regal Shoe Company in accordance with the terms of the contract; that Horrell & Criss would properly care for said goods and indemnify and save harmless Regal Shoe Company from all loss, cost, or expense arising from loss or damage to said goods, caused by fire, accident, or otherwise; that it would at its own expense keep all of said goods properly insured in the name of the Regal Shoe Company to an amount and in a company satisfactory to that company; that it would use its best endeavor to sell the goods so consigned; that it would allow the party of the first part at any time to make a detailed inventory of the consigned goods then on hand; that it would keep accurate and complete books of account with reference to the goods consigned under the contract and the sale thereof, which books, together with all statements and memoranda concerning same, should at all times be open to the inspection of Regal Shoe Company; that it would on the first of each month render Regal Shoe Company a complete, accurate, and detailed statement of the sales of said consigned goods made by Horrell & Criss during the preceding month, and that it would at that time turn over in cash to Regal Shoe Company the purchase price and one-half of the selling allowance of all consigned goods sold by it during said preceding month, said purchase price to be equal to the invoice valuation of said goods sold; that it would at any time on demand forthwith return to the party of the first part any and all goods consigned as aforesaid and then unsold.

Clause (g) of the contract provided as follows: "That upon the termination of this agreement it (Horrell & Criss) will (and its executors and administrators shall) purchase of the party of the first part (Regal Shoe Company) all consigned goods then on hand at invoice prices and terms." The contract made further provision that "all goods consigned hereunder shall be and remain the property of the party of the first part until sold, and thereupon the title to the proceeds arising from such sale shall likewise vest in the party of the first part until the purchase price has been turned over in accordance with the terms hereof." It further provided that: "This agreement may be terminated at any time by the party of the first part upon the breaching of any of the terms and conditions hereof by the party of the second part. It may also be terminated by party of the first part at any time by giving thirty days' notice in writing to that effect to the party of the second part. A termination of this agreement shall in no manner affect the title of the

party of the first part to the goods consigned hereunder and to the proceeds arising from the sale of such goods."

At the termination of the contract period Horrell & Criss did not purchase the consigned goods then on hand. Instead, on March 1, 1913, a few days after such expiration the following agreement was entered into: "It is mutually agreed that the agreement made on the 7th day of August, 1911, between Regal Shoe Company, of Boston, Mass., and Horrell & Criss of Ft. Worth, Tex., regarding the local agency at said Ft. Worth, is hereby continued without change until February 7, 1914, subject to the same conditions, and that this rider shall be attached to and be made a part of the original contract." A few days after the expiration of the period as thus extended and on, to wit, February 14, 1914, a further contract was entered into in terms identical with the above extending the agreement until February 7, 1915.

The record and exhibits accompanying the certificate of the referee abundantly reveal that Regal Shoe Company and Horrell & Criss acting in good faith, entered into the contract of August 7, 1911; that they were agreed as to its terms and their meaning; that in so far as the exigencies of trade permitted they observed and complied with the terms of the contract as above outlined during the entire period for which it was made to run, to wit, 18 months. This contract has in it all the provisions usually found in a contract by the terms of which merchandise is consigned by a manufacturer to an agent, or retailer, for sale for the account of the manufacturer—the title to the merchandise remaining in the latter until sold. It would be so construed without question, were it not for the presence therein of clause (g) with its provisions and what has transpired between the parties with relation thereto.

[1] As stated above, upon the termination of the contract period Horrell & Criss did not purchase the consigned goods then on hand; but, instead, a few days after such termination, entered into an agreement, designated a "rider" which was attached to the original contract, and stipulated that the original contract with its terms should be in effect and control the relation of the parties for another term. A few days after the termination of the extended term another extension of the original contract was undertaken to be made by a "rider" identical with the former one. It does not appear from the record that, between the time of the termination of the original contract and the execution of the respective "riders," the rights of any third party or parties intervened. After execution by the parties of the respective "riders," they continued to do business under and comply with the terms of the original contract, thus revealing their good faith and indicating their purpose and intention. Where the parties to a contract have given it a particular construction, such construction will generally be adopted by the court in giving effect to its provisions. And the subsequent acts of the parties, showing the construction they have put upon the agreement themselves, are to be looked to by the court and in some cases made controlling. 9 Cyc. 588.

The parties have the undoubted right to make their own contract, and to put their own construction upon it, and to regulate their rights and liabilities thereunder. If the court leaves the parties to be governed by their own understanding of their own language, it in effect enforces the contract as actually made. That they should be so permitted to construe their own agreement accords with every principle of reason and justice. Metropolitan National Bank v. Benedict Co., 74 Fed. 182, 20 C. C. A. 377. "And when both parties to a contract, acting in good faith, are agreed as to its meaning and their rights under it a stranger having no interest in the subject-matter of the contract cannot insist that a different interpretation shall be put upon it, or compel the parties to put that interpretation upon it which will benefit him. The law will not override the will of the parties in the construction of their own contracts, for the benefit of a third party, whose interests are not affected thereby, or who acquired his interest with full knowledge of what the parties conceded and agreed was their contract." Metropolitan National Bank v. Benedict Co., supra.

[2] The trustee contends that there was no consideration for the attempted renewal of the contract through the "riders," and that therefore, upon the expiration of the contractual period, the shoes in virtue of the provisions of

section (g) by absolute sale became the property of Horrell & Criss. Therefore what, if any, consideration was given in the attempted renewals through the "riders"? In addition to the parties' agreeing to an extension of the terms of the original contracts, with its consequent liabilities upon both parties, the renewals by such "riders" were in and of themselves a sufficient consideration. Parties may change or modify a contract by a subsequent one, and both of these may be modified by a third. Davis Brothers v. Dallas National Bank, 7 Tex. Civ. App. 41, 26 S. W. 222; Ellet-Kendall Shoe Co. v. Martin, 34 Am. Bankr. Rep. 502, 222 Fed. 851, 138 C. C. A. 277.

A strong evidential fact that Horrell & Criss considered title to the merchandise to be in Regal Shoe Company is the fact that Regal Shoe Company was not listed as a creditor of the bankrupt, nor were the shoes in question included in the assets. The contention of the trustee cannot, in my opinion, rightly be upheld. The referee erred in denying the claim of the shoe company to the shoes in question and consequently to the fund resulting from their sale.

The order of the referee, denying the right of claimant and directing such fund to be turned over to the trustee for distribution under the terms of the bankruptcy law, will stand reversed, and an order will be entered directing the fund to be turned over to the Regal Shoe Company.

B. K. Goree, of Ft. Worth, Tex., for petitioner.

Geo. Q. McGown and Edwin T. Phillips, both of Ft. Worth, Tex., for respondent.

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

PER CURIAM. This case seems to have been correctly ruled and decided in the District Court. The petition to superintend and revise is denied.

PRUDENTIAL INS. CO. OF AMERICA v. STEWART.

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

No. 2834.

INSURANCE ⊂=186(2)—LIFE INSURANCE—POLICY—CONSTRUCTION.

An application for a life policy was made on February 2d, and bore date February 19th, but was not delivered until April 15th, when the first premium was paid. The application declared that the policy should not take effect until it should be issued and delivered and the first premium paid. Another provision of the policy, under the heading "Premium," declared that the premium was payable on delivery of the policy and thereafter quarter-annually, or as provided under the heading "Provisions," on or before the 19th day of February, May, August, and November. The policy declared that in payment of any premium save the first a grace of one month would be allowed during which time the policy would remain in force. Insured died in July within the period of grace if the three months' period be reckoned from the date of the delivery of the policy and the payment of the first premium. *Held*, that as the language of a policy is to be construed most favorably to the insured, and as there were two possible interpretations, the date of the payment of the first premium will be deemed as marking the date on which the policy became effective and premiums became due, to avoid a forfeiture.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 396; Dec. Dig. ⊂=186(2).]

In Error to the District Court of the United States for the Southern Division of the Western District of Washington; Edward E. Cushman, Judge.

Action by Ada T. Stewart against the Prudential Insurance Company of America, a corporation. There was a judgment for plaintiff, and defendant brings error. Affirmed.

S. A. Keenan, of Seattle, Wash., for plaintiff in error.

S. Warburton and Boyle, Brockway & Boyle, all of Tacoma, Wash. for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. This was an action to recover on a life insurance policy. The application for insurance was made on February 2, 1915. The policy was issued and bore date February 19, 1915, but it was not delivered until April 15, 1915, and on that date the first premium was paid. The application contained the provision:

"That said policy shall not take effect until the same shall be issued and delivered by the said company, and the first premium paid thereon in full."

The policy contained the following:

"Premium.—Twelve and $^{70}/_{100}$ dollars, payable on the delivery of this policy and thereafter quarter-annually at the home office of the company."

It contained a provision that in the payment of any premium under the policy except the first a grace of one month, without interest, would be allowed during which time the policy would remain in force. The insured died on July 19, 1915, and within the period of grace after the expiration of three months, if the three months are to be reckoned from the date of the delivery of the policy and the payment of the first premium. By the terms of the contract, as above stated, therefore the policy was still in existence at the time of the death of the insured, and the plaintiff was entitled to recover unless the date of the payment of the second premium was fixed at an earlier date by a certain other provision of the policy. That provision follows the clause above quoted, so that the whole provision is as follows:

"Twelve and $^{70}/_{100}$ dollars, payable on the delivery of this policy and thereafter quarter-annually at the home office of the company, or as provided under the heading 'Provisions' on the second page hereof, in exchange for the company's receipt on or before the nineteenth day of February, May, August and November in every year during the continuance of this policy."

It is the contention of the plaintiff in error that the clause beginning with the word "or" is controlling, that although the policy was not delivered until April 15, 1915, and did not take effect until that day, the second quarterly payment of premium became due on the 19th day of May, and, not having been paid, the policy lapsed on June 19th. In McMaster v. New York Life Ins. Co., 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64, the court said:

"We are dealing purely with the question of forfeiture, and the rule is that, if policies of insurance contain inconsistent provisions or are so framed as to be fairly open to construction, that view should be adopted, if possible, which will sustain, rather than forfeit, the contract."

In Thompson v. Phenix Ins. Co., 136 U. S. 287, 292, 10 Sup. Ct. 1019, 1023 (34 L. Ed. 408), the court said:

"If a policy is so drawn as to require interpretation, and to be fairly susceptible of two different constructions, the one will be adopted that is most favorable to the insured. This rule, recognized in all the authorities, is a just one, because those instruments are drawn by the company."

The contract of insurance in the present case contained, as we have seen, two inconsistent provisions; one that the policy took effect only upon the issuance and delivery thereof and the premium was to be payable on such delivery, and thereafter quarter-annually; the other that the premiums were to be paid on the 19th day of February, May, August, and November in each year. The contract was fairly susceptible of two different constructions. This court would not be justified in ruling that the insured had not the right to assume that the first provision was controlling. He had stipulated in his application that the insurance was to take effect from the date of the delivery of the policy, and he may have assumed—and it is not an unreasonable assumption—that the second provision in regard to the date of payment, which begins with the word "or," was intended to present an alternative, and to give him the option to decide whether he would pay in accordance with the terms of the first provision or those of the second. The construction which the plaintiff in error contends for would require the assured to ignore a plain provision of the contract and to pay a premium for insurance which he never received. We think the court below committed no error in ruling that the policy was still in force at the date of the death of the insured. Decisions construing policies of a similar nature favorably to the insured are Stinchcombe v. New York Life Ins. Co., 46 Or. 316, 80 Pac. 213; Stramback v. Fidelity Mut. Life Ins. Co., 94 Minn. 281, 102 N. W. 731; Cilek v. New York Life Ins. Co., 97 Neb. 56, 149 N. W. 49, 1071; Halsey v. American Central Life Ins. Co., 258 Mo. 659, 167 S. W. 951.

The plaintiff in error relies upon decisions such as McConnell v. Provident Savings Life Assur. Soc., 92 Fed. 769, 34 C. C. A. 663. But in that case the policy did not take effect upon delivery, and by the express terms of the policy the dates for the payment of subsequent premiums were fixed with reference to the date of the policy, and there was no ambiguity in the terms of the policy. The other cases cited are similar to the case just noted, with the exception of Mutual Life Ins. Co. v. Stegall, 1 Ga. App. 611, 58 S. E. 79. In that case the policy, dated August 30, 1904, contained the provision that annual premiums should be paid in advance on August 30th and on that date each year thereafter. The insured did not accept the policy until November 19, 1904. He died in October the following year. In that case, as in this, it was stipulated that the policy should not become effective until its delivery and the payment of the first premium, but it differed from the policy in the case at bar in that it contained no provision that the succeeding annual premiums should be payable annually thereafter. The court held that the policy became void for the failure of the insured to pay the second annual premium on August 30, 1905. That conclusion seems to have been influenced by the statute of the state

which provided that a policy of life insurance "runs from midday of the date of the policy and the time must be estimated accordingly, if the policy is limited to a specified number of years." The state statute and the difference in the terms of the policies renders the decision inapplicable here.

It would have been a very easy matter for the plaintiff in error to prepare a policy which was not ambiguous. If it intended not to be bound by the provision that the policy took effect on delivery and that the premiums were payable quarterly yearly thereafter, it should have made known its intention in plain words. We think the court below committed no error in directing the jury to return a verdict for the defendant in error.

The judgment is affirmed.

GARZOT et al. v. O'NEILL et al.

(Circuit Court of Appeals, First Circuit. November 14, 1916.)

No. 1181.

1. CANCELLATION OF INSTRUMENTS ⟸6—VALIDITY OF CONTRACT.
Petitioner granted a corporation a right of way over two parcels of real estate, in consideration of the corporation's granting petitioner the exclusive right to establish a dry goods store on which the corporation should issue tickets to its workmen for merchandise. Thereafter Act Porto Rico March 12, 1908, forbidding employers to issue such tickets to workmen, was enacted, and as a result workmen ceased to trade at petitioner's store. *Held* that, as the contract when made was not illegal, and as the corporation was prevented from carrying out its part of the agreement only by an act of the Legislature, the contract cannot be rescinded, so as to restore to petitioner his right of way, on the theory that the contract was invalid, but its invalidity did not appear.
[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. § 4; Dec. Dig. ⟸6.]

2. APPEAL AND ERROR ⟸170(2)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Difficult questions, while possibly involved in a proceeding to cancel a contract, as to the legality of legislation, cannot be disposed of, when not raised by precise pleadings, and not decided below.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1037, 1038; Dec. Dig. ⟸170(2).]

Appeal from the District Court of the United States for the District of Porto Rico; P. J. Hamilton, Judge.

Proceeding by Welch & Co. against the Central San Cristobal, Incorporated, in which one Juan R. Garzot and another intervened; the motion for intervention being opposed by Alexander R. O'Neill, receiver, and others. From a decree denying the petition of the interveners, they appeal. Affirmed.

Otto Schoenrich, of New York City (Juan Hernandez Lopez, of San Juan, Porto Rico, on the brief), for appellants.

Joseph W. Murphy, of New York City (Lorenzo D. Armstrong and Carroll G. Walter, both of New York City, on the brief), for appellees.

Before PUTNAM and DODGE, Circuit Judges, and MORTON, District Judge.

PUTNAM, Circuit Judge. This case arose in the District Court of the United States for the District of Porto Rico, through interventions by Garzot and his wife, in a proceeding relating to the foreclosure instituted in Porto Rico against the Central San Cristobal, Incorporated. The decree of the District Court was against the interveners, who, therefore, properly brought the case here by an appeal, as distinguished by a writ of error.

We find among the papers what appears to be an opinion of the District Court, filed July 22, 1915. It was only a loose paper, and not bound to the record, as we have it; but we have no doubt it is such an opinion. At any rate, we accept it as such. This opinion cites, as applicable to the case, sections 1258, 1260, 1261, and 1262 of the Porto Rico Civil Code.

It then proceeds that it is not clear from the petition whether the point of view is taken that the case is brought particularly under the civil law, or governed by the principles in equity. We accept it as of the latter class, and, although the opinion of the learned judge of the District Court is a forcible one and carefully drawn, we do not agree that the case is governed by the sections of the Civil Code referred to. It is rather a case under the rules of equity, which are somewhat broader than the sections of the Code referred to.

[1] The facts of the case are stated in the above opinion, as follows:

"During the progress of this cause, Juan R. Garzot, on October 5, 1914, filed an intervening petition, asking that a contract between him and the defendant Central of May 9, 1906, be rescinded for failure of consideration. The petition alleged that the petitioner granted defendant a right of way over two certain tracts of real estate in Naguabo, known as 'San Francisco,' consisting of about 406 cuerdas, and 'Fortuna,' containing about 609 cuerdas, for an indeterminate period, in consideration of the Central granting petitioner the exclusive right to establish a dry goods store at the Central, on which the Central should issue tickets to its workmen for merchandise. Petition denies that there is any other consideration. On the hearing it was shown that this contract was executed as alleged, but that failure to carry out the store arrangement was due not to any fault of the Central, but to an act of the Legislature of Porto Rico, dated March 12, 1908, forbidding employers to issue such tickets to workmen. The result was that the workmen ceased to trade at the store and bought their goods elsewhere. The petitioner consequently shut up the store. The Central duly registered the contract in question, and its right of way thereunder is among those contained in the mortgage of July 1, 1910, duly registered, to the United States Mortgage & Trust Company. The Central passed into the hands of the receiver herein August 16, 1913. There were negotiations between the receiver and petitioner relative to this right of way, but the receiver would not cancel the contract because of the importance of the right of way to the operation of the Central. It not only covered the lands through which it ran, but reached other lands, partly those of petitioner, beyond."

The law of rescission, upon which the appellant seems to rely, is quite clearly stated in Adams' Equity (8th Ed.) beginning at page 173, in the following words:

"The jurisdiction for rescission and cancellation arises where a transaction is vitiated by illegality or fraud, or by reason of its having been car-

ried on in ignorance or mistake of facts material to its operation. And it is exercised for a double purpose, first, for cancelling executory contracts, where such contracts are invalid, but their invalidity is not apparent on the instrument itself, so that the defense may be nullified by delaying to sue until the evidence is lost; and, secondly, for setting aside executed conveyances or other impeachable transactions, where it is necessary to replace the parties in statu quo. And in such cases, though pecuniary damages might be in some sense a remedy, yet, if fraud be complained of, there is jurisdiction in the Court of Chancery. The mode of relief under this equity may be by cancellation of the instrument, or reconveyance of the property which has been unduly obtained, or by an injunction against suing at law on a vitiated contract, or against taking other steps to complete an incipient wrong."

This author is authentic and clear, although concise. We find nothing in this statement of the law of rescission and cancellation which applies to the case at bar; neither do we know of any principle that applies it to this case. We need not enlarge on that topic, or explain why we make that statement. Rescission or cancellation arises out of something done by the parties ordinarily, and we find nothing of that kind here, nor in the sections of the Civil Code referred to, which are even narrower as applied to the law of rescission and cancellation in equity.

The essence of the case is that there is nothing within these rules applicable to the case. There was nothing in the relation of the parties as constituted by them, which brought about a termination of the arrangement which they had made; but it is all purely a matter of legislation, which had no origin with the parties. It is true that the legislation was very sweeping, and wiped out the substance of the arrangements which the parties made. It did not lay the basis of either rescission or cancellation. It only left a question whether or not the legislation referred to was within the powers of the authorities of Porto Rico, as represented by its Legislature.

[2] If not, the proposition to be submitted is whether, by the legislation referred to, the arrangement made between the parties stands undisturbed, so that relief would be granted through the usual channels of judicature, or whether the legislation was within the inherent powers of the Legislature, and, if yes, whether there was any remedy under the provision of the law of eminent domain, or otherwise. Also, perhaps the fundamental question is whether the legislation as applied here was an exercise of the police powers as permitted even under the Constitution of the United States, which everybody must obey. These questions have not been submitted to us or raised by the parties, and are too difficult to be disposed of except on precise pleadings, and the proper examination of the law in reference thereto.

Therefore, without investigating the case further, it becomes our duty to affirm the decision of the District Court.

The decree of the District Court is affirmed, and the respondents will recover their costs of this appeal.

MORTON, District Judge. I concur in the result. I understand that no claim is here made by Garzot, except for rescission of the contract, and that the question whether he may be entitled to compensation or damages was not passed upon by the District Court, and is left open.

STATE BANK OF CLEARWATER, NEB., v. INGRAM.

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

No. 4528.

1 BANKRUPTCY ⊜165(1)—PREFERENCE—VACATION.

Within four months of proceedings in bankruptcy, and at a time when the bankrupt was insolvent and the defendant bank knew it, the bankrupt transferred to defendant as security for an antecedent debt fire policies under which a loss and claim had arisen. The bank collected the policies, credited the amounts to the bankrupt on its books, and received his check in payment of a mortgage, which the bank discharged, given by the bankrupt, on lots on which the burnt buildings stood. The bank had no lien on the policies or their proceeds, but had it enforced its mortgage its debt or the major portion would have been satisfied. *Held*, that the transaction could not be sustained on the theory that the bank, by reason of its mortgage on the lots, was not in the same class with unsecured creditors, and was entitled to obtain full payment in any way it could from general assets, while the remedy of the trustee was to assert by way of subrogation the mortgage lien which the bank had discharged, for as to the policies the bank was an unsecured creditor.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 266; Dec. Dig. ⊜165(1).]

2. BANKRUPTCY ⊜326—CLAIM—SET-OFF.

No right of set-off in the bank results from the assignment of the policies, collection and deposit of the proceeds to the bankrupt's credit, and the receipt of the bankrupt's check in payment of its demand in the action by the trustee to recover the preferential payment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ⊜326.]

3. BANKRUPTCY ⊜311(1)—PREFERENCE—VACATION.

Where a decree for the amount of a preferential payment was recovered by the trustee of the bankrupt, the creditor against whom decree was had may prove his claim as a general creditor upon satisfying the decree.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 497–499; Dec. Dig. ⊜311(1).]

Appeal from the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Suit by J. Q. Ingram, trustee of the estate of John L. James, bankrupt, against the State Bank of Clearwater, Neb. From a decree for complainant, defendant appeals. Affirmed.

J. W. Rice, of Norfolk, Neb. (Kelsey & Rice, of Norfolk, Neb., on the brief), for appellant.

Frederick S. Berry, of Wayne, Neb. (Mapes & McFarland, of Norfolk, Neb., on the brief), for appellee.

Before HOOK and SMITH, Circuit Judges, and REED, District Judge.

HOOK, Circuit Judge. This is an appeal from a decree that the trustee in bankruptcy recover a voidable preference from the State Bank of Clearwater, Neb. The trial court found from the evidence the existence of the conditions of fact prescribed by section 60b of

the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 562 [Comp. St. 1913, § 9644]), such as insolvency, the time and effect of the transfer, and knowledge of the creditor, and we think its findings were right. Omitting irrelevant matters, the case reduced to its final terms is as follows:

Within four months of the commencement of the proceedings in bankruptcy, and at a time when the bankrupt was insolvent and the bank knew it, he transferred to it as security for an antecedent debt certain fire insurance policies under which a loss and claim had arisen. He authorized the bank to collect on the policies and apply the proceeds to the debt. Before this transaction the bank had a valid mortgage on the lots on which the burned buildings stood, but it had no lien on the policies or their proceeds. There were other liens on the lots, one prior to the bank's mortgage, and others inferior. The bank collected on the policies, credited the amounts to the bankrupt on its books, and took the bankrupt's check in payment of the old debt. At the same time it discharged its mortgage on the lots. Afterwards the lots were sold under decree in a foreclosure suit to which the trustee in bankruptcy was not a party, and the proceeds were exhausted by the claims of the other lienholders. The value of the real property was not sufficient to pay all the liens upon it, but if the bank had retained and enforced its mortgage it would have received all or the greater part of its claim. Before the transaction with the bank the policies constituted much the greater part of the free assets of the bankrupt available to his general creditors; there was little else. Their unsecured claims were in quite a large amount.

[1] It is contended that the bank, with its prior mortgage on the lots, was not in the same class with unsecured creditors, and that it had a right to obtain full payment in any way it could, whether from the property mortgaged to it or from general assets; also that the remedy of the trustee was to seek the foreclosure suit, become a party, and assert a right of subrogation to the mortgage lien which the bank discharged. The status of a creditor, whether general or secured, is naturally determined by his relation to the property of the bankrupt. As to the policies of insurance the bank was a general creditor. It had no lien or claim upon them. The fact that it had other security did not give it the right to take or seize for itself the unincumbered property of the bankrupt. The actual effect of the assignment of the policies was that the bank was paid in full and the general creditors received but little. When the bank took the assignment with knowledge of the bankrupt's insolvency, it still retained its mortgage on the lots until it received payment from the insurance money. It then discharged its mortgage generally. There was no attempt to save or make good the loss to the general estate. Whether under the circumstances the trustee had a right of subrogation need not be determined. At the best the bank left the succeeding trustee a lawsuit, with its attendant uncertainty and expense, and, if successful, the necessity of protecting himself at the judicial sale against an admitted prior lien. Moreover, an effort of the trustee to secure subrogation would have been complicated by a home-

stead interest of the bankrupt in part of the mortgaged lots. We think the transaction should not be sustained.

[2, 3] No right of set-off in the bank results from the assignment of the policies, the collection, its deposit of the proceeds to the bankrupt's credit and the taking of his check in payment of its demand. Traders' Bank v. Campbell, 14 Wall. 87, 20 L. Ed. 832. The decree of the trial court should be modified, however, by allowing the bank to prove its claim as a general creditor upon payment of the decree against it. Page v. Rogers, 211 U. S. 575, 29 Sup. Ct. 159, 53 L. Ed. 332.

The decree, as so modified, is affirmed.

TRAVELERS' INS. CO. v. ALLEN.

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

No. 4630.

1. EVIDENCE ⊂⊃59—PRESUMPTIONS—SUICIDE.
There is a presumption against suicide in an action on an accident policy, and the burden is on defendant to establish it.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 79; Dec. Dig. ⊂⊃59.]

2. INSURANCE ⊂⊃668(12)—ACCIDENT INSURANCE—EVIDENCE—SUFFICIENCY.
In an action on an accident policy for the death of insured resulting from suffocation by gas in a hotel room, the question whether the death was accidental *held* for the jury.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1763; Dec. Dig. ⊂⊃668(12).]

3. INSURANCE ⊂⊃458—ACCIDENT INSURANCE—RIGHT OF RECOVERY.
Where one insured under an accident policy was suffocated in a hotel room by gas, recovery may be had, whether the escape of the gas was caused by insured's own accident or that of another.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1176; Dec. Dig. ⊂⊃458.]

4. INSURANCE ⊂⊃659(1)—ACCIDENT INSURANCE—EVIDENCE—TESTIMONY AT CORONER'S INQUEST.
In an action on an accident policy, testimony by a witness, given at a coroner's inquest over the body of the insured, offered by defendant, is properly excluded, particularly where the witness was present and testified at the trial on defendant's behalf.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1691, 1693; Dec. Dig. ⊂⊃659(1).]

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Maude Allen against the Travelers' Insurance Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

William F. Gurley, of Omaha, Neb. (Joseph W. Woodrough and David A. Fitch, both of Omaha, Neb., on the brief), for plaintiff in error.

Gerald F. Harrington, of Omaha, Neb. (R. M. Johnson and M. F. Harrington, of O'Neill, Neb., on the brief), for defendant in error.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. This is an action by the beneficiary of a policy of accident insurance issued to Zachariah Cuddington. The insured was found dead in his room in a hotel in Omaha, Neb., on the morning of October 30, 1914. It was agreed that his death resulted from suffocation by gas. The defense was that he committed suicide—a cause of death not covered by the policy. The jury found the issue for the plaintiff, and judgment was rendered accordingly.

[1, 2] The defendant contends that the undisputed evidence showed suicide, and therefore the trial court erred in denying its motion for a directed verdict. It must be admitted that the evidence as a whole pointed quite strongly to suicide, but we cannot say there was not substantial evidence to the contrary, and that the conclusion of the court and jury was unjustified. There were some substantial conflicts in the evidence. This was particularly so as to the testimony of the hotel porter, but as he and those who testified upon the same matters were before the jury it was their province to determine where the truth lay. A chambermaid, who first looked into the room from an unlocked door of the one adjoining, said the gas smelled stronger in the latter place, also that the transom over the door leading from the room of the insured to the hall was open—a fact rather inconsistent with suicide intelligently premeditated. A friend who was with the insured at the hotel until some time after 9 o'clock the previous evening testified that they had a pleasant, cheerful time together. Much is made of two letters in the handwriting of the insured, found in his possession, addressed to a niece, and showing a contemplation of death. Assuming they were originals, and not copies retained by him, we do not attach great significance to them. They were dated May 1st and 5th of the same year, nearly six months before his death, and his expressions which are regarded as so indicative were of a general character, and the not unnatural contemplations of a man of his age. He was a bachelor of about 62 years. Moreover, in one of them he spoke of an intention to make another niece, the plaintiff, the beneficiary in his accident policy, and that was in fact done three months after the date of the letter, and three months before his death. The letters contained various directions he desired carried out, and, even if originals, may reasonably have been written at their dates, and retained to be found with him in case of death in the usual course. Experience teaches that such ways of men are not uncommon. If the letters were written at their dates, almost all their evidential value to the defendant disappears. On the other hand, there was another letter, dated the day before he died, addressed to his nephews, in which he promised to visit them

"as soon as election is over," and that presumably was the fall election then soon to occur. We do not set out all the evidence, which, as we say, pointed rather strongly to suicide, but have merely mentioned some considerations which might reasonably have caused the trial court to pause and finally to decide to submit the case to the jury. The presumption was against suicide, and the burden was on the defendant.

[3] Complaint is also made of an instruction that, if the death of the insured resulted from his own accident or the accident of another, the plaintiff might recover. The instruction is sound as a legal proposition, but it is said there was no evidence whatever of the act of any other person. We think the trial court properly regarded the source of the escaping gas, and whose act or omission caused it, as sufficiently doubtful and obscure to justify the instruction.

[4] The exclusion of the testimony of the hotel porter at the coroner's inquest was proper. Aside from its incompetency as an original proposition the porter, as a witness for defendant, testified at the trial below.

The judgment is affirmed.

UNITED STATES v. LEWIS et al.

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

No. 4469.

1. CONTRACTS ⟹303(3)—DEFENSES.
Where one contracts absolutely and unconditionally to construct and deliver a finished work for the acceptance of another, such as a levee, he is not relieved by casualties, commonly known as acts of God.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1412–1416; Dec. Dig. ⟹303(3).]

2. CONTRACTS ⟹303(3)—PERFORMANCE—DEFENSES.
Where a contract for the construction of a levee provided that portions of the levee upon which payments shall have been made, but which shall not have been accepted, if damaged or destroyed, shall be replaced by the contractor, and that all damages from floods or other causes before the work shall be received shall be borne by the contractor, it is no defense to an action against the contractor and his sureties for failure to restore a part of the work destroyed by flood that the flood was an act of God, for the contract obviously included, not only ordinary floods, against which the contractor would be required to guard, but all floods.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1412–1416; Dec. Dig. ⟹303(3).]

In Error to the District Court of the United States for the Eastern District of Arkansas.

Action by the United States of America against J. B. Lewis and others. There was a judgment for defendants, and plaintiff brings error. Reversed and remanded, with directions.

W. H. Martin, U. S. Atty., of Hot Springs, Ark., and W. H. Rector, Asst. U. S. Atty., of Little Rock, Ark.

Before HOOK and CARLAND, Circuit Judges, and MUNGER, District Judge.

HOOK, Circuit Judge. In this action by the government upon a contract and bond for the construction of levee work on the lower Mississippi, the contractor and his sureties set up, as an excuse for a failure to restore a part of the work destroyed by flood, "that said flood was an act of God, beyond human foresight to guard against, and was not due to negligence or the default of defendants." The government's demurrer to the defense was overruled, it stood thereon, and judgment went for defendants.

[1, 2] The ruling upon the demurrer proceeded upon a misconception of the obligation of the contractor. It was not that he would merely use due diligence and care, but was an absolute one to complete the work to the acceptance, by stages, of the officer in charge. The destroyed portion of the levee had not been accepted. Moreover, the contract and specifications contained the following provisions:

"It is to be understood that portions of the levee upon which payments have been made, but which have not been accepted as herein provided, shall, if damaged or destroyed, be repaired or replaced by the contractor at his own expense. * * * All damage or injury to work, resulting from floods or other causes before the work has been received by the contracting officer, shall be sustained by the contractor."

The general rule is that, where one contracts absolutely and unconditionally to create and deliver a finished work to the acceptance of another, he is not relieved by casualties commonly denominated acts of God. See Berg v. Erickson, 234 Fed. 817, —— C. C. A. ——, and the cases cited. But the case here does not even need this rule of construction, because there was an express agreement that the contractor should bear all damage by floods. Certainly he could not say that ordinary floods only were meant, for as against them the ordinary care and diligence which is impliedly required of every one in all activities would have sufficed.

The judgment is reversed, and the cause is remanded for further proceedings in accordance with this opinion.

SMITH & CO., Limited, v. KINGFALFA MILLS.

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

No. 4108.

1. APPEAL AND ERROR ⟸671(3)—REVIEW—MATTERS PRESENTED FOR REVIEW.
In an action tried to the court, where there was a general finding and judgment for defendants, and no bill of exceptions disclosing the evidence on which the court acted, or its rulings admitting or rejecting evidence or declarations of law adopted or denied, there was nothing presented for review on writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2869; Dec. Dig. ⟸671(3).]

2. TRIAL ⟸393(1)—FINDINGS OF FACT—WHAT CONSTITUTES.
A memorandum opinion by the trial judge, who, sitting without a jury, found generally for defendant, does not amount to a special finding of facts.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 920; Dec. Dig. ⟸393(1).]

In Error to the District Court of the United States for the District of Nebraska; Thomas C. Munger, Judge.

Action by Smith & Co., Limited, against the Kingfalfa Mills. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Andrew P. Moran, of Nebraska City, Neb. (D. W. Livingston, of Nebraska City, Neb., on the brief), for plaintiff in error.

Paul Jessen, of Nebraska City, Neb., for defendant in error.

Before HOOK and CARLAND, Circuit Judges.

HOOK, Circuit Judge. [1, 2] This is a writ of error to review a judgment in an action at law upon contract. The assignments of error relied on challenge proceedings at the trial and the sufficiency of the evidence to support the judgment. The trial was by the court upon waiver of a jury. The court found generally for the defendant and gave judgment accordingly. It made no special findings of fact. Its memorandum opinion does not fill that office. Tiernan v. Chicago Life Ins. Co., 131 C. C. A. 284, 287, 214 Fed. 238; Keeley v. Mining Co., 95 C. C. A. 96, 169 Fed. 598. There is no bill of exceptions disclosing the evidence upon which the court acted, or rulings admitting or rejecting evidence, or declarations of law adopted or denied. The judgment rendered was within the issues made by the pleadings.

By the long settled practice of the appellate courts of the United States, frequently announced, there is nothing in the record before us which we can review.

The judgment is affirmed.

LANGEVER v. STITT.

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

No. 2878.

BANKRUPTCY ⊂=396(4)—EXEMPTIONS—RIGHT TO—BENEFICIARY.

A bankrupt, head of a family, is not, either under the Texas statutes relating to exemptions of heads of families or under the common law, entitled to claim as exempt a diamond ring worth upwards of $100, long worn by him as an ornament.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 659; Dec. Dig. ⊂=396(4).]

Appeal from the District Court of the United States for the Eastern District of Texas; Edward R. Meek, Judge.

In the matter of J. J. Langever, bankrupt. J. W. Stitt, trustee, refused to set aside as exempt a diamond ring possessed by the bankrupt, and on certificate the order of the referee denying the exemption was affirmed, whereupon the bankrupt appeals. Affirmed.

The following is the opinion of Meek, District Judge:

At the time J. J. Langever filed his voluntary petition in bankruptcy, the record reveals he was the head of a family, residing in Ft. Worth, Tex. He possessed a diamond ring worth about $150, which he had long worn for ornament on a finger of his left hand. He claimed this ring as exempt to him. The trustee of the estate refused to set it off to him. The bankrupt excepted to the action of the trustee, and the referee overruled the exception and directed the delivery of the ring to the trustee. The question is now before me on certificate of the referee.

After considering the briefs of counsel, both for the claimant, the bankrupt, and the trustee, I am constrained to hold that the bankrupt is not entitled to have exempted to him and to retain possession of the diamond ring under any provisions of the exemption statutes of the state of Texas relating to and fixing exemptions to heads of families, or under any provisions of the common law applicable here. An order will therefore be entered, approving and affirming the order heretofore entered herein by the referee. In event my engagements will permit, I reserve the right later to prepare and file an opinion in this case.

Chas. T. Rowland, of Ft. Worth, Tex., for appellant.

George W. Steere, of Ft. Worth, Tex., for appellee.

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

PER CURIAM. We find no reversible error in the order appealed from, and the same is affirmed.

GOLD et al. v. GOLD.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2323.

1. PATENTS ⊂=114—SUIT TO OBTAIN PATENT—EFFECT OF PATENT OFFICE DECISION.

While the decision of the Court of Appeals of the District of Columbia in an interference proceeding is not conclusive in a subsequent suit by the defeated applicant to obtain the issuance of a patent under Rev. St. § 4915 (Comp. St. 1913, § 9460), even though the evidence is the same, the District Court must be convinced that it furnishes no substantial support for the decree before it will be justified in overturning the same.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. ⊂=114.]

2. PATENTS ⊂=114—PATENT OFFICE DECISION.

This rule is applicable, whether the controversy bears on the credibility of witnesses and the weight of evidence, or on questions peculiar to patent laws, such as the construction and scope of the patent application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. ⊂=114.]

3. PATENTS ⊂=114—SUIT TO OBTAIN PATENT—ISSUES AND PROOF.

In a suit under Rev. St. § 4915, to obtain the issuance of a patent, the issue is not limited to the question of priority of invention between the parties, but to entitle complainant to a decree he must fully establish his right to the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 166; Dec. Dig. ⊂=114.]

4. PATENTS ⊂=328—SUIT TO OBTAIN PATENT—HOSE COUPLER.

Complainant in a suit under Rev. St. § 4915, *held* not to have established his right to a patent to the invention covered by the Gold patent, No. 948,667, for a coupler for hose for connecting the steam-heating pipes of railway cars.

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

Suit in equity by Edward E. Gold against Egbert H. Gold and the Chicago Car Heating Company. Decree for complainant, and defendants appeal. Reversed.

Otto R. Barnett, of Chicago, Ill., for appellants.

Arthur C. Fraser and William A. Redding, both of New York City, for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. Appellee brought suit under R. S. § 4915 (Comp. St. 1913, § 9460), to obtain letters patent. The invention is for an improvement upon the "Sewall" or straight port coupler for connecting the lengths of rubber hose for steam-heating pipes of railway cars, so that, while not preventing their unlocking when the cars separate, it shall prevent accidental uncoupling. A lock thus affording sufficient resistance to prevent accidental uncoupling is called an impositive lock.

The District Court not only granted the prayer of the bill, but it also declared appellant Gold's patent as to the five claims in question void. Furthermore, it annulled his patent in respect to three other claims, as to which priority had been granted him in the Patent Office, by an order which, because unappealed, made this matter res adjudicata as between the parties thereto.

Appellant Gold was the senior applicant. He filed in April, 1902; appellee, in June, 1903. Before interference proceedings were begun, certain of this appellant's claims not involved in the interference, and which had been rejected on the ground that his application afforded no basis for claiming an impositive lock, were allowed on ex parte appeal; one examiner in chief dissenting. Subsequently, after he had had access to appellee's files through an interference proceeding, and had added the new claims, the interference proceedings, which resulted in the decree herein attacked, were instituted as to these eight claims. Appellee then moved to dissolve the interference, on the ground that appellant Gold's application did not cover the invention of these claims. This motion was denied by the examiner, and on appeal the examiners in chief left the question open to be determined on the evidence at the final hearing.

On final hearing of the interference, the examiner awarded priority to appellant Gold on three claims, but to appellee on the five claims here in issue. The decision, however, turned on another point than that of the scope of the application. On appeal, the majority of the examiners in chief held that appellant Gold had no right to claim the impositive lock under his original application, and for that reason affirmed as to the five claims. For the same reason, the Commissioner of Patents again affirmed their decision. In each instance, appellant was awarded priority as to the three other claims. As to these three, no further appeal was taken, but on appeal as to the five claims the Court of Appeals of the District of Columbia reversed the Commissioner.

[1] These claims were held to be covered by the application and priority was awarded to appellant Gold. 34 App. D. C. 229. Thereupon letters patent No. 948,667 were granted to him on February 8, 1910. But for section 4915, this determination would be res adjudicata. Under this act, however, the losing party may renew the contest and endeavor to establish his right to a patent de novo. If, in addition to the evidence presented in the interference proceedings, new and additional evidence be given in court, due weight must be accorded thereto. But we cannot assent to appellants' argument that, if the evidence in court and in the interference proceedings is identical, the decision in Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, makes the final decision in the interference proceedings conclusive, and requires a dismissal of the bill without any consideration of the evidence; for, though some of the statements in the opinion may support this view, the action of the court in this and in subsequent cases in discussing the evidence negatives such an interpretation of the duty of the court.

The final decision in the interference proceedings, while not conclusive, is nevertheless of the utmost importance. The Court of Appeals acts therein as the highest patent tribunal; like the Patent Office officials, its members acquire a wide experience in these intricate questions, the solution of which demands expert knowledge and training. Moreover, unlike the ex parte grant of patents, interference proceedings are contested between parties in interest, and, while conducted by administrative officials, are quasi judicial in their nature.

The District Court, in this statutory proceeding to review the decree rendered in a contested case by a court acting as the final expert administrative governmental department, exercises a jurisdiction somewhat analogous to, though broader than, that exercised by a court of equity on a bill to set aside a judgment at law—broader, in that the evidence may go to the merits of the original controversy; but, though a re-examination of the evidence is not precluded, the court must be thoroughly convinced that it furnishes no substantial support whatever for the decree before the conclusions reached by the Court of Appeals of the District of Columbia will be overturned.

[2] And while this seems obvious enough, when the re-examination involves merely a weighing of the evidence and a consideration of the credibility of witnesses, as in the ordinary priority of invention cases, it is equally true when questions peculiar to the patent law, such as the construction and scope of the patent application, are involved. For it is just such questions that the administrative tribunal is pre-eminently qualified to solve. Even then, of course, the court is not absolved from the duty of examination; but, unless it be perfectly clear that the final expert administrative body, the Court of Appeals, erred, relief should not be granted under section 4915. On a careful consideration of the record, we hold that the sound construction of the application is not free from doubt. The varying conclusions by the several administrative officials would alone raise this doubt; but, far from finding the decree of the Court of Appeals without support in the record, if it were essential for us to determine the question as an original proposition, we should agree with the conclusions therein reached for the reasons given in the opinion rendered by that court.

[3] But even a contrary conclusion on the construction of appellant Gold's patent application would not necessarily result in a decree in favor of appellee. For in the interference proceedings, if it be finally held that one of two applicants covers, but the other does not cover, the invention in his application, the former must be successful, not necessarily because of any inherent right, but because of the complete absence of right in the losing party. In other words, the issue in the interference proceedings is priority as between the inventions covered by the two applications; if one fails to cover it, the other is necessarily successful. But, as the Commissioner of Patents pointed out, the decision on the interference issue does not determine the right to the patent. In the further ex parte consideration of the successful party's application, actual priority of invention must be established. An earlier reduction to practice, whether by a third person or by the unsuccessful contestant in the interference case, will prevent

the grant of a patent. And so, too, in a case under section 4915; the issue is not limited to priority of the invention covered by the two applications. To obtain a decree for a patent, the complainant must fully establish his right thereto.

[4] But in this case the Court of Appeals of the District of Columbia has found that appellant Gold made and publicly exhibited a device embodying the invention a year before appellee had reduced his invention to practice by filing his application and that appellee saw and examined the device at that time; in other words, that irrespective of the application, appellant Gold, and not appellee, was the inventor of the device covered by claims 1 to 5. If this finding be correct, then appellee would under no circumstances be entitled to letters patent.

We deem it unnecessary to review the evidence; for, while it is conflicting, that offered by appellee tending to support his claim of conception and communication to appellant Gold in 1892, and reduction to practice in 1901, or early in 1902, as well as his charge, both that the device exhibited by appellant in June, 1902, was merely a subsequently abandoned experiment, and that it did not embody the essential feature of the invention, yet, in the light of appellant Gold's contradictory testimony on each of these points, we cannot hold that the Court of Appeals was clearly wrong in its conclusions or that they lack substantial support in the record. On the contrary, any conclusion other than that reached by the Court of Appeals, namely, that appellee's reduction to practice cannot be carried back of his filing date, and that appellant Gold fully embodied the invention in an operative device in June, 1902, and thereby reduced it to practice before appellee, even if the application of April, 1902, failed to disclose the invention of these claims, would be subject to the gravest doubt.

It follows, therefore, that the decree must be reversed, and the cause remanded, with directions to dismiss the bill.

MOORE v. WRIGHT WIRE CO.

(Circuit Court of Appeals, First Circuit. November 14, 1916.)

No. 1202.

PATENTS ⊂=328—INFRINGEMENT—CONSTRUCTION.

The Marwick patent, No. 851,179, for a machine for bundling scrap, consisting of a rotary mandrel and a yoke into which the mandrel passes, the yoke serving to control the formation of the bundle and to compact the same, construed, and *held* not to cover all machines having rotating tapered shafts or mandrels for winding scrap into bundles, together with means of operating therewith, and so not to be infringed by defendant's device.

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

Bill by Ethelbert A. Moore against the Wright Wire Company. From a decree dismissing the bill, complainant appeals. Affirmed.

Robert B. Killgore, of New York City, and Southgate & Southgate, of Worcester, Mass. (John P. Bartlett, of New York City, on the brief), for appellant.

George H. Kennedy, Jr., of Worcester, Mass., for appellee.

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

PUTNAM, Circuit Judge. In this case, the District Court dismissed the bill on a hearing on the merits, and entered a decree for the defendant upon the ground of noninfringement, from which the plaintiff appealed. The bill was filed by Ethelbert A. Moore on letters patent, issued on April 23, 1907, No. 851,179, entitled "A Machine for Bundling Scrap." The patent issued to David B. Marwick and another, and contained, in all, 25 claims, of which only 4 were in issue.

The first of these claims was as follows:

"1. A machine for bundling scrap, comprising a rotary mandrel, and a 'yoke' into which the mandrel passes, said 'yoke' serving to control the formation of the bundle and to compact the same upon the mandrel."

The rest of the claims were in the same general terms, and we need not consider them further than to say that they fail to specifically deal with a combination of efficient elements, in such an original way as to justify a broad and sweeping construction. The pith of the decision of the District Court is in the following terms:

"The claims in suit can be made to cover the defendant's machine only by saying, as the plaintiff does say, that the ends, back and bottom of the defendant's housing form, together with the compacting roller, a 'yoke' into which the mandrel passes, serving to control the formation of the bundle and to compact the same on the mandrel, within the meaning of claim 1; or a device surrounding the mandrel, and co-operating therewith in the formation of the bundle, within the meaning of claim 9; or a 'yoke' supporting one end of the mandrel, whose inner wall serves to compact the bundle thereon, within the meaning of claim 15; or a 'yoke' into which the mandrel passes, within the meaning of claim 18.

"But this is to make Marwick's patent cover all machines having rotating tapered shafts or mandrels for winding scrap into bundles, together with any means co-operating therewith, in any manner, to form the bundle, which can in any sense be said to 'surround' the mandrel, or into which the latter in any sense 'passes.'"

Then the opinion proceeds to say, in effect, that this would require, in order to justify a finding of infringement, a broader construction than can be believed warranted by the scope of any invention with which Marwick can be credited.

The decree of the District Court is affirmed, and the appellee recovers its costs of appeal.

BIJUR MOTOR LIGHTING CO. v. ECLIPSE MACH. CO. et al.

(District Court, W. D. New York. July 14, 1916.)

No. 136B.

1. CONTRACTS ⇐155—CONSTRUCTION—GENERAL RULES.
A written agreement, drawn after protracted negotiations initiated by one of the parties, under whose supervision the instrument was also drawn, is to be strictly construed, and any doubt as to its true meaning and construction is to be resolved against such party.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 736; Dec. Dig. ⇐155.]

2. CORPORATIONS ⇐406(2)—PRESIDENT—AUTHORITY TO MAKE CONTRACTS.
Where a part of the business for which a corporation was organized was "to acquire, sell, and deal in patents and patent rights upon inventions," yet in fact it dealt in a large number of patents, in which transactions it was represented by its president, who was also its general manager, he must be presumed, in favor of a third person dealing with the corporation, to have had authority to execute a contract granting a license under one of its patents.

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

3. PATENTS ⇐209(1)—CONTRACT TO GRANT LICENSE—VALIDITY.
A written agreement, executed on behalf of complainant corporation, by which it contracted to grant a license to defendants under a patent, *held* valid and binding, and to entitle defendants to a specific performance.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 300; Dec. Dig. ⇐209(1).]

In Equity. Suit by the Bijur Motor Lighting Company against the Eclipse Machine Company and Vincent Bendix. Decree for defendants.

Engelhard & Pollak and Emery, Booth, Janney & Varney, all of New York City (Walter H. Pollak, Frederick L. Emery, and Samuel L. Jackson, all of New York City, of counsel), for plaintiff.

Rector, Hibben, Davis & Macauley, of Chicago, Ill., and Stanchfield, Lovell, Falck & Sayles, of Elmira, N. Y. (John B. Stanchfield, of New York City, Samuel E. Hibben, of Chicago, Ill., and Alexander D. Falck, of Elmira, N. Y., of counsel), for defendants.

HAZEL, District Judge. This is a bill in equity to enjoin the defendants from infringing patent No. 1,095,696, granted May 5, 1914, to Joseph Bijur, inventor, for improvements in engine starting apparatus, consisting of specific means for transmitting power from the starting motor to the flywheel of the engine. Defendants attack the validity of the patent, but mainly rely upon a written agreement or contract, dated July 9, 1914, to grant a license under the invention to Vincent Bendix, and pray for specific performance thereof. The defendants' asserted legal right to a license under the agreement or writing is sharply controverted by the complainant company, and the maintenance

of this action for infringement is dependent upon the intendment of the parties at the time of the execution and delivery of the document. The replication substantially avers that an agreement was never executed or delivered, and that complainant was induced to sign the writing by fraudulent representations made by the defendant Bendix; but at the trial the latter averment was disclaimed or abandoned, and testimony directed towards proving that no completed or binding agreement to license had been made.

Concededly no fraud or deception was practiced by Bendix or the witness Dunn, who represented the Eclipse Machine Company, sublicensee, at the time the writing was executed, to induce Bijur, president of the complainant company, or Allen, an employé, to sign the agreement. The latter were not ignorant persons, or persons unacquainted with business methods or contractual obligations. By education and experience they were familiar with the effects of the consummation of contracts, and accordingly must abide by the consequences of their acts. They initiated the meeting with Bendix and Dunn at the office of Blair, their solicitor, where the plan of co-operation and association with Bendix in the exploitation of the patent in suit and the probable effects thereof were discussed in detail and at length.

The agreement, although terse and inelaborate, nevertheless admittedly is without ambiguity or indefinitiveness, and is believed to fairly express the intention of the parties. Each subdivision of the document was protractedly discussed before and after reducing it to writing, and no doubt was fully comprehended by the participants in the transaction. If anything was left unincorporated which should have been included, there is nothing in the document to indicate the fact. Its very silence on the subject is to my mind indicative of the fact that matters not expressly referred to were regarded as matters of detail, and not of the essence of the agreement. If in truth the effectiveness of the agreement was intended to be dependent upon future conditions, a reading of the agreement does not disclose such intention, although it appears that Bendix was to furnish at some future time the wording of the broadest claim of the German application, warrant its allowance, give information regarding the filing date, and, further, to secure a certain United States application for patent which was alleged to interfere with the Bijur patent in suit. The instrument in question reads as follows:

"Memorandum of Agreement Reached July 9, 1914, Between Bijur Motor Lighting Company and Vincent Bendix.

"First. Mr. Bendix is to receive a license under the Bijur patent, No. 1,095,696, for the life of the patent, and for the manufacture, use, and sale of starters involving a screw shaft.

"Second. This license is to be exclusive as against all parties save Bijur Motor Lighting Company.

"Third. This agreement is to be binding upon the heirs and successors of both parties, and upon the assignees of the whole business of each party, and is to convey to Mr. Bendix the right to sublicense the Eclipse Machine Company, its heirs, successors, and assigns of its business.

"Fourth. Mr. Bendix is to pay a royalty of five hundred dollars ($500) a year.

"Fifth. Mr. Bendix is to grant the Bijur Motor Lighting Company an exclusive license under each of his foreign patents or applications on starting apparatus for the life of the prospective foreign patents or applications.

"Sixth. The foreign rights given under the Bendix foreign patents are in no way to interfere with the rights of export and use in foreign countries of all apparatus built in accordance with the license to Mr. Bendix under the Bijur patent in this country.

"Seventh. The rights of Mr. Bendix under this agreement and those of his licensee shall extend to the manufacture in Canada, as well as its use and sale.

"Eighth. Mr. Bendix agrees, without further consideration, either to secure a certain United States application now pending in the Patent Office, and alleged to interfere with the Bijur patent, and guarantee that it be conducted and handled throughout in a manner satisfactory to the Bijur Motor Lighting Company, or, failing in this, that he will, at his own expense, vigorously prosecute the parties owning or controlling such application, or the resultant patent, to his full ability, under any rights which he may possess.

"Ninth. Mr. Bendix and the Eclipse Machine Company agree to mark the goods licensed under this agreement, 'Licensed under Patent No. 1,095,696,' or equivalent words.

"Tenth. As against infringers of the Bijur patent, building screw shaft starting apparatus, Mr. Bendix is to bear the expense of legal proceedings, and as against other infringers of said patent Bijur Motor Lighting Company is to bear the expense of legal proceedings.

"Eleventh. Mr. Bendix is to furnish the wording of the broadest claim which has been allowed to his German application, and warrant that it has been allowed, and also the effective filing date of the German case.

"Twelfth. Mr. Bendix agrees that the licensee [the Eclipse Machine Company] will, in consideration of the granting of this license by the Bijur Motor Lighting Company, give an additional discount of five per cent. (5%) off from the best price named to any other motor and lighting company, and that he will also obtain the best deliveries and prompt service.

"In witness whereof, we have hereunto set our hand and affixed our seals this 9th day of July, 1914, the Bijur Motor Lighting Company by its proper officer thereunto duly authorized. Bijur Motor Lighting Company.

"By Walter C. Allen. [L. S.]

"Vincent Bendix. [L. S.]"

As complainant asserts that this agreement was informal, preliminary, and incomplete, and not a binding and enforceable obligation, it is necessary to summarize the facts and circumstances in chronological order: In the year 1912, before the agreement in question was suggested, Bendix invented a transmission drive for gas engines, and filed an application for a patent. Associated with one Brandenburg, he immediately exploited the same, and entered into a license and manufacturing agreement with the Eclipse Machine Company, of Elmira, N. Y., for the manufacture of starters upon payment of royalty. Prior thereto, on March 12, 1912, the complainant's application for a patent for starters for engines was filed, and on May 5, 1914, was inadvertently granted, as shown by the file wrapper and contents in evidence, in view of the fact that Bendix was entitled to an interference therewith under rule 96 of the Patent Office to determine any question of priority of invention. Thereupon Bendix, as he testified, because of the expense entailed by interference proceedings, recurred to the offer previously made by complainant to give him a license under the Bijur patent.

On May 30, 1914, Bendix met the witness Allen, complainant's employé, and requested a conference on the license project which was

later had with Mr. Bijur, Mr. Allen, and Mr. Blair, patent solicitor for complainant, on June 13, 1914, at the office of the latter. The grant of a license, under the Bijur patent, the Bendix application for a patent, and right of interference within the time specified by the Patent Office, and which had not then expired, and the foreign applications for patents filed by Bendix, were discussed, but without the parties reaching any agreement. It is shown that Bendix afterwards mailed copies of the drawings upon which his foreign applications were based to complainant's solicitor, and on July 8, 1914, there was another conference between Bijur, Allen, and Blair, on one side, and Bendix and the witness Dunn, on the other. The giving of a license under the Bijur patent was again discussed in all its details, with regard to the length of the license, the right of Bendix to sublicense to the Eclipse Machine Company, the royalties, the license from Bendix to Bijur of foreign patents, the applications, the manner of marking the manufactured articles by the sublicensee of Bendix, the Eclipse Machine Company, the control of other applications alleged to interfere with the Bijur patent, etc., and on the following day another conference, lasting several hours, was held at Blair's office, resulting in the dictation of the agreement in question and its typewritten transcription. The evidence discloses that Blair, Bijur, and Dunn dictated portions of the agreement, and that each paragraph was read aloud by the stenographer before it was transcribed, as was also the agreement in its completed form. While the dictated agreement was being typewritten, Bijur and Dunn, who had other engagements, left the office; Bijur, before leaving, having requested Allen to remain and sign the document on behalf of the Bijur Motor Lighting Company. There is dispute as to what was said about signing the document; both Bijur and Allen claiming that Bijur requested Allen to initial the agreement in its completed form. When the agreement was written out, Blair examined it, removing the certificate of acknowledgment, which he regarded as immaterial, and handed the same to Allen. It was then reread and signed as hereinbefore indicated.

[1] It is conceded by both sides that the concluding clause, "In witness whereof," etc., was not dictated, but was added by the stenographer who took the same from some contract form. It is claimed that the original omission of the concluding clause supports the view that the agreement was recognized by both parties as being informal and preliminary; but this is negatived by the fact that neither the appearance of the undictated clause in the transcribed agreement nor the formal way in which the name of complainant company appears as a signatory by Allen, with the letters "L. S." at the end, elicited any comment at the time the document was signed, which tends to indicate that they met with approval. The formal opening words, "Memorandum of Agreement Reached July 9, 1914, Between the Bijur Motor Lighting Company and Victor Bendix," and the protracted meetings and negotiations before an understanding was reached, make applicable the general rule of strict construction, which requires resolving any doubt as to the true meaning and construction of any of the provisions against the complainant, at whose instigation the parties met

for the purpose of reaching an agreement, and by whom or under whose supervision it was prepared or drawn. Wilson v. Cooper et al. (C. C.) 95 Fed. 625; Van Zandt v. Hanover Nat. Bank, 149 Fed. 127, 79 C. C. A. 23; Christian v. First Nat. Bank of Deadwood, S. D., 155 Fed. 705, 84 C. C. A. 53. Under the circumstances the fact that the concluding clause was not dictated, but was added by the stenographer, does not warrant the inference that the writing constituted an incomplete agreement, or merely a memorandum of what was to be later embodied in a formal agreement. The writing contains all the elements of a valid contract, regardless of the concluding clause. Nor were the instructions by the president of complainant to Allen to initial the document as distinguished from signing it, of material importance (Bean v. Clark [C. C.] 30 Fed. 225); none of the salient provisions having been changed after his departure.

[2] A question, however, arises as to Bijur's authority to execute the agreement without the express sanction of the board of directors. It is true the defendants are required to prove the authority of the president to make license agreements; but the burden has, I think, been fairly met. The many authorities cited in complainant's brief in support of the contention that a president of a corporation upon general principles has no legal right to sell or convey the property of the corporation, or bind it by his contract to do so, without the concurrence of the board of directors, no doubt correctly states the law; but such authorities are here inapposite. It cannot be presumed that Bijur was without authority, as the business of the complainant, among other things, was to do the very thing which he did, namely, "to acquire, sell, and deal in patents and patent rights upon inventions." The case of Kansas City Hay Press Co. v. Devol et al. (C. C.) 72 Fed. 717, urged as a controlling precedent, can easily be distinguished. There the patent was assigned by the president and secretary, without any authorization of the board of directors, to pay a personal debt of the president, the patent being the only asset possessed by the corporation; moreover, there is no proof that consideration passed to the company, and the general management of its affairs, under the by-laws, was in the president and board of directors.

In De La Vergne Refrigerating Mach. Co. v. German Savings Institution, 175 U. S. 40, 20 Sup. Ct. 20, 44 L. Ed. 65, the president, without authority from the board of directors, entered into a contract with another to acquire all its assets and stock, which at the time were in the hands of a receiver for the benefit of creditors, and the Supreme Court held that under such circumstances no consideration could pass to the buying company, and as the laws of the state where the buying company was incorporated prohibited such company from using any of its funds to buy stock in any corporation, the transaction was ultra vires. Without going into the other cases cited on this point by the complainant, I conceive it to be the law that officers or agents of a corporation, who are permitted to hold themselves out as authorized to act, bind the corporation by their silence when there is a duty upon them to speak. In United States Bank v. Dandridge, 12 Wheat. 63, 6 L. Ed. 552, the Supreme Court said:

"If officers of the corporation openly exercise a power which presupposes a delegated authority for the purpose, and other corporate acts show that the corporation must have contemplated the legal existence of such authority, the acts of such officers will be deemed rightful, and the delegated authority will be presumed. * * * In short, we think that the acts of artificial persons afford the same presumptions as the acts of natural persons. Each affords presumptions, from acts done, of what must have preceded them, as matters of right or matters of duty."

The general principle of law applicable to the powers and duties of executive officers of corporations is not believed entirely inapt under the facts herein disclosed, and by analogy the case of Standard Fashion Co. v. Siegel-Cooper Co., 44 App. Div. 121, 60 N. Y. Supp. 739, is of value. There the contract was signed by the general manager, who acted for the president of the company during the latter's absence from the room, with knowledge that a completed contract for space in the company's department store was with his approval about to be signed and delivered. His authority and that of the general manager, the signer, to make the contract was questioned, on the ground that the by-laws of the company did not give them such authority; but the court said:

"It is idle to appeal to the by-laws of such a corporation as affecting contracts made with third persons in reliance upon the apparent authority of its executive agents."

And quoted from Rathbun v. Snow, 123 N. Y. 349, 25 N. E. 379, 10 L. R. A. 355:

"By-laws of business corporations are as to third persons private regulations, binding as between * * * its members or third persons having knowledge of them, but of no force as limitations per se as to third persons of an authority which, except for the by-law, would be construed as within the apparent scope of the agency."

The court considered that letting space in the department store was as much a part of the business of the corporation as buying and selling other commodities in which the company dealt. In the present case, as heretofore stated, a part of the business of the complainant company was the actual dealing in patent rights, and it is shown to have been the owner of upwards of 100 patents covering various articles of manufacture in which it dealt, and accordingly the making of license agreements was, I think, within the scope of its ordinary business, especially as there is evidence in the record of other transactions relating to the issuance of patent licenses by Bijur and ratification of his acts by the board of directors at a later date. See Scofield et al. v. Parlin & Orendorff Co., 61 Fed. 804, 10 C. C. A. 83; 10 Cyc. 903; 10 Cyc. 941; Cook on Corporations, § 725; Jenson v. Toltec Ranch Co., 174 Fed. 86, 98 C. C. A. 60.

Nor is the contention convincing that a different rule applies in the federal courts than in the courts of New York state with regard to by-laws and corporate agency. In San Antonio v. Mehaffy, 96 U. S. 312, 24 L. Ed. 816, the Supreme Court, citing Whitney Arms Co. v. Barlow et al., 63 N. Y. 62, 20 Am. Rep. 504, says:

"The doctrine of ultra vires, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided."

In Patterson v. Robinson, 116 N. Y. 193, 22 N. E. 372, it is said:

"Where a contract, made in the name of a corporation by its president, is one the corporation has power to authorize its president to make, or to ratify after it has been made, the burden is upon the corporation of showing that it was not authorized or ratified."

Nor is St. Vincent College v. Hallet, 201 Fed. 471, 119 C. C. A. 647, an authority on this point, as a careful reading of the case will clearly show, for there, it is enough to state, the learned court pointed out the distinction between the principles of corporation law applicable to charitable corporations and to trade corporations.

Bijur was not only the president, but also the general manager, of the complainant company, and had full power and authority over its business affairs. He was in active charge, controlled its policy, owned a large block of the capital stock, and with one exception the directors were relatives of his. Meetings of the board of directors were few, and in fact none was held until more than a year after the contract in controversy was made. From this it may be inferred that the company practically invested its president with the powers of the board of directors in relation to licensing patents, and it was therefore bound by his acts in the same way as though such acts had been specifically authorized by the board. He had the power to delegate to Allen, an employé of the company, the doing of a ministerial act which he himself was empowered or authorized to do. Standard Fashion Co. v. Siegel-Cooper Co., supra. It was the act of an amanuensis in obedience to instructions given him. Commercial Bank of Lake Erie v. Norton & Fox, 1 Hill (N. Y.) 501.

[3] It is further contended that the Eclipse Company was necessary as a party to the agreement, and that, as it did not sign the same, the complainant was released; but as such company had previously been licensed by Bendix to manufacture starters under his invention and other starting device inventions acquired by him, of which complainant had notice, it was not astonishing that the agreement for the greater part was phrased to indicate an agreement between Bendix and the complainant only. Dunn testified that he did not expect to become a party to the instrument, save in the way of becoming a beneficiary through Bendix's acquirement, and none of the provisions of the agreement, except perhaps the ninth, which is qualified and explained by the twelfth, suggests the necessity of the Eclipse Company's becoming a party to the agreement, and thus the premises upon which the argument is predicated, that the instrument cannot as a matter of law bind either of the signers because of nonexecution by the Eclipse Machine Company, fail. Whitaker v. Richards, 134 Pa. 191, 19 Atl. 501, 7 L. R. A. 749, 19 Am. St. Rep. 684; Cutter v. Whittemore, 10 Mass. 442; Dillon v. Anderson, 43 N. Y. 231.

It is further submitted that Bendix and Dunn practically concede, in a letter written to Blair a short time after the instrument was

signed, that it was incomplete and merely a memorandum of a formal agreement to be entered into in the future. The letter is as follows:

"The Waldorf-Astoria, New York, 7/9, 1914.

"Dear Mr. Blair: I will be in Chicago Saturday morning, and will have Mr. Hibben write up a complete and final agreement per your memorandum, and send it to you along with the foreign data for your approval. * * *.

"Very truly yours, V. Bendix."

Contemporaneously therewith he telegraphed Brandenburg, his associate, as follows:

"New York City, July 9, 1914.

"G. G. Brandenburg, c/o Brandenburg & Company, 1112 South Michigan Avenue, Chicago, Illinois.

"Have signed papers completing very satisfactory arrangements with Bijur, who has also signed exclusive license to us. * * * V. Bendix."

On comparison there will be observed an apparent inconsistency in these communications, but in the light of the evidence they are in accord with defendant's claim that, after making the agreement, the understanding was that a formal written license under the Bijur patent and a formal license under the Bendix foreign application, including the warranty that a certain claim had been allowed in a German patent, should be prepared independently of the agreement. It was in terms agreed that Bendix should furnish the wording of the broadest claim that had been allowed to his German application, and it was testified by complainant's witnesses (see Blair letter, Plaintiff's Exhibit 12, in answer to a letter from Bendix's solicitors, conveying information as to filing date, and including drawings of the German application, also bearing upon this claim) that the German application was regarded an important feature in the negotiations preceding the contract, and that the supposed allowance of the claim having a scope as broad as the Bijur patent "was in his [Bijur's] mind to form a leading compensation for a license to Mr. Bendix"; but in my opinion paragraph 11 does not make the operativeness of the contract dependent upon a condition precedent, and to read such a condition into it would do violence to the principle that all prior negotiations, understandings, and intentions were merged in the written agreement, and, accordingly, the agreement cannot be varied, contradicted, or modified to comport with what is now claimed to have been a primal reason for entering into the contract.

There was discussion as to whether the Bendix claims embodying the screw shaft device would dominate the Rushmore device in Germany; but the testimony of Blair relating thereto was not so clear and definite as to convey the impression that it was desired to dominate it, in the sense that it would be held an infringement, and that unless this resulted an agreement would not have been entered into. Allen on this point testified substantially that Bendix, in the presence of Dunn, said that he had applied in Germany for a patent covering his method of connecting up the motor with the gasoline motor, and that as he knew that the Rushmore company had most of the business over in Europe, and as he understood that we were trying to break in, he held out that his "patent would be very valuable over there," that "it domi-

nated the Rushmore patent," and that they "could put Rushmore out of business." But Bendix and Dunn denied such statements, and testified to a radically different version—i. e., that the conversation simply suggested that the Bendix German application would operate to secure protection in Germany of a device competing with the Rushmore device, that the broadest German claim was to be furnished, but that nothing was said about leaving the matter open, as testified by Blair, until he (Blair) had a chance to give an opinion as to the scope of the Bendix claim. As the Bijur device in suit was not patented in Germany, it is not improbable that the acquirement of the Bendix application would have been desirable, and would have given substantial protection to the starting device manufactured under the Bijur patent. The drawings of the Bendix device, which were submitted to Blair, indicated a relative movement between the pinion and the shaft, and, if the dominancy of the Rushmore device then marketed in Germany had been the principal reason for making the contract, Blair, it is reasonable to suppose, would not have omitted a statement to that effect. Besides, there was nothing in the agreement to indicate an intention to assign the legal title to the Bendix application, so that action might be brought against the Rushmore company for infringement in Germany, and presumably such a provision would have been embodied therein, regardless of what the law in Germany might have been as to the right of an exclusive licensee to prosecute for infringement, if it had been intended that the license should supersede the Rushmore construction.

The claim considered by defendants as the broad claim was submitted to complainant July 14, 1914, and on September 28th of the same year a somewhat differently phrased claim was submitted; but in explanation it was testified that the earlier submission included original claim 1, revised claim 1, and claims 2 and 3, which had not been objected to by the examiner, and which were therefore deemed allowed. The broadest of the claims submitted, according to complainant, was limited to the relative movement between the motor and the driving pinion, while the pinion in the Rushmore structure was made to move by the motor armature, but was claimed to have no relative movement with respect thereto. It is unnecessary, and indeed it is impossible upon this record, to determine whether the broadest claim submitted by Bendix was broad enough to cover the Rushmore starter.

It is finally contended, assuming the contract to have been valid, that defendants failed to perform thereunder, as they did not vigorously prosecute the Remy application, but allowed the Bendix rights to go by default; but this contention is, I am satisfied, without merit. The agreement by Bendix to furnish information as to the Remy application and to prosecute the interference at his own expense were not conditions precedent to the making of the license contract; the provision being open to the construction merely that it was the intention of the parties to remove all question of interference by a third party, and the information imparted by Bendix at the time of making the contract being true, as the subsequent declaration of interference between the Remy company and the Bijur application showed. In acquiring the Remy application, it must be admitted, Bendix certainly eliminated

objections raised against the grant of the patent to Bijur, a grant declared by the Patent Office to have been inadvertent.

There were other provisions, as complainant contends, which might well have been referred to in the memorandum agreement, such as the date of the license, time of payment of royalty, etc.; but their omission does not invalidate the agreement, as it has frequently been held that, where no time is fixed for the performance of the contract, the law implies a reasonable time for performance. Gill Mfg. Co. v. Hurd (C. C.) 18 Fed. 673. The evidence in its entirety shows that defendants have reasonably performed the obligations required of them under the agreement by tendering to the complainant the royalty specified, together with a license from Bendix to the Bijur company under his foreign patents and applications, and by afterwards tendering the Remy application, and by performing the acts required of them.

My conclusion, therefore, is that the defendants do not infringe the Bijur patent in suit, and a decree, including specific performance as affirmatively prayed, may accordingly be entered, with costs.

GRINNELL WASHING MACH. CO. v. CLARINDA LAWN MOWER CO.

(District Court, S. D. Iowa, C. D. September 6, 1916.)

1. PATENTS ⊂=327—VALIDITY—PRECEDENTS.
   In a suit for infringement of a patent, the District Court will follow a decision of the Circuit Court of Appeals, upholding the validity of the patent, where the defendant, who asserted noninfringement, offered no new evidence as to its invalidity, and there was no proof relating to the validity of the patent, except that appearing in affidavits.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 620–625; Dec. Dig. ⊂=327.]

2. PATENTS ⊂=310(10)—TRIAL AMENDMENTS—ALLOWANCE.
   In suit for infringement of a patent, where the case was specially assigned for final hearing by agreement of the parties, defendant's request for leave to amend its answer, by inserting an extract from the answer of a defendant in another case involving the infringement of the same patent, should be denied, where defendant conceded it had no proof as to the matter, but relied on the court taking judicial notice of the evidence in the other case; this being particularly true, as in the other case the validity of the patent was upheld.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 516; Dec. Dig. ⊂=310(10).]

3. PATENTS ⊂=243—INFRINGEMENT—DEFENSES.
   Where a patent was upheld as a combination of old elements producing a new and useful result, or an old result in a more facile, economical, and efficient manner, defendant cannot defeat a charge of infringement, because each specific portion of its gearing device was different from the specific parts on plaintiff's device.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 382–384; Dec. Dig. ⊂=243.]

In Equity. Suit by the Grinnell Washing Machine Company against the Clarinda Lawn Mower Company. Injunction granted.

Orwig & Bair, of Des Moines, Iowa, for complainant.
Orr & Turner, of Clarinda, Iowa, for respondent.

WADE, District Judge. [1] The principal defense is noninfringement. There is no proof relating to the validity of the patent, except what may appear in affidavits, and inasmuch as the Circuit Court of Appeals of this Circuit, in Newton Washing Machine Co. v. Grinnell Washing Machine Co., 222 Fed. 512, 138 C. C. A. 112, has specifically determined that the patent is valid, it is the duty of this court to accept such adjudication as a guide herein. I do not hold that this is an adjudication as to the defendants; but, in the absence of any issue or proof introducing new defense or new evidence, it is my duty to follow the decision of the Court of Appeals.

[2] This case was specially assigned for final hearing by agreement of parties, and at the time the case came on for hearing under such agreement a request was made for leave to amend the answer by inserting an extract from the answer in Newton Washing Machine Co. v. Grinnell Washing Machine Co., supra; but defendant conceded that it had no proof, and relied upon the court taking judicial notice of the evidence in the other case. Inasmuch as these matters had been specifically determined by the Court of Appeals, I felt it my duty under the circumstances to deny the application; especially was this my duty in view of the fact that the offer to amend was not made until the case came on for trial, and even at that time the parties had no evidence to establish the averments tendered.

[3] The defense proceeded upon an erroneous theory as to the patent sustained by the Court of Appeals. Reliance was placed upon the fact that each specific portion of the defendant's gearing device was different from the specific parts of the plaintiff's device; but the patent was upheld by the Court of Appeals of this Circuit merely as a "combination of old elements producing a new and useful result, or an old result in a more facile, economical, and efficient manner." It was the patent upon the combination which was sustained, not upon the elements or devices used in the combination.

I realize that, in view of the opinion in Johnson v. Grinnell Washing Machine Co., 231 Fed. 988, 146 C. C. A. 184, by the Circuit Court of Appeals of the Seventh Circuit, the question of the validity of the patent is a close one; but it is my duty to follow the decision of the Court of Appeals of this Circuit.

I therefore have no choice, but to sustain the claims of the plaintiff, and to grant the injunction prayed for.

In re CITY OF SEATTLE.

(District Court, W. D. Washington, N. D. August 5, 1916.)

No. 3372.

1. REMOVAL OF CAUSES ⇐79(2)—MOTION TO REMOVE—TIME FOR FILING.
Under Rem. & Bal. Code Wash. § 7768, a city instituted condemnation proceedings to appropriate private property to protect its water supply; a petition being filed in the superior court pursuant to section 7770. Summons was served under section 7772, declaring that upon the filing of the petition summons returnable as summons in other civil actions shall be issued and served on the parties made defendant. Section 7774 declares that upon return of the summons, or as soon thereafter as the business of the court shall permit, the court shall proceed to the hearing of such petition, and shall impanel a jury to ascertain the compensation to be made. By section 222, subd. 2, a defendant is required to appear and answer within 20 days after service; while section 411 provides for judgment by default in case of failure to answer, subdivision 2 declaring that, where the action is to determine the amount of damages, the court may order the damage to be assessed by a jury, and provides that, if defendant gives notice of appearance before the expiration of the time for answering, he shall be entitled to 5 days' notice of the time and place of application to the court for the relief demanded. *Held*, that the statutes should be construed together, and upon the failure of defendant to file its petition for removal within 20 days, or to serve notice of its appearance before the expiration of the 20 days fixed by summons, it waived all right to notice of further proceedings, and the right of removal under Judicial Code (Act March 3, 1911, c. 231) § 28, 36 Stat. 1094 (Comp. St. 1913, § 1010), on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 141, 142; Dec. Dig. ⇐79(2).]

2. REMOVAL OF CAUSES ⇐52—SEPARABLE CONTROVERSIES.
Where a petition to condemn land of a mortgagor was duly served on the mortgagor, and it failed to petition for removal to the federal court within time, there is no separable controversy, which will entitle the mortgagee to removal of the cause to the federal court thereafter on the ground of diversity of citizenship.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 102, 103, 105; Dec. Dig. ⇐52.]

In the matter of the petition of the City of Seattle to condemn, appropriate, and damage private property for the purpose of protecting the supply of fresh water of the city from pollution, as provided for and specified in Ordinance No. 35647 of said city. On petition of the Chicago, Milwaukee & St. Paul Railway Company and another, the cause was removed to the federal courts. On motion to remand. Motion granted.

Hugh M. Caldwell, Corp. Counsel, and Walter F. Meier and Frank S. Griffith, Assts. Corp. Counsel, all of Seattle, Wash., for city of Seattle.

F. M. Dudley and G. W. Korte, both of Seattle, Wash., for defendants.

NETERER, District Judge. [1] Petition is filed by the city of Seattle, pursuant to the laws of Washington and ordinance of the city,

seeking to appropriate certain lands belonging to the Chicago, Milwaukee & St. Paul Railway Company, in which the United States Trust Company of New York and Edward Sheldon, and the Guaranty Trust Company of New York and Alexander J. Hemphill, are interested as mortgagees. Summons was duly served upon the defendant railway company on the 6th of May, 1916. No summons has been served upon the other petitioners. Separate petitions for removal were filed on the 6th of June, 1916, on the ground of diversity of citizenship and separable controversy. Motion has been made to remand the cause to the state court upon the ground that there is no separable controversy and the petition was filed out of time.

This proceeding is prosecuted under the provisions of section 7768, Rem. & Bal. Codes & Statutes of Washington, and petition is filed pursuant to section 7770, and defendants brought into court by summons as provided by section 7772, which provides that:

"Upon the filing of the petition aforesaid * * * summons, returnable as summons in other civil actions, shall be issued and served upon the persons made parties defendant. * * *"

And by section 222, subd. 2, R. & B., supra, a defendant is required to appear and answer within 20 days after service.

Section 7774, Rem. & Bal., supra:

"Upon the return of said summons, or as soon thereafter as the business of court will permit, the said court shall proceed to the hearing of such petition and shall impanel a jury to ascertain the just compensation to be paid for the property taken or damaged; but if any defendant or party in interest shall demand, and the court shall deem it proper, separate juries may be impaneled as to the compensation or damages to be paid to any one or more of such defendants or parties in interest."

A condemnation proceeding has been held by the Supreme Court, in Mason City & Ft. Dodge Ry. Co. v. Boynton, 204 U. S. 570, 27 Sup. Ct. 321, 51 L. Ed. 629, to be a suit in the generally understood sense of that term. In section 411, Rem. & Bal., supra, provision is made for the entry of judgment or decree in case of default, providing the cases in which proof shall be taken. Subdivision 2 provides, where the action is to determine the amount of damages, the court may order the damages to be assessed by a jury, and further provides:

"If the defendant give notice of appearance in the action before the expiration of the time for answering, he shall be entitled to five days' notice of the time and place of application to the court for the relief demanded in the complaint."

The purpose of the statute of Washington unquestionably is to apply the same rules with relation to the procedure in condemnation as in other actions, and any right granted to a party to such proceeding by law must be invoked prior to the expiration of the time fixed in civil actions. Sections 411, 222, 7772, and 7774, Rem. & Bal., supra, must be construed together, and upon the failure of the respondent to file its petition for removal within 20 days, or serve notice of its appearance before the expiration of the 20 days fixed by summons, it waived all right of notice of further proceeding and right of removal under section 28 of the Judicial Code. The petition for removal of the Chicago,

Milwaukee & St. Paul Railway Company was therefore filed too late. Adams v. Puget Sound T. L. & P. Co. (D. C.) 207 Fed. 205.

[2] The railway company being the owner of the land, the trust companies' interest being that of mortgagee, there is no separable controversy. State ex rel. Columbus v. Ry. Co. (C. C.) 48 Fed. 626; City of Washington v. Columbus & C. M. Ry. Co. (C. C.) 53 Fed. 673; Oroville & N. R. Co. v. Legett (C. C.) 162 Fed. 571; City of Le Mars v. Iowa Falls & S. C. R. Co. (C. C.) 48 Fed. 661; Perkins et al. v. Lake Superior & S. E. Ry. Co. (C. C.) 140 Fed. 906; Kansas City v. Hennegan (C. C.) 152 Fed. 249; Fishblatt v. Atlantic City (C. C.) 174 Fed. 196; Seattle & Montana Ry. Co. v. State (C. C.) 52 Fed. 594; City of Bellaire v. B. & O. Ry. Co., 146 U. S. 117, 13 Sup. Ct. 16, 36 L. Ed. 910.

Motion to remand is granted.

In re ROBINSON.

(District Court, W. D. Washington, N. D. May 5, 1916.)

No. 5638.

BANKRUPTCY ⇐116—MONEY IN CUSTODY OF COURT—AUTHORITY OF COURT.

The bankrupt and another were indicted for conspiracy to conceal assets from the trustee. Petitioner was arrested in another district, and at that time a sum of money was found upon his person, whereupon he consented to the forwarding of the money to the bankruptcy court, stating that, if it was decided in the bankruptcy proceedings the money belonged to the bankrupt, he was willing to relinquish it, but asserting that the money belonged to him. Thereafter petitioner filed in the bankruptcy proceedings a petition for delivery of the money to him, to which payment creditors objected. *Held* that, in view of Bankr. Act July 1, 1898, c. 541, §§ 60b, 67e, 70e, 30 Stat. 562, 564, 565 (Comp. St. 1913, §§ 9644, 9651, 9654), providing for vacation of preferences, for recovery of property transferred by the bankrupt within four months of bankruptcy, and for the avoidance of transfers which creditors might have avoided, the court of bankruptcy should retain the money until the right thereto was adjudicated, and the trustee should be required to join issue on the petition.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐116.]

In Bankruptcy. In the matter of the bankruptcy of J. B. Robinson. On petition of Louis Robinson for return of money in custody of court. Petition for immediate return denied, and trustee in bankruptcy directed to join issue thereon.

Philip Tworoger and Edward Judd, both of Seattle, Wash., for petitioner.

Leopold M. Stern, of Seattle, Wash., for creditors.

NETERER, District Judge. On March 29, 1916, the grand jury returned an indictment against J. B. Robinson and Louis Robinson on a charge of conspiracy to conceal assets from the trustee in bankruptcy of J. B. Robinson. Louis Robinson, the petitioner, was arrested in the Northern district of Illinois, and on petition for removal

waived examination and bond, and was directed returned to this district. About April 8th there was transmitted to the judge of this court a draft drawn by the Continental & Commercial National Bank of Chicago, on the National Bank of Commerce, of Seattle, Wash., dated March 27, 1916, numbered 39,245, and for the sum of $640, payable to the order of the clerk of the District Court of the United States, Western District of Washington, accompanied by a letter from Judge George A. Carpenter, District Judge for the Northern District of Illinois, in which the following appeared:

"The marshal found, as it is stated, sewed in Robinson's coat, $680. The attorneys for the creditors at Seattle asked me to impound the money. The prisoner also invited me to take charge of $640 of the money, saying that if the court in the bankruptcy proceedings decided the money belonged to the bankrupt he was perfectly willing to give it up, but insisted all of the time that it was his. The attorneys claimed that it was a part of the proceeds of goods of the bankrupt sold here. Of course, as to this I have no knowledge. The money was deposited with the clerk of the court, and I told Robinson it would be forwarded to your court to await disposition in due course of the bankruptcy proceedings. Accordingly I inclose draft. * * *"

The draft was delivered to the clerk of this court. On April 10th Louis Robinson filed a petition in the bankruptcy proceedings, in which it is stated that he was arrested in Chicago on the 22d day of March on the charge of conspiracy to conceal assets from the trustee, and that at the time of his arrest he had in his clothes $640 in money belonging to him, that the officers threatened to take the said money, and "that thereupon the petitioner delivered the said money to Hon. G. A. Carpenter, one of the Judges of the District Court for the Northern District of Illinois, with the request that the money be forwarded to the clerk of this court, to be delivered upon the petitioner's arrival, to him," and he further alleges that said money was forwarded and is now in the hands of the clerk of this court, and alleges that he is the sole owner of the money, that no other person has any interest therein either directly or indirectly, and prays an order of the court directing the clerk to pay said sum to the petitioner.

At the time the petition was presented to this court, attorneys representing the creditors in the bankruptcy proceedings appeared in court and objected to the payment of the money, claiming that it was a part of the estate of the bankrupt, and that an order should be entered directing the payment of it to the trustee in bankruptcy. A petition also was filed and presented at the time to the court, praying that the adjudication in bankruptcy be set aside. After hearing, the petition to set aside the adjudication was denied.

It appears from the record in this case that the petitioner voluntarily surrendered the money to the District Court for the Northern District of Illinois, saying that, "if the court in bankruptcy proceedings decided the money belonged to the bankrupt, he was perfectly willing to give it up." It is apparent from the entire record in this case that the petitioner did indicate a willingness that the right to this money should be adjudicated by the bankruptcy court. If this money is a part of the proceeds of merchandise of the bankrupt, and the petitioner conspired with the bankrupt to conceal this from the trustee in bankruptcy,

then the money clearly should not be returned to the petitioner, but should be ordered paid to the trustee in bankruptcy. If, on the other hand, the money is the property of the petitioner, and bears no relation to the merchandise of the bankrupt, then it should be paid to the petitioner. The money being in the custody of the court, it is clearly the duty of the court under the Bankruptcy Act (sections 60b, 67e and 70e) to retain the money until the right thereto is adjudicated. Collier on Bankruptcy (10th Ed.) page 487b.

The petition to return the money at this time is therefore denied. The trustee in bankruptcy is directed to join issue upon the petition which has been filed, so that the same may be determined, and show cause why said money should not be returned to the petitioner; the issue to be determined in due course, and such order made as the disclosed facts may justify.

PROVIDENT LIFE & TRUST CO. et al. v. FLETCHER et al.

(District Court, S. D. New York. November 1, 1916.)

No. E 10-111.

1. USURY ⟸37—USURIOUS TRANSACTIONS—UNCERTAINTY AS TO REPAYMENT OF PRINCIPAL.
   As a general rule a transaction is not usurious, if the principal is put at any genuine hazard.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. § 92; Dec. Dig. ⟸37.]

2. USURY ⟸37—USURIOUS TRANSACTIONS—PURCHASE OF CONTINGENT LEGACY.
   A transaction by which a legatee 44 years old, who had been refused life insurance by a number of companies as a bad risk, in consideration of money advanced him, assigned an interest in a legacy payable to him only in case he reached the age of 55 years, *held* not usurious.
   [Ed. Note.—For other cases, see Usury, Cent. Dig. § 92; Dec. Dig. ⟸37.]

3. EQUITY ⟸13—GROUNDS FOR EQUITABLE RELIEF—UNCONSCIONABLE CONTRACTS.
   In such case mere inadequacy of consideration is not sufficient to render the assignment invalid, and where the assignor had an income of $9,000 a year, and had previously made similar assignments of other legacies, which had matured, and had full understanding of the transaction, there is no ground upon which a court of equity should grant relief, as against an inequitable or unconscionable bargain.
   [Ed. Note.—For other cases, see Equity, Cent. Dig. § 26; Dec. Dig. ⟸13.]

4. EXECUTORS AND ADMINISTRATORS ⟸524(2)—RIGHT TO SUE IN FOREIGN JURISDICTION—FEDERAL COURTS—NEW YORK STATUTE.
   Foreign executors, who have filed the papers required by Code Civ. Proc. N. Y. § 1836a, may maintain a suit in a federal court in New York to recover assets of the estate.
   [Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 2334; Dec. Dig. ⟸524(2).]

In Equity. Suit by the Provident Life & Trust Company and Catherine Stewart Wood, as executors of the will of William Brewster Wood, deceased, against Austin B. Fletcher, as testamentary trustee

of Conrad Morris Braker, under the will of Conrad Braker, Jr., deceased, and Conrad Morris Braker. Decree for complainants.

This is a suit in equity to compel the defendant Austin B. Fletcher, as testamentary trustee under the last will and testament of Conrad Braker, Jr., to pay over to the plaintiffs $15,000, with interest from January 5, 1907, under the fifteenth and sixteenth paragraphs of the will of the said Braker. The plaintiffs are the executors under the last will and testament of William Brewster Wood, deceased, of Philadelphia. The defendants are the trustee above named and Conrad Morris Braker, the beneficiary under the said fifteenth and sixteenth items of the last will of Conrad Braker, Jr., by virtue of which trusts were created out of which the plaintiffs seek to be paid. The jurisdiction of this court depends upon the fact of diversity of citizenship, and has been established by the Supreme Court, to which an appeal was taken on that point. The facts are as follows:

Conrad Braker, Jr., died on the 21st of July, 1890, leaving his wife, Frances J. Braker, and his next of kin, the defendant Conrad Morris Braker, a son, and another son, Henry J. Braker. By his will he left various provisions in trust for his son Conrad Morris Braker, whom it is clear he already thought incapable of managing his own affairs, although at the time of his death the said Conrad Morris Braker was already 32 years old. These provisions were as follows:

In the twelfth item of his will he bequeathed to the said Conrad Morris Braker the sum of $30,000, of which $5,000 was to be paid within 60 days after the testator's death, and the remaining $25,000 within 6 months thereafter.

In the thirteenth item of his will he settled a fund of $20,000 in trust upon his grandchild, Florence May Braker, and created a contingent remainder therein in favor of Conrad Morris Braker, in the event of the death of the said Florence May Braker before she reached the age of 21 years. This provision never came into effect.

In the fourteenth item of his will he bequeathed to his son Henry J. Braker $50,000 in trust for Conrad Morris Braker, to pay him the interest thereon during his life, to pay $20,000 of the principal 10 years after his death, $20,000 15 years after his death, and the remaining $10,000 20 years thereafter. These were contingent remainders.

By the fifteenth item of his will the testator bequeathed a further sum of $50,000 to Henry J. Braker in trust for Conrad Morris Braker, to pay the interest to him until he should reach the age of 55 years, when the same should be paid to him, and, in case of his death before, over to his wife, Florence, for life, and the remainder to the testator's grandchild.

In the sixteenth item of his will he bequeathed one-half of the residue of his total estate, after the bequests theretofore made for the benefit of Conrad Morris Braker, to his son Henry J. Braker, in trust for Conrad Morris Braker until he should reach the age of 55, at which time the trustee should pay over to him the whole amount, less $25,000, with which, at the age of 54, the trustee should purchase for him an annuity.

On the 25th day of February, 1902, Conrad Morris Braker executed an assignment in writing to the New York Finance Company, a New York corporation, of all his interest to the extent of $35,000 in the contingent remainder of $50,000 bequeathed him under the fifteenth item of his father's will, and in the contingent residuary remainder likewise bequeathed to him in the sixteenth item of the said will, subject to prior assignments to one Frank L. Rabe, which will be later mentioned. The circumstances under which this transfer was made will also be set forth in detail later.

On July 5, 1912, the New York Finance Company executed its promissory note to William Brewster Wood, the plaintiff's testator, in the sum of $15,000, and on the same day therewith pledged, likewise by written assignment, as collateral security thereto, all their right arising by virtue of the assignment of Conrad Morris Braker of February 25, 1902, heretofore mentioned. On May 14, 1912, the New York Finance Company executed a second agreement, this time to the executors of William Brewster Wood, who had died on the 24th day of April, 1905, reciting that there was due, upon the said note of $15,000, $19,725, and conveying to the said executors all their right, title, and

interest to the extent of $20,000 in the contingent remainder bequeathed to Conrad Morris Braker under the sixteenth item of the will of Conrad Braker, Jr. The assignment of Conrad Morris Braker to the New York Finance Company of the bequest under the sixteenth item of the will was not for $20,000, and that figure appears to have been reached because the transfer to Frank L. Rabe under the fifteenth item of the will conveyed $35,000 out of the total of $50,000, leaving the $15,000 applicable upon the $35,000 assigned by Braker's assignment to the New York Finance Company on February 25, 1902. This left $20,000 of such assignment to be borne by the bequest under the sixteenth item. The direct conveyance to the executors of Wood, therefore, is limited to the sixteenth item and to $20,000; for the balance they must claim as executors of a pledgee.

The assignment of Conrad Morris Braker to the New York Finance Company took place on the day mentioned in the document between one Cochran, an officer of the company, and Braker himself. Braker received only $2,150, for which he gave his receipt. He swears that he did not read the papers, and did not know what they contained, but that he supposed it was a simple loan, and that he could repay it when due. Depue, an officer of the company, swore that he read the papers to Braker before the day of execution, and the stenographer of the New York Finance Company swore that she had seen Braker reading them. Cochran, who closed the transaction, swore that on the day in question he handed the assignment and affidavit to Braker, who read them both over in his presence. The closing papers consisted of the assignment already mentioned, and of two affidavits, one executed by Florence Braker, Conrad Morris Braker's wife, and the other by Braker himself, which recited that he would be 44 years of age on the 25th day of February, 1902, that he had made certain assignments of his interests, under the will, but that except for such assignments the remainders were unincumbered. The affidavit of Florence Braker, which was executed on the 18th day of February, 1902, at Stamford, Conn., and which had been taken there for that purpose, recited that she was fully acquainted with the facts and that she knew of no sale other than those recited by Braker himself. In her deposition, Florence Braker swore that she signed the affidavit without reading it, but she said that Helfrich, who was an intermediary between Braker and the New York Finance Company, told her that, if her husband died before he reached 55, the company would have to lose the money; that that was a risk they would have to run, as they would get nothing. She also swore that Helfrich had told her that the transaction was a loan, which her husband could be rid of if he paid back the money he had received.

Braker, as part of the transaction here in question, had originally agreed to insure his life for the benefit of the New York Finance Company, and after application to four or five of the leading insurance companies he had been rejected as a bad risk, owing to a supposed affection of the kidneys. In view of this failure there were executed two additional papers at closing, an added assignment of $1,800 in place of the policy, and a collateral agreement for the release of this assignment, if within a year he should secure the policy of insurance above mentioned. He never procured the insurance, and the assignment, therefore, remains outstanding.

Conrad Morris Braker had made several prior transactions of the same or nearly the same character. On January 25, 1901, he borrowed of Mehry R. Loeb $5,000, payable on July 21, 1905, and assigned to him as collateral an interest to the extent of $20,000 under the fourteenth item of the will. On February 7, 1901, Loeb released to Conrad Morris Braker one-half of his interest under the fourteenth item of the will, and on February 11, 1901, Braker borrowed $2,500 from one William H. Sage, and assigned to Sage $8,000 of the one-half released by Loeb to Braker as aforesaid. On April 18, 1901, Braker assigned to Frank L. Rabe seven-tenths, or $35,000 of the bequest of the contingent remainder, $50,000, payable to him under the fifteenth item of the will on February 25, 1913. In this assignment there was a further provision that, if that bequest was insufficient, it should be made up under the sixteenth item of the will. For this Rabe paid him $3,500. On June 13, 1901, Braker assigned to Rabe all his remaining interest under the fourteenth item of the will, to wit, the remainder of $20,000, payable July 31, 1905, and $10,000

payable July 31, 1910, subject to the prior assignments of Loeb for $5,000 and to Sage of $8,000. For this Rabe paid him $2,500. These assignments to Rabe antedated the formation of the New York Finance Company, but were made by him in the interest of that company when formed, and were assigned to the company on October 1, 1901.

Braker, further to secure Sage and Loeb in their loans, took out three policies of insurance upon his life in the Penn Mutual Life Insurance Company, which he assigned to them as collateral, one of which went to Loeb and two to Sage. On the 18th of April, 1901, Braker assigned to Rabe any equity he might have in the Sage policies as added security for the advance of $3,500, and on the 13th of June, 1901, he assigned any equity which he might have in the Loeb policy as added security for the advance of $2,500. On April 23, 1901, Braker also took out two policies in the Equitable Life Insurance Company, of $7,500 each. These he assigned on April 24, 1901, to Rabe, as added security for the advance of that day.

On July 21, 1905, one remainder of $20,000 under the fourteenth item of the will fell in, and Braker was paid. He distributed this, $5,000 to Loeb, $8,000 to Sage, and $7,000 to Rabe. On that day there remained due under Rabe's assignment of April 18, 1901, $35,000 out of the remainders created by the fifteenth and sixteenth items of the will, and under Rabe's assignment of June 13, 1901, $10,000 out of the remainder created by the fourteenth item, which would fall due on July 21, 1910. By a suit in the Supreme Court of the State of New York between the New York Finance Company and Rabe, the assignment of June 13, 1901, was adjudicated usurious and void, and there remained due at the beginning of this suit, therefore, only the assignment in suit, and the assignment of April 18, 1901. Conrad Morris Braker became 55 years of age on February 25, 1913, and the legacies became payable under the fifteenth and sixteenth items of the will.

The trustee was made a party, and raises no question, except to the jurisdiction of the court and the absence of certain parties, so that the substantial controversy is between the executors of Wood on the one hand and Braker on the other.

Nathan A. Smyth and Peter B. Olney, Jr., both of New York City, for plaintiffs.

Safford A. Crummey and Alfred G. Reeves, both of New York City, for defendant Braker.

William P. S. Melvin, of New York City, for defendant trustee.

LEARNED HAND, District Judge (after stating the facts as above). There are two preliminary questions of fact which require solution: First, whether Braker understood the character of the transaction at the time of its execution; and, second, whether the New York Finance Company had recourse to any life insurance policies as security for the advances.

I have no hesitation in finding that Braker understood the character of the transaction. He was at that time 44 years old, and had been engaged with money lenders in four transactions within the year. His testimony is therefore not only inherently unlikely, but he is contradicted directly by Cochran, Depue, and Mrs. Jewell, and in effect by his wife, who says that Helfrich told her that, if her husband died before February 25, 1913, the company would lose its money, information inconsistent with the idea that it was an unconditional loan, as Braker now says. Furthermore, neither side dared call Helfrich, a consideration counting against the defendant rather than the plaintiffs, because it rests upon him to show that the transaction was not what the documents make it appear. The burden of proof in such cases

rests upon those who would show it as of a different character from what is written.

I think it clear that the life insurance policies should not be taken as applicable to the transaction of February 25, 1902, and yet it is only if they were so intended that they may be considered upon the question of usury. The parties meant Rabe to recover the whole face of the assignments of April 18 and June 13, 1901; they had no intention of regarding them as security for the advances. It is precisely on that account that one of them has already been held to be usurious, and that the other may be so held; at least, it has been challenged. If Braker were to die, the assignments became due; it was likewise the purpose of the parties, not that the policies should be security for a loan, but that Rabe should have the whole of them. At least, that is the way in which the documents read, and there is nothing to contradict them. The parties intended the transactions to take place just as they were written, and could not, therefore, have intended the policies to be available upon the transaction of February 25, 1902. It is irrelevant that they *might* have used the overplus of the policies to secure the repayment of February 25, 1902, if they had regarded the Rabe advances as loans, because they did not consider that they were loans at all. On February 25, 1902, they also tried to get a policy, and they would have affected the whole transaction with usury if they had succeeded; but their effort shows that they did not regard the existing policies as available upon this transaction. Moreover, even if they had intended the policies to stand as security for the transaction at bar, their intent would have been ineffectual, because the Rabe transactions were void for usury, and with them fell the policies. I do not, indeed, think that the fact of these policies' being void affects the situation, which must be controlled by the intent of the parties on February 25, 1902; but the argument was made that intent was not the measure, and it is a perfect answer that the policies *could* not be added security, because, being usurious, they were available for no purpose.

[1, 2] These questions of fact being disposed of, the first question of law which arises is whether the transaction, without the security of any life insurance policies, was usurious. In Rex v. Drury, 2 Lev. 7, Lord Hale seems to have thought that the obligor must be bound to pay the principal in order to constitute usury; but such is certainly not the law, and that case was disapproved in Scott v. Lloyd, 9 Pet. 418, 447, 9 L. Ed. 178. The general test is whether the principal is put at any genuine hazard. Chesterfield v. Janssen, 2 Vesey, 125; Tyson v. Rickard, 3 Har. & J. (Md.) 109, 5 Am. Dec. 424; Colton v. Dunham, 2 Paige (N. Y.) 267. A number of cases have come up in the state of New York similar to that at bar, and, indeed, some of them transactions of the New York Finance Company. They have generally been held usurious, but in all cases which I have been able to find they have been so held because, under all the possible circumstances, the principal must be repaid. Wetzlar v. Wood, 143 App. Div. 311, 128 N. Y. Supp. 50; Id., 154 App. Div. 890, 138 N. Y. Supp. 1148; Id., 214 N. Y. 639, 108 N. E. 1111; Hall v. Eagle Ins. Co., 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed 211 N. Y. 507, 105 N.

E. 1085; Hartley v. Eagle Ins. Co., 167 App. Div. 230, 152 N. Y. Supp. 686; Merc. Ins. Co. v. Gimbernat, 134 App. Div. 410, 119 N. Y. Supp. 130; Otten v. Freund, 150 App. Div. 434, 135 N. Y. Supp. 59; Braker v. N. Y. Fin. Co., 155 App. Div. 894, 139 N. Y. Supp. 1117; Id., 214 N. Y. 683, 108 N. E. 1090. In all these cases, either in one way or another, the payment of principal was secured beyond any but colorable hazard. Now it is quite clear that in the case at bar the parties started out, as I have said, upon a usurious transaction, and if Braker had been able to secure a policy of life insurance nothing could be said for its validity, because the principal would have been secured under all contingencies. But he was unable to get any insurance policy, and the necessary result, whatever the original purpose, was to imperil the principal, not upon a mere colorable hazard, but upon a genuine one. At that time he was 44 years old, and had been refused by at least four insurance companies as an undesirable risk, on account of his kidneys. The question whether he would live 11 years or not was a genuine hazard of the most real sort, which cannot be disguised by the fact that he has in fact lived out the time. Whatever other illegality the transaction may have, it was certainly not usurious.

[3] The second question of law is whether the case is one of those "catching bargains" against which a court of equity will relieve. The jurisdiction is among the oldest of the Court of Chancery (Aylesford v. Morris, L. R. 8 Ch. App. 484, 489), and is certainly connected with the preservation of family property (Twistleton v. Griffith, 1 P. Wms. 310), and the importance of protecting wealthy young heirs from ruining a patrimony before they feel the force of family traditions. It has never been defined with much clearness, for the language of Lord Hardwicke in Chesterfield v. Janssen, 2 Ves. Sr. 125, 155, 156, which seems to have been regarded as the best statement of the doctrine, does not, with deference, define anything at all beyond saying that there are circumstances short of deceit in which the court will regard one of the parties as at a relative disadvantage to the other. Until 1867 mere "inadequacy of consideration" was undoubtedly enough in England. Earl of Aldborough v. Trye, 7 Cl. & F. 436, 456; St. Albyn v. Harding, 27 Beav. 11; Foster v. Roberts, 29 Beav. 467. But the situation proved intolerable, and in that year by 31 Vict. c. 4, it was provided that such inadequacy alone should not upset the bargain.

In this country it is uncertain just what is the true rule. In Pennsylvania the law was early settled as the statute of Victoria settled it in England in 1867. Davidson v. Little, 22 Pa. 245, 60 Am. Dec. 81; Re Jackson, 203 Pa. 33, 52 Atl. 125; Re Phillip, 205 Pa. 511, 55 Atl. 212. The same is true in Virginia. Cribbens v. Markwood, 13 Grat. (Va.) 495, 67 Am. Dec. 775 (an excellent discussion); Mayo v. Carrington, 19 Grat. (Va.) 74, 107. In two early cases, one in New York (Osgood v. Franklin, 2 Johns. Ch. 1, 25, 7 Am. Dec. 513), and the other in South Carolina (Butler v. Haskell, 4 Desaus. 651, 697), language was used which certainly recognized the English rule, though it was not necessary to the decision. In Illinois the cases do not decide the point (Parsons v. Ely, 45 Ill. 232, Gary v. Newton, 201 Ill. 170, 66

N. E. 267; Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917), but leave it likely that inadequacy of consideration is not enough. In Massachusetts an early case certainly looks the other way, but nothing is decided. Trull v. Eastman, 3 Metc. 121, 37 Am. Dec. 126.

I accept the Pennsylvania and Virginia rule as more appropriate to our modern society. We have no public concern for the preservation of family inheritances, and ought, I believe, have no tenderness towards expectants of rich reversions. It may be that the purchase of a remainder carries with it the burden of showing that there was no exploitation of extreme need, no beguiling of youthful heirs, and even that the ancestor consented, when there is one—a doctrine very strange in American ears (Curtis v. Curtis, 40 Maine, 24, 63 Am. Dec. 651; Hale v. Hollon, 90 Tex. 427, 39 S. W. 287, 36 L. R. A. 75, 59 Am. St. Rep. 819; Boynton v. Hubbard, 7 Mass. 112); but I cannot believe that, in addition, it must be shown that the consideration was what the court may think adequate. Once the parties are shown capable of dealing with each other, I can see no possible reason for refusing them the right to make their own bargain. Even allowing that youth or poverty in such circumstances create an incapacity to contract, there is certainly no valid reason in America for preventing the sale of expectancies. If it be not so, we shall find it necessary to permit it by statute, as was done in England, for the supposed protection to such persons foils itself; they become incapable of selling when they need to sell.

I have hitherto assumed that the consideration here was inadequate, and perhaps it was; at least, the purchaser cannot show that it was not. Yet the matter is surely open to doubt, for, although the remainder was ten times, or nearly, the principal with interest to February 25, 1913, the hazard was wholly unknown and unascertainable. Actuarial tables are founded upon average lives, and Braker's was not such. His rejection by so many insurance companies proves that the hazard was not calculable, and it is quite impossible to fix the proper odds upon any basis but a guess. At least, we must concede that the consideration may have been adequate, though, were I to guess, I should say that it was not.

Except for that element, there is certainly no ground for interposing. Braker was 44 years old, and had had earlier experience in such matters. Even if the tutelage of his father would not have been preposterous under the circumstances, his father was dead; he was not an expectant heir, but a remainderman on his own estate for life. He had the assistance of Helfrich, an ambiguous intermediary, to be sure, but at least not shown to be of the lender's party. Most important of all, he was already affluent; his income of $9,000 a year not only provided for his necessities, but gave him much greater wealth than of 99 men out of 100. I find it hard to have patience with the waterish sentiment which seeks to make such a man the court's ward, and to protect him against the consequences of his own folly. If he is to have the enjoyment of great wealth, let him share its responsibility. If the prospect of a dollar so teased his appetite that the future ceased to be a reality, either let him be regarded as an incompe-

tent and put in ward, or let us treat him as a person in a world of persons, and let him weave his fate as he will. Whatever our judgment of those who profit by the imbecilities of their fellows, their punishment should not, as I think, be through the repudiation of a promise made under such circumstances. A hard bargain with a hard-pressed man is one thing; we do not allow a workman to barter away his protection from injury. But a hard bargain with a well-furnished spendthrift is another; I can see no social purpose in giving such a one an immunity which the community at large does not enjoy.

[4] The next question is of the plaintiffs' capacity to sue. The assignment of 1912 was clearly sufficient to pass any interest in the sixteenth item, for it was made to them as executors, and they did not take it by operation of law. However, it is quite likely that the remainder under this item will not be enough for the full debt, so that the question arises of their capacity to sue for the remainder created under the fifteenth item. They have filed the papers requisite under section 1836a of the New York Code to enable a foreign executor to sue in a New York court. The question is whether that statute should be held to cover a cause originally brought in a federal court. Had it been removed from the state court, Hayes v. Pratt, 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279, would control; but it was not. Section 1836a in form applies only to the state courts, and a literal interpretation of it would prevent its use in such a case as this, yet I am disposed to interpret it as meaning that the state of New York recognizes, under the conditions specified, the right of foreign executors to collect by process of law the property of their decedent within the state, a matter over which the state of New York has entire control. Such executors may come into a federal court, it is true, only under the terms of an act of Congress; but, if the substantive right is given them, the acts of Congress are sufficient. Their incapacity is not procedural, but because administration is in rem, and the law of the territory where the res is situated, may recognize any one as a proper representative of the decedent. I cannot believe that the purpose of section 1836a was to recognize the foreign executor as such a proper representative only when he sued in a state court. Lecouturier v. Ickelheimer (D. C.) 205 Fed. 683.

The last question is of the supposed prior conveyance by the New York Finance Company to Banes. At the trial I said that, if the trustee continued to press the point that the plaintiffs' title was affected by these conveyances, the matter would have to come up again, because it was not clear to me just what the situation was in that regard. If that matter, which certainly can be cleared up, is not pressed, the plaintiffs may take a decree as prayed, with costs, without further delay.

JOHNSON v. BARRETT et al. (two cases).

(District Court, N. D. Georgia. October 9, 1916.)

Nos. 73, 74.

1. BANKRUPTCY ⟸180—FRAUDULENT TRANSFERS—INTENT—EVIDENCE.

To constitute a fraudulent conveyance, voidable under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1913, § 9651), there must have been an actual intent to hinder, delay, or defraud creditors, and the measure of proof required to establish such intent is the same that would be required to set aside a conveyance as fraudulent against creditors at common law. Evidence which only justifies a suspicion of fraud is not sufficient.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 252, 253; Dec. Dig. ⟸180.]

2. BANKRUPTCY ⟸184(2)—PREFERENCES—TRANSFERS OF PROPERTY—RECORDING LAWS.

A state statute requiring conveyances of real estate to be recorded to render them valid against subsequent purchasers or incumbrancers in good faith without notice, but under which they are valid without recording as against general creditors of the grantor, is not a law requiring them to be recorded, within the meaning of Bankr. Act 1898, § 60a, as amended by Act Feb. 5, 1903, c. 487, § 13, 32 Stat. 799 (Comp. St. 1913, § 9644), and for the purposes of the act a conveyance in such state is effective from its date.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⟸184(2).]

In Equity. Suit by A. A. Johnson, trustee in bankruptcy of Elmo L. Barrett, against Elmo L. Barrett, and others. Decree for defendants.

John M. Slaton and J. H. Porter, both of Atlanta, Ga., for complainant.

A. C. Wheeler, of Gainesville, Ga., and I. L. Oakes, of Lawrenceville, Ga., for defendants.

NEWMAN, District Judge. The testimony in these two cases, taken before me, has all been written out, and the testimony of Mrs. F. S. Barrett and J. T. Chamlee, which was taken by consent by a commissioner since the last hearing before me in June, has been filed, and is now before the court.

After considering all of this evidence carefully, it is perfectly clear to me that there is no case whatever made against Mrs. F. S. Barrett, or as to the lot conveyed by her son, Elmo L. Barrett, to her. The evidence shows, I think satisfactorily, that the Southern Oak Leather Company was indebted to Mrs. Barrett in the sum of $500, and Elmo L. Barrett was indebted to her individually in the sum of $150 or $200. Elmo L. Barrett took up the debt, or assumed the debt, due by the Southern Oak Leather Company to his mother in the year 1913, and conveyed the house and lot to her in consideration of the debt, and she accepted the real estate for the debt.

I might add that it seems to me perfectly clear that she put the money she received from Harrison into the hands of Mr. Newton,

cashier of the Citizens' Bank of Gainesville, and that he recently paid her back the money. So that, without any hesitation, the transaction as between Mrs. F. S. Barrett, the mother, and Elmo L. Barrett, must be considered as a legal and valid transaction, and there is no possible chance of recovery here.

As to the other matter, the property transferred by Elmo L. Barrett to his father, F. S. Barrett, there are some circumstances which throw more doubt around that; but these circumstances are slight, and are insufficient in my judgment to justify a recovery from him by the trustee.

The note introduced in evidence, given by Elmo L. Barrett to F. S. Barrett, has been criticized by counsel for the plaintiff here, and, as I understand it, it is urged that the court should hold that there is evidence sufficient to show that it was made after the time it bears date. The paper is dated November 15, 1902, and the figure "2" is evidently made over what was first a figure "3," which would make it November 15, 1903. As I understand the contention, it is that it was dated back, that it was made some time after the date it purports to have been written, and in thus dating it when made it was first dated 1903, and it was then thought that would not do, and it was changed to 1902.

There is suspicion aroused by the looks of this paper, undoubtedly; but I do not think it is sufficient to justify a recovery without a stronger case otherwise than is made here. Strong reliance was placed upon the fact that about the time or just before the Southern Oak Leather Company was placed in bankruptcy, and not very long before Elmo L. Barrett himself became a bankrupt, certain papers were witnessed by Letson, justice of the peace, who testifies that they were folded back in such a way that he did not see the dates. He does not know anything at all about what the papers were, and says they might have been deeds, or, as I understand him, might have been bonds for title, he does not know. Elmo L. Barrett testified positively that the deed was made and that it was witnessed long before that time, he says in January, 1913, as I understand it, and that it was delivered to his father F. S. Barrett in the March following.

[1] It would be the merest inference, and arrived at, so far as I can see, only upon suspicion, to decide that the papers witnessed by Letson, justice of the peace, in the latter part of 1914, were the deeds in question.

Another thing to which weight is attached by the plaintiff is the testimony by A. C. Harrison as to the facts connected with his purchase of the property from F. S. Barrett, and particularly as to the money he says passed between them. Undoubtedly this testimony may be very justly criticized, and if the case depended entirely upon Harrison getting a good title from F. S. Barrett I would be very much inclined to think the plaintiff could recover as to that property; but it seems to me, if F. S. Barrett got a good title from his son, Elmo L. Barrett, it is immaterial whether his transaction with Harrison was foolish and fraudulent or not. If the transaction between Elmo L. Barrett and F. S. Barrett was a valid and legal transaction as between them, it would not seem to make any difference if F. S. Barrett after-

wards for some reason, even if, under foolish advice, he was frightened about his title to the property, should have made a transfer of it to Harrison for the purpose of strengthening his title, as he thought.

Having concluded, as I feel I must, that the transaction between the two Barretts, Elmo L. and F. S. Barrett, was a binding transaction, and was not made simply for the purpose of hindering, delaying, and defrauding creditors, but was made without any fraudulent intent as to creditors, and to pay his father, as he says, what he must undoubtedly from this evidence have owed him, it necessarily follows that the old gentleman would have a right to do what he pleased with it thereafter, and, however suspicious the transfer to Harrison might appear, it would give no ground for recovery here.

The law covering this case is well settled in Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008. In the opinion in that case by Mr. Justice Day this is said:

"A consideration of the provisions of the bankruptcy law as to preferences and conveyances shows that there is a wide difference between the two, notwithstanding they are sometimes spoken of in such a way as to confuse the one with the other. A preference, if it have the effect prescribed in section 60, enabling one creditor to obtain a greater proportion of the estate than others of the same class, is not necessarily fraudulent. Preferences are set aside when made within four months, with a view of obtaining an equal distribution of the estate, and in such cases it is only essential to show a transfer by an insolvent debtor to one who himself or by his agent knew of the intention to create a preference. In construing the Bankruptcy Act this distinction must be kept constantly in mind. As was said in Githens v. Shiffler [D. C.] 112 Fed. 505: 'An attempt to prefer is not to be confounded with an attempt to defraud, nor a preferential transfer with a fraudulent one.' In In re Maher, 144 Fed. [D. C.] 503–509, it was well said by the District Court of Massachusetts: 'In a preferential transfer the fraud is constructive or technical, consisting in the infraction of that rule of equal distribution among all creditors, which it is the policy of the law to enforce when all cannot be fully paid. In a fraudulent transfer the fraud is actual; the bankrupt has secured an advantage for himself out of what in law should belong to his creditors, and not to him.'

"Is the conveyance voidable under subdivision 'e,' § 67? Under the terms of that subdivision a fraudulent conveyance is made void as to creditors, except as to grantees in good faith and for a present fair consideration. The provision saving conveyances to purchasers in good faith and for a present fair consideration prevents such conveyances from being declared void by the act, although they have been made by the bankrupt with intent on his part to hinder, delay or defraud his creditors. But the act does not dispense with the necessity of showing, to avoid a conveyance or transfer under section 67e, that the bankrupt had the actual intent to hinder, delay, or defraud creditors. What is meant when it is required that such conveyances, in order to be set aside, shall be made with the intent on the bankrupt's part to hinder, delay, or defraud creditors? This form of expression is familiar to the law of fraudulent conveyances, and was used at the common law, and in the statute of Elizabeth, and has always been held to require, in order to invalidate a conveyance, that there shall be actual fraud; and it makes no difference that the conveyance was made upon a valuable consideration, if made for the purpose of hindering, delaying, or defrauding creditors. The question of fraud depends upon the motive. Kerr on Fraud and Mistake, 196, 201. The mere fact that one creditor was preferred over another, or that the conveyance might have the effect to secure one creditor and deprive others of the means of obtaining payment, was not sufficient to avoid a conveyance; but it was uniformly recognized that, acting in good faith, a debtor might thus prefer one or more creditors. Stewart et al. v. Dunham et al., 115 U. S. 61 [5 Sup. Ct.

1163, 29 L. Ed. 329]; Huntley v. Kingman, 152 U. S. 527, [14 Sup. Ct. 688, 38 L. Ed. 540.]

"We are of opinion that Congress, in enacting section 67e, and using the terms 'to hinder, delay, or defraud creditors,' intended to adopt them in their well-known meaning as being aimed at conveyances intended to defraud. In section 60 merely preferential transfers are defined, and the terms on which they may be set aside are provided; in section 67e, transfers fraudulent under the well-recognized principles of the common law and the statute of Elizabeth are invalidated. The same terms are used in section 3, subdivision 1 [Comp. St. 1913, § 9587], in which it is made an act of bankruptcy to transfer property with intent to hinder, delay, or defraud creditors. Such transfers have been held to be only those which are actually fraudulent. It was so held in Lansing Boiler & Engine Works v. Ryerson, [128] Fed. 701 [63 C. C. A. 53]. Considering the language, which is identical with that in section 67e, the Circuit Court of Appeals, speaking through Judge Severens, said: 'The language of subsection 1 of section 3 is the familiar language of statutes against conveyances fraudulent as against creditors, and we think there can be no doubt that Congress intended the words employed should have the same construction and effect as have for a long period of time been attributed to those words. Githens v. Shiffler [D. C.] 112 Fed. 505. And, so construed, the test of the conveyance intended by subsection 1 of section 3 is that of the bona fides of the transfer. Loveland's Bankr. (2d Ed.) § 51. For it is the well-settled law that a conveyance made in good faith, whether for an antecedent or a present consideration, is not forbidden by such statutes, notwithstanding that the effect may be that it hinder or delay creditors by removing from their reach assets of the debtor.'

"And to the same effect is the decision of the Circuit Court of Appeals of the Second Circuit in In re Bloch, 142 Fed. 674 [677, 74 C. C. A. 250], in which that court had occasion to consider the meaning of section 67e, as applicable to section 57g of the act, as amended in 1903 [Comp. St. 1913, § 9641], requiring the surrender of preferences voidable under section 60, subdivision 'b,' or of fraudulent conveyances voidable under section 67e, in order to make proof of a claim, and in considering section 67e, Judge Townsend, speaking for the court, said: 'We think Congress must be presumed to have intended by the introduction of section 67e to require a surrender only of such transfers as would have been fraudulent at common law, or would constitute an act of bankruptcy under section 3 of the act. In Githens v. Shiffler, supra, the bankrupt used the proceeds of a sale of property to prefer certain creditors. The court, upon a review of the authorities, held that section 3 applies only to those transfers which, according to the established course of authority, constituted a fraudulent transfer at the time of the passage of the Bankruptcy Act, and held that a mere preferential transfer, as distinguished from a fraudulent one, was not an act in bankruptcy under said section 3. The question as to whether a transfer is made with intent to hinder, delay, or defraud depends upon whether the act done is a bona fide transaction. Loveland on Bankruptcy, 391; Cadegan v. Kennet, 2 Cowper, 435; Lansing Boiler & Engine Works v. Ryerson, supra. An intent to defraud is the test of the right to avoid a transfer under section 67e.'

"In dealing with this question this court said, in Thompson v. Fairbanks, 196 U. S. 516 [25 Sup. Ct. 306, 49 L. Ed. 577]: 'There is no finding that in parting with the possession of the property the mortgagor had any purpose of hindering, delaying, or defrauding his creditors or any of them. Without a finding to the effect that there was an intent to defraud, there was no invalid transfer of the property under the provisions of section 67e, of the bankruptcy law.' That it is essential to show actual fraud, in order to invalidate conveyances under 67e, is the view of the text-writers upon this subject. Loveland on Bankruptcy (3d Ed.) 476; Collier on Bankruptcy (6th Ed.) 562; 1 Remington on Bankruptcy, § 1498.

"We do not agree, if such is to be held the effect of the third conclusion of law in the finding of the Court of Appeals, that the giving of the mortgage and its effect upon other creditors could not be considered as an item of evidence in determining the question of fraud. What we hold is that, to constitute a conveyance voidable under section 67e, actual fraud must be shown."

The case as presented—and strongly presented—for the trustee makes, at the most, a suspicion of wrongdoing in these transactions; hardly a suspicion as to Mrs. Barrett, the mother of the bankrupt, but at the most only a suspicion. The testimony of all three of the Barretts, the father, the mother, and Elmo L. Barrett, the son and the bankrupt, shows that these papers were all executed and delivered about 18 months before the bankruptcy of the Southern Oak Leather Company, and more than that before the personal and individual bankruptcy of Elmo L. Barrett.

[2] I do not remember that there was much reference in argument to the fact that the deeds to Mr. and Mrs. F. S. Barrett were not recorded until shortly before the bankruptcy, some 2 months before the bankruptcy of the Southern Oak Leather Company, and about 3½ months before the individual bankruptcy of Elmo L. Barrett, upon the idea that under the amendment to section 60 of the Bankruptcy Act the 4 months should not expire until 4 months "after the date of the recording or registering of the transfer, if by law such recording or registering is required." If it should be contended that under this amendment to the Bankruptcy Act the transfers were within the 4 months because in Georgia they were required to be recorded, then the case of Carey v. Donohue, 240 U. S. 430, 36 Sup. Ct. 346, 60 L. Ed. 538, would be important. The headnotes of that case will, I think, show what was decided, without attempting to quote from the opinion. The first headnote is this:

"The reference to the requirement for record in section 60 of the Bankruptcy Act is not to a requirement for the protection of bona fide purchasers without notice and who are outside the purview of the act, but to a requirement of record for protection of creditors and persons interested in the bankrupt's estate and in whose behalf or place the trustee is entitled to act; and where there is no such requirement, and the transfer was made more than 4 months before the filing of the petition, there can be no recovery under section 60."

The second headnote is as follows:

"A provision in a state statute that instruments conveying real estate shall, until filed for record, be deemed fraudulent only so far as relates to subsequent bona fide purchasers without knowledge or notice, as in section 8543, General Code of Ohio, is not a requirement that the instrument be recorded within the meaning of section 60 of the Bankruptcy Act."

The law in Georgia is very much like the law in Ohio; that is, record is not necessary against general creditors, but is necessary as to bona fide purchasers without knowledge or notice, and also mortgagees without such notice or knowledge. So that these transfers being made to settle existing indebtedness, it is the date of the conveyance and the date of the execution that would be resorted to, to determine the validity of the transfer, and not the date of its record necessarily under the amendment to section 60 of the Bankruptcy Act.

It may be well to state here the testimony of Elmo L. Barrett as to how he came to make these deeds and how they came to be witnessed afterwards. His testimony is that he made out the deed to his father on the date it bears date (November 14, 1912), and some little time after that he intended having it witnessed by the justice

of the peace, and went to his office in the evening on his way home, but failed to find the justice of the peace, Mr. L. H. Letson, in his office; but he got a man by the name of D. B. Wall to witness it, and put it back in his pocket, and carried it to his office. Afterwards he got Mr. L. H. Letson, the justice of the peace, to sign it. He thinks he carried Mr. Letson four or five papers to witness for him at the time he carried him the deed to his father in question here, and that it was some time the 1st of January, near the first of the year, that he had Mr. Letson witness this deed with the other papers. Afterward his father came to Norcross, to his place of business, and he handed him the deed; but his father told him to keep the deed for him and look after the property, and he put the paper in his safe, where it remained until he filed it for record in November, 1914.

L. H. Letson says he was justice of the peace prior to the time of this transaction, but resigned in February, 1912, and then he was appointed notary public and ex officio justice of the peace, and thinks his commission was dated January 3, 1913. He was not either justice of the peace or ex officio justice of the peace in November, 1912; but, as I have stated, Elmo L. Barrett says that he took the papers to him about the first of the year 1913, and the presumption is, of course, that Mr. Letson would not undertake to do an official act while he was not an officer, so that necessarily it was after January 3, 1913, which would be entirely consistent with the testimony of Elmo L. Barrett and of the justice of the peace.

There is nothing at all in the evidence, it seems to me, except a suspicion, as I have stated, that the deed from Elmo L. Barrett to his mother was not executed at the time he states—that is, the date it bears in July, 1913—and delivered some time near that time, when she was at his home.

A careful examination of the deeds fails to disclose anything, so far as their appearance goes, to contradict the testimony here of the Barretts about them. The old couple, Mr. F. S. Barrett and his wife, lived in Gainesville at the time of these transactions, while the son lived in Norcross, and the property he conveyed to them was in Norcross; so I do not see anything in the fact that he continued to collect the rents on the property and to look after it for his parents. He was located in Norcross and familiar with it; they were quite old, and the mother in feeble health, so that would seem to be, not only reasonable, but the natural and probable thing they would do under the circumstances. Both of them swear that they had no knowledge whatever that their son, Elmo L. Barrett, was in failing circumstances, or that he was not doing well in his business and perfectly solvent.

There is nothing in the evidence, absolutely nothing as to the mother, and I do not see that there is anything as to the father, to contradict what they say about this. A finding in favor of the trustee and against them in these cases would be absolutely without justification, if the ordinary rules and the rules of law governing such transactions are applied. Elmo L. Barrett seems to have been justified in supposing himself in good financial condition at the time these deeds are

said to have been made, and it was not until the fall of 1914, after the European War commenced and times became so stringent, that he appears to have been in failing circumstances.

The result is that decrees must be entered dismissing the bills.

MILTON MFG. CO. v. CHICAGO, B. & Q. R. CO. (TAYLOR, Intervener).

(District Court, S. D. Iowa, Ottumwa Division. September 15, 1916.)

1. RAILROADS ⊜469—FIRES—EXEMPTION FROM LIABILITY—LEASE.

A condition in a lease of part of a railroad right of way, whereby the lessee agreed to hold the railroad company harmless from all suits and claims for damage occasioned by fire communicated from locomotives of the company, whether caused by negligence or not, is valid, and no recovery can be had by the lessee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊜469.]

2. RAILROADS ⊜469—FIRES—EXEMPTION FROM LIABILITY—LEASE.

A lease of a portion of a railroad right of way, providing that the railroad company should not be liable for damage by fire communicated from its locomotives, though the result of negligence, provided that on termination of the lease according to an option reserved to either party the lessee should remove at once from the premises all structures and property not belonging to the company, and in case of failure the company might remove the same at his expense. The lessee terminated the lease, but continued in the possession of the property without any new lease or new arrangement as to possession. *Held* that, by continuing in possession in violation of his covenant to remove, the lessee could not escape the effect of the covenant freeing the railroad company from liability for fires communicated by its locomotives.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊜469.]

3. PARTIES ⊜40(2)—INTERVENTION—INTEREST.

Where a railroad company allows sparks to escape from its locomotive, and they fire property, the railroad company cannot be subjected to two suits for the same wrong, although, if the property be subject to a mortgage, the mortgagee, having an interest therein, may intervene in a suit by the mortgagor.

[Ed. Note.—For other cases, see Parties, Cent. Dig. §§ 62, 67; Dec. Dig. ⊜40(2).]

4. RAILROADS ⊜469—FIRES——EXEMPTION FROM LIABILITY—LEASES.

A lease of a portion of a railroad company's right of way declared that the lessee should hold the company harmless from all claims, demands, and suits for loss, injury, or damage, including loss or damage occasioned by fire communicated from the locomotives of the company, whether caused by negligence or not. The lessee erected a building on the demised premises, and gave a chattel mortgage upon its stock of goods therein contained. The mortgagee had no notice, either actual or constructive, of the lease or the exemption. *Held*, that the exemption should be construed merely as a contract of indemnity whereby the lessee was to protect the company from all claims, and therefore the mortgagee, not knowing of the covenant, might recover, where the mortgaged property was burned through the negligence of the company.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊜469.]

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5. RAILROADS ⊂⊃469—FIRES—EXEMPTION FROM LIABILITY—LEASE—COVENANTS RUNNING WITH THE LAND.

In such case the condition cannot be *held* applicable to the mortgage on the theory that it was a covenant running with the land; the giving of a chattel mortgage not amounting to a conveyance, and the lessee not parting with his interest

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 1665; Dec. Dig. ⊂⊃469.]

At Law. Action by the Milton Manufacturing Company against the Chicago, Burlington & Quincy Railroad Company, in which Henry C. Taylor, trustee, intervened. On demurrer to the petition and petition of intervention. Demurrer to petition upheld, and demurrer to petition of intervention overruled.

E. Rominger, of Bloomfield, Iowa, for plaintiff.

Palmer Trimble, F. T. Hughes, and E. L. McCoid, all of Keokuk, Iowa, for defendants.

D. H. Payne and Henry C. Taylor, both of Bloomfield, Iowa, for intervener.

WADE, District Judge. The plaintiff leased a portion of the right of way of the defendant, and erected thereon a plant for the manufacture of ax handles, which plant, together with the stock of manufactured products, machinery, and fixtures, was destroyed by fire alleged to have been caused by the negligence of the defendant. The plaintiff brings this action to recover damages for the loss of said property, and the intervener, Henry C. Taylor, trustee, intervenes in the action, alleging that at the time of the fire he held a mortgage for $7,000 upon the property destroyed.

It appears from the petition of plaintiff, and the petition of intervener, that plaintiff acquired its right to construct its manufacturing establishment by a lease executed by the defendant, which lease contained the following clause:

"The lessee agrees to hold the railway company and the Chicago, Burlington & Quincy Railroad Company, its lessor, harmless from all claims, demands, suits, attorney's fees, and expenses, for loss, injury, or damage, including loss or damage occasioned by fire set out from the locomotive of the railway company, whether caused by the negligence of the railway company or otherwise, to the person or property of the lessee, the railway company, or its employés, or any other person whomsoever, while on or about the demised premises."

By demurrer to the plaintiff's petition, and the petition of intervention, the defendant raises the question that conceding the loss through the negligence of the defendant, the foregoing clause in the lease exempts the defendant from liability either to plaintiff or to the intervener.

[1, 2] First. As to the plaintiff's cause of action, it has been repeatedly held, under leases containing similar provisions, that the lessee could not recover. Griswold v. Railway Co., 90 Iowa, 265, 57 N. W. 843, 24 L. R. A. 647; City of New York Insurance Co. v. Railway Co., 159 Iowa, 129, 140 N. W. 373; Hartford Insurance Co. v. Railroad

Co., 175 U. S. 91, 20 Sup. Ct. 33, 44 L. Ed. 84; Hartford Co. v. Railway, 70 Fed. (8th Cir.) 201, 17 C. C. A. 62, 30 L. R. A. 193.

To avoid the rule announced in these decisions, the plaintiff alleges that prior to the time of the fire it had terminated the lease by serving notice in accordance with the terms thereof, and complying with the other provisions of the lease, authorizing either party to terminate the lease at any time.

It appears, however, from the petition, that, notwithstanding the alleged termination of the lease, the lessee continued in possession of the property without any new lease, and without any new arrangement as to such possession. Under these circumstances, I cannot hold that the lessee has any greater rights after the termination of the lease than it had while the lease was in force. One of the provisions of the lease is that upon termination thereof "the lessee shall remove at once from the premises all structures and property not belonging to the railway company, and in case of failure so to do the railway company may tear down or remove the same at the expense of the lessee." This provision of the lease made it the duty of the lessee, upon termination, to remove the property; and I cannot hold that, by continuing in possession of the property after the lease was terminated in violation of its covenant to remove, it acquired any greater rights, or rights less burdened, than those it possessed before the lease was terminated.

"The case of Bradley v. Covel, 4 Cow. 349, is analogous to the case before us, and in that the rule is fully recognized that, the tenant holding over without any new terms fixed, there is a tacit consent to the former terms of the lease." Newell v. Sanford, 13 Iowa, 191.

Under such a lease it is my opinion that when the party terminates it, and continues to occupy the property in violation of the terms of the lease, he must be held to elect to continue such possession, subject to all the conditions under which he held, while the lease was in force. He cannot, by his own wrong in remaining in possession in violation of the terms of the lease, place upon the lessor burdens from which, under the terms of the lease, the lessor was specifically exempt.

The demurrer to the petition of the plaintiff will therefore have to be sustained.

[3, 4] Second: Is the intervener—the mortgagee of the property kept upon the leased premises—barred from recovery by virtue of the contract between the landlord and the tenant?

It does not clearly appear what specific property was covered by the mortgage, but it is alleged that it covered "an interest in all of said property," which is described as "a large stock of handles and material for the manufacture of handles." So that it affirmatively appears that the trustee was the mortgagee in a chattel mortgage covering personal property contained in buildings upon the leased premises. It further appears from the petition that the mortgagee had no notice, either actual or constructive, of the lease, or the provisions in the lease, pertaining to exemption from damage by fire or other acts caused by the negligence of the defendant.

The first question necessary to be determined, so far as the intervener is concerned, is: What was the effect of the clause in the lease

above quoted? It will be observed that the lessee agrees "to hold the railway company and the Chicago, Burlington & Quincy Railroad Company, its lessor, harmless from all claims, demands, suits, attorney's fees, and expenses, for loss, injury, or damage, including loss or damage occasioned by fire set out from the locomotives of the railway company, whether caused by the negligence of the railway company, or otherwise, to the person or property of the lessee, the railway company, or its employés, or any other person whomsoever, while on or about the demised premises."

Does this language of the contract undertake to exempt the company from liability for negligence, or does it undertake to bind the lessee to indemnify the company for any damages it might be compelled to pay because of its negligence? Even if it undertook to exempt the railway company from liability for negligent destruction of the property of a third person, I do not believe that in the absence of consent of the third person to the terms of the contract, or at least in the absence of notice to him, that he would be bound by the contract between the lessor and the lessee. In fact this has been repeatedly held.

In Texas & Pacific Railway Co. v. Watson, 190 U. S. 287, 23 Sup. Ct. 681, 47 L. Ed. 1057, where cotton was destroyed upon a platform erected by a lessee under a contract similar to the contract in this case, the Supreme Court of the United States says:

"Seventh. The remaining assignment of error is to the effect that error was committed by the appellate court in affirming the judgment despite the fact that the trial court refused to admit in evidence the stipulations and exemptions from liability from loss caused by fire contained in the lease under which the lessee held possession and occupancy of the storage platform on which the cotton in question was when destroyed by fire. As Watson was not in privity with the lessee—and it is conceded he had no knowledge of such stipulations when he stored his property on the platform—there was no tenable ground on which to contend that he was in any wise bound by the stipulations in question."

In Brewer v. Railway, 124 N. Y. 59, 26 N. E. 324, 11 L. R. A. 483, 21 Am. St. Rep. 647, the subject is fully considered in the following:

"It, however, does not appear that the plaintiff's intestate had any knowledge or information of the provisions of the contract between the two companies. When he entered into the service of the express company, he assumed the ordinary hazards incident to that business in his relation to that company, but there was no presumption, or implied understanding, that the messenger took upon himself the risks of injury he might suffer from the negligence or fault of the defendant. He was in no sense the employé of the defendant, nor could he, without his consent, be subjected to the responsibilities of that relation. Railway Co. v. Ivy, 71 Tex. 409 [9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758]. He was lawfully in the car, having the charge of the property and business there of the express company under its employment; and, although he paid no fare to the defendant, was carried by virtue of no contract made by him personally with the latter, and must have understood that he was there pursuant to some arrangement of his employer with the defendant, he was not necessarily by that fact chargeable with notice of the provisions in question of the contract. Presumptively, he was entitled to protection against personal injury by the negligence of the defendant. Blair v. Railway Co., 66 N. Y. 313 [23 Am. Rep. 55]; Nolton v. Railway Co., 15 N. Y. 444 [69 Am. Dec. 623]; Smith v. Railroad Co., 24 N. Y. 222; Id., 29 Barb. 132; Collett v. Railroad Co., 16 Adol. & E. (N. S.) 984. And it is not seen how Brewer could, without his knowledge or consent, be placed in such relation to the defendant as to relieve it from liability to him for the consequences

of its negligence affecting him personally His contract of employment with the express company for its service did not, so far as appears, impose upon him such hazards, nor was he chargeable with the stipulations in the contract between those companies, except so far as they, through notice to him or otherwise, entered into that pursuant to which he went into, or remained in, the service of the express company. The negligence of the defendant was the violation of its duty. It was the want of the care to which the plaintiff's intestate was entitled for his protection. This duty, and such right, did not depend or rest upon contract, but upon the relation as carrier of the plaintiff, and the care which the defendant, as such, was required to exercise. It is violated duty that furnishes the ground of an action for negligence, and, where there is no duty, there is no liability for such cause. We are unable to see, in principle, any legal support for the proposition that a person entering into a contract of service with one employer may, without his knowledge or assent, be made to assume the hazards of a service conducted by another, and in which he is not engaged, and be personally subjected to the consequences of the negligence of the latter, without remedy against him. No such question was in the case of Seybolt v. Railroad Co., 95 N. Y. 562 [47 Am. Rep. 75], which arose out of the same disaster. The contract between the companies did not purport to relieve the defendant from its duty to exercise due care for the protection of the messenger. Nor did the defendant take from it any right to disregard such duty; but whatever right to relief from the consequences of its negligence in that respect the defendant derived from the contract arose, by way of indemnity, upon the stipulations of the express company."

The mortgagee of property is the owner of an interest therein, and in case of its negligent destruction he has the right, in a proper proceeding, to recover against the wrongdoer; the wrongdoer cannot be subjected to two suits for damages—one by the mortgagor and one by the mortgagee. The wrongdoer is entitled to have all the questions of liability determined in one action, and where, as in this case, the mortgagor brings suit, the mortgagee has a right to intervene, and, despite the fact that the mortgagor is barred from recovery because of some private stipulation between him and the lessor, the right of the mortgagee to proceed to recover for the wrong done to him as mortgagee cannot be denied. I do not know of any reason why the interest which the mortgagee owned in this property should not be considered, for all the purposes of this case, property for the destruction of which the mortgagee should be entitled to recover to the extent of his interest, unless he is barred by the provisions of the lease.

And in the absence of knowledge or notice I do not see any reason why such mortgagee, who in good faith and in the ordinary course of business accepts a mortgage upon property contained in a building or warehouse erected upon railway ground under such a lease, should not, so far as a wrongdoer is concerned, stand in practically the same position as did the owner of the cotton stored upon the platform in the Watson Case, supra.

But my construction of this lease is not that it exempts the company from all liability for negligent destruction of the property of a third person. A contract of this kind should be strictly construed. It is a contract close to the line of invalidity upon grounds of public policy. It is a contract evidently prepared by the defendant, and in case of doubt should be most strictly construed against it. In Kenney v. Railway, 125 N. Y. 422, 26 N. E. 626, the Supreme Court of New York says:

"Our decision, however, is placed upon the ground that this contract does not, in unmistakable language, provide for an exemption from liability for the negligence of the defendant's employés. The rule is firmly established in this state that a common carrier may contract for immunity from its negligence, or that of its agents, but that, to accomplish that object, the contract must be so expressed, and it must not be left to a presumption from the language. Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement ipsissimis verbis. The doctrine of such contracts was stated by this court in the case of Perkins v. Railroad Co., 24 N. Y. 196, 206 [82 Am. Dec. 281]. It was reiterated in the opinion of Judge Allen in Blair v. Railroad Co., 66 N. Y. 313, 318 [23 Am. Rep. 55]; and in Mynard v. Railroad Co., 71 N. Y. 180 [27 Am. Rep. 28], Church, C. J., reviewing the question at some length, considered the prior decisions of this court, and referred to certain decisions in the United States Supreme Court holding a different doctrine as to such agreements. In recognizing the right of the carrier to contract for its immunity from the results of negligence, he stated the general rule to be that such contracts must be expressed in unequivocal terms. This decision was followed, as being decisive of the question, in the later decisions in Holsapple v. Railroad Co., 86 N. Y. 275, Nicholas v. Railroad Co., 89 N. Y. 370, and Canfield v. Railroad Co., 93 N. Y. 532 [45 Am. Rep. 268]. The cases cited related to the carriage both of goods and of persons, but no reason exists for making a distinction in the application of the rule that general words and language, capable of other operation, will not be construed to limit the responsibility of the carrier for negligence. The rule is a salutary and a reasonable one. It offers no difficulties in its reduction to practice in the making of contracts, and its reiteration by us, in this case, is profitable if it serves to establish it more firmly as a rule for the governance of agreements designed to affect such immunity as is claimed to exist here. In this case the clause in question is capable of another meaning. It may be read, not necessarily as releasing or preventing an action by employés of the express company against the railroad company for damages for injuries received while on the road, but as an agreement to indemnify the railroad company in the event of such an action. That would be a perfectly proper agreement for the parties to make as a part of the consideration for the contract, and, while we need not say that such is the construction, we point it out as a possible one."

Considering a similar contract, the United States Circuit Court, in Southern Railway Co. v. Blunt & Ward, 165 Fed. 258, says:

"Considerations based upon public policy and the nature of the carrier's undertaking influence the application of the rule, and forbid its operation, except where the carrier's immunity from the consequences of negligence is read in the agreement (in so many words)—ipsissimis verbis. It must not be left to a presumption from the language. Such a contract, however, may be read as an agreement to indemnify the railroad company, in the event of an action against it, for recovery of damages caused by its negligence, and that would be a perfectly proper agreement for the parties to make, as a part of the consideration for the contract."

The court in this case further says:

"The plaintiff was primarily liable to these third parties and it is indemnified against these very judgments that under the contract is being claimed by the railway company."

In considering a like question in Stephens v. Railway, 109 Cal. 86, 41 Pac. 783, 29 L. R. A. 751, 50 Am. St. Rep. 17, the Supreme Court of California says in sustaining the validity of such a contract:

"It must be borne in mind that the lessees of defendant under these contracts are no part of the public. Each one of them has sold his right as one

of the public, and is not in a position to complain as to the burdens cast upon him as an individual. The public here are the people holding no leases. The defendant in this case not only owes the public the same duty after the execution of the lease that it did before, but there is no reason in the world why it would not perform that duty in the same way as it had done in the past, however careful or neglectful that performance might be. Why would not this be so? For the public had the same rights and the same remedies against the defendant after as before the execution of the lease, and likewise the defendant was liable for damages in the same amount, upon the same property, and upon the same facts. It thus appears that the contract in no way changed the relations and conditions existing between the defendant and the public."

Under these authorities, and upon sound principles of public policy, it is my judgment that the stipulation in the lease in controversy, should be construed merely as a contract of indemnity—an agreement by the lessee to indemnify the railway company for any loss it might sustain by reason of being held liable for negligence which resulted in the destruction of property upon the leased premises. It would have been easy, if it were the intention, to specifically state that property upon the premises should be at the risk of the owner thereof, and that the company would not be liable for its destruction even through its negligence; but even with such a condition, under the authorities above cited, I hardly see how a third person, with no knowledge or notice of such a condition, would be bound thereby.

It would be a harsh rule which would permit a secret contract between a lessor and lessee to bind third persons without their knowledge or consent. Here is a manufacturer, who erects its factory upon the railway right of way; it must buy and sell in the ordinary course of business. It must ordinarily borrow money, and perhaps execute bills of sale or mortgages upon its property to secure the payment of borrowed money, or to secure those from whom goods are purchased. The nominal rental of $10 per annum is not the consideration; the real consideration is the additional business which the transportation of its freight will bring to the railway company. It is interested in the progress and in the development of the factory. It does not seem reasonable that it was the intention of the railway company to affect the rights of the public who would be compelled to transact business with the lessee.

This mortgagee, so far as the record is concerned, had a right to examine this property, ascertain its value, look upon it as any other property in a factory, and extend credit upon it, and it would be unjust, after the destruction of the property through the negligence of the defendant, to confront him with a private stipulation between the parties, permitting, in effect, the railway company, through its negligence, to destroy the property and leave him without security of any kind. Before such a result can be justified by the court, if at all, the contract should be clear and certain and unambiguous.

I am required to hold that, so far as the interests of third persons are concerned, the provisions of the lease are merely an agreement by the lessee to indemnify the lessor against loss, and that the mortgagee is not bound by said personal and private stipulation.

[5] Much is said about this being a "covenant which runs with the

land." But the land was not conveyed, so far as appears from the record; the lessee did not part with his interest as lessee; he simply executed a chattel mortgage upon property stored upon the leased premises. It does not appear whether the mortgage was upon the building or not, so that I am not passing upon the question presented upon the assumption that this was a real estate mortgage.

The demurrer to the petition of intervention will be overruled. The defendant excepts.

RITZ CYCLE CAR CO. v. DRIGGS-SEABURY ORDNANCE CORP.

(District Court, S. D. New York. November 6, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⊂⊃93(3)—TRADE-MARK—RIGHT TO.
While the mere adoption of trade-mark confers no property right, a single instance of user, with accompanying circumstances showing an intention to continue the use of trade-name or trade-mark is sufficient to establish a right to its use.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. ⊂⊃93(3).]

2. TRADE-MARKS AND TRADE-NAMES ⊂⊃40—PERSONS ENTITLED TO ATTACK.
Where complainant adopted a trade-mark for motor cars, it intended to place on the market and had built two cars bearing such trade-mark, defendant, having contracted to build cars so marked for complainant, cannot, particularly as it thereafter disposed of cars bearing such trade-mark, and as complainant had spent large sums in introducing the trade-mark to the trade, deny complainant's right to the same.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 45; Dec. Dig. ⊂⊃40.]

3. TRADE-MARKS AND TRADE-NAMES ⊂⊃40—CONTRACTS—BREACH.
Where defendant agreed to manufacture motor cars for complainant, the same to be delivered monthly, and time was of the essence of the contract, defendant's failure to deliver one installment of the cars according to contract warranted complainant in rescinding the whole contract, where slight changes in the structure of the cars had not necessitated a delay, and defendant had requested none, while payments for which complainant was liable had not accrued, and so defendant was not entitled to dispose of the cars under the provision allowing it to use complainant's trade-mark in case of the latter's breach.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 45; Dec. Dig. ⊂⊃40.]

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃98—DAMAGES—MEASURE.
Where defendant sold goods under complainant's trade-mark, any profits made by defendant in violation of the trade-mark rights of complainant are recoverable, including damages to its business, regardless of any profit which would have been made by complainant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂⊃98.]

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃98—VIOLATION—DAMAGES.
Defendant agreed to manufacture motor cars for complainant, which complainant had contracted to sell to the trade. Defendant breached its contract, whereupon complainant rescinded the entire contract, and defendant made sales, wrongfully using complainant's trade-mark. *Held*, that while the profits which complainant would have made on the cars should be taken into consideration, yet as complainant is entitled to recover any profits made by defendant, as well as damages for injuries to

its business, the difference between complainant's manufacturing and selling prices are not necessarily the measure of damages, but the profits should be ascertained by an accounting.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂⊃98.]

6. DAMAGES ⊂⊃22—BREACH OF CONTRACT.

Where defendant breached a contract to manufacture motor cars for complainant, damages recoverable are those flowing directly and proximately from defendant's breach.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 59–61, 63; Dec. Dig. ⊂⊃22.]

In Equity. Bill by the Ritz Cycle Car Company against the Driggs-Seabury Ordnance Corporation, which cross-complained. Decree for complainant.

Rockwood & Haldane, of New York City (Edgar T. Brackett, of Saratoga Springs, N. Y., and Nash Rockwood and Charles A. Winter, both of New York City, of counsel), for complainant.

Cadwalader, Wickersham & Taft, of New York City (Cornelius W. Wickersham and John F. Charlton, both of New York City, and Francis H. McAdoo, of Washington, D. C., of counsel), for defendant.

HAZEL, District Judge. This action in equity was brought to enjoin the defendant corporation from infringing complainant's common-law trade mark or name "Ritz," an abbreviation of Ritzwaller, the name of complainant's president, adopted in September, 1913, and applied to cycle cars or light automobiles. The circumstances are peculiar, in that the parties entered into a written agreement by which the defendant was to manufacture cars or automobiles of complainant's design, making deliveries in installments. Upon failure by complainant to comply with the conditions of the agreement, the defendant was to have the right to market and sell the cars manufactured by it, using the trade-mark "Ritz" and applying the proceeds on any claims, arising out of the breach or annulment of said contract, as the defendant might have against complainant; and complainant agreed in the event of a breach to assist defendant in marketing the cars with respect to any unfulfilled contracts of sale.

Defendant by its answer, among other things, denied the establishment of a valid trade-mark in the name "Ritz" as applied to cycle cars or automobiles, and admitted the sale of 205 cars or automobiles bearing that name after the contract was broken, justifying its action on the ground of complainant's nonpayment of certain promissory notes, a part of the consideration for the making of the agreement. The answer put in a counterclaim for two promissory notes, of $2,500 each, and for the price of a car or automobile manufactured for demonstrating purposes. A reply to the answer denied that complainant had broken or annulled the agreement, and alleged that it was first broken or rescinded by defendant; that accordingly no right inured to defendant under the agreement to market or sell any cars or automobiles bearing said adopted trade mark or name. Damages for breach of the contract were also demanded.

The issues presented by the proofs may be summarized thus: Had complainant established a valid trade-mark in the name "Ritz" at the time the contract was made? Was a property right created by its adoption and use? Was there such failure by complainant to perform the contract as gave defendant the right under paragraph 13b of the contract in question to sell or market cars and apply the proceeds to claims for labor or materials used in their construction? Are the counterclaims properly interposed as an offset to complainant's right of recovery?

The evidence shows that, although the trade-mark was not known to the public to any extent by user, it had nevertheless been exploited, catalogued, photographed, and advertised, in trade journals and otherwise, at much labor and expense, preparatory to the establishment of a business for manufacturing and selling cars or automobiles impressed with it. The said agreement refers to the cars as Ritz cars, or Ritz cycle cars, and, prior to its making, two demonstration cars, model A and model B, were completed, which were designated as Ritz cars; model B being shipped to defendant for inspection in March, 1914. The contract provided for the manufacture of a car to be known as model C, which, however, in general appearance and design was to be of the type of model B. Complainant had contracted to sell and deliver to the Ohio Motor Company 100 Ritz cars to be manufactured by defendant, and was quite actively engaged in negotiating sales with prospective buyers and in establishing agencies at the date of the contract and up to the time of its breach.

Although it is unnecessary to specify all the details of the agreement under which the cars were to be manufactured, it should be understood that 500 Ritz cycle cars were to be manufactured by defendant and delivered in lots of approximately 100 per month, the first lot to be delivered by the end of June, 1914; that the price of construction agreed upon was $425, less a discount of $120; that the complainant was to deposit, and did deposit, with the defendant $10,000, payable $5,000 in cash, and the balance in two promissory notes, of $2,500 each, one payable in three months, and the other in four months, from date, to cover the cost of manufacturing tools required in the construction of the cars; that the complainant was to furnish detail drawings and specifications and place an inspector in the factory to approve materials; and provision was made for changes in construction and design "to efficiently complete said cycle cars."

There was much dispute as to who first terminated the contract. The defendant claims that complainant was responsible for the breach, and in proof thereof points to a letter, dated July 17, 1914, stating in substance that, on account of defendant's prior rescission, complainant was compelled to terminate its part of the contract. Hence it is contended that paragraph 13b became operative, regardless of who first broke the contract, but that it was in fact broken when complainant failed to pay its note for $2,500 falling due July 8, 1914. In opposition to this contention it is insisted that the promissory note was not paid because the defendant had previously failed to make delivery in June of approximately 100 cars, or of any cars.

To this contention rejoinder is made by defendant that such delivery was delayed by complainant's failure to seasonably furnish detailed drawings and specifications, as provided by paragraph 9 of the contract, and that complainant had ordered changes, or acquiesced in changes, which materially delayed completion of the cars. Did complainant's conduct relieve defendant from performance or render performance by defendant impossible? Did defendant's conduct, resulting in the repudiation of the contract, deprive it of the right to sell cars under and by the name of Ritz?

[1, 2] Considering the question of a property right in the trade-mark "Ritz": It is undeniable that the general rule is that there must have been a user of an adopted trade mark, name, or symbol in connection with the goods or article to which it is applied, as its mere adoption, even with an expenditure of money in preparation for its use, confers no property right. But in this case something more than a mere adoption and exploitation of the trade-mark is evidenced. Not only was the trade-mark affixed to two completed cars at the time the contract was entered into, but reference is made therein to Ritz cars, amounting to a recognition of complainant's property right to the name. A single instance of user, with accompanying circumstances showing an intention to continue the use of the trade name or mark, is sufficient to establish a right to its use. Hopkins on Unfair Trade, § 18. Sebastian, in the Law of Trade-Marks, quoting from Romilly, M. R., says:

"'The interference of a court of equity could not depend on the length of time the manufacturers had used it,' but that 'from the time of their commencing the user of their trade-mark they became entitled to the protection of the court against any other persons using the same, so that purchasers might be induced to purchase the goods of other persons as theirs.'"

But as between this complainant and defendant it was unnecessary that the trade-mark should have been established by user or have been known to the public for any definite length of time. Its recognition by defendant and the subsequent sale of cars bearing it operated as an estoppel of a denial of a property right therein. There are cases, it is true, which broadly hold that a trade-mark fails to eventuate in a property right unless it is used, but in nearly all such cases its origin or use was in dispute between rival claimants. Hopkins on Unfair Trade, § 18.

[3] As to the merits: Although many changes and modifications were made in the drawings and specifications of various parts of the Ritz automobile, such changes pertained mostly to unimportant parts, and did not delay construction. Some of the changes were suggested by defendant's president, and others by its foreman, while still others were suggested by complainant's inspector or engineer; but, before being made, they were all discussed with defendant's president and approved by him. Parts already manufactured were not changed, and certain of the changes were not to affect the cars to be delivered in the first installment. No objection was made by defendant that the changes would delay the initial delivery. There was much dispute between the engineers employed by complainant and defendant as to the char-

acter of the changes, and as to whether they in fact delayed the delivery of the first lot of cars; but it is not deemed necessary to itemize them, as it has been proven that they were not the actual cause of the delay. The most important changes in the drawings, it seems to me, related to the running board, the core box, and the valve and exhaust pipe of the Driggs-Seabury motor, which at first it was contemplated using; but as defendant's president agreed to such modifications, and as the first 100 cars were to contain a motor manufactured by defendant, any delay because of enlargement of the valve had no especial bearing upon failure to make the first delivery.

Time was of the essence of the contract—a condition precedent—and under the doctrine of Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, upon nonperformance of such condition the party aggrieved had the right to repudiate the entire contract. As it does not appear that defendant at any stage of the preparation of the drawings or modifications requested any extension of time, the asserted delay and abrogation of the contract by refusal to deliver the June installment of cars was, I think, due to other causes. At this time complainant was arranging for deliveries to prospective purchasers, and presumably, if defendant had expressed its inability to complete the cars if changes were made, they would have been left unchanged. Hence, in my opinion, defendant's failure to deliver 100 cars by the end of June, 1914, was not waived, and the contract was broken by it without any fault attributable to complainant.

It appears that complainant failed to make payment for the demonstration car manufactured for it by defendant, and of the promissory note due on July 8, 1914; that later, on July 17, 1914, the parties met to compose their differences, complainant suggesting a new arrangement as to delivery of cars; but, as defendant would not assent to such arrangement, demand was made, under the agreement, for the dies and tools necessary in the construction of the cars. Upon defendant's refusal to surrender the same, notice of repudiation of the entire contract was given. The language of Judge Rogers in Frankfurt-Barnett Co. v. Wm. Pryn Co., Ltd., 237 Fed. 21, — C. C. A. —, decided last July, is applicable. He said:

"The contract into which these parties entered was a contract between merchants, and time is of the essence of such contracts. As the Supreme Court in Norrington v. Wright, 115 U. S. 188 [6 Sup. Ct. 12, 29 L. Ed. 366], held, an agreement regarding the delivery of the goods is ordinarily to be regarded as a warranty or condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. Under this contract, however, the goods were not to be delivered at one time, but in installments. Such contracts are sometimes referred to as involving divisible promises. There is authority for saying that, where the installments extend over a considerable period of time, a default either in delivery or in payment does not necessarily and in all cases discharge the contract, although it necessarily gives rise to an action for damages. * * * But in Norrington v. Wright, supra, the Supreme Court came to the conclusion that such contracts are entire, and a failure to make the delivery of a single installment gives the other party the same right to rescind the whole contract that he would have had if it had been agreed that all the goods should be delivered at once."

Failure to pay for the demonstration car and the promissory note, which did not become due until after the first installment of cars was to have been delivered, did not excuse performance by defendant, and accordingly paragraphs 13a and 13b did not become operative, and the cars sold by defendant under the trade-name "Ritz," without complainant's consent, were infringements upon the latter's property right and acquirement.

[4, 5] Both sides have requested an indication from the court to the master as to the measure of damages which should be allowed herein. Defendant contends that the loss of sales of cars to Simmons is not a proper element of damages; that recovery is limited to the loss of gains and profits that complainant would have made, had the contract been fulfilled; and that defendant's profits only from the sale of cars impressed with the trade-mark are recoverable. Counsel for complainant, on the other hand, contends for the right to recover the profits that complainant would have made from cars bearing the trade-mark, regardless of any profit made by defendant; that, as to the breach arising from failure to deliver the balance of the cars over and above the cars which the defendant sold in violation of trade-mark rights, complainant should recover the profit of $35 per car, which, according to the evidence, would have resulted if the contract in question had been fulfilled. In a case such as this, wherein the measure of damages depends upon the particular facts, it is difficult to specify the exact rule. While it is true that there is evidence showing the manufacturing price of a car to be $305, and the selling price to customers $340, indicating a profit of $35, yet it is not at all certain that the cars will all be sold at such figure. The price which Simmons agreed to pay for 100 cars, together with the price to customers specified in the contract, will probably be taken into consideration; but the uncertainty as to marketability must also be considered, testimony in regard to which has not as yet been given by defendant.

No hard and fast rule can be indicated for the master to follow. It may be stated, however, that, as I understand the law, any profits made by defendant in violation of the trade-mark rights of complainant are recoverable, regardless of any profits made by complainant. But see Wolf Bros. & Co. v. Hamilton-Brown Shoe Co., 206 Fed. 611, 124 C. C. A. 409. Complainant's profits would ordinarily not be the true measure of damages for infringement of trade-mark rights. The manufacturing and selling prices specified in the contract, or the profits defendant expected that complainant would realize on sales to customers, are believed not to be the true criteria of recovery. As recovery has been invoked in equity and not at law, the ascertainment of profits must be in the nature of an accounting. 28 Am. & Eng. Encyc. of Law (2d Ed.) page 437; Browne on Trade-Marks (2d Ed.) page 506. It is true such rule opens the door for proof that the infringing cars were sold by defendant at a loss and not at a profit; but as an offset, it may be remarked, complainant has the right to recover profits, even though the cars were not sold at a profit by it.

[6] The damages recoverable in consequence of the breach of the contract by defendant's failure to deliver the cars or automobiles are those which flow directly and approximately from it. The contract, I think, is to be treated as one to manufacture the cars, and the damages, no doubt, may be based on the cost of production and the price contemplated on resale. There are adjudications holding that the measure of damages to be applied in such a case is the difference between the contract price and the market value of the article; but the cars in question were of an unusual type at the date of the contract, and the market price or value difficult of ascertainment. Todd v. Gamble, 148 N. Y. 382, 42 N. E. 982, 52 L. R. A. 225. The cardinal rule is thought to be that a complainant, who is prevented from selling an article to be manufactured by reason of defendant's failure to perform the contract, is to be recompensed for any loss sustained through loss of profits, or even of the opportunity to make profits. In the application of this rule, however, care must be taken to exclude any anticipated good bargains, advantages of resale, and loss of other contracts, because such benefits were manifestly not in the minds of the parties at the time of making the agreement.

Inasmuch as there is to be a reference to a master to ascertain and report the damages, I do not think that anything further should be said by me in relation to the rule of damages to be followed, especially as testimony is to be given by defendant bearing upon this issue. The master must be guided by the facts, adapting thereto the particular rule of damages which in his judgment is warranted. The order of reference to the master should contain a provision that the testimony already taken herein relating to damages and profits be considered by him, together with such additional testimony as may be offered by either party to this action, including the testimony bearing upon the counterclaims contained in the answer relating to making a demonstration car and failure to pay a promissory note given for the construction of another, as such counterclaims fairly arose out of the transaction which is the subject of this suit.

A decree may be submitted, with costs, in accordance with the foregoing views.

COPPER QUEEN CONSOL. MINING CO. v. JONES et al.

SAME v. GEARY et al.

(District Court, D. Arizona. November 7, 1916.)

REMOVAL OF CAUSES ⟸3—AUTHORITY OF STATE TO PROHIBIT.

Civ. Code Ariz. 1913, par. 2228, declares that if any foreign corporation licensed as provided to do business in the state shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of the state, remove such suit to the federal court or shall institute any proceeding against any citizen of the state in any federal court, its license shall be revoked, while paragraph 2243 declares that where any foreign corporation, having instituted an action in the federal courts or removed one to such court, shall thereafter transact business within the state, it shall be guilty of a misdemeanor.

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

Held, that the judicial power of the federal courts as created by the federal Constitution and provided for by Congress pursuant to its constitutional authority is wholly independent of state action, such statutes are invalid, and their operation against a foreign corporation doing business in Arizona, which removed an action brought against it to the federal court, will be enjoined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 4, 5; Dec. Dig. ⟸3.]

In Equity. Bills by the Copper Queen Consolidated Mining Company, a corporation, against Wiley E. Jones and others and W. P. Geary and others to enjoin enforcement of Civ. Code Ariz. 1913, pars. 2228, 2243, on the ground that they are unconstitutional. Temporary injunction granted.

Ellinwood & Ross and Clifton Mathews, all of Bisbee, Ariz., for complainant.

Wiley E. Jones, Atty. Gen., and R. Wm. Kramer and G. W. Harben, Asst. Attys. Gen., for defendants.

Before MORROW, Circuit Judge, and VAN FLEET and SAWTELLE, District Judges, convened under section 266 of the Judicial Code of the United States (Act March 3, 1911, 36 Stat. 1162, as amended by Act March 4, 1913, 37 Stat. 1013).

MORROW, Circuit Judge. The jurisdiction of this court is invoked by the complainant upon the ground of diverse citizenship, and also upon the ground that the controversy is one arising under the Constitution and laws of the United States. The complainant is a corporation organized and existing under the laws of the state of New York and is a resident and citizen of that state; and the defendants are residents and citizens of the state of Arizona, and collectively constitute the Corporation Commission of that state. The complainant is now, and has been for more than 30 years, engaged in the business of owning, controlling, and operating mines and mining claims in the state of Arizona and of extracting valuable ores from said mines; also, of purchasing ores and concentrates in the republic of Mexico and in the state of New Mexico and importing the same into the state of Arizona for treatment, reduction, and smelting at smelters and reduction works owned by the complainant in Arizona. During all this time it has been engaged in the business of shipping and selling in interstate and foreign commerce the metals and other products obtained from said ores and concentrates, there being no market therefor within the territory or state of Arizona. For this business, the complainant has had a license from the Corporation Commission under the statute of the state, hereinafter mentioned.

On the 14th day of February, 1912, the territory of Arizona was admitted into the Union as a state, and on the 12th day of June, 1912, the Legislature of Arizona passed an act, the sections of which were subsequently incorporated into the Revised Statutes of the state, 1913, as paragraphs 2226 and 2228. The first-mentioned paragraph required all foreign corporations doing business within the state to pay a license fee of $15 to the Corporation Commission for a license to do business in the state; and the last-mentioned paragraph provided that if

any company mentioned in section 2226 of the Revised Statutes "shall, without the consent of the other party to any suit or proceeding brought by or against it in any court of this state, *remove said suit or proceeding to any federal court, or shall institute any suit or proceeding against any citizen of this state in any federal court, it shall be the duty of the corporation commission forthwith to revoke the license issued to said company to do, or transact business in this state,* and to publish such revocation in some newspaper of general circulation published in this state; and every act done by said corporation subsequent to said revocation of said license shall be utterly void." The Legislature of the state on the 7th day of May, 1912, passed an act which was subsequently incorporated into the Revised Statutes, 1913, as paragraph 2243. That section provides as follows:

"If any foreign corporation shall, without the consent of the adverse party, *remove to a federal court any action pending against it in any court of this state, or institute an action against a citizen of this state in a federal court of this state, such action on the part of the corporation shall forfeit its right to transact or carry on any business in this state; and such corporation, and any officer, agent, or employé thereof, who shall thereafter transact or engage in any business or employment for such corporation in this state, shall be severally guilty of a misdemeanor, and, upon indictment or information and conviction therefor in the superior court of any county in which such corporation, or any officer, agent or employé thereof, transacts or engages in any business, be fined for each offense not less than five hundred dollars nor more than one thousand dollars.*"

At the time of the admission of the state into the Union on February 14, 1912, and the passage of the Act of May 7, 1912, and the Act of June 12, 1912, complainant owned real property in said state of the value of more than $32,000,000 and personal property of the value of more than $250,000, and at that time complainant was extracting from its mines and mining claims and was treating, reducing, and smelting at its mills and reduction works an average of 700,000 tons of ore per annum, and was shipping, marketing, and selling the entire mineral product in interstate and foreign commerce in the average amount of 80,000,000 pounds of copper per annum, and was purchasing in the republic of Mexico and in the state of New Mexico and importing, treating, reducing, and smelting in the state of Arizona an average of approximately 180,000 tons of ores and concentrates of the approximate value of $6,000,000 per annum, and marketing and shipping the product in interstate and foreign commerce, there being no market for such product in the state of Arizona; the proceeds and sales amounting to an average of $18,500,000 per annum.

It is alleged in the complaint that on the 7th day of March, 1916, a suit was brought against the complainant in the superior court of the state of Arizona in and for the county of Cochise by Vinnie S. Minica, as administrator of the estate of Jose Martinez, deceased; and on the 25th day of March, 1916, the complainant as defendant in that suit filed in said superior court its petition and bond for the removal of said suit to this court; and on the 1st day of April, 1916, said suit was, without the consent of said Vinnie S. Minica, duly removed to this court. It is further alleged that the defendants, as members of the Corporation Commission of Arizona, proceeding under para-

graph 2228 of the Revised Statutes of the state, threaten to, and unless restrained by this court will, issue an order of said commission declaring the license, right, and authority of the complainant to transact business within the state of Arizona canceled, revoked, and annulled, to the great and irreparable damage of the complainant; and said Corporation Commission, unless restrained by this court, will proceed under paragraph 2243 of the Revised Statutes of the state to prosecute to judgment and conviction the complainant, its officers, agents, and employés, subjecting it and them to numerous and vexatious actions and proceedings to recover ruinous and confiscatory penalties, to complainant's great and irreparable damage.

Upon the filing of the complaint, a temporary restraining order was issued pending the assembling of this court in accordance with the provisions of section 266, Judicial Code of the United States (Act March 3, 1911, c. 231, 36 Stat. 1162, as amended by Act March 4, 1913, c. 160, 37 Stat. 1013 [Comp. St. 1913, § 1243]). The present hearing is upon an application for a temporary injunction restraining the defendants from enforcing, or attempting to enforce, the provisions of paragraphs 2228 and 2243 of the Revised Statutes of Arizona, and from canceling, revoking, or attempting to cancel or revoke, the license and right of the complainant to transact business in the state of Arizona, and from prosecuting any suit under paragraph 2243 of the Revised Statutes of the state.

We think the questions involved in these cases have been very fully determined by the Supreme Court of the United States in the various cases that have been before that court where statutes of the states, of the character here in question, have been considered. Home Ins. Co. v. Morse, 20 Wall. 445, 22 L. Ed. 365; Doyle v. Continental Ins. Co., 94 U. S. 535, 24 L. Ed. 148; Barron v. Burnside, 121 U. S. 186, 7 Sup. Ct. 931, 30 L. Ed. 915; Southern Pacific Co. v. Denton, 146 U. S. 202, 13 Sup. Ct. 44, 36 L. Ed. 942; Security Mutual Life Ins. Co. v. Prewitt, 202 U. S. 246, 26 Sup. Ct. 619, 50 L. Ed. 1013, 6 Ann. Cas. 317; Herndon v. Chicago, Rock Island & Pacific Ry. Co., 218 U. S. 135, 30 Sup. Ct. 633, 54 L. Ed. 970; Roach v. Atchison, Topeka & Santa Fé R. Co., 218 U. S. 159, 30 Sup. Ct. 639, 54 L. Ed. 978; Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187; and finally in two cases that have recently been before the Supreme Court from the state of Wisconsin (Donald v. Philadelphia & Reading Coal & Iron Company and Frear v. Western Union Telegraph Company, decided May 22, 1916, 241 U. S. 329, 331, 36 Sup. Ct. 563, 60 L. Ed. 1027), where the questions were almost identically the same, if not the identical questions here presented, and we find that the argument made here in support of the state statute is precisely the same as that made before the Supreme Court in those cases, so that there is not a single question or point in argument in these cases that has not been presented to the Supreme Court and by that court fully considered and determined.

In the case of Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187, Chief Justice White, speaking of a similar statute, said:

"It may not be doubted that the judicial power of the United States, as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious. The doctrine is so elementary as to require no citation of authority to sustain it. Indeed, it stands out so plainly as one of the essential and fundamental conceptions upon which our constitutional system rests, and the lines which define it are so broad and so obvious, that, unlike some of the other powers delegated by the Constitution, where the lines of distinction are less clearly defined, the attempts to transgress or forget them have been so infrequent as to call for few occasions for their statement and application. However, though infrequent, occasions have not been wanting, especially on the subject of the removal of causes with which we are now dealing, where the general principle has been expounded and applied so as to cause the subject, even from the mere point of view of authority, to be beyond the domain of all possible controversy."

Then the Chief Justice, referring to the cases of Doyle and Prewitt, which have been cited here on behalf of the state as authority to support the statute of this state, says:

"Those cases involved state legislation as to a subject over which there was complete state authority, that is, the exclusion from the state of a corporation which was so organized that it had no authority to do anything but a purely intrastate business, and the decisions rested upon the want of power to deprive a state of its right to deal with a subject which was in its complete control, even though an unlawful motive might have impelled the state to exert its lawful power. But that the application of those cases to a situation where complete power in a state over the subject dealt with does not exist has since been so repeatedly passed upon as to cause the question not to be open."

Then in these last two cases of Donald v. Philadelphia & Reading Coal & Iron Co. and Frear v. Western Union Telegraph Co., the Supreme Court declined to go into any argument upon the question, simply saying that:

"Consideration of the Wisconsin statutes convinces us that they seek to prevent appellees and other foreign commercial corporations doing local business from exercising their constitutional right to remove suits into federal courts. To accomplish this is beyond the state's power. * * * We are asked in effect to reconsider the question discussed and definitely determined in Harrison v. St. L. & San Francisco R. R., 232 U. S. 318 [34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187]. We there said ([232 U. S.] 328 [34 Sup. Ct. 335, 58 L. Ed. 621, L. R. A. 1915F, 1187]): 'The judicial power of the United States, as created by the Constitution and provided for by Congress pursuant to its constitutional authority, is a power wholly independent of state action and which therefore the several states may not by any exertion of authority in any form, directly or indirectly, destroy, abridge, limit, or render inefficacious.'"

These last two cases are not only controlling as a matter of general judicial authority, but in the applicability of the questions there determined to the facts in the two cases now before us. The complainant in the Philadelphia & Reading Coal & Iron Company Case, as in these cases now before us, was a commercial corporation; and it, like the complainant in these cases, was engaged in interstate commerce. In the Philadelphia & Reading Coal & Iron Company Case the commerce consisted in the shipping and selling of coal, while in the present cases it consists in the shipping and selling of copper, in

interstate commerce. The cases are identical in all the elements involving the constitutional questions raised, and we must therefore hold that paragraphs 2228 and 2243 of the Arizona Revised Statutes of 1913 are unconstitutional and void.

The counsel for the complainant will prepare an interlocutory decree providing for a temporary injunction pending the litigation.

In re FOOTVILLE CONDENSED MILK CO.

In re VALECIA CONDENSED MILK CO.

(District Court, W. D. Wisconsin. April 18, 1916.)

BANKRUPTCY ⊂⊃348—CLAIMS—PRIORITY—"WORKMEN"—"SERVANTS."

Bankruptcy Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (Comp. St. 1913, § 9648), declares that claims for wages due to clerks or servants, etc., earned within three months before the commencement of the proceedings, shall be entitled to priority. Bankrupt milk companies engaged claimants to haul milk from surrounding producers to the factory, claimants to be paid according to the amount of the milk hauled, with a fixed minimum. The amounts per hundred paid claimants were deducted from the price paid the producers. Claimants had their own routes and supplied their teams and equipment, and were entitled, if the amount of milk hauled warranted, to engage assistants. *Held*, that though claimants performed services and engaged in manual labor, they were not "workmen" or "servants" within the act; there being no direct supervision of their conduct by the bankrupts, but instead their status was similar to that of expressmen, draymen, or other independent contractors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊂⊃348.

For other definitions, see Words and Phrases, First and Second Series, Servant; Workman.]

In Bankruptcy. In the matter of the bankruptcy of the Footville Condensed Milk Company. The claim of Charles Demerow was allowed by the referee as a preferential claim owing to a clerk, servant, or workman, etc. In the matter of the bankruptcy of the Valecia Condensed Milk Company. The claim of Phillip Meister was allowed as preferential because owing to a clerk, servant, or workman, etc. Proceedings to review the allowance of such claims. Determinations of referee reversed, and claims held not entitled to priority.

These matters were argued together, Demerow filing a claim against the bankrupt Footville Condensed Milk Company for $144; Meister against the bankrupt Valecia Condensed Milk Company for $149.39. Each alleged the sum to be due from his debtor for services rendered during February and the first 26 days of March, 1915.

The cases present a question arising upon many other claims against each estate, aggregating something like $7,000 or $8,000, filed in the two proceedings. That general question is, Are or were such claimants, who were engaged by the respective bankrupts to haul milk to the condenseries, workmen, clerks, or servants, and as such entitled to priority of payment of their claims under section 64b (4) of the Bankruptcy Act? It is assumed that the facts adduced upon the hearing of these two claims disclose fairly the situation in general, and therefore they will be summarized.

The claims are for the compensation alleged to be due for hauling to the factory the milk bought by the company from farmers or dairymen. The price per hundred pounds of raw milk was fixed by the company from time to time by quotations or offers, and upon a basis at "receiving room," "plant," or factory, as the case may be. The price was based upon a specification of a milk test showing 3.5 butter fat. For each 1/10 per cent. increase of butter fat the price per hundred pounds of milk increased 1 cent. Thus, if the quoted price were $1.20 per hundred pounds testing 3.5, the price on a test of 3.6 would be $1.21. Now, if the farmer delivered the milk himself, he received the full quoted price per hundred pounds upon the test which developed. As a matter of fact many farmers did not produce enough to warrant the expenditure of time and for hauling equipment necessary to make their own deliveries. This circumstance, together with the natural desire on the part of the factory to stimulate the production of a maximum supply of milk, led to the development and establishment in the localities where factories existed of so-called "milk routes." Their development naturally depended upon the quantity of milk deliverable, and this was ascertained through the investigations and solicitation of the condensery's so-called field man, whose functions consisted in solicitation of milk supply from farmers, the making of suggestions, and, as the name indicates, acting as a representative in the field of milk production in the vicinity of the factory. The routes, of course, were established when and where the supply justified. It was thereupon traveled each day by the hauler, whose duties consisted in taking the raw milk from farmers, hauling it to the factory, and returning to the farmers or dairymen the cans which they owned. Each can was designated by number corresponding to the number given to the particular farmer. The haulers supplied the equipment, such as horses, wagons, and canvas covers for the wagons. The milk company owned no teams or wagons used in hauling.

The general, and in particular, the compensation features of these hauling arrangements may be thus summarized: Written contracts with haulers were not entered into. The individual apparently made application to be assigned to the service, to have a "route." Doubtless in instances the formality of engagement was much like that attending engagements for ordinary service, or the initiation of the ordinary relation of master and servant; that is, the individual sought a "job." But, probably, the nature of the work and the customs attending it were such that the individual would regard the "getting of a milk route" as quite accurately descriptive of the relation.

The proof shows that since January, 1915, these companies paid the hauling charge, 15 cents per hundred, but that the provision for its payment was made in this way: The total deliveries were computed on the test basis, as that may be disclosed from day to day. A settlement slip carried these totals and computation, and there was a deduction of 15 cents per hundred pounds made against the particular farmer, and the balance covered by check. The deduction thus made was known as the hauler's charge, and obviously was the fund out of which the companies paid the hauler. If the farmer himself delivered the milk, no such deduction was made. The factory kept a record of the quantities delivered by each hauler, and the latter received monthly payment of the aggregate, based on the hauling rate of 15 cents per hundredweight.

Prior to January, 1915, there had been some variation from this custom, based upon the contingency of a hauler's load being less than a ton. But they are not material in determining the character of the relation.

Certain other facts may be noted. In some instances, as in the Demerow Case, the company guaranteed the hauler a minimum of $3 per day; that is, if his load during any day was less than a ton, he received $3 (that being 15 cents per hundredweight on a ton); whereas, if he hauled more than a ton, the compensation was 15 cents per hundredweight for all actually hauled on that day. So, too, in respect of the Meister claim, his was to be compensated at a flat rate of $80 per month, irrespective of quantity hauled. Each hauler had his own route.

Richmond, Jackman & Swansen, of Madison, Wis., for claimants.
Sanborn & Blake, of Madison, Wis., for trustee.

GEIGER, District Judge (after stating the facts as above). Section 64b, subd. 4, of the Bankruptcy Act grants a priority of payment to "Wages due to workmen, clerks, or servants," etc., of a bankrupt. As above indicated, the only question is whether these claimants were workmen or servants of the bankrupts, entitled to the preferential treatment accorded by the statute. Obviously, elementary definitions of these terms cannot be very helpful. That a laborer is one who labors, a workman one who works, or, as Bouvier puts it, "one who is employed in some business for another," are truisms just as applicable to conceded instances of "independent contractor" as to conceded relations of master and servant. So, too, the fact that each claimant, as a part of his engagement, obligated himself to live up to certain specifications respecting the manner of performance does not distinguish the relation as one of master and servant from one of ordinary independent contract containing like specifications. Nor can the method of payment be the criterion, and therefore the attendant guaranty of a minimum per day in the one, or the monthly stipend in the other, of the two cases, is not determinative of the character of the relation.

If the fact that these claimants in discharging their engagement performed such manual or physical labor as is usually a proper subject of hiring a workman or servant were controlling, then obviously they are workmen or servants. But that rather begs the real question, which is, What was the relation wherein they performed their work or rendered their service? Remington on Bankruptcy (2d Ed.) § 2168 et seq. Now, in answering the question, it must, of course, be conceded that in making the arrangement for the hauling of milk it was essential to provide for the driving of the teams and the handling of milk cans, as well as for the actual hauling from the farmer to the factory by a team-drawn wagon. Neither could be dispensed with. But the result to be accomplished was the transportation by team and wagon, and that was the dominant subject of the relation created by the contract. And the fact that this involved necessarily and indispensably the attendant personal service of the owner of the team in driving the team, loading and unloading milk cans, does not bring into the situation the element which, as will be seen, affords the ultimate general test. That element is the subordination and personal subservience of a workman or servant to the one who engages him. That element is, in my judgment, lacking in the cases before us, just as it is in the everyday instances of expressmen, draymen, liverymen, cabmen, passenger, or freight transfer agencies. These common situations are never deemed to create the relation of master and servant, though frequently the service rendered and the method of compensation is identical with that appearing in the cases before us.

Another pertinent feature of the relation of claimants to these factories is found in the entire freedom to sublet, assign, or in any manner to delegate the performance of the obligation to another or to others. So, too, if the quantity of milk deliverable on any route shall prove to exceed the capacity of a single team, it would be permissible for any hauler to increase his equipment to meet the re-

quirements, to hire servants for that purpose, or in fact to do anything he pleased to meet the requirements of a route, if he cared to assume additional burdens in order to derive greater benefits. Of course, it does not appear that the latter ever happened, but the right to assign or delegate the performance of the obligation assumed seems entirely clear, and the personal subservience and subordination usually found in the relation of master and servant or workmen excludes that idea.

Counsel suggests that if one of claimants were injured while discharging his duties as a hauler he would probably be entitled to an award under the Workmen's Compensation Act. This, of course, involves the whole question respecting the relation existing. But if resort to analogies is to be had, we might also consider whether the negligence of a hauler—for example, in failing to hitch his team—could be imputed to the corporation operating the condensery, so as to render it liable to third persons injured by reason thereof.

It is my judgment that upon application of fair tests of independence or subservience the claims fall within the former class, and that adjudicated cases cited by the trustee support this view. Remington on Bankruptcy, supra; Re Zotti (D. C.) 23 Am. Bankr. Rep. 607, 178 Fed. 304; Re Crown Point Brush Co. (D. C.) 200 Fed. 882; Re Gurewitz, 121 Fed. 982, 58 C. C. A. 320; Re Mayer (D. C.) 101 Fed. 227; Spruks v. Lackawanna Dairy Co. (D. C.) 189 Fed. 287; Re Blakman Bros., 6 Chi. Leg. N. 18; Re Rose, 1 Am. Bankr. Rep. 68; Campfield v. Lang (C. C.) 25 Fed. 128; Farmer v. St. Croix Power Co., 117 Wis. 76, 93 N. W. 830, 98 Am. St. Rep. 914.

The conclusion is that the claims are not entitled to priority. An order may be entered, reversing the ruling of the referee accordingly.

In re BRAUS.

Ex parte VAN BEUREN et al.

(District Court, S. D. New York. November 8, 1916.)

BANKRUPTCY ⊂=407(3)—DISCHARGE—FRAUDULENT TRANSFER.

An insolvent debtor, who owned a number of stores, organized a corporation, of which he held all the stock, except a few qualifying shares, held by his wife and another, and to such corporation he transferred the more profitable stores; it being his intention to break the leases on two of the unprofitable stores. After appointment of his trustee in bankruptcy, he delivered the stock in the corporation to such trustee. *Held*, that the conveyance of his property to the corporation was fraudulent as to the bankrupt's creditors, and was a bar to a discharge, for the creditors would be hindered and delayed, as they would not only have to obtain possession of the stock, but then of the chattels represented by the stock; such conclusion being supported by the fact that the bankrupt intended by the conveyance to the corporation to defeat the rights of his landlord.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 740, 742–749; Dec. Dig. ⊂=407(3).]

In Bankruptcy. In the matter of the bankruptcy of Arthur S. Braus. On objection by Frederick T. Van Beuren and others to

bankrupt's petition for discharge. Petition dismissed, order affirmed, and discharge denied.

This cause comes up upon a petition for discharge. Certain creditors have objected, on the ground of a fraudulent transfer under the following circumstances: The bankrupt was engaged in the cloak and suit business for about 15 years, having 20 stores scattered about, of which 7 were in the city of New York. Three of these stores, in Fourteenth street, Manhattan, were unprofitable, and in January, 1915, the bankrupt, who had been losing money through the year 1914, organized a corporation, of which he held all the stock, but a few qualifying shares for his wife and one Samuel Klotsky. To this corporation he conveyed 5 of the stores in question, being those which he considered the most profitable. His explanation of this transaction was that he hoped to get in some friends as partners who would furnish money to rehabilitate the business, so that he could pay his creditors. The incorporation he insisted was to protect his creditors; the protection he had in mind being to break the leases on the 2 unprofitable stores in New York, and so get rid of them. After his trustee was appointed, he turned over his stock in the corporation to the trustee, and it does not appear that he did this under compulsion.

Mitchell & Mitchell, of New York City, for objecting creditors.
Alex B. Greenberg, of New York City, for bankrupt.

LEARNED HAND, District Judge (after stating the facts as above). It is not a clear question on authority whether it is a fraudulent transfer against creditors for an insolvent to convey all his property to a corporation in exchange for all or nearly all its stock. In the following cases such was the situation, and the sale was held bad: Mulford v. Doremus, 60 N. J. Eq. 80, 45 Atl. 688; Kelley Co. v. Pollock & Bernheimer, 57 Fla. 459, 49 South. 934, 131 Am. St. Rep. 1101; Bank v. Trebein, 59 Ohio St. 316, 52 N. E. 834; Benton v. Minn. Tailoring, etc., Co., 73 Minn. 498, 76 N. W. 265; Kellogg v. Douglas County Bank, 58 Kan. 43, 48 Pac. 587, 62 Am. St. Rep. 596; Bourgeois v. Risley Real Est. Co., 82 N. J. Eq. 211, 88 Atl. 199; Bennett v. Minott, 28 Or. 339, 39 Pac. 997, 44 Pac. 288; Roberts v. Hughes, 86 Vt. 76, 88, 83 Atl. 807. Bourgeois v. Risley Real Est. Co., supra, Bennett v. Minott, supra, and Roberts v. Hughes, supra, are, it is true, of slight importance, because in each the insolvent transferred the stock to his wife which he received on the sale apparently without consideration; but the language of the opinion seems to indicate that the sale alone would have been regarded as fraudulent.

Booth v. Bunce, 33 N. Y. 139, 88 Am. Dec. 372, is authority for the rule that it may be such, regardless of the fact that the stock is liable to execution after the transfer has been made. I hesitate, however, to cite that case as authority for the rule that the sale was void per se, because the court rested upon a verdict of the jury. However, the jury had nothing on which to go but the sale for stock, and it necessarily followed that such a sale alone must delay creditors, if the case was correctly decided. This seems to me a question of law, however the case was left to the jury. In Kellogg v. Douglas County Bank, supra, Bank v. Trebein, supra, and Benton v. Minn. Tailoring, etc., Co., supra, the insolvent had pledged the stock by way of preference; but the court does not seem to have rested upon that. In-

deed, as was said in Coaldale Coal Co. v. State Bank, 142 Pa. 288, 21 Atl. 811, and Scripps v. Crawford, 123 Mich. 173, 81 N. W. 1098, if the insolvent might prefer his creditors with his property, why may he not do so with the stock, which was the consideration for the property? I cannot see that this element really affects the case, and these cases, as well as Mulford v. Doremus, supra, and Kelley v. Pollock & Bernheimer, supra, seem to support the rule that such a sale is void.

There are, however, cases which hold that a sale by an insolvent to a corporation for its stock is not in fraud of creditors, because the right to levy on the stock is an equivalent of the right to levy on the chattels. Coaldale Coal Co. v. State Bank, 142 Pa. 288, 21 Atl. 811; Densmore Commission Co. v. Shong, 98 Wis. 380, 74 N. W. 114; Scripps v. Crawford, supra; Plaut v. Billings-Drew Co., 127 Mich. 11, 86 N. W. 399; Shumaker v. Davidson, 116 Iowa, 569, 87 N. W. 441; Kingman & Co. v. Mowry, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169. The last of these was an obviously honest effort to realize on the assets for the benefit of creditors, and the court based its decision upon that fact. I do not, therefore, regard the case as an authority to the contrary of the cases first cited, especially as the distinction is there pointed out that such sales, though not necessarily fraudulent, become such, when the purpose is to put the property out of the reach of creditors, even momentarily. Some indication appears, also, in the opinion in Shumaker v. Davidson, supra, that such a sale may become fraudulent if designed to obstruct creditors. The decision turned upon the fact that the sellers, a firm in each case, were not shown to be insolvent; and so does Densmore Commission Co. v. Shong, supra. If by that is meant that the sale was not shown to include all the seller's assets, and to leave him with only the stock, there is a valid distinction. Yet if the seller was not solvent independently of the stock received in exchange, the latter must be deemed the equivalent of the chattels for the purposes of execution, or the cases cannot stand. Such was the holding, at least, in Coaldale Coal Co. v. State Bank, supra. Perhaps it is fair to assume that the sellers were independently solvent, and, if so, the only jurisdiction holding the sale void as such is Michigan in the two cases cited.

I cannot agree on principle that the stock is the equivalent of the chattels for the purposes of the creditors; that depends upon whether on execution sale the stock will realize as much as the chattels, which every one who has any experience knows it generally will not. A judgment creditor must therefore in practice buy in the stock at the sale, and then try to get possession of the chattels and sell them. He may or may not succeed in this without substantial delay or hindrance. That will depend upon how surely he can disregard the corporate form, which in turn depends in part upon whether he is the only shareholder, and whether there have been debts contracted by the corporation. Even then he must have another sale. I do not believe that the law should tolerate any such embarrassments to creditors, when they result from mere contrivances to effect just what they do effect, and are not the incidents of a genuine effort to conduct the insolvent's affairs in his own interest.

In re Julius Brothers, 217 Fed. 3, 133 C. C. A. 328, L. R. A. 1915C, 89, gives no color for any such ruling. In that case the consideration, which was adequate in amount, consisted of cash, and was to be at once distributed among all creditors unconditionally. At least that was the theory adopted by the Circuit Court of Appeals, whatever may have been the facts. 209 Fed. 371.

In view of the foregoing, the sale in the case at bar must be held to be fraudulent. It certainly was not in the course of the general business of the bankrupt. It was only designed, as he admits, to change the rights of his creditors, and, indeed, it was to prevent his landlords from collecting their debts at all. I do not think that this intent was so abortive, by virtue of their right to levy on the stock, as to make it an irrelevant futility.

It is therefore unnecessary to determine the very vexed question whether an assignment for the benefit of creditors should be a bar to discharge. That it is a conveyance which may be set aside within four months under Bankr. Act July 1, 1898, c. 541, § 67e, 30 Stat. 564 (Comp. St. 1913, § 9651), is certainly true. In re Gutwillig, 92 Fed. 337, 34 C. C. A. 377; In re Beisenthal, Fed. Cas. No. 1,236, 14 Blatchf. 146. Yet after the period of four—or, under the act of 1867 (Act March 2, 1867, c. 176, § 35, 14 Stat. 534), six—months has expired, it is valid. Mayer v. Hellman, 91 U. S. 496, 23 L. Ed. 377. It may be urged that the same conveyance cannot be fraudulent for four months, and not fraudulent thereafter; but that is the effect of these decisions. It is no more inconsistent to say that the same conveyance may not be fraudulent, under section 14b and yet be such under 67e. The decision of this question is not necessary for disposing of this case, because from any aspect this conveyance delayed creditors.

Petition dismissed; order affirmed; discharge denied.

THE IXION.

(District Court, W. D. Washington, N. D. July 14, 1916.)

No. 3342.

1. SEAMEN ⟸1—FOREIGN VESSELS—AUTHORITY OF CONGRESS.
Congress has the right to prescribe rules which shall govern vessels and sailors while within the jurisdiction of the United States, notwithstanding the vessels are foreign craft, and the sailors alien persons.
[Ed. Note.—For other cases, see Seamen, Dec. Dig. ⟸1.]

2. SEAMEN ⟸16—WAGES—LIBEL.
Rev. St. § 4530, as amended by Act March 4, 1915, c. 153, § 4, 38 Stat. 1165, declares that every seaman on a vessel of the United States shall be entitled to receive on demand from the master one-half of the wages which he shall have then earned, at every port where the vessel shall load or deliver cargo, provided such demand shall not be made before the expiration of nor oftener than once in five days, and that any failure on the part of the master to comply with the demand shall release the seaman from his contract, and he shall be entitled to full payment of wages earned,

provided this section shall apply to seamen on foreign vessels while in harbors of the United States. Seamen's Act Dec. 21, 1898, c. 28, § 10, 30 Stat. 763 (Comp. St. 1913, § 8323), makes it unlawful in any case to pay any seaman any wages in advance of the time when he has actually earned the same, or to pay such wages to any other person. *Held* that, as it was apparently the intention of Congress that no advancements should be made to sailors on foreign vessels for services performed within the ports and waters under the jurisdiction of the United States, a libel, showing that a sailor on a foreign vessel had earned wages while in a port of the United States and that demand in accordance with the above section was refused, states a cause of action, though the master of the vessel had already paid the seaman more than one-half of the wages earned during the entire voyage.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 56–65; Dec. Dig. ⟸16.]

In admiralty. Libel by John A. Clyma against the steamship Ixion, her apparel, tackle, and furniture. On exceptions to libel. Exceptions denied.

Jay C. Allen, of Seattle, Wash., for libelant.
Huffer & Hayden, of Tacoma, Wash., for respondent.

NETERER, District Judge. Libelant, a British subject employed as a seaman upon a British vessel, states that on the 20th of May, 1916, he had earned on the voyage, under his articles of employment, £282, 1s. ($1,353.84), upon which had been paid £264, 7s. 4d. ($1,268.96); that there was an allotment to be deducted of £4 ($19.20), leaving a balance of £13, 13s. 6d. ($65.64) due; that the vessel, on the 15th day of May, 1916, entered the Port of Seattle for the purpose of loading and delivering cargo, and on the 20th day of May, following, while still in port so loading and delivering cargo, libelant, acting under section 4530 of the Revised Statutes of the United States, as amended, "did demand of the master of said vessel the payment of one-half of the amount of his wages then earned; that the libelant had not made a demand for any wages within five days previous thereto; that said payment was refused by said master, and because of said refusal the libelant did, on the 22d day of May, 1916, pursuant to the provisions of said act of Congress, demand his release from said contract, and did then and there demand full payment of the wages which he had so earned, which said payment the said master did refuse and has continually refused since said time"; and prays process in due form of law according to the course of this court in admiralty and maritime jurisdiction, condemnation of the vessel, tackle, etc., to pay the claim.

Exception is filed to the libel, in which it is contended, among other things:

"That it appears that the libelant has been paid more than half of the wages due him from the time of joining said ship to the filing of the libel and does not show that the libelant has not been paid more than half of the wages due him and was not paid more than one-half of the wages due him at the time of filing the libel, for any voyage upon which he engaged to serve under the articles mentioned in the libel."

[1] It is contended by the claimant that the shipping articles entered into by the libelant were entered into in a foreign jurisdiction, by a

foreign vessel and an alien person, and that the rights of the parties must be determined by the laws of the ship's flag.

I think the claims made by the claimant are stated too broadly. Congress has the right to prescribe rules which shall govern a vessel and sailors while within the jurisdiction of the United States, and, if the libelant has brought himself within the provisions of the act of Congress referred to, the exceptions must be denied.

[2] Section 4 of chapter 153, 38 Stat. at Large, p. 1165, amendatory of section 4530, Rev. Stat. U. S., provides:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void; provided, such a demand shall not be made before the expiration of nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. * * * Provided further, that this section shall apply to seamen on foreign vessels *while in harbors of the United States*, and the courts of the United States shall be open to such seamen for its enforcement." (Italics ours).

By express provision this act applies to seamen engaged on foreign vessels while in ports of the United States, and the courts of the United States shall be open to enforce such claims. It is further contended by the claimant that it affirmatively appears upon the face of the complaint that advancements have been made to seamen which more than pay one-half of the wages earned on the voyage to the time of demand. I think that section 10 of the Seamen's Act, 30 Stat. at Large, p. 763, indicates the policy of the Congress with relation to seamen on United States vessels by making it "unlawful in any case to pay any seaman wages in advance of the time when he has actually earned the same, or to pay such advance wages to any other person." A consideration of the provisions of section 4530, supra, as amended, in connection with section 10 of the Seaman's Act, supra, is conclusive, in my judgment, that the intent of Congress was that no advancements could be made upon wages earned on foreign vessels while in the harbors of the United States or within the jurisdiction of the waters of the United States. The libel showing that wages were earned while in the Port of Seattle, demand made within the provisions of section 4530, supra, as amended, and payment refused, a cause of action is stated, and the exceptions must be denied.

I have conferred with Judge CUSHMAN, and am authorized to state that he concurs in the conclusion herein.

HENNA et al. v. SAURI & SUBIRA et al.

(Circuit Court of Appeals, First Circuit. November 10. 1916.)

No. 1170.

1. APPEAL AND ERROR ⟸878(1)—REVIEW—QUESTIONS PRESENTED FOR REVIEW.
Where defendants, who had judgment below, did not appeal from a ruling adverse to one of their contentions, such ruling cannot be reviewed.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3573, 3574; Dec. Dig. ⟸878(1).]

2. MORTGAGES ⟸295(4)—EQUITY OF REDEMPTION—CONVEYANCE.
Holders of a first mortgage, desiring to foreclose, agreed to pay the mortgagors fixed sums in consideration of an agreement not to obstruct foreclosure, and to transfer their rights, if any, to the mortgagees, the first payment to be made on the day the mortgagees should take possession after and by virtue of the foreclosure. *Held* that, as the agreement was not to be effective for any purpose until foreclosure proceedings should have vested the mortgagees with title, the agreement did not amount to a conveyance of the equity of redemption, with which the title of the first mortgagees would merge, precluding foreclosure as against a second mortgagee.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 821; Dec. Dig. ⟸295(4).]

3. MORTGAGES ⟸505(1)—FORECLOSURE—UPSET PRICE.
The Mortgage Law of Porto Rico of 1893 (Rev. St. & Codes Porto Rico 1913, p. 1063 et seq.) requires as to mortgages previously recorded, wherein no definite value was fixed by agreement of the parties for the mortgaged property to serve as a basis for sale in case of foreclosure, that such value should be established either by a public instrument, or by appraisal in the foreclosure proceedings under direction of court. Mortgages recorded prior thereto recited that the properties were worth fixed amounts, but did not indicate that the parties had agreed to those amounts as fixing a value for the purpose of foreclosure. *Held*, that the values recited in the mortgages did not constitute an upset price for the purpose of foreclosure sale, so such price was properly fixed by appraisal under direction of court.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1501; Dec. Dig. ⟸505(1).]

4. COURTS ⟸405(14)—ASSIGNMENTS OF ERROR—SEPARATE ASSIGNMENTS.
Under court rule 11 (150 Fed. xxvii, 79 C. C. A. xxvii), declaring that the plaintiff in error shall file with his petition for a writ of error an assignment of errors, which shall set out separately and particularly each error asserted, several errors should not be grouped in one assignment.
[Ed. Note.—For other cases, see Courts, Dec. Dig. ⟸405(14).]

5. COURTS ⟸405(3)—REVIEW—QUESTIONS OF LOCAL LAW.
A determination by the Porto Rico Supreme Court that there had been such a compliance with the provisions of the Porto Rico Mortgage Law of 1893 relating to notice of time and place of sale that the foreclosure proceedings should not be set aside, relating to a question of purely local law, will not be disturbed by the Circuit Court of Appeals for the First Circuit, unless clearly erroneous.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. ⟸405(3).]

Appeal from the Supreme Court of Porto Rico.

Suit by Emilia-Victoria Henna and others against Sauri & Subira and others. A judgment for defendants was affirmed by the Supreme Court of Porto Rico, and plaintiffs appeal. Affirmed.

Jose A. Poventud, of Ponce, Porto Rico, for appellants.

Hollis R. Bailey, of Boston, Mass. (A. F. Castro, of Ponce, Porto Rico, on the brief), for appellees.

Before DODGE and BINGHAM, Circuit Judges, and ALDRICH, District Judge.

DODGE, Circuit Judge. This suit in equity was begun August 19, 1912. The relief sought was the avoidance of foreclosure proceedings in the court of first instance of Ponce, begun in November, 1897, and completed during the year 1898. There was an order by said court on January 1, 1898, for a public sale of the mortgaged real estate, and also, later in 1898, an adjudication thereof to Sauri, Subira & Co., holders of the two mortgages foreclosed and purchasers at the sale. The proceeds of the sale having been insufficient to pay the amount due on the two mortgages foreclosed, there was a subsequent order for the cancellation, as an incumbrance of record, of a third mortgage upon the property sold, held at the time by one Rosaly, since deceased, whose rights under it passed, as is not disputed, to the plaintiffs in said suit in equity, appellants in this court. Besides asking that the foreclosure proceedings be declared void, they asked that said third mortgage be reinstated.

[1] Rosaly lived in England, and died there in 1906. That the plaintiffs' rights have been lost by his or their delay in enforcing them, amounting to 14 years in all, is not claimed in this court. The district court for the judicial district of Ponce, wherein this suit was begun, held that under section 1865 of the Porto Rico Civil Code a suit like this was not "prescribed" until after 15 years had expired, and from this ruling the defendants took no appeal.

The district court held that no ground for invalidating the foreclosure proceedings had been established, and this result was affirmed on appeal by the Supreme Court of Porto Rico. Thereupon the plaintiff appealed to this court.

The two mortgages foreclosed by Sauri, Subira & Co., dated from 1880 and 1885, respectively, and were given by two brothers Oppenheimer. That given in 1880 covered two properties, called "Aguas Prietas" and "Consuelo Vayas." That given in 1885 covered the same properties and also another called "Isabel." Sauri, Subira & Co. were not the original mortgagees, but had become owners of both mortgages before instituting the foreclosure proceedings. The Oppenheimers had also given the third mortgage here in question upon the two properties first above mentioned, and Rosaly had become its owner before the foreclosure proceedings. It did not cover the property "Isabel."

The sums secured by their two mortgages remaining unpaid after demand, Sauri, Subira & Co. had, before beginning their foreclosure proceedings, agreed in writing with one of the Oppenheimers and with the widow of the other, who had succeeded to some part, at least, of her deceased husband's rights in the three properties, to pay certain sums for a transfer of all their rights, if any, in the mortgaged properties, and for their agreement not to obstruct or oppose foreclosure of said two mortgages. Part of said sums was agreed to be

paid on the day Sauri, Subira & Co. should take possession after and by virtue of the foreclosure; the remainder at a later time. But no part of said agreed sums was to be paid, nor, according to its terms, was the agreement to be effective for any purpose, until the foreclosure proceedings should have vested Sauri, Subira & Co. with title to the properties covered by the mortgages.

[2] Both courts in Porto Rico have agreed in rejecting the plaintiffs' contention that these agreements with the Oppenheimers extinguished Sauri, Subira & Co.'s mortgage titles and left them with no basis for any foreclosure proceedings. We find no error in this result. There had been no conveyance to Sauri, Subira & Co. of any rights belonging to the Oppenheimers in the mortgaged properties, and therefore no merger of rights, prior to the foreclosure. The agreements had no further effect than to put Sauri, Subira & Co. in position to obtain a full release of all possible adverse rights, should they so desire, which might remain in the Oppenheimers after the foreclosure proceedings. In case any one else became owner of the properties through said proceedings, Sauri, Subira & Co. would want no such release, and the agreement was in such case to go for nothing. This disposes of assignment of error II.

[3] The foreclosure proceedings were subject to the provisions of the reformed Mortgage Law of Porto Rico, which went into effect in 1893. This required, as to mortgages previously recorded wherein no definite value was fixed by agreement of the parties for the mortgaged property to serve as a basis for the sale in case of foreclosure, that such value should be established either by "a public instrument," or by appraisal in the foreclosure proceedings under the direction of the court. The latter course was followed in these proceedings; application being made to the court for appraisal of the properties January 10, 1898. The appellant contends that the mortgages themselves fixed the values by agreements therein between the parties thereto. The appraisal fixed a value considerably less than that which, according to the appellants, had been fixed in the mortgages themselves, and this value became, under the Mortgage Law, the upset price at which the properties were to be offered for sale. If there had been a value expressly agreed for the purpose in the mortgages, its amount would have been treated as the upset price. Both courts in Porto Rico held that, although the mortgages recited that the properties were respectively worth certain amounts, they did not indicate that the parties had agreed on those amounts as fixing a value for the purpose stated above. That they did not expressly so agree is undeniable. Whether such an agreement could be implied from their terms is a question of construction, upon which we do not find sufficient grounds for differing with the conclusion of both courts which have passed upon it. This disposes of assignment of error III.

[4, 5] Assignments of error IV, V, and VI relate to certain alleged defects in the foreclosure proceedings, and complain that there was error in not holding said proceedings void because of them. The facts here involved were not in dispute.

Public notice of the time and place of sale, to be given by posting and publication, was ordered. Such notices were required by the Mortgage Law (article 128, par. 3) to contain "a statement of the titles of ownership" of the property sold. In these notices the names of the properties and their owners were stated, also the acreage of each, and the value of each as fixed by the above appraisal. It was further stated that the deeds might be found in a certain office. But neither the boundaries of the properties nor the wards wherein they lay were specified, and the plaintiffs' contention was that therein the notices failed to satisfy the requirements of law (assignment IV). A further alleged error specified in this assignment, which ought to have been separately assigned according to rule 11 of this court (150 Fed. xxvii, 79 C. C. A. xxvii) is referred to below.

The notices contained the statement that there were no rights recorded against the properties, subsequent to those existing by virtue of the two mortgages being foreclosed. The statement was not true, as appeared from the foreclosure petition filed by the mortgagees themselves, which had annexed to it a registrar's certificate distinctly showing Rosaly's mortgage to be of record as a subsequent incumbrance. There was, however, no claim that the incorrect statement was made for any dishonest purpose or got into the notices otherwise than by inadvertence. The plaintiffs contended that it prejudiced Rosaly's rights and was a failure to comply with article 172, par. 2, of the Mortgage Law, which required the names of persons interested under subsequent incumbrances and not already notified to be stated in the notices of sale. (Assignment of Error V.)

The notice of sale issued was published in the Gazette, March 4, 5, and 6, 1898. The sale was on March 18th. Article 128, par. 3, of the Mortgage Law provided that "the sale shall take place 20 days after the publication of the notice." No complaint that the sale was made on insufficient notice was ever made by the mortgagors, but the plaintiffs contended that as to Rosaly the failure to allow 20 days made the proceedings void. (Assignment of Error VI.)

The notice was posted in the municipality of Ponce, within which the properties lay, on the doors of the court building and of the office of the clerk; the usual places for posting such notices, according to the evidence, under such circumstances. There were no notices posted in the particular wards within which the properties lay, and it did not appear that there were any usual places for such posting within said wards. The Mortgage Law, or the regulations for its execution (article 172), required posting "in the customary places where the proceedings are being had and where the property is situated." The plaintiffs contend that this requirement had been insufficiently complied with (Assignment of Error IV); but this alleged error is not insisted on in the brief filed here on their behalf.

Both courts in Porto Rico agreed in considering the alleged defects specified in the above assignments IV, V, and VI insufficient to invalidate the foreclosure proceedings or warrant the relief sought by the plaintiffs' bill. Rosaly was found to have had due notice of the proceedings, and although they disputed this finding in the Supreme

Court of Porto Rico, the plaintiffs have not assigned it as error in this court. With regard to the alleged failure to set forth the "titles of ownership" in the notice, both courts held that enough having been set forth to identify the properties to be sold, and their owners, and to inform any one interested where all further particulars could be learned, it did not make the notices defective. With regard to the incorrect statement as to subsequent incumbrances, both courts held that Rosaly could not complain of it as a want of due notice to him, and that it did not tend to prejudice him by preventing bidding at the sale. With regard to the failure to publish 20 days before the sale, both courts held that the mortgagors might waive it, and that, in the absence of any proof of actual damage to him thereby, it gave a subsequent mortgagee no right to invalidate the proceedings because of it. With regard to the failure to post notices in the wards, both courts held that the law did not require such posting and had been complied with by the posting in the usual places.

How far the alleged defects relied on affected the validity of the proceedings in 1898, and to what extent Rosaly's successors were entitled to take advantage of them in 1912, were questions of purely local law; and the action taken by the court below regarding them is to be upheld except upon conviction of clear error committed. Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538. The plaintiffs fail to satisfy us that any such clear error has been committed.

The above conclusions dispose also of assignments I and VII. They leave for consideration only assignments VIII and IX, which raise only questions as to costs, the action regarding which was discretionary with the court below; and nothing is found in the record indicating any abuse of such discretion. Other errors are asserted in the brief filed here by the appellants, but, there being no assignments of error relating to them, they are not entitled to consideration.

The judgment of the Supreme Court of Porto Rico is affirmed, and the appellees recover costs of this appeal.

LANE v. LEITER.

INTERIOR ELEVATOR CO. v. LEITER.

(Circuit Court of Appeals, Seventh Circuit. May 26, 1916.)

Nos. 2245, 2246.

1. MONOPOLIES ⊂⊃17(1)—CONTRACTS IN "RESTRAINT OF TRADE"—"ATTEMPT TO CORNER GRAIN MARKET"—"COMBINATION TO MONOPOLIZE FOOD PRODUCTS"—"RESTRICT THE FREEDOM OF MARKETS."

An agreement between the owners of large quantities of wheat to hold the same together and sell in the market only by agreement between themselves is illegal, under Hurd's Rev. St. Ill. 1915–16, c. 38, § 130, which declares the making of a contract for cornering or attempting to corner the market in relation to grain a criminal offense, and the contract void, and likewise under Const. Minn. art. 4, § 35, and Laws Minn. 1891, c. 10, § 1, which condemn contracts to monopolize food products or restrict the

freedom of such markets. Such contracts are also void at common law, as in restraint of trade and against public policy.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 13; Dec. Dig. ⊂⊃17(1).

For other definitions, see Words and Phrases, First and Second Series, Restraint of Trade.]

2. MONOPOLIES ⊂⊃21—VALIDITY OF NOTES—ILLEGAL CONSIDERATION.
Defendant and two others, each the owner of a large quantity of wheat in store in the spring, entered into a pooling agreement to hold their wheat together for the purpose of controlling the market and forcing up the price. If either wished to sell any part of his holdings, he was to first offer it to the other parties. After the price had advanced, one of the other parties desiring to sell 920,000 bushels, defendant bought it under the agreement, to be still held subject thereto, agreeing to pay about 40 cents a bushel above what was the market price when the agreement was made. He made payments of something more than such former market price, and gave two notes for the remainder of the agreed price. *Held*, that the notes, the only consideration for which was the profit made by the seller as a direct result of the illegal agreement, were invalid, and not collectible in his hands.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. ⊂⊃21.]

3. MONOPOLIES ⊂⊃21—VALIDITY OF NOTES—ILLEGAL CONSIDERATION.
The fact that at the seller's request defendant made the notes payable, respectively, to two elevator companies, in whose elevators the wheat was stored and held, did not charge him with knowledge or establish as a fact that such companies were the owners of the wheat and the principals in the sale; it appearing that the elevators were public warehouses, and that the seller was the president and majority stockholder and controlled the business of both, and that other officers of the companies had knowledge that throughout the transaction and in the sale he had represented and treated the wheat as his own property.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. ⊂⊃21.]

4. MONOPOLIES ⊂⊃23—SALE—VALIDITY OF CONTRACT.
A contract by an owner to sell wheat is not invalid, because he had knowledge that it was to be used in fulfillment of an agreement which was illegal, as in restraint of trade, where he was not a party to such agreement.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 16; Dec. Dig. ⊂⊃23.]

5. PRINCIPAL AND AGENT ⊂⊃143(2)—UNDISCLOSED AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL.
The fact that a party, in making a contract, acts for an undisclosed principal, does not enlarge the rights of the principal over his own as against the other party, nor deprive the latter of any defense which he would have had against the agent.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 503, 506, 507, 511, 512; Dec. Dig. ⊂⊃143(2).]

6. APPEAL AND ERROR ⊂⊃230, 259—REVIEW—CONDUCT OF TRIAL.
Remarks made by the court in the presence of the jury are not subject to review by an appellate court, where no objection was made, nor exception taken at the time.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1499; Dec. Dig. ⊂⊃230, 259.]

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

Actions at law by Chester W. Lane and by the Interior Elevator Company against Joseph Leiter. Judgment for defendant, and plaintiffs bring error. Affirmed.

These actions, commenced September 30, 1911, arise out of the same transactions and were tried together. The first was on a note for $58,034.92, made to Monarch Elevator Company, indorsed to plaintiff in error, an officer of payee, who took title merely for convenience, and does not claim to be a holder in due course. The other was on a note for $199,355.79, to plaintiff in error Interior Elevator Company. Both notes are dated Chicago, October 6, 1898, due on or before 3 years from their date, with interest at 3 per cent. per annum, and signed by defendant in error. Nothing of principal or interest has been paid. The defense is that the notes grew out of an alleged undertaking or conspiracy entered into between Frank H. Peavey, and Charles A. Pillsbury, both of Minneapolis, and Joseph Leiter, of Chicago, defendant in error, to corner the wheat market, and are void under the common law, as well as under section 130, c. 38, Revised Statutes of Illinois, which denounces as criminal the making of option contracts for grain, or the cornering or attempting to corner the market in relation to grain, and declares all contracts made in violation of the section to be gambling contracts and void, and that they are likewise void under article 4, § 35, of the Minnesota Constitution, and chapter 10, § 1, Gen. Laws Minn., in force in 1898, which condemn combinations or agreements to monopolize food products, or to interfere with or restrict the freedom of such markets. The jury found for defendant, and the District Court rendered judgments accordingly. In the opinion following further facts are stated.

Dwight S. Bobb and James B. Wescott, both of Chicago, Ill., for plaintiffs in error.

Henry Russell Platt, of Chicago, Ill., for defendant in error.

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

ALSCHULER, Circuit Judge (after stating the facts as above). In the forepart of April, 1898, Peavey, Pillsbury, and Leiter were each large operators in and holders of wheat. Under date of April 14th Pillsbury wrote Leiter saying:

"Peavey has about a million and a half of contract wheat in his own houses and he has 600,000 or 700,000 warehouse receipts in other elevators. Indeed, if you do not get your wheat all sold by May 1st I think this market could be absolutely controlled and cash wheat put to about any premium we wanted, if you, Mr. Peavey, and myself all worked together; but the arrangement might have to be made before the first of May."

In a letter of April 18th he suggested Leiter and himself taking a certain amount of Peavey's wheat, and proceeded:

"Now when this is done Mr. Peavey will have about a million and a half bushels of wheat left in Minneapolis and quite a little bunch in Duluth. He will agree to work with us to control the cash wheat market and will see that none of his wheat is shipped to Chicago. In a general way Mr. Peavey and I have controlled this market several times in this way; we put our wheat together, in a bunch, then we fix a price at what we want to sell it, and each one sells wheat in proportion to the amount he holds. In case one man wants to sell and the others do not, the other two have the privilege of buying the wheat from him or letting him sell. I should think this would be a good arrangement for us to make all around, and then a very little after the first of May we can regulate the premium on cash wheat here, all we want to."

On the 19th Leiter wrote Pillsbury, saying he had lunched with Peavey and that they agreed on the proposition as outlined in Pills-

bury's letter, and that no wheat belonging to either party to the arrangement should come to Chicago for sale, whether to be sold on joint account or account of any individual who may sell. Under same date Pillsbury wrote Leiter, going into further details, and saying:

"I think if we can control all the cash wheat in the Northwest we can make foreigners and home millers pay about what we are a mind to ask for the stuff."

On the 24th, Pillsbury, Peavey, Leiter, Thompson, from Duluth, a special partner of Pillsbury, and French, of Chicago, a friend of Leiter, met at Pillsbury's office in Minneapolis. The details of the business were talked over, and the letters which had passed between Pillsbury and Leiter were submitted. It was agreed that the three (Pillsbury, Peavey, and Leiter) enter into the arrangement substantially as indicated by the letters; that Peavey and Pillsbury should handle the Minneapolis end of the pool or corner, Thompson attend to affairs at Duluth, and Leiter look after the Chicago end; and that no member of the pool should sell any of his holdings until he offered them to other members of the pool; but, if they refused to buy he might sell as he saw fit, except that no part of the Northwestern wheat should in any event be sold on the Chicago market.

Leiter wanted a written agreement, but Pillsbury and Peavey refused, saying it was a criminal conspiracy, and that they would have to work under a "gentlemen's agreement." The record contains much more of similar import, but the references made sufficiently indicate the nature of the undertaking.

[1] Such agreements are void, not only under the statutes referred to, but also at common law, as being in restraint of trade, and against public policy. Dr. Miles Medical Co. v. Park & Sons Co., 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502; Craft et al. v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Samuels et al. v. Oliver et al., 130 Ill. 73, 22 N. E. 499; C. W. & V. Coal Co. v. People, 214 Ill. 421, 73 N. E. 770; Foss et al. v. Cummings et al., 149 Ill. 353, 36 N. E. 553. In the case last cited the court, holding the agreement void as an attempt to corner the market in violation of the statute, as well as being in restraint of trade and void at common law, quoted with approval the following language from 9 Am. & Eng. Ency. of Law 595:

"All compacts between merchants, speculators, or any class of men to elevate or depress the market are injurious to the public interest, and in restraint of trade. When such a purpose is apparent in a contract, it strikes the agreement with nullity. Such a combination of dealers is nothing less than a conspiracy against trade, entered into for selfish purposes, and tending to make the poor poorer and the rich richer. Whether the design is to bring the price of any commodity to a point below its value in a fair and open market, or to raise it above its true worth, the illegality of the combination is the same. Such design will not be furthered by the courts, though there may be circumstances under which the object of such a contract does not sufficiently appear to expose the illegality. If the true character is known, the contract will be held void."

[2] A part of the wheat which Peavey brought into this unlawful combine or corner consisted of 200,000 bushels then in the elevator of the Monarch Elevator Company and 705,000 then in the elevator of

the Interior Elevator Company, both at Minneapolis. It will be needless to detail the operations of the combine, but suffice to say under its influence the market price of wheat, which was about $1 when the combine was formed, rapidly and substantially rose. On May 9th Peavey desiring to realize on this 905,000 bushels came to Chicago, and under the pooling agreement offered it to Leiter, who after some parley contracted to take it at $1.45, Peavey to store it free till September 1st. This did not terminate nor dissolve the corner, nor end the participation in the pool or corner of this 905,000 bushels, but under the manipulation and control of these men the pool actively continued its operations, with the result that for a short time afterward wheat went as high as $1.75. But Leiter could not unload without breaking the market, and about the middle of June, finding himself unable longer to carry his vast holdings of wheat, a committee, consisting of Messrs. Peavey and Armour, was appointed to take over and dispose of the same for the benefit primarily of his creditors. This they did, ultimately selling all Leiter's wheat, including this 905,000 bushels, at about 85 cents. After the 905,000 bushels had been disposed of, it was found that the price realized, plus the very large amounts which from time to time Leiter had put up with Peavey as margins to carry this wheat, aggregated a sum which, deducted from the price of $1.45 per bushel, left a debit balance against Leiter on this purchase, amounting to the aggregate of these two notes, and constituting the only consideration for them.

The evidence warranted the jury in finding that it was in pursuance of the unlawful agreement to corner the market that Peavey sold and Leiter bought and held the 905,000 bushels, and that through the influence of the pool or corner by May 9th wheat had advanced in price about 40 cents over the price when the pool was formed, and that the entire consideration for the notes represented profits on the wheat to Leiter's vendor, and loss to Leiter, resulting directly from this unlawful attempt to corner the wheat market. In other words, if it may be assumed that but for the corner there would have been no substantial change in price between April 24th and May 9th, and that if Leiter, on the last date had undertaken to buy wheat on a market uninfluenced by the corner, he could have bought it at about 40 cents per bushel less than under the "gentlemen's agreement" he was practically compelled to pay (or contract to pay) to his partner in the very unlawful enterprise which enhanced the price. Selling at $1.45, the resultant profit by reason of the pool, on the 905,000 bushels at 40 cents would be $362,000, of which there remains unpaid $257,390.71, the aggregate of the notes, which thus represent profits arising directly out of what the law stamps a gambling transaction. If the action were by Peavey, clearly he could not recover; nor, indeed, is it contended in the briefs for plaintiffs in error that he could.

[3, 4] But plaintiffs in error contend that this wheat was the property of the Monarch and Interior Elevator Companies, respectively, and was by them sold to Leiter; that these companies had no participation in the unlawful conspiracy or attempt to corner the market; and that plaintiffs in error are therefore entitled to recover upon the notes.

If from the record these facts so conclusively and certainly appear that the jury ought not reasonably to have found otherwise, it is clear plaintiffs in error should prevail, even though the elevator companies may have had knowledge that the wheat would be used for the purposes of the unlawful combination. Armstrong v. American National Bank of Chicago, 133 U. S. 433, 10 Sup. Ct. 450, 33 L. Ed. 747; Jackson et al. v. City National Bank of Goshen, 125 Ind. 347, 25 N. E. 430, 9 L. R. A. 657; Willson v. Owen, 30 Mich. 474.

Who was the vendor of this wheat is thus of the very essence of the controversy. There is nothing in the record to show that prior to the purchase on May 9th Leiter had the slightest reason to believe any one but Peavey owned the wheat. From the inception of the corner, again and again, orally and in writing, Peavey referred to it and treated it as his own, and as such he brought it into the pool. Where it was stored was of no particular concern to Leiter. The fact that he then knew, if he did know, or that at the time of his purchase of it he knew it was in these elevators, would not of itself lead him to believe that the elevator companies owned the wheat. These were terminal elevators—public warehouses—licensed under the law, and having the duty to receive and store and hold as bailees, grain for all who may bring it to them, and to issue warehouse receipts in manifestation of the ownership. Gen. St. Minn. §§ 7659, 7646, 7649, 7650.

Although this wheat was in these elevators before the agreement to corner was made, the record does not disclose that the companies ever had the warehouse receipts. General Manager Stevens did not know who had them, but stated it may have been Peavey & Co., who may have held them as collateral for money advanced, the same as a bank might have held them. He said the companies had books which showed where the receipts were, but the books were not produced. Mr. Lane testified that these books having the records for 1898 could not be found and must have been destroyed. The receipts themselves, which must have been surrendered to the companies when the wheat was withdrawn from the elevators, remain also unaccounted for in the record. If the certificates were in Peavey's name, originally or by assignment, either as absolute owner or as security for advances, he had the indicia of title in himself to substantiate his asserted and apparent ownership. However, it does not appear that Leiter questioned his title, but that he took it for granted the wheat was Peavey's, and that Peavey had, as he assumed to have, the right to deal with it as his own. But the record discloses facts from which the jury was amply justified in concluding that these companies well knew and understood that Peavey was representing and handling the wheat as his own, and even in finding that to all practical intents and purposes the wheat was in fact Peavey's, and the companies only his agencies or instrumentalities in carrying and handling it.

All the extended correspondence and dealings with Leiter were conducted in the name of Peavey, or Peavey & Co., the two names being indiscriminately employed. E. M. Stevens, testifying for plaintiffs in error, said he was at these times the general manager and auditor of these companies, and auditor and employé of Peavey as well. Each of

them paid him. He had authority to sign the names of the companies, or of Peavey, or Peavey & Co., and did so as the nature of the business required. He appears to have signed Peavey's name to various letters in evidence which contain statements of Peavey's ownership inconsistent with title of the wheat in any one but Peavey. It would unduly tax credulity to say that Stevens was not entirely familiar with all the details of all these transactions. From his testimony it appears that Peavey was the directing and radiating center of a grain dealing "system" which bore his name, and of which these and other companies were a part, and which was known as the "Peavey System." All the business stationery of Peavey and the elevator companies bore on its face an emblem consisting of a red diamond with "P. V." printed on it to designate the user as a Peavey concern. The Peavey and the elevator offices were on the same floor. Peavey owned a majority of the stock of both companies, and with his family and partner held 84 per cent. of the Monarch and 89 per cent. of the Interior stock. He was president of both, and Stevens said he was the "dominant factor" and controlled the policies of all his companies, that he could have ordered out every bushel of wheat belonging to the houses, and that no one of the companies could have sold contrary to his orders. Witness Higgins, who was superintendent of the Monarch, and kept the records of grain received, also testifying for plaintiffs in error, said that he knew nothing about the ownership of wheat, except as Peavey's office sent word, and that the dealings with outside parties were in Peavey's hands.

But the transaction of sale and purchase is in itself of course of prime importance in determining who were the parties to it. The negotiations took place at Chicago. Peavey, asserting his desire and right under the "gentlemen's agreement" to sell the wheat, offered it to Leiter as the agreement required. They reached an understanding which they manifested by two letters dated May 9th at Chicago. One from Peavey to Leiter is as follows:

"Confirming our conversation this a. m., we sell you this day 905,000 bushels No. 1 Minneapolis wheat in store Minneapolis at $1.45 per bushel, you to margin it as required and pay interest and insurance; but you are to have free elevator storage until September 1st, at which time you will settle and pay us for whatever amount may be due us on above purchase."

Leiter's reply addressed to F. H. Peavey & Co., is as follows:

"Referring to your letter of even date, I beg to confirm your letter and our conversation of this morning. I bought from you this day 905,000 bushels of No. 1 Northern Minneapolis wheat in store Minneapolis at $1.45 per bushel, and I agree to margin as required and pay interest and insurance; but you are to furnish me free elevator storage until September 1st, at which time I will settle and pay you for whatever amount may be due you on above purchase."

This closed and constituted the contract of purchase and sale of this wheat, and to this contract it does not appear the elevator companies, so far as concerns Leiter, were directly or indirectly parties. In fulfilment of the contract, Peavey wrote Leiter from Minneapolis on May 12th:

"I inclose invoices of the 905,000 bushels of wheat you bought of me May 9th. They are sent in the regular form, so as to be properly on our books."

Then follow some comments with respect to the conduct and progress of their wheat corner, closing with the sentence, "I shall not let this market close below 10 cents under Duluth unless you advise to the contrary," and signed "Frank H. Peavey." The "invoices" inclosed with this letter, being the main reliance of plaintiffs in error to show a sale by the companies, are set out, as follows:

MONARCH ELEVATOR CO.

(PV)

Minneapolis, Minn. May 9th, 1898.

Joseph Leiter, Esqur.
Date of Sale .....Chicago, Illinois.

Car Number	Transferred To	Grade	Gross Weight	Dkg. Net. Weight	Price
	In Store Mpls.	1°	200000 (208)	145	$290000
JL					Warr.

Minneapolis, Minn. May 9, 1898.

M. Joseph Leiter,
Chicago.
Bought of the Interior Elevator Co.

(PV)

Terminal Elevators — 214 Flour Exchange — Capacity 3,000,000 Bushels

Sale No.	Car Init.	Gross Lbs.	Gross Bu.	Insp.	Net Dock Bu.	Price	Amount
Mpls.	Wheat in Store (209)			1° J.L.	705,000.00	145 Warr.	1022250.00

This is the first instance where these corporate names appear in the transaction, and aside from the notes themselves is practically all the evidence the record affords to show that the wheat was sold to Leiter by these companies. The instruments were both dated back to May 9th, the date of sale, so that, as was explained, interest would run from that time—indicating that at the time the companies regarded the sale as having been made by what occurred between Leiter and Peavey on the 9th, and not by the sending of these invoices. The Monarch Company form does not purport to be a sale at all, in that no date is filled in the blank after the form words "Date of Sale." The Interior Company form recites that Leiter "bought of the Interior Elevator Company." It is urged that Leiter's concurrence in a sale to him by the companies appears from the fact that he initialed these papers. These papers, so initialed, were not sent to the companies to manifest to them his acceptance, but with the letter from Peavey transmitting them, remained in Leiter's possession. It appears that it was his custom to place his initials on all correspondence and papers that came under his observation, not by way of approval or ratification, but merely by way of identification of the paper as having

been examined by him, and this accounts for the same initials (J. L.) on many of the other papers in evidence. Peavey's statement in the letter that the invoices "are sent on the regular form, so as to be properly on our books," does not indicate that by inclosing the invoices it was designed to convey information that any one other than Peavey himself was the vendor of the wheat.

After May 9th the correspondence between Peavey and Leiter concerning the progress of their combine, and the status of this wheat purchase, actively continued; this wheat being invariably referred to as having been Peavey's, and as being now carried by him for Leiter. He made repeated calls on Leiter for further margins on this and much other wheat, to which Leiter responded by sending him from time to time in May and June large sums, aggregating over $300,000, on this wheat alone, although, as Stevens testified, the money was not paid over to the companies, nor does it appear on their books at all until October 6th, which is the date of the notes, when it shows for the first time as having been credited on the purchase price of the wheat.

On June 7th Peavey, signing by Stevens, wrote Leiter:

"We inclose you herewith interest statements for 905,000 cash sale which we have with you. 705,000 of which is on our books with our Interior Elevator Company and 200,000 with the Monarch Elevator Company. Interest has been charged on these statements to June 1st, and they will render you like statements at the end of each month. We do not charge insurance at this time, but same will follow in one item at the closing of the deal."

Interest statements by the elevator companies were inclosed, and others sent monthly till the deal was closed out. It is urged that this letter and the sending of the interest statements further manifest that the deal was between Leiter and plaintiffs in error; but to us it seems rather to emphasize the conclusion that the transaction was wholly between Peavey and Leiter, at least a finding of the jury to that effect would surely not be without evidence to sustain it.

Books and records were received in evidence to show that the wheat was in fact bought by the companies, and was their property. This may be admitted, yet it does not follow that the sale to Leiter was by them. For one to contract with another for the sale of a commodity, and to fulfill his contract by having a third person whose property it was make the delivery, is a very usual transaction. But this does not give the third party, who theretofore was the owner, any claim against the vendee, whose liability is to his vendor alone. Any relation or understanding between Peavey and these companies under which their wheat may have been used to fulfill Peavey's undertaking with Leiter, was really no affair of Leiter's, who was dealing with Peavey for wheat which Peavey either owned or had the apparent, if not the actual, right to dispose of as his own.

[5] It is suggested in briefs for plaintiffs in error that the relation of the companies to the transaction was that of Peavey's undisclosed principals; but this would not enlarge their right over Peavey's, nor deprive Leiter of any defense against them which he would have had

against Peavey. Tiffany on Agency, § 71; 2 Mechem on Agency (2d Ed.) § 2074, and cases there cited.

But it is insisted that the fact of Leiter's giving the notes to the elevator companies, in connection with the other facts referred to, conclusively shows the contract to have been with the companies, and entitled them to an instructed verdict in their favor. The probative value of the fact of so giving the notes was for the jury to determine. From the uncontradicted testimony of witness Warr it appears that on October 6th Stevens presented at Leiter's office three statements showing debit balances of $58,034.92 on the 200,000 in the Monarch, $199,355.79 on the 705,000 in the Interior, and $196,614.19 on other deals with Peavey; that shortly afterwards Peavey came in and asked Leiter to give a note for the amount due, but that when it came to make out the note he requested three notes, instead of one, each covering one of the amounts shown on these statements. The notes were so made, and each statement appears indorsed by Peavey "Received payment by note due October 6, 1901"—the first being signed, "Monarch Elevator Co., by F. H. Peavey, Pt.," the second, "Interior El. Co., by F. H. Peavey, Pt.," and the last "F. H. Peavey & Co."

There is no necessary significance in the fact of Leiter's giving the notes to the companies. If the "gentlemen's agreement" was then still of sufficient potency to induce him to give his note at all in settlement of this otherwise uncollectable balance, it is not unreasonable to conclude that he was willing to divide it into as many notes, made payable to such payees, as Peavey might request.

Counsel for plaintiffs in error are urgent in their insistence that serious error was committed by the court in charging the jury that if Peavey controlled and dominated the Monarch and Interior Companies, and was their actual managing officer, his knowledge of the illegality of the agreement with Leiter and Pillsbury would carry notice of such illegality to the companies. Many cases are cited to sustain the proposition that, where a corporate officer deals in his individual capacity with the corporation, his knowledge acquired in such transaction will not be attributed to the corporation. For defendant in error cases are cited to show that the rule does not apply where the officer has the absolute control and domination of the company's business. We need not consider the limitations or application of the rule, for not only would the companies have had such knowledge through Stevens, who does not appear to have had any personal interest in the transactions, but elsewhere in the charge the jury was told that knowledge of the company that the grain would be used in furtherance of a gambling transaction would not prevent recovery on the notes, unless accompanied by proof of the fact that the companies were interested in the illegal transaction, and that, if the contract of sale was between Leiter and the companies, then unless the companies were so interested they are entitled to recover. So, even if the part of the charge complained of is erroneous, plaintiffs in error sustained no harm through it.

[6] Complaint is made of certain remarks of the trial judge in the presence of the jury; but as the record does not show objection or exception to the remarks at the time the matter is not reviewable.

Drumm-Flato Commission Co. v. Edmisson, 208 U. S. 534, 28 Sup. Ct. 367, 52 L. Ed. 606; Robinson v. Van Hooser, 196 Fed. 620, 116 C. C. A. 294; I. C. R. R. Co. v. Griffin, 80 Fed. 278, 25 C. C. A. 413.

Peavey having died prior to the trial, reversal is urged for the error alleged in admitting Leiter's testimony of his conversations with Peavey, on the ground that Peavey was the agent of the elevator companies in the sale of the wheat, and that under section 4, c. 51, Rev. Stat. of Illinois, a party who contracted with an agent, since deceased, of the adverse party, may not testify to conversations had with the agent, unless the conversation was in the presence of a surviving agent of the adverse party. Without considering the applicability of the statute to a case such as this, where the very question in issue is whether or not deceased was in fact the agent or the principal, we find that the error, if any there was, in admitting the testimony, was not prejudicial to plaintiffs in error. Substantially all of it related to matters which were otherwise and without contradiction fully shown by other evidence of undoubted competency. The transaction of April 24th at Minneapolis was proved by witnesses Thompson and French, and the nature of it further abundantly appears from letters in evidence. The wheat purchase was fully shown by the letters of May 9th, and the conversation between Peavey and Leiter leading up to that deal (which does not vary the terms of these writings) was testified to by French; and witness Warr testified to the conversation at the time of giving the notes, and if he did not state the facts, Peavey's brother, who was also there present, might have been, but was not, called to testify.

We find no error which would warrant a reversal of these judgments, and they are affirmed.

DAIGLE v. UNITED STATES et al.

(Circuit Court of Appeals, First Circuit. November 8, 1916.)

No. 1191.

1. CUSTOMS DUTIES ⟸130—IMPORTATION OF PROHIBITED GOODS—FORFEITURE.
Potatoes, the importation of which is prohibited, cannot, on being brought into the United States, be forfeited under Rev. St. §§ 2865, 3082 (Comp. St. 1913, §§ 5548, 5785), or under sections 3082 and 3097 (Comp. St. 1913, §§ 5785, 5809), as they are not dutiable.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

2. AGRICULTURE ⟸9½, New, vol. 4 Key-No. Series—UNLAWFUL IMPORTATION —QUARANTINE REGULATIONS—FORFEITURE.
Under Quarantine Act Aug. 20, 1912, c. 308, § 7, 37 Stat. 317 (Comp. St. 1913, § 8758), authorizing the Secretary of Agriculture to forbid the importation into the United States of any fruits, vegetables, etc., necessary to prevent the introduction into the United Staes of any disease, or of any injurious insect not theretofore widely prevalent throughout the United States, the Secretary of Agriculture, on December 22, 1913, forbade the importation, from the Dominion of Canada, Newfoundland, and other countries, of the common potato, because afflicted with potato diseases

not widely distributed throughout the United States. Plaintiff in error introduced from Canada into the United States potatoes in violation of such order, and without submitting them for inspection by customs officials. Rev. St. §§ 3061, 3062 (Comp. St. 1913, §§ 5763, 5764), respectively declare that any officers authorized to board or search vessels may examine any vehicle or person, on which or whom he shall suspect there is merchandise subject to duty, or introduced into the United States contrary to law, and that every such vehicle, together with motive power used in drawing or propelling the same, shall be subject to seizure and forfeiture. Section 3082 (section 5785) provides for the forfeiture of merchandise fraudulently imported into the United States contrary to law, while section 3100 (section 5812) declares that all merchandise and other articles imported into the United States from any contiguous foreign country, as well as vehicles, shall be inspected at the first port of entry where they shall arrive. *Held* that, as goods which are properly subjects of import, whether dutiable or nondutiable, are imported contrary to law, unless inspected by an inspector, on being imported from Canada, the potatoes, though not dutiable, and though not a lawful subject of importation, because their introduction into the country was forbidden, were imported contrary to law, unless inspected, and the potatoes, as well as the vehicles and animals used in transporting them, are subject to forfeiture.

3. CUSTOMS DUTIES ⟸130—FORFEITURES—LIBEL OR INFORMATION.

The claimant of potatoes imported into the United States in violation of law, as well as the vehicles used in their importation, all of which were sought to be forfeited, cannot, though the importation was by land, complain that the process was termed a libel of information, rather than a libel, though a libel of information is the proper process to procure a forfeiture in case of a seizure upon the sea; the instrument alleging that the seizure was by land.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⟸130.]

4. EVIDENCE ⟸39—JUDICIAL NOTICE.

The court may take judicial notice of treaties between the United States and Great Britain relating to the boundary line between the United States and Canada, as well as public acts and proclamations carrying the treaties into effect, for they are historical and nortorious facts, and hence the admission of a map filed by the commissioners appointed under the Webster-Ashburton treaty of 1842 to locate the boundary cannot be objected to, because their report was not introduced; it being presumed that the court took judicial notice of the report.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 53; Dec. Dig. ⟸39.]

5. APPEAL AND ERROR ⟸1047(1)—REVIEW—HARMLESS ERROR.

Where the Webster-Ashburton treaty of 1842, fixing the boundary line between the United States and Canada, and the map and the report of commissioners appointed to locate the boundary line were conclusive proof of the location, a ruling by the court that the map of the commissioners, the report and treaty not having been introduced, conclusively fixed the boundary, was harmless error, for the court could and undoubtedly did take notice of the treaty and report.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4146, 4150–4152; Dec. Dig. ⟸1047(1).]

6. APPEAL AND ERROR ⟸1056(2)—REVIEW—HARMLESS ERROR.

In a proceeding to forfeit potatoes, together with the vehicles used in bringing them into the United States, on the ground that they were unlawfully imported from an island in the St. John river, which was part of the Dominion of Canada, claimant, who imported the potatoes, having been notified by customs inspector that produce from the island could not be

brought into the United States unless duties were paid, cannot complain of the exclusion of evidence that there were monuments on the island from which he deemed that it was part of the territory of the United States, and that therefore he imported the potatoes in good faith.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4188; Dec. Dig. ⊂⇒1056(2).]

In Error to the District Court of the United States for the District of Maine; Clarence Hale, Judge.

Libel of information by the United States of America and others against Twenty-Two Barrels of Potatoes and other property claimed by Hilaire Daigle. There was a judgment of forfeiture, and claimant brings error. Affirmed.

Herbert E. Locke, of Augusta, Me. (W. R. Pattangall, of Augusta, Me., on the brief), for plaintiff in error.

John F. A. Merrill, U. S. Atty., of Portland, Me., for defendants in error.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. This is a libel of information, brought by the United States attorney for the district of Maine against twenty-two barrels of potatoes, two horses, a pair of double harnesses, and a wagon, described in the libel, and under seizure by the collector of customs of that district as being forfeited to the United States. The causes of forfeiture set out in the libel are hereafter stated and considered.

Daigle appeared as claimant of the property, filed a special demurrer, and made answer, denying all the allegations of the libel.

The potatoes were raised by the claimant on Daigle Island, which is situated in the St. John river, some 400 or 500 feet from his farm, at Ft. Kent, in the state of Maine, and were brought from the island to Ft. Kent on October 14, 1914. Immediately after they were brought in there they were seized by the customs officers, together with the other property mentioned in the libel. The jury found that the property seized by the officers was unlawfully imported into the United States, as charged in the information.

In the court below the government contended that Daigle Island was British soil, while the claimant's contention was that it was a part of his farm in Ft. Kent. The District Court ruled that Daigle Island was Canadian territory, belonging to Great Britain. The claimant requested the court to rule, as a matter of law, that neither the potatoes nor the other property enumerated in the libel were subject to forfeiture on any of the four grounds stated in the libel, for the reason that the potatoes were not, on October 15, 1914, subject to duties under the customs laws of the United States then in force, and that the customs officers had no duties to perform with reference to their importation, because, under the act of Congress known as the "Plant Quarantine Act" (37 Stat. at Large, p. 315), and by virtue of an order of the Secretary of Agriculture of the United States, under date of December 22, 1913, made in pursuance of the authority conferred upon him by said

act, the importation of the potatoes from Canada was absolutely forbidden by law. The court ruled that the embargo was not a defense to the libel. The claimant excepted, and assigned this ruling as error.

[1, 2] The question presented is whether the 22 barrels of potatoes, together with the other property enumerated in the libel, which was used in bringing the potatoes into this country from Canada, were subject to seizure and condemnation on any of the grounds stated in the four counts of the libel, in view of the fact that the importation of the potatoes into the United States was prohibited under the Plant Quarantine Act and the order of the Secretary of Agriculture in pursuance thereof.

The Quarantine Act provides:

"Sec. 7. That whenever, in order to prevent the introduction into the United States of any tree, plant, or fruit disease or of any injurious insect, new to or not theretofore widely prevalent or distributed within and throughout the United States, the Secretary of Agriculture shall determine that it is necessary to forbid the importation into the United States of any class of nursery stock or of any other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products from a country or locality where such disease or insect infestation exists, he shall promulgate such determination, specifying the country and locality and the class of nursery stock or other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products which, in his opinion, should be excluded. Following the promulgation of such determination by the Secretary of Agriculture, and until the withdrawal of the said promulgation by him, the importation of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products specified in the said promulgation from the country and locality therein named, regardless of the use for which the same is intended, is hereby prohibited; and until the withdrawal of the said promulgation by the Secretary of Agriculture, and notwithstanding that such class of nursery stock, or other class of plants, fruits, vegetables, roots, bulbs, seeds or other plant products be accompanied by a certificate of inspection from the country of importation, *no person shall import or offer for entry into the United States from any country or locality specified in such promulgation, any of the class of nursery stock or of other class of plants, fruits, vegetables, roots, bulbs, seeds, or other plant products named therein, regardless of the use for which the same is intended:* Provided, that before the Secretary of Agriculture shall promulgate his determination that it is necessary to forbid the importation into the United States of the articles named in this section he shall, after due notice to interested parties, give a public hearing, under such rules and regulations as he shall prescribe, at which hearing any interested party may appear and be heard, either in person or by attorney: Provided further, that the quarantine provisions of this section, as applying to * * * white-pine blister rust, potato wart, and the Mediterranean fruit fly, shall become and be effective upon the passage of this act."

"Sec. 10. That any person who shall violate any of the provisions of this act * * * shall be deemed guilty of a misdemeanor and shall, upon conviction thereof, be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding one year, or both such fine and imprisonment, in the discretion of the court," etc.

December 22, 1913, David F. Houston, Secretary of Agriculture, issued a notice of a potato quarantine under his hand and the seal of the United States, Department of Agriculture, reading as follows:

"The fact has been determined by the Secretary of Agriculture that injurious potato diseases, including the powdery scab (Spongospora subterranea), new to and not heretofore widely prevalent or distributed within and throughout the United States, existing in the Dominion of Canada, Newfoundland, the

islands of St. Pierre and Miquelon, Great Britain, Ireland, and Continental Europe, and are coming to the United States with imported potatoes.

"Now, therefore, I, David F. Houston, Secretary of Agriculture, under the authority conferred by section 7 of the act of Congress, approved August 20, 1912, known as 'the Plant Quarantine Act' (37 United States Statutes at Large, page 315), do hereby declare that it is necessary, in order to prevent the introduction into the United States of such potato diseases, to forbid the importation into the United States, from the countries hereinbefore named, of the common or Irish potato (Solanum tuberosum) until such time as it shall have been ascertained, to the satisfaction of the Secretary of Agriculture, that the country or locality from which potatoes are offered for import is free from such potato diseases.

"On and after December 24, 1913, and until further notice, by virtue of said section 7 of the act of Congress, approved August 20, 1912, the importation, from the countries hereinbefore named, of the common or Irish potato, except for experimental or scientific purposes by the Department of Agriculture, is prohibited: Provided, that shipments of such potatoes loaded prior to December 24, 1913, as shown by consular invoices, will be permitted entry up to and including January 15, 1914."

Rev. St. § 3082 (Comp. St. 1913, § 5785), provides:

"If any person shall fraudulently or knowingly import or bring into the United States, or assist in so doing, any merchandise, contrary to law * * * such merchandise shall be forfeited," etc.

If it had been alleged in the libel that the goods in question had been knowingly brought into the United States contrary to law, in that their importion was prohibited under the Plant Quarantine Act and the order of the Secretary of Agriculture, there would be little doubt but that the potatoes, together with the other property used in bringing them into the country, would be subject to seizure and condemnation under Rev. St. §§ 3082, 3061, 3062 (Comp. St. 1913, §§ 5785, 5763, 5764), and section 7 of the Quarantine Act; but none of the counts of the libel contain such allegations.

The forfeiture cannot be sustained under the first two counts of the libel for these counts are evidently based upon sections 3082 and 2865 of the Revised Statutes (Comp. St. 1913, §§ 5785, 5548). In both of these counts it is alleged that the importation was contrary to law in that the potatoes were subject to the payment of duties, were smuggled and clandestinely introduced into the United States with intent to defraud the government of its revenue, and without payment of the duties—facts which were not and could not be proved, for the potatoes were not dutiable, their importation being prohibited.

In the third count it is alleged that the potatoes were knowingly imported into the United States contrary to law in that they were brought in without offering the same for entry to a customs official of the United States, and it is sought to support this count under sections 3082 and 3097 of the Revised Statutes (Comp. St. 1913, §§ 5785, 5809). But it will be seen that under the provisions of section 3097 the merchandise of which entry must be made is "merchandise subject to duties," and, as the potatoes here in question, as above pointed out, are not merchandise subject to duty, the failure to make entry of them was not a violation of the provisions of that section.

In the fourth count it is alleged that the potatoes were knowingly imported into the United States from Canada contrary to law in that

they "had not been unladen in the presence of or inspected by an inspector or other officer of the customs of the said United States at the first port of entry or customs house where the merchandise had arrived," and it is sought to sustain the seizure and condemnation of all the property mentioned in this count of the libel under the provisions of sections 3082, 3100, 3061, and 3062. The last three sections read as follows:

"Sec. 3100. All merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country, except as hereafter provided, as well as the vessels, cars, and other vehicles and envelopes in which the same shall be imported, shall be unladen in the presence of, and be inspected by, an inspector or other officer of * * * customs, at the first port of entry or custom house in the United States where the same shall arrive," etc.

"Sec. 3061. Any of the officers or persons authorized to board or search vessels may stop, search, and examine, as well without as within their respective districts, any vehicle, beast, or person, on which or whom he or they shall suspect there is merchandise which is subject to duty, or shall have been introduced into the United States in any manner contrary to law, whether by the person in possession or charge, or by, in, or upon such vehicle or beast, or otherwise, and to search any trunk or envelope, wherever found, in which he may have a reasonable cause to suspect there is merchandise which was imported contrary to law; and if any such officer or other person so authorized shall find any merchandise on or about any such vehicle, beast, or person, or in any such trunk or envelope, which he shall have reasonable cause to believe is subject to duty, or to have been unlawfully introduced into the United States, whether by the person in possession or charge, or by, in, or upon such vehicle, beast, or otherwise, he shall seize and secure the same for trial.

"Sec. 3062. Every such vehicle and beast, or either, together with teams or other motive-power used in conveying, drawing, or propelling such vehicle or merchandise, and all other appurtenances, including trunks, envelopes, covers, and all means of concealment, and all the equipage, trappings, and other appurtenances of such beast, team, or vehicle, shall be subject to seizure and forfeiture. * * *"

It is evident from the provisions of section 3100 (Comp. St. 1913, § 5812) that goods which are properly subjects of import, whether dutiable or non-dutiable, unless they are unladen in the presence of or inspected by an inspector or other officer of the United States on being imported from Canada, are imported contrary to law, and that in the present case the potatoes, if they were subjects of import, though non-dutiable, having been brought in without being submitted for inspection, would be subject to seizure and condemnation under sections 3082, 3061, and 3100, and the horses, harnesses and wagon, used in bringing them in would be subject to seizure and condemnation under sections 3082, 3061, and 3062. But the contention is made that the potatoes here in question were not subjects of import, even as non-dutiable articles, for their importation was prohibited under the Plant Quarantine Act and the order of the Secretary of Agriculture, and the question is whether the provisions of section 3100 apply to merchandise, the importation of which is prohibited, and require that it, on being brought "into the United States from any contiguous foreign country, * * * shall be unladen in the presence of, and be inspected by, an inspector or other officer of * * * customs, at the first port of entry or custom house in the United States where the same

shall arrive." Although merchandise, the importation of which is expressly prohibited, cannot lawfully be imported, it does not follow that its introduction into the country will not also be contrary to the provisions of section 3100, if not submitted for inspection, so that it may be excluded. The provisions of section 3100 are broad in their terms. They contemplate that "all merchandise, and all baggage and effects of passengers, and all other articles imported into the United States from any contiguous foreign country" shall be subjected to inspection at the first port of entry or custom house in the United States where the same shall arrive, with the single exception provided for in section 3102 (Comp. St. 1913, § 5814), which has nothing to do with this case.

We are therefore of the opinion that all merchandise introduced into this country from Canada, whether subject to duty, free from duty, or the importation of which is prohibited, is introduced in violation of law, if not submitted for inspection as required by section 3100, and that the District Court was right in ruling that the Plant Quarantine Act and the order of the Secretary of Agriculture did not constitute a defense to the libel as applied to the fourth count.

[3] The contention is made that the court erred in overruling the demurrer on the ground that a libel of information is not the proper process to procure a forfeiture in case of a seizure on land; that the process should be styled an information, and not a libel of information, which is the process provided for the forfeiture of property seized upon the sea. It is not claimed, however, that in this proceeding it was not alleged that the seizure was on land or that this allegation was not sufficient to give the court jurisdiction, as a court of common law. This being so, we think it matters little that the process was termed a libel of information rather than an information, and that the contention is without merit.

[4, 5] The jurisdictional boundary between Canada and the United States on the St. John river in the locality of the claimant's farm was in issue. This boundary line was established under the Webster-Ashburton treaty of 1842, article I of which provides as follows:

"Beginning at the monument at the source of the river St. Croix as designated and agreed to by the commissioners under the fifth article of the treaty of 1793, between the governments of the United States and Great Britain; thence, north, following the exploring line run and marked by the surveyors of the two governments in the years 1817 and 1818, under the fifth article of the treaty of Ghent, to its intersection with the river St. John, and to the middle of the channel thereof; *thence, up the middle of the main channel of the said river St. John, to the mouth of the river St. Francis,*" etc.

In article VI of the treaty it was provided that two commissioners should be appointed, "one by the President of the United States, by and with the advice and consent of the Senate thereof, and one by Her Britannic Majesty," and that they should "proceed to mark the line above described, from the source of the St. Croix to the river St. John, and shall trace on proper maps the dividing line along said river and along the river St. Francis to the outlet of the Lake Pohenagamook," etc. The treaty also required the commissioners to make a joint report to their respective governments describing such line or bound-

ary, and to accompany the same with maps certified by them to be true maps of the new boundary. By the treaty of July 1, 1908, between Great Britain and the United States relating to the same boundary, it was agreed in article III that the boundary as described and laid down in articles I and VI of the treaty of 1842 should be re-marked and charted. In this treaty it is recited that:

"The commissioners appointed under article VI of the treaty of 1842 aforesaid were required to and did mark by monuments the land portion only of said line, and were not required to and did not mark by monuments the portions of the boundary extending along water courses, with the exception that the nationality of the several islands in the St. John river was indicated by monuments erected thereon, and a series of monuments were placed by them along the edge of certain of the water courses to fix the general direction of the boundary, most of which monuments have since disappeared, but the entire boundary, including its course through the waterways as well as on land, was charted and marked on maps by said commissioners under the provisions of article VI, above referred to, and the nationality of the respective islands in the St. John river was determined by them, as appears from the joint report filed by said commissioners dated June 28, 1847, and the series of maps signed by said commissioners and filed with their joint report."

At the trial in the District Court no evidence with reference to the boundary and its location was submitted to the jury. As an aid in determining this question, counsel for the government presented to the court a map, purporting to be a copy of the map filed by the commissioners appointed under the Webster-Ashburton treaty of 1842, which was certified to under the seal of the Department of State, and the provisions of the treaty were called to the attention of the court. The report of the commissioners under the treaty of 1842, which they were directed to make and file with the map, was not presented to the court, and, because of this, the claimant objected to the map as an incomplete document.

In determining the location of the international boundary at the place in question, it was the right of the court to take into consideration the treaties above spoken of, together with the public acts and proclamations in carrying them into effect, as they were historical and notorious facts of which it could take judicial notice. United States v. Reynes, 9 How. 147, 13 L. Ed. 74; Callsen v. Hope (D. C.) 75 Fed. 758. And as the court was authorized to take judicial notice of these documents, it is to be presumed that he took cognizance of the report, as well as the treaty and map. This being so, the formal presentation of the report to the court was unnecessary.

The court ruled that the map was absolute proof of the location of the boundary line and that Daigle Island was Canadian territory. This ruling, so far as it related to the map being absolute proof, was perhaps technically incorrect; but it is difficult to see wherein the claimant was harmed by the ruling, as the treaty taken in connection with the report and the map of the commissioners, of which the court took judicial notice, was undoubtedly conclusive proof of the location of the boundary at the point in question. The treaty fixed the boundary on the St. John river at the middle of the main channel of the stream, and the map made in pursuance of the treaty shows Daigle Island to be on the Canadian side of the main channel.

[6] The claimant also insists that the District Court erred in excluding certain evidence whereby he proposed to show that at a time subsequent to the Webster-Ashburton treaty there were monuments on Daigle Island marking the boundary line. It is claimed that the purpose of this offer was (1) to show where the boundary line was in fact laid on the ground, and (2) the claimant's understanding of where the line was as bearing on the good faith of his act in bringing in the potatoes.

What the monuments on Daigle Island marking the boundary were, the offer does not disclose. The Webster-Ashburton treaty did not authorize the commissioners to place monuments along the course of the St. John river. As to this portion of the boundary, they were simply directed to indicate on their map the location of the main channel of the stream. This they did, and it is wholly improbable that they placed any monuments upon this island to indicate the boundary line. The treaty of 1908 shows that the monuments placed upon the islands in the river were not to indicate the boundary line, but whether a particular island was American or British territory, according as it was on one side or the other of the main channel of the stream. And this is also clearly shown by the marks on the map made by the commissioners which, as before stated, shows Diagle Island as Canadian territory. This offer of proof, therefore, could have been of no consequence as showing where the boundary line was on the St. John river, if it was competent. The main channel of the river was fixed by the treaty as the bound. It was in existence at the time the treaty was made, and required no action on the part of the commissioners for its establishment. Their only duty with respect to it was to indicate it on the map.

We are therefore of the opinion that the treaty, map, and commissioners' report constituted the only competent evidence on the question, and that the claimant could have been in no way injured by the exclusion of the testimony as bearing on the true location of the line.

If the offer was also for the purpose of showing that claimant did not knowingly bring the potatoes from Daigle Island to Ft. Kent contrary to law, as he understood the boundary line was where the monuments were placed on the island, the claimant was not injured by the exclusion of his offer for it appeared that he was specifically notified by the collector of customs, through his deputy, about a month prior to bringing the potatoes to Ft. Kent, that Daigle Island was Canadian territory, and that no produce of the island was to be brought in unless duties were paid.

The decree of the District Court is affirmed.

SIDEY v. CITY OF MARCELINE, MO.*

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

No. 4648.

1. MUNICIPAL CORPORATIONS ⟸865(3)—BONDS—VALIDITY.

Const. Mo. art. 10, § 12, limits the amount of indebtedness of a city to 5 per cent. of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes previous to the incurring of such indebtedness. Under the laws of the state the assessor has six months, from June 1st of one year to January 1st of the following year, within which to make the assessment, and as the assessment roll then goes into the custody of other officials for equalization, etc., it may not be completed until late in the year following the June in which it is commenced; but the property is assessed at its value on June 1st. Defendant municipality was organized in 1888, and the first assessment was made in 1889. Bonds were sold in 1890, just after the assessment for that year had been begun, and it was not completed until months after the sale. *Held*, that the assessment next before the last assessment prior to the issuing of the bonds was the assessment for the year 1888 made by a school township upon property finally incorporated in the city, and not the assessment for 1889, as the uncompleted assessment for 1890 could not be deemed the last assessment previous to incurring the indebtedness, and as the bonds exceeded 5 per cent. of the assessed valuation for the year 1888, they are invalid, for to allow bonds to be issued under the theory that an assessment immediately prior to the disposal of the bonds was the last assessment previous to incurring the indebtedness, would open the door to fraud and manipulation of the assessment, so as to increase the valuation to warrant the issue.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1838; Dec. Dig. ⟸865(3).]

2. MUNICIPAL CORPORATIONS ⟸863—INDEBTEDNESS—BONDS.

That the defendant municipality had not been organized long enough to have two complete assessments prior to the issuance of the bonds does not remove it from the limitation of the Constitution, and allow it to incur indebtedness regardless of the limit imposed.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 1824–1827; Dec. Dig. ⟸863.]

3. COURTS ⟸366(8)—FEDERAL COURTS—PRECEDENTS.

Where there had been no decision of the highest state court upholding bonds issued by a city in excess of the constitutional limitation, decisions of the state court construing such constitutional limitations are binding on a federal court, where the bondholder sought relief in that tribunal.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 962, 963; Dec. Dig. ⟸366(8).]

4. MUNICIPAL CORPORATIONS ⟸931—BONDS—ESTOPPEL.

Though municipal bonds recited that the total debt of a city, including the bonds, was within the limit of indebtedness allowed by law, such recital does not estop a municipality from asserting the invalidity of the bonds because the indebtedness created exceeded the constitutional limitation; this being particularly true in view of the Missouri statute (Rev. St. 1909, § 1275) providing for certification of bonds by the state auditor, and declaring that the state auditor's certificate shall be prima facie evidence only of the facts therein stated, and shall not preclude any person from showing the contrary.

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

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

*Rehearing denied January 15, 1917.

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

Action by David Sidey against the City of Marceline, in the County of Linn, and State of Missouri. There was a judgment for defendant, and plaintiff brings error. Affirmed.

W. D. Tatlow, of Springfield, Mo. (John H. Overall, of St. Louis, Mo., on the brief), for plaintiff in error.

H. J. West, of Brookfield, Mo. (John C. Crawley, of Marceline, Mo., on the brief), for defendant in error.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. This is a suit to recover on municipal bonds amounting to $6,000, issued by the city of Marceline, Mo., for the purpose of building an electric light plant. The city was organized in 1888. The election for the issuance of bonds was held in June, 1890. The bonds were dated in July, and were actually sold in August, 1890. The Constitution of Missouri (article 10, § 12) limits the amount of indebtedness of the city to "five per cent. of the value of the taxable property therein, to be ascertained by the assessment next before the last assessment for state and county purposes, previous to the incurring of such indebtedness." Under the revenue laws of Missouri the assessor has six months, from June 1st of one year to January 1st of the following year, within which to make the assessment. The assessment roll then goes into the custody of other officials, such as boards of equalization, and may not be completed until late in the year following the June 1st upon which it is commenced. Property is assessed at its value on June 1st, and, although the assessment may not be completed until a year or more after June 1st, it speaks as of that date. There was no assessment of property by the city of Marceline for the year 1888, because the city was organized that year. The first assessment occurred in 1889. The assessment for 1890, the year in which the bonds were issued, had only started at the time the bonds were sold, and was not completed until months afterward. The trial court held that the assessment limiting the bonds here in question was for the year 1888. It held that the "last assessment" for city and county purposes previous to the issuance of the bonds was 1889. The property which was finally embraced in Marceline was part of a school township in 1888, and was taxed under township authority. The total assessed value of the property in the entire township for that year was $89,945. That would support a bond issue of only $4,497.25. For that reason the trial court held that the $6,000 issue involved in this suit was in excess of the constitutional limitation and void. The case was tried before court and jury upon the pleadings and agreed statement of facts. Both parties moved for a directed verdict. The court denied plaintiff's motion, and granted defendant's, to which ruling plaintiff excepted. Upon the verdict thus directed, judgment was entered dismissing the complaint upon the merits. Plaintiff brings error.

[1-3] Plaintiff's first contention is based upon the fact that the assessment for 1890 had commenced before the bonds were sold, and that

assessment, when afterwards completed, fixed the value of property in Marceline on the 1st day of June, 1890. For this reason it is contended that the assessment for 1890 was the "last assessment for state and county purposes previous to the incurring of the indebtedness," and that the "assessment next before" was for the year 1889. The valuation for that year would sustain the bond issue. There are two reasons why the trial court properly refused to sustain this position of plaintiff: First, the object of the constitutional provision of Missouri defining the assessment that should fix the value of the property for bonding purposes was to select an assessment sufficiently remote from the bond issue, so that property could not have been assessed for the purpose of laying a foundation for incurring the debt. To sustain plaintiff's position would defeat this object of the Constitution and make it possible to base a bond issue upon an assessment so near that it could be manipulated for the very purpose of evading the Constitution. Second, the Supreme Court of Missouri, in State ex rel. Dexter v. Gordon, 251 Mo. 303, 158 S. W. 683, had this provision of the Constitution before it, and decided as the unanimous opinion of the court that to meet the requirements of this section the assessment must be completed at the time the indebtedness is incurred. The same interpretation had been given to similar provisions in other jurisdictions. Culbertson v. Fulton, 127 Ill. 30, 18 N. E. 781; Wilkinson v. Van Orman, 70 Iowa, 230, 30 N. W. 495; Railroad v. Wilbur, 63 Neb. 627, 88 N. W. 660. Judge Philips, of the Western District of Missouri, had the issue of bonds which is involved in the present suit before him in the case of Prickett v. Marceline (C. C.) 65 Fed. 469, and delivered an able opinion, which was followed by the trial judge. There had been no interpretation of this constitutional provision by the Supreme Court of Missouri, prior to the issuance of the bonds, favorable to the plaintiff's present contention, so that he could say that he bought the bonds in reliance upon that interpretation. It follows that the decision of the Supreme Court of that state in State ex rel. Dexter v. Gordon, 251 Mo. 303, 158 S. W. 683, is binding upon us. The circumstance that the city had not been organized long enough to have two completed assessments prior to the issuance of the bonds throws a new question into this case. The assessment, however, to which the Constitution points, is the assessment "for state and county purposes." The fact that the city had not been in existence long enough to meet what the framers of the Constitution evidently had in mind cannot take the case out of the limitation. If that were not so, a city during the first two years of its organization would be wholly free from the debt limit.

[4] The bonds contain a recitation "that the total debt of said city, including this bond, is within the limit of indebtedness allowed by law." The statute of Missouri (Rev. St. 1909, § 1275) provides for the certification of bonds by the state auditor. It expressly provides, however, that the auditor's certificate "shall be prima facie evidence only of the facts therein stated, and shall not preclude or prohibit any person from showing or proving to the contrary in any suit or proceeding to test or determine the validity of such bonds, or the power of

any county court, city or town council, or board of trustees, or official board, or other authority, to issue such bonds." There was no provision either of law or of the Constitution authorizing the city officers to certify that the bonds were within the constitutional debt limit. Their certificate certainly ought not to be given any greater force than the law allows to the certificate of the state auditor, for which express provision is made. A learned argument is made in the briefs to show that the certificate contained in the bonds estops the city from questioning their validity in the hands of a good-faith purchaser. The same argument was made to this court in St. Lawrence Township v. Furman, 171 Fed. 400, 96 C. C. A. 356, 17 Ann. Cas. 1244. The question was fully considered by the court, and it was there held that when the Constitution points to a definite record, such as a public assessment of property, for a particular year, and limits the amount of indebtedness to a percentage of that valuation, the purchaser of municipal bonds is bound to consult the record indicated by the Constitution, and cannot claim to be a good faith purchaser if the bonds violate a constitutional limitation thus fixed. Any other interpretation would make the constitutional provision "a mere scrap of paper," to be nullified by the simple declaration of those intended to be restrained by its limitation.

The judgment is affirmed.

CARLAND, Circuit Judge (concurring). I concur, for the reason that I feel bound by the decision of this court in St. Lawrence Township v. Furman, 171 Fed. 400, 96 C. C. A. 356, 17 Ann. Cas. 1244.

HOME INS. CO. OF NEW YORK v. WILLIAMS.

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

No. 2935.

1. INSURANCE ⟸336(6)—FIRE POLICIES—CONSTRUCTION.

A fire policy contained a clause declaring that it should be void, unless otherwise provided by agreement indorsed thereon, if the insured should procure other contracts of insurance on the property covered. To the policy was attached before delivery a so-called rider containing an iron safe clause, and reciting that no additional insurance was permitted unless amounts were inserted by the agent of the company in the blank space left, in which there was an insertion of the amount of $8,500. *Held* that, as overinsurance by concurrent policies tends to cause carelessness and fraud, the addition of the rider to the policy did not abrogate the provision that concurrent insurance should avoid it; the rider itself recognizing that provision.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 871; Dec. Dig. ⟸336(6).]

2. INSURANCE ⟸336(6)—FIRE POLICIES—CONSTRUCTION.

In such case, though concurrent insurance to the amount of $8,500 was authorized by the rider, the obtaining of concurrent insurance to a greater amount would forfeit the policy.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 871; Dec. Dig. ⟸336(6).]

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3. INSURANCE ⟸668(4)—JURY QUESTION—QUESTIONS OF LAW.
In an action on a fire policy, where the defense was noncompliance with the iron safe clause requiring insured to keep in an iron safe such a set of books as would enable the insurer to determine therefrom the stock of goods on hand at the time of the fire without recourse to oral testimony, and the facts as to the books kept were undisputed, the question whether they complied with the policy was one of law for the court.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1735–1740, 1758–1760; Dec. Dig. ⟸668(4).]

4. INSURANCE ⟸335(4)—FIRE POLICIES—IRON SAFE CLAUSE—COMPLIANCE.
A policy on a stock of goods contained an iron safe clause obligating the insured to keep such a set of books as would enable the insurer to determine therefrom with reasonable accuracy the stock of goods on hand at the time of the fire without recourse to oral testimony, save as to the method of keeping the books, which were at night to be kept locked in a fireproof safe and at all times when the building was not open for business. Insured's cash sales book was destroyed by fire, and to prove his loss he introduced the book in which his account with a bank was kept, showing deposits of money, the amounts of checks drawn, and to whom payable, and the wholesale book, giving the names of sellers and the amounts paid. The wholesale book did not show the nature of the purchases, and, though insured was engaged in other businesses, his bank book did not show whether the funds were derived from his mercantile business or not. *Held* that, while oral testimony was admissible to show the method of bookkeeping, no particular method being required, there was no compliance with the iron safe clause; the books produced being insufficient, without oral testimony, to show the amount of goods on hand at the time of the fire.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 853; Dec. Dig. ⟸335(4).]

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by P. W. Williams against the Home Insurance Company of New York. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

B. P. Crum, of Montgomery, Ala., and W. W. Callahan and A. J. Harris, both of Decatur, Ala., for plaintiff in error.

Alexander C. Birch, of Birmingham, Ala., for defendant in error.

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

CALL, District Judge. In April, 1915, P. W. Williams brought suit in the Morgan county law and equity court against the Home Insurance Company on a policy of insurance theretofore issued to him for $5,000, covering the fixtures, etc., in his store and the stock of merchandise usually kept in a general retail store. By appropriate proceedings the case was removed to the United States District Court for the Northeastern Division of the Northern District of Alabama.

The defendant thereupon filed its answer to the complaint, setting up defenses as follows: (1) That it was not indebted, to that part of the complaint seeking to recover $3,500 for the loss of the stock of merchandise. (2) That the policy was void if additional insurance was

taken out, unless indorsed in the blank spaces of the policy by the agent, and that the agent had indorsed in said blank space a permit for $8,500 additional insurance on the stock of merchandise; that the plaintiff had taken out additional insurance on said stock for $9,000, and permission for said additional insurance was not by the defendant or any one authorized to bind it, indorsed on or attached to the policy sued on. (3) That the policy contained the iron safe clause, which contained the warranty to keep such books, which will clearly and plainly present a complete record of business transacted, including all purchases, sales, and shipments, both for cash and credit, from the date of inventory provided for and during the continuance of this policy; and that the assured would keep such books and inventory securely locked in a fireproof safe at night, and at all times when the building was not open for business, or, failing in this, the assured will keep said books and inventory in some place not exposed to a fire which would destroy the aforesaid building. In the event of failure to produce such books and inventories for inspection of the company, this policy shall be null and void, and constitute a perpetual bar to any recovery thereon. That the warranty was breached, in that plaintiff did not keep locked in his safe at night, or other secure place, as required by said warranty, a set of books as required, but the book containing the cash sales from January 1, 1914, to October 16, 1914, was left out of said safe and was burned. (4) That the iron safe clause was breached, in that plaintiff did not keep in his safe or other place as required in said warranty, any book or books which presented a complete record of his cash sales from the date of his inventory up to the time of the fire. (5) That after the fire the defendant demanded of the plaintiff the books kept by him in his business, as required in the warranty, and the plaintiff failed to produce any books showing his cash sales from January 1 to October 14, 1914. (6) That the plaintiff breached the warranty, in that the plaintiff failed to produce any book or books which showed a complete record of purchases of goods made by him between the issuance of the policy and the date of the fire.

The plaintiff demurred to the second plea as to overinsurance, and filed nine replications to the pleas separately and severally; the first that the matters set up in said pleas were untrue, and the other eight setting up substantial compliance and waiver by the defendant.

The defendant demurred to all of said replications, except the first, and the plaintiff amended its fifth replication, the substance of which it is not necessary to set out. Thereupon the defendant filed rejoinders to replications 5, 7, and 8, and also an amended rejoinder. The plaintiff demurred to these rejoinders. Plaintiff's demurrer to defendant's second plea was sustained.

Issues were joined on the complaint, the general issue and special pleas 3, 4, 5, and 6, plaintiff's general replication and special replications 7, 8, and 9 to defendant's special pleas 3, 4, 5, and 6, and defendant's rejoinders 4 and 5 to plaintiff's special replications 7, 8, and 9. The fifth rejoinder set up a nonwaiver agreement.

Upon these issues the case went to trial, and a verdict and judgment

in favor of the plaintiff in the sum of $4,932.95 resulted. From this judgment the defendant prosecutes this writ of error.

There are 22 assignments of error, but it will not be necessary for this court to examine all of them. Those necessary to be examined will be noticed as the opinion proceeds.

[1] The first assignment discussed in plaintiff in error's brief is the second in the assignments filed. It is:

(2) The said court erred in sustaining plaintiff's demurrer to the defendant's plea numbered 2.

This plea set up that the insured, by indorsement in the blank spaces left in the policy for that purpose, obtained permission to take out $8,500 additional insurance on stock, and the insured had taken out $9,000 additional insurance, setting out the different policies and in what companies.

The plaintiff demurred to this plea on four grounds: (1) Because said plea does not present a defense in law. (2) Because it appears in said plea that the condition and warranty was not breached. (3) Because it appears from said plea concurrent insurance was authorized under the terms of the policy, and that no penalty attaches when concurrent insurance is authorized. (4) Because there is no inhibition against excessive insurance when any insurance is concurrently authorized.

The third and fourth grounds are especially relied upon by the defendant in error to sustain the court's ruling, and we suppose those two grounds were stressed in the argument before the trial court. The policy of insurance in this case contained the following provision in the body of the policy:

"This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contracts of insurance, whether valid or not, on property covered in whole or in part by this policy."

To this policy before delivery was attached what is designated as a rider, in which was contained the iron safe clause and the following:

"No additional insurance permitted unless amounts were inserted by agent of this company in the blank spaces noted below, viz.: $8,500 on stock."

The contention of counsel for plaintiff below is that the rider supersedes the contract of forfeiture in the body of the policy, and, the rider containing no provision to make the policy void, overinsurance cannot be visited with forfeiture. Ordinarily provisions for forfeitures are not favored. Justice Shiras, in Northern Assurance Co. v. Building Association, 183 U. S. at page 317, 22 Sup. Ct. at page 136, 46 L. Ed. 213, in speaking of a similar provision in a policy, says:

"Overinsurance by concurrent policies on the same property tends to cause carelessness and fraud, and hence a clause in the policies, rendering them void in case other insurance had been or should be made upon the property and not consented to in writing by the company, is customary and reasonable."

This policy specifically provided, in substance, this same provision, and attached thereto is a rider specifying the amount of additional insurance and upon what property it might be taken. This rider was

made and became a part of the policy, with the same force as if the terms of it had immediately followed the provision for forfeiture, and must be construed together with the policy to which it was attached, and of which it became a part.

In the light of the language used by Justice Shiras, above quoted, we think the plain language used in the policy should be given effect. The very language used in the rider shows clearly that the company did not abrogate the provisions in the body of the policy, but gave notice to the insured that it insisted upon it. We refer to the language preceding the clause allowing the additional insurance, to wit:

"This insurance is effected subject to the following conditions, which are hereby made warranties by the assured and are accepted as parts of this contract."

See Queen Insurance Co. v. Young, 86 Ala. 430, 5 South. 116, 11 Am. St. Rep. 51.

[2] It is also contended by counsel for plaintiff below that, the company having given authority for concurrent insurance, the amount of such insurance is of no moment, and the company cannot object to overinsurance. We think this position not well taken in the light of the adjudged cases, and considering the object of the clause and the reasons inducing the company to incorporate it in its policies. Northern Assurance Co. v. Grandview Assn., 183 U. S. 317, 22 Sup. Ct. 133, 46 L. Ed. 213; Works, Pritchett & May v. Springfield F. & M. Ins. Co. (Tex. Civ. App.) 79 S. W. 42; Senor v. Western Millers Mut. F. Ins. Co., 181 Mo. 104, 79 S. W. 690; Gross v. Colonial Assurance Co., 56 Tex. Civ. App. 627, 121 S. W. 517; Home Insurance Co. v. Morrow, 145 Ala. 284, 39 South. 587. We are therefore of opinion that error was committed in sustaining the demurrer to the second plea.

[3, 4] Issues were presented by the pleas that the iron safe clause was violated and the plaintiff therefore could not recover because of the several matters in said pleas set out. The principal contention before this court was that the evidence showed without contradiction that the plaintiff below had violated the warranties contained in the iron safe clause, because, first, he had not produced a set of books showing the cash sales from January 1 to October 14, 1914; and, second, he failed to produce any books showing a complete record of purchases between the issuance of the policy and the date of the fire.

The evidence shows that after the fire the adjuster of the defendant below went to the plaintiff and demanded his books, and was then informed that the cash sales book from January 1 to October 14, 1914, had been destroyed by the fire that consumed his stock of goods. This fire occurred at night, or the early morning of Sunday. The testimony showed that the plaintiff, in addition to his mercantile business, was engaged in selling mules, buggies, and wagons, and bought and sold cotton in the early part of 1914. To prove his loss the plaintiff produced, in lieu of the cash sales book burned, a book in which his account with the First National Bank was kept, showing deposits of money; the amounts of such deposits being shown, and

the amounts of checks drawn, and to whom payable. The testimony showed that the plaintiff had but the one bank account, into which all his deposits were made. The book did not show for what purpose nor to pay what account the checks were given. The book of bills payable produced was equally silent on these points. The wholesale book produced and filed in evidence did not show the character of the goods the plaintiff had purchased. A sample of the entries is contained in the bill of exceptions, as follows:

Cahaba Southern Coal & Mining Company.

1914.			
August	29th.	By bill	$117.10
Nov.	11th.	By check $50.00	
Dec.	15th.	By check $25.00	

In each instance the debit was designated "By bill," and there was nothing to show the character of the goods purchased, except it be by the name of the firm preceding the account. The plaintiff had all the books he kept except his cash sales book from January 1 to October 14, 1914, and this bank pass book, which were burned in the fire that destroyed the stock. These books were his account against the First National Bank, his cash sales book from October 16th to the date of the fire, his ledger, showing his charge sales, payments on same, and his expense account, and his inventories. His cash sales book from January 1 to October 14, 1914, his check book, with the stubs, showing the money paid out by him, and his invoices, showing the kind of goods which he had received during the year, were not kept in the safe and were burned.

The fourteenth assignment of error challenges the correctness of the court's oral charge as follows:

"It is for you to determine whether that was sufficient to enable the company to arrive at the value and amount of the stock on hand at the time of the fire."

The twentieth assignment of error is the refusal of the court to give the peremptory instruction requested, to wit:

"If the jury believe the evidence, you should find for the defendant."

The question raised on the issues by the brief of the plaintiff in error is: Do the books kept by the plaintiff and produced by the insured enable the defendant to reasonably arrive at the amount of the loss? There is no dispute as to the books produced and their character. If they do not enable the defendant to reasonably arrive at the amount of the loss, then it was error for the court to leave to the jury to say whether such books were sufficient. The facts being undisputed, it becomes a matter of law for the court. Houff & Holler v. German American Ins. Co., 110 Va. 585, 66 S. E. 834.

The iron safe clause obligated the insured to keep such a set of books as would enable the insurer to determine from the books and papers submitted to him with reasonable certainty the stock of goods on hand at the time of the fire without recourse to oral testimony, except as to the method of keeping said books. No particular method

of bookkeeping is required, but the books must themselves furnish the information with reasonable certainty, unaided by oral testimony, except as above indicated, to explain the method of keeping them. We apprehend there will be no question of this principle. Outside evidence may be received, the surrounding circumstances, the subject-matter, the location and character of the business, the method of keeping the books, and the evidence of expert bookkeepers to explain the entries found in the books and as to what the books themselves show. But such oral testimony cannot be received to supply omissions in said books.

The rule is well established that substantial compliance is all that is necessary to meet the requirements of this clause; and this phase of the case will be examined with these principles in mind. The witness Merriweather testified that, apart from what the insured had told him, he could not have arrived at the valuation of the stock at the time of the fire from the books. He further says that, if he had had the cash sales book with the books produced, he could have arrived at it. Therefore the statements of the insured, made from memory, explaining the deposits in the account with the bank, together with the books, was the basis of the calculation by which the amount of stock was ascertained. This is not a substantial compliance with the iron safe clause. Again, the book of purchases produced, showing purchases only by the entries "By bill," with no description, general or otherwise, of the goods purchased, is not a substantial compliance with said clause. Everett-Ridley Co. v. Traders' Ins. Co., 121 Ga. 228, 48 S. E. 918, 104 Am. St. Rep. 99; Royal Ins. Co. v. Kline Bros., 198 Fed. 471, 117 C. C. A. 228.

We are therefore of opinion that the trial court erred in giving the oral charge excepted to, and in its refusal to give the peremptory charge requested.

For the errors pointed out, the case is reversed and remanded, with instructions to overrule the demurrer to the second plea, and for such further proceedings as are consonant with this opinion.

LONDON & LANCASHIRE FIRE INS. CO. v. WILLIAMS.

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

No. 2944.

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by P. W. Williams against the London & Lancashire Fire Insurance Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

B. P. Crum, of Montgomery, Ala., and W. W. Callahan and A. J. Harris, both of Decatur, Ala., for plaintiff in error.

Alexander C. Birch, of Birmingham, Ala., for defendant in error.

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

CALL, District Judge. This case was tried at the same time as No. 2935, Home Insurance Company of New York v. P. W. Williams, 237 Fed. 171, — C.

C. A. —, upon the same issues and the same testimony, except as to the amount of insurance. The assignments of error are the same, except that there was no plea in this case setting up overinsurance.

For the reasons given in the opinion in case No. 2935, the judgment is reversed, and the case remanded for a new trial.

In re FLEIG MERCANTILE CO.

HIRSHFELD v. FLEIG MERCANTILE CO.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2318.

1. TRUSTS ⊂⊃63¾—CREATION—ASSUMPTION OF DEBTS—NOVATION.

A bankrupt merchant's offer of a composition, to be paid partly in cash and partly in notes, having been accepted, and the bankrupt being unable to make the cash payment, his property was transferred to a corporation formed to carry on the business, which assumed payment of the composition notes, as well as advances made by the principal creditor to make cash payments to those creditors who would not waive them. *Held*, that as the transfer to the corporation was absolute, the creditors reserving no lien, there was no trust or trust relation which could be asserted by the creditors, whereby they could reach the property conveyed.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 91, 92, 98, 99, 100; Dec. Dig. ⊂⊃63¾.]

2. BANKRUPTCY ⊂⊃164—"PREFERENCE"—WHAT CONSTITUTES.

In such case, where there was no agreement by the other creditors that the principal creditor, who made advances to assist the corporation, should have priority over them, it appearing that all the creditors deemed a substantial equity would remain for the bankrupt after payment of the composition notes, a payment to the principal creditor on account of his advances, the corporation having become bankrupt, constitutes a "preference," where in derogation of the rights of other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 267; Dec. Dig. ⊂⊃164.

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

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

In the matter of the Fleig Mercantile Company, bankrupt. From an order dismissing an involuntary petition in bankruptcy, Jacob B. Hirshfeld, doing business as J. B. Hirshfeld & Co., and others, appeal. Reversed and remanded, with directions.

Simon La Grou, of Chicago, Ill., for appellants.

Herman Frank, of Chicago, Ill., for appellee.

Before BAKER, MACK, and ALSCHULER, Circuit Judges.

MACK, Circuit Judge. This is an appeal from an order of District Court dismissing an involuntary petition in bankruptcy.

Fleigeltaub, a merchant, was in bankruptcy, owing about $50,000. A composition was suggested under which the creditors were to receive 25 per cent. of their claims, 10 per cent. in cash and 15 per

cent. in notes. A creditors' committee and various attorneys represented the creditors. Appellant Graff was attorney for the bankrupt. The bankrupt appears to have had no money to make the cash payment, and most of the creditors waived present payment of the 10 per cent., agreeing to accept additional notes therefor. The ten per cent. of the claims not thus waived and the expense of the bankruptcy aggregated about $4,000. This was advanced by one Adelman, who was the largest creditor. As the creditors, however, were unwilling to turn back the property to Fleigeltaub and to accept his notes, a plan was formulated whereby the property of the bankrupt would pass to a corporation, which was to be formed for the purpose of taking title to the property, carrying on the business, assuming and paying Fleigeltaub's obligations, including the composition notes and Adelman's advances, and thereafter turning over the business to Fleigeltaub. Details of the plan were submitted to the District Court, as well as to the creditors' committee and the attorneys for at least some of the creditors. The notes with the cash for carrying out the composition, were deposited with the court. A transfer of the property was made by the bankrupt to one Tannenbaum, a clerk in the office of one of the lawyers, and the composition was accordingly approved.

Pursuant to the agreed plan, a corporation known as Fleig Mercantile Company, was formed under the laws of Illinois, with capital stock of $12,000; the stockholders being Adelman, 61 shares, Goldstein, another large creditor, 58 shares, and Fleigeltaub, 1 share—totaling 120 shares, of $100 each. Tannenbaum, on receiving conveyance of the property, entered into an agreement with Fleigeltaub that he (Tannenbaum) convey the property to the corporation to be organized, subject to the assumption of Fleigeltaub's debts; that the stockholders transfer their stockholdings therein to the corporation, when the corporation or Fleigeltaub should have paid all of the advances, notes, and disbursements in connection with Fleigeltaub's composition; that in the meantime the corporation employ Fleigeltaub as manager of the business at $40 a week; and that, in the event the composition were not approved by the District Court, Tannenbaum reconvey the property.

Tannenbaum conveyed to the corporation by bill of sale, stating therein that it was made subject to certain claims and obligations assumed by the corporation in connection with the bankruptcy, and reciting that the company "by accepting the bill of sale assumes the payment of such indebtedness and obligations." The corporate records of the company show that, in consideration of the sale to the company of the property, the company assumed certain indebtedness shown by a certain "schedule of obligations assumed"; but this schedule does not appear in the evidence. It is apparent, however, from the record, that the obligations referred to were those incurred in the making of the composition, and it appears that these obligations were accordingly assumed by the corporation.

The corporation employed Fleigeltaub as manager, but the business did not prove successful. The creditors' committee sent out a letter

to all of the noteholders under the composition, stating the result of the conduct of the business. They further reported that Adelman had advanced $2,000 to help carry on the business, in addition to the original $4,000, and that, owing to business conditions and various circumstances set forth, the committee had decided to discontinue the store, to dispose of the merchandise, and, after paying the moneys advanced and such portions of the original waived 10 per cent. cash payment as then remained unpaid, to divide the balance pro rata among the composition creditors of Fleigeltaub. They stated that they would make arrangements for the disposition of the stock, probably at auction, and invited the creditors, if they had a better plan to propose, to suggest it at once, so that the committee might proceed in conformity with the wishes of the creditors.

Thereafter the stock was turned over to Tauber, an auctioneer, who realized thereon about $6,100 net. Adelman had previously been paid about $2,000 upon his advances, and he was paid through Tauber $1,500 more, which the creditors charged in the petition to be a preferential payment. It does not appear from the record what, if any, debts the corporation had, other than those assumed by it and growing out of the Fleigeltaub bankruptcy, amounting approximately to $13,000, and the additional advances by Adelman.

[1] 1. The only real contest in the District Court was as to the petitioners' relation to the respondent, whether they were creditors or beneficiaries under a trust. When the property was turned over to the corporation, it became the absolute owner thereof. It had the legal right to use it as it deemed best for its corporate purposes. No lien thereon was reserved to Fleigeltaub's creditors. Nothing in the nature of a trust was expressly stated in the written documents. The composition claims were assumed as part of the consideration for the property transferred. Neither a trust fund nor a trusteeship was within the contemplation or agreement of the parties. There was merely the common-law assumption of Fleigeltaub's debts, the creation of a legal obligation. Pursuant to the composition arrangement and to its express written assumption of these debts, the corporation subsequently indorsed Fleigeltaub's notes. Clearly petitioners, the noteholders, were creditors, and not mere trust beneficiaries.

2. That defendant was insolvent at the time of the alleged preferential payment was not contested in the District Court; without detailing the evidence, the record conclusively establishes such insolvency and Adelman's knowledge thereof.

[2] 3. Was the payment to Adelman a preference? If Adelman were but an ordinary creditor, having no claim entitled to priority as against other creditors, then concededly the payment operated to give him a preference. Defendant, however, now contends that, at least as against these petitioners and the others who were originally creditors of Fleigeltaub, Adelman was entitled to priority of payment. The basis for such a claim is not clear. If the assumption by the corporation of Fleigeltaub's debts had not been general as to all creditors, but special and conditioned as to some, to pay the other creditors only after Adelman should have been fully paid, or if all

of the other creditors had expressly subordinated their claims to that of Adelman, he might well claim priority, and thus negative the apparent preferential character of the payments. But, while one witness testified that the two creditors who were directors of the corporation had so agreed, the record is silent as to any general agreement by all the creditors granting such priority.

Nor is there anything in the surrounding circumstances to justify the court either in finding that the parties impliedly assented to such an arrangement or in imposing upon them this priority of claim irrespective of their assent. When they entered into the composition agreement, even those creditors who did not waive the 10 per cent. cash were not concerned with the means by which the necessary money was raised. The fund in court was sufficient for their purposes. They, as well as the other creditors, were willing, however, to let Fleigeltaub work out his supposed equity, provided he was placed under corporate control and the balance of their claim was assumed by the corporation. At that time the parties believed that there was a good equity for Fleigeltaub in the fund over and above the claims as settled by the composition and all expenses—an equity valued, though undoubtedly overvalued, at $12,000. It was in reliance upon this belief that Adelman was willing to furnish the necessary advances without making what would doubtless have been a vain attempt to obtain a legal priority by common agreement.

The course of business, moreover, negatives any implied agreement, for with Adelman's knowledge the 10 per cent., the cash payment of which had been waived, as well as a part of all the other notes, was subsequently paid by the corporation, before any payment of Adelman's claim. And because of the consequent depletion of its funds, the corporation borrowed the additional moneys from Adelman, the repayment of which is charged as a preferential payment. No security had been demanded by Adelman; none was given. No priority over other creditors accrued to him because of either the loan itself or the purpose for which it was required. The payments to Adelman were preferential.

The order must be reversed, and the cause remanded, with directions to enter an order of adjudication.

UNITED STATES et al. v. TROGLER et al.

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

No. 4684.

1. JUDGMENT ⊂⊃297—ENTRY—MODIFICATION—JURY.

The government brought an action in the District Court to set aside certain patents for coal lands, pending which a defendant trust company brought suit in the same court to foreclose a trust deed on the lands, which passed to a decree establishing the validity of the trust deed, its lien upon the land, with a direction for a sale, and the land was sold, and before the entry of a decree in the present suit the period of redemption expired,

and parties defendant who were purchasers at the foreclosure sale became entitled to a deed, and after decree in the present suit that the patents were fraudulently obtained, and that the government was entitled to their cancellation, except as against good-faith purchasers, and adjudging the trust deed, covering the land in suit, and other land to be a valid charge upon the property, the government and the purchasers, the only parties interested, stipulated that, in consideration of the purchaser's transfer of an adjoining tract to the government, the government would relinquish its claim to the land in suit, and apply to the court for a modification of the decree according to the stipulation. *Held*, that the trial court retained control of the decree, and, without process, had jurisdiction to enter the formal modification of the decree.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 581, 584–586; Dec. Dig. ⊂⊃297.]

2. APPEAL AND ERROR ⊂⊃82(2)—ORDERS APPEALABLE—REFUSAL TO MODIFY DECREE.

Such order declining to modify the decree was appealable, as it was a final determination of a new matter properly submitted to the court.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 518, 519, 521; Dec. Dig. ⊂⊃82(2).]

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

Action by the United States against William A. Trogler, F. W. Keitel, E. M. Dorsey, H. S. Dorsey, the Commonwealth Trust Company, and others. Decree for the United States, with order of sale, and from the action of the District Court in declining to enter a modified decree, asked for in a stipulation presented by the United States and the Dorseys, the United States and the Dorseys appeal. Reversed, with directions to the trial court to enter a decree granting the relief asked for in the stipulation.

Archibald A. Lee and Eugene B. Lacy, Asst. U. S. Atty., both of Denver, Colo. (Harry B. Tedrow, U. S. Atty., of Denver, Colo., on the brief), for appellants.

Edwin H. Park, of Denver, Colo., for appellees.

Before SMITH and CARLAND, Circuit Judges, and AMIDON, District Judge.

AMIDON, District Judge. The United States brought an action in the federal court for the district of Colorado to set aside certain patents for coal lands. Among the parties to that litigation were the original patentees and Keitel, who had secured the patents through dummy entrymen, and also many subsequent claimants of interests in the property. Among the latter were the appellees here, William A. Trogler and F. W. Keitel. The Commonwealth Trust Company, which held a trust deed to secure a loan of $25,000 upon the property, was also a party to that suit, as were the Dorseys, who were the beneficiaries of the trust deed. This suit was filed in March, 1910. Thereafter a suit was brought in the same federal court by the trust company to foreclose the trust deed. Everybody having any interest in the property, including the appellees here, were parties defendant to that bill. While the government suit to cancel the patent was still pending, the

suit to foreclose the trust deed passed to the usual decree establishing the validity of the trust deed, the fact that it was a lien upon the land, and directing a sale of the property to pay the amount due, $37,200.56. The government, of course, was not a party to the foreclosure suit, because it could not legally be made a party. The land was sold pursuant to the decree in that suit, and, before the entry of a decree in the suit by the government to cancel the patent, the period of redemption expired, and the Dorseys, who were purchasers at the foreclosure sale, became entitled to a deed. After the title of the Dorseys thus became complete, the suit by the government passed to judgment. The decree found that the patents were obtained fraudulently, and that the government was entitled to their cancellation, except as against good-faith purchasers and incumbrancers of the property. It likewise found that the trust deed was taken without any notice of the fraud, and for value, and adjudged it to be a valid charge upon the property. The deed of trust covered a large number of tracts of land, among these the northeast quarter of section 26, township 8 north, of range 87, which is the property primarily involved here. As to that quarter section there were no good-faith purchasers except the holders of the trust deed. As to the other tracts covered by the trust deed there were other parties having valid rights. At this point it is important to call attention to the fact that the government was not bound by the proceedings that had taken place in the suit to foreclose the trust deed. In the hope that the government might save the northeast quarter of section 26, the decree in the government suit ordered that all the tracts covered by the trust deed be again sold, directing that the tracts, exclusive of the northeast quarter, be first sold, and if sufficient should be realized from their sale to satisfy the trust deed, then the government was to take the northeast quarter free and clear of all claims, and if it should be necessary to sell the northeast quarter, the decree provided that, if sold for more than enough to satisfy the balance of the trust deed, then that the money be paid into court, and the government receive the surplus.

In order to understand this litigation it is important to keep in mind that the trust deed was held to be valid, not only in the suit for its foreclosure, but in the suit by the government. It is also important to keep in mind that Trogler and Keitel, the appellees here, were defendants in the suit to foreclose the trust deed, and that by the decree in that case, and the sale, and the deed, and the confirmation of the whole proceedings by the court, all their right, title, and interest in the property was foreclosed and passed to the purchasers, the Dorseys. So, before the decree was entered in the government suit, the appellees here had ceased to have any right or interest in the property.

After the entry of the decree in the government's case, and before any sale had been made under that decree, negotiations were had between the representatives of the government and the Dorseys. The Dorseys held title to a valuable 80 acres of coal land in another section. While there is no evidence on the subject, it is a reasonable inference that the Dorseys were anxious to get the northeast quarter of 26, because of its connection with the other properties to which they

obtained title under the foreclosure sale. To effect this object the government and the Dorseys entered into a written stipulation whereby the Dorseys conveyed all their right, title, and interest to the 80-acre tract to the government, and in consideration of that conveyance, the government stipulated to relinquish all its claim to the northeast quarter of 26, and further stipulated that it would apply to the court for a modification of the decree in the government case so that it would confirm the title of the Dorseys in the northeast quarter of 26. Upon the signing of this stipulation by counsel representing the Dorseys, and by counsel representing the government, they being the only parties who had any interest in the property covered by the government suit, the stipulation was presented to the trial court for the entrance of a supplemental decree in conformity with the stipulation. Thereupon appellees, Trogler and Keitel, appeared and objected to the modification of the decree. The parties to the stipulation resisted their being heard on the subject, because they had ceased to have any interest in the property; but the trial court, acting upon the belief that inasmuch as the term had gone down at which the decree in the government suit was entered, it had lost all control of that decree, declined to enter the decree asked for by the government and the Dorseys. The present appeal is brought to review that action of the trial court.

[1] Two questions are raised: First, was the judgment of the trial court appealable? and, second, if it was appealable, should the decree be reversed or affirmed?

We think the trial court was wrong. It was not asked to modify the former decree upon a re-examination of the issues that were involved in the suit in which the decree was entered. Its action was invoked to give effect to an agreement made between the parties to the decree subsequent to its entry. Clearly parties are at liberty to enter into agreements in respect to their rights under judgments of courts, the same as in regard to any other property right. And if the aid of the court is necessary in order to carry out their agreement, we see no reason why a court should not give them such relief. The real objection goes to a matter of practice. It is elementary that after a final decree is entered in a cause, and the term has adjourned, the parties are dismissed from the court. The defendant is not called upon to pay any further heed to the litigation. The court has no jurisdiction over him to modify its decree. That arises out of the fact that its process has ceased to be effective. The defendants are out of court, and the court cannot act in their absence upon the rights established by the decree. That formal objection, however, may be wholly obviated by parties to the suit returning to the court and asking for further action at its hands, which in no way involves a re-examination of the matters embraced in the decree. Upon such a reappearance there is no need of process. The court's jurisdiction over the persons is complete, and there can be nothing but a formal objection to the court's granting the relief asked.

It is plain what the difficulty was in the present case. If the original decree was executed, and the government obtained title to the northeast quarter of section 26, it would pass beyond the control of coun-

sel to deal with the subject. The rights of the government then could only be disposed of by a special act of Congress, or in the manner provided for the disposition of public lands. The stipulation was entered into to avoid that difficulty.

[2] We also think the order was appealable. It was a final determination of a new matter which was properly submitted to the court.

The decree is reversed, with directions to the trial court to enter a decree granting the relief asked for in the stipulation.

UNITED STATES CAST IRON PIPE & FOUNDRY CO. v. EASTHAM.

(Circuit Court of Appeals, Fifth Circuit. November 14, 1916.)

No. 2964

1. MASTER AND SERVANT ⟸104—INJURIES TO SERVANT—APPLIANCES—DUTY OF CARE.

Where all the evidence was to the effect that belt shifters were never used on cone pulleys, where the belt was shifted from a larger to a smaller cone and from a smaller to a larger one, and that it was impracticable to use such a device in shifting the belt from the smaller to the larger cone, negligence on the part of the master cannot be predicated on his failure to furnish a belt shifter for use in shifting the belt from the larger to the smaller cone, for that would require the master to make his premises absolutely safe, while he is bound only to exercise reasonable care to provide a safe place of work and safe appliances.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 176; Dec. Dig. ⟸104.]

2. DAMAGES ⟸208(4)—PERSONAL INJURIES—CONJECTURE.

In a personal injury action, where there was testimony that plaintiff would be disabled for some time, but there was no evidence as to what extent his disability would decrease his earning power, the jury is not entitled to conjecture on that question, and it should not be submitted.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 533, 534; Dec. Dig. ⟸208(4).]

3. APPEAL AND ERROR ⟸1062(3)—REVIEW—HARMLESS ERROR.

In a servant's action for personal injuries, where the evidence showed that a device which the servant claimed the master should have installed was not in use, and failed to show in what amount the servant's earning capacity would be decreased by his disability, the refusal of instructions taking from the jury the question of the master's negligence in failing to install the device, and taking from them the question of the servant's loss by reason of decreased earning capacity, was prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4214; Dec. Dig. ⟸1062(3).]

In Error to the District Court of the United States for the Northern District of Alabama; William I. Grubb, Judge.

Action by Fred C. Eastham against the United States Cast Iron Pipe & Foundry Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded.

W. P. Acker, of Anniston, Ala., J. T. Stokely, of Birmingham, Ala., and Chas. B. Atkins, of Atlanta, Ga., for plaintiff in error.

Robt. N. Bell, of Birmingham, Ala., for defendant in error.

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

CALL, District Judge. Fred C. Eastham brought suit against the United States Cast Iron Pipe & Foundry Company to recover for personal injuries suffered by him in defendant's manufacturing plant in the city of Bessemer, Ala. The case was tried upon two counts in the plaintiff's declaration, A and D.

Count A alleges plaintiff's employment, and that while engaged in the discharge of his duties his arm was caught in or by a belt which was running over a pulley, and he was thereby injured, and that said injuries were proximately caused by reason of a defect in the condition of the ways, works, machinery, or plant, in that said belt was defective and dangerous. Count D alleged that said injuries were caused by the negligence of a person to whom superintendence had been intrusted, to wit, Ike Jones.

To these counts the defendant interposed sundry defenses, the first "not guilty" and the others contributory negligence of the plaintiff in various ways.

[1] The evidence shows without contradiction that the plaintiff, while shifting a belt on a cone pulley on the shafting from the larger cone to a smaller, was injured; that mechanical shifters, whereby one can stand on the floor and shift a belt, are never used to shift a belt on a cone pulley; that it is impossible to use such a shifter on a cone pulley to shift the belt from a smaller to a larger cone, but might be used to shift the belt from the larger to the smaller cone; that mechanical shifters were used to shift belts from a loose pulley to a fast one, or vice versa, and if such a shifter had been installed it would have been perfectly safe to shift the belt from the larger to the smaller pulley on a cone pulley; that none of the witnesses had ever heard of a mechanical shifter being used on a cone pulley. The court in its general charge to the jury said:

"Now the other respect in which Jones is charged with negligence by the plaintiff is that he permitted the work to be conducted in the absence of a belt shifter; that is, as I understand it, an appliance by which the plaintiff could have shifted the belt from the ground, instead of standing on the platform or brace and doing the work in close contact with the belt."

And, after giving the law governing the duty of the master to the employé, the court continued:

"If you are satisfied that a reasonably prudent employer should have used a belt shifter, and would have adopted the use of a belt shifter, then this defendant would have been negligent in failing to do so."

The defendant requested in writing the following charge, which was refused, and exception seasonably noted to such refusal:

"If you believe the evidence in this case, you cannot predicate any negligence against the defendant's superintendent, Jones, on account of the absence of a belt shifter to shift the belt which the plaintiff was shifting at the time of his injury."

This charge should have been given. The trial court under its charge submitted to the jury to find whether it was negligence on the part of the employer not to have the belt shifter, when all the evidence

was to the effect that no one had ever known or heard of such an appliance being installed on a cone pulley, where the belt was shifted from a larger to a smaller cone and from a smaller to a larger cone, and that it was impracticable to use such a device in shifting the belt from the smaller to the larger cone. To predicate negligence on the absence of such shifter is to require the employer to make his premises absolutely safe, thus to change the employer's liability from "the use of reasonable care to provide a safe place for the employé to work" to that of an insurer of his safety. The law governing the liability of the master to provide a reasonably safe place to work was clearly and correctly communicated by the court in its charge. Westinghouse Co. v. Heimlich, 127 Fed. 92, 62 C. C. A. 92; Shandrew v. Railway Co., 142 Fed. 320, 73 C. C. A. 430; H. D. Williams Cooperage Co. v. Headrick, 159 Fed. 680, 86 C. C. A. 548; Randall v. Balt. & Ohio R. R. Co., 109 U. S. 478, 3 Sup. Ct. 322, 27 L. Ed. 1003; Southern Pacific Co. v. Seley, 152 U. S. 145, 14 Sup. Ct. 530, 38 L. Ed. 391.

[2] The defendant requested in writing the following charge, which was refused, and exception seasonably noted:

"The court charges the jury that, if you believe the evidence in this case, in the event you find for the plaintiff, you cannot award him more than nominal damages for decreased earning capacity on account of his alleged injuries."

The court in its general charge covered fully the elements of damage the plaintiff was entitled to recover for his injuries, but did not instruct them that he was entitled to recover for a decreased earning capacity due to the injury. At the conclusion of the court's general charge the plaintiff requested the following charge, which was given, to wit:

"I charge you that if you believe from all the evidence that the defendant is shown to be liable to plaintiff on any count in the complaint, you should find a verdict for plaintiff and assess damages sufficient to compensate plaintiff for suffering and injury and loss of wages and all such damages claimed as you find from the evidence plaintiff has suffered from the injury."

Each of the counts alleged that the injuries had permanently rendered the plaintiff less able to work and earn money. The evidence of plaintiff's witness Dr. Waldorf was to the effect that 12 months from the time of the trial would elapse before the plaintiff would recover the full use of his arm. The testimony further showed by an exhibition to the jury by plaintiff that he had only a partial use of the arm. Necessarily, under this testimony, the plaintiff would be unable to earn full wages on account of his disability for 12 months after the trial, if the jury believed the evidence. There was no evidence tending to show to what extent this disability would decrease the earning capacity of the plaintiff.

The court in its general charge had fully covered the element of damages for loss of wages up to the time of the trial, and the only effect of giving the charge requested was to call the attention of the jury particularly to the damages claimed by plaintiff which the evidence showed he had suffered by reason of the injury. In this condition, unless the jury's attention had been called to the fact that it could not assess substantial damages for the decreased earning capacity shown

by Dr. Waldorf's testimony, it might well be, and probably is a fact, that the jury took this into consideration in arriving at the amount of the verdict. The decisions of the Alabama Supreme Court are uniform that only nominal damages can be recovered for decreased earning capacity in cases where the testimony does not furnish a basis for substantial damages. The jury is not allowed to invade the realm of supposition, to arrive at the compensation to be awarded the plaintiff for this element of damages.

The defendant was entitled to have the jury instructed on this point; its request for such instruction was refused, and error thereby committed.

[3] We do not feel that we can say the errors above pointed out were without injury to the defendant.

The judgment appealed from is therefore reversed, and the case remanded for a new trial.

CONTINENTAL & COMMERCIAL TRUST & SAVINGS BANK et al. v. NORTH PLATTE VALLEY IRR. CO. et al.*

(Circuit Court of Appeals, Eighth Circuit. November 4, 1916.)

No. 4647.

1. CORPORATIONS ⟸482(8)—MORTGAGES—FORECLOSURE—PRIORITIES.

On a former appeal in a proceeding to foreclose mortgages on an irrigation system, where there was a conflict between bondholders and those asserting mechanics' liens the Circuit Court of Appeals directed a hearing to determine the value of the property subject to the lien of the mortgage and liens of materialmen, and that at the hearing the value of the property of which the several mechanics' lienholders had priority should be ascertained, as well as the total value of all remaining property subject to the mortgage, and that the proceeds should be divided among the bondholders and the mechanics' lien claimants in the same proportion as the value of the property upon which the lien claimants had priority considered as part of the whole system should bear to the total value of the mortgaged property diminished by the value of the property subject to the superior lien. *Held*, that it was improper for the court to ascertain the value of the two projects, and order distribution of the proceeds in such proportion as the value of that project on which mechanics' lien claimants had priority bore to the value of the other project or portion of the property not subject to such liens, but the value of the structures on which mechanics, etc., had liens should be computed, and the proceeds should be distributed in such proportion as that value should bear to the value of the remaining property.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸482(8).]

2. APPEAL AND ERROR ⟸1097(1)—REVIEW—LAW OF CASE.

A decision of an appellate court on a former appeal is the law of the case, but the court may determine that its mandate was misinterpreted below.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4358, 4359, 4363, 4427; Dec. Dig. ⟸1097(1).]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

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

*Rehearing denied January 10, 1917.

Bill by the Continental & Commercial Trust & Savings Bank, as trustee, and others, against the North Platte Valley Irrigation Company and others. From the decree adjudging priorities in the property, complainants appeal. Reversed and remanded.

Eldon Bisbee, of New York City (Charles L. Powell and Levy Mayer, both of Chicago, Ill., and William C. Kinkead, of Cheyenne, Wyo., on the brief), for appellants.

Ernest Morris, of Denver, Colo. (Wm. W. Grant, Jr., of Denver, Colo., on the brief), for appellees.

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

CARLAND, Circuit Judge. This case was before us at a former term —219 Fed. 438, 135 C. C. A. 150—and a reference to the opinion on that appeal is made for a more particular statement of the case. Then, as now, the contest was, and is, between certain mechanics' lien claimants and bondholders secured by a first mortgage. On the former appeal this court, after establishing certain liens for labor and material furnished, modified the decree of the lower court, and in its mandate directed that a hearing be had to determine the value of the property subject to the lien of the mortgage and the liens of the materialmen. It was directed:

"That at this hearing the value of the property on which the several mechanic's lien holders have a priority, should be ascertained as well as the total value of all the remaining property subject to the mortgage. * * * And the proceeds of the sale, after paying the necessary costs and expenses of administering the receivership and other prior charges, should be divided among the bondholders and the mechanic's lien claimants in the same proportion as the value of the property upon which the lien claimants have a superior lien considered as a part of the whole system bears to the total value of the mortgaged property, diminished by the value of the property subject to the superior lien."

[1, 2] The court on the former appeal desired on the one hand to avoid compelling the mechanic's lien claimants to sell and remove the structures on which they had a superior lien as permitted by the law of Wyoming (R. S. 1887, §§ 1519, 1523; R. S. 1899, § 2891), as it appeared that this would give the lien claimants the mere wrecking value of the structures, and on the other hand the court wished to avoid compelling the bondholders to pay the amount of the mechanics' liens in full when they, the bondholders, had already lost about 85 per cent. of their investment. By our former decision and under the laws of Wyoming the mechanics' liens were only superior to the lien of the mortgage as to the structures for the building of which the liens were claimed. While by our former decision we extended the mechanics' liens to the hydro-electric system, pursuant to what we thought was the law of Wyoming, we did not decide that the liens of the mechanics were superior to the mortgage lien upon that system. In this respect we intended to, and did, follow the law of Wyoming, which granted priority simply upon the structures for the building of which the liens were claimed, leaving the lien of the mortgage superior to that of the materialmen upon the real estate belonging to the hydro-electric sys-

tem. As the mortgaged property will come far short of paying the mortgage debt the mechanics' lien claimants could recover nothing if it was not for the priority of their lien on the buildings; therefore it is the value of the same that is material in proportioning the proceeds arising from a sale of the mortgaged property. For the same reason the extension of the lien to the whole system practically results in no benefit to the mechanics' lien holders.

The court below had a hearing as ordered by the mandate of this court. It made no specific finding of facts, but found in its decree generally that the hydro-electric system mentioned and described in the bill of complaint, taking into consideration the uses to which it was plainly adapted and its availability for valuable uses, to be $100,000. It found that the gravity system mentioned and described in the bill of complaint was $190,669, making a total for the entire mortgaged property of $290,669. It further decreed that the mortgaged property should be sold as an entirety and the proceeds divided in the proportion found by this decree to be the value of the hydro-electric system and the gravity system separately. Manifestly this was not carrying out the mandate of this court. By extending the mechanic's liens over the hydro-electric system, so called, there was no intention of deciding, nor is our opinion subject to the interpretation that we decided, that the mechanics' liens were superior to the lien of the mortgage upon that system. Neither is the decree of the court as to the division of the proceeds of sale in accordance with the mandate of this court. To add together the value of the gravity system and the value of the hydro-electric system, and then divide the proceeds of sale in the proportion which the value of the hydro-electric system bears to the total value of the mortgaged property, is erroneous, as will plainly appear by what has been heretofore said.

The decree appealed from must be reversed, and the case remanded, with instructions to the trial court to refer the case to a master, with instructions to find the value of each structure upon which a mechanic's lien is claimed separately, taking into consideration the uses to which each structure is plainly adapted and its availability for valuable uses; also, to find the value of the hydro-electric system without the improvements. The value of the system without the structures should be added to the value of the gravity system, and the proceeds of the sale on foreclosure should be divided in the same proportion as the total value of the structures upon which the mechanics' liens are claimed bears to the total value of the mortgaged property exclusive of the value of the structures. We recognize the rule that our former opinion is the law of the case so far as the questions there decided are concerned, but we now decide that our mandate was misinterpreted. We may properly say further that we do not regard the mere manner in which a decree shall be executed as being within the rule above referred to.

Reversed and remanded.

LOTT et al. v. SALSBURY.

In re HYMAN.

(Circuit Court of Appeals, Fourth Circuit. October 5, 1916.)

No. 1444.

1. BANKRUPTCY ⊜446—REVIEW—PETITION TO SUPERINTEND AND REVISE.
In a proceeding to superintend and revise in matter of law, the court cannot deal with controverted questions of fact.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊜446.]

2. BANKRUPTCY ⊜348—LIENS—LANDLORD'S LIENS.
Bankr. Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (Comp. St. 1913, § 9648), specifying the debts which shall have priority, and fixing the order of payment, provides that, after payment of the actual and necessary cost of preserving the estate, etc., wages due workmen, clerks, or servants, etc., earned within three months before the commencement of the proceeding, not to exceed $300 to each claimant, shall have priority. The section also gives priority to debts owing to any person who by the laws of the state is entitled to priority. Code Va. 1904, §§ 2791, 2792, give a landlord a specific lien for rent upon any goods of the lessor upon the leased premises. *Held* that, as it was not the intention of the Bankruptcy Act to interfere with valid liens which might be conferred by the sovereignty, the lien of a landlord is superior to the claim of clerks and servants for wages due for services rendered within three months of bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 536; Dec. Dig. ⊜348.]

On Petition to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Norfolk, in Bankruptcy; Edmund Waddill, Jr., Judge.

In the matter of A. L. Hyman, bankrupt. The lien of M. Salsbury, as landlord, was by order of the District Court (226 Fed. 982) given priority over the claims of Bernice Lott and others, as clerks of the bankrupt, and such claimants petition to superintend and revise the order in matter of law. Affirmed.

Leo Judson, of Norfolk, Va., for petitioners.

James G. Martin, of Norfolk, Va., for respondent.

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

JOHNSON, District Judge. This case comes here on a petition to superintend and revise in matter of law an order of the District Court of the United States for the Eastern District of Virginia. The order complained of is dated December 18, 1915, in the matter of A. L. Hyman, bankrupt, and decides that the landlord of the bankrupt had a lien for his rent upon goods on his premises and that out of the proceeds of such goods the landlord is entitled to payment before clerks' wages for the three months immediately preceding bankruptcy.

[1, 2] The petition raised several questions of fact. This court, in

a proceeding to superintend and revise in matter of law, cannot deal with controverted questions of fact. The order complained of was based upon an admitted state of facts, and in justice to the District Court we can only review what was before and passed upon by that court. The referee in bankruptcy in his report says:

"It was admitted by all parties that the said claims were for wages earned as clerks by the said parties within three months before the date of the commencement of these proceedings; and it was also admitted that the claim of the landlord for rent was for rent of the premises upon which the articles sold by the trustee and from the sale of which the fund arising for distribution arose were stored."

This admitted state of facts presented a clear-cut proposition of law for the District Court and that proposition the court passed upon. Is the claim of the landlord for the rent of the premises in which the bankrupt was conducting his business superior to and entitled to priority over the claims of clerks for salary for the three months immediately preceding bankruptcy? The statutes of Virginia (Code, §§ 2791 and 2792) give the landlord a specific lien upon any goods upon the leased premises for rent. Even against lien creditors the landlord has his lien for rent for not exceeding one year. Chief Justice Chase, in construing the statutes of Virginia, just referred to, said:

"We cannot doubt that this statute creates a lien in favor of the landlord and a lien of high and peculiar character. We have no concern with the policy of this legislation. It is upon the statute books and the lien so created must be respected and enforced. Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien under the execution, but the claim which by law is made superior to either is no lien?"

The bankruptcy law does not undertake to displace or invalidate bona fide liens upon the property of the bankrupt. It declares null and void liens that were given or accepted in fraud of the bankruptcy law, but all liens given or accepted in good faith and not in contemplation of bankruptcy nor in fraud of the bankruptcy act are entitled to recognition and payment in accordance with the law creating them. Section 64b of the Bankrupt Act (Act July 1, 1898, c. 541, 30 Stat. 563 [Comp. St. 1913, § 9648]) which provides for the order of distribution of bankrupt's funds has no reference whatever to lien debts. It has reference to the distribution of the funds not subject to lien among nonlien creditors. If, for instance, there is a tract of land with mortgage or deed of trust on it, and such land is sold for an amount in excess of the lien debt, the lien debt is paid out of the proceeds, and the balance is in the hands of the trustee for distribution among nonlien creditors under section 64b.

The case most strongly relied upon is Guarantee Title & Trust Co. v. Title Guaranty & Trust Co., 224 U. S. 152, 32 Sup. Ct. 457, 56 L. Ed. 706. That case holds that the United States except for taxes due had not in the enactment of the bankruptcy law exercised its sovereign right of providing a preference for its own claims against the bankrupt. It is conceded that the government has such a right and frequently exercises it. In the case just referred to the court held that the government had, except as to taxes, put itself in the plight of an ordi-

nary unsecured creditor and under section 64b was postponed till certain claims, wages among others, were paid.

The order of the District Court complained of is approved and affirmed.

Affirmed.

CHANCELLOR v. UNITED STATES.

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

No. 4425.

1. INDIANS ⟸38(5)—INTOXICATING LIQUORS—EVIDENCE—ADMISSIBILITY.
In a prosecution for introducing from another state, in violation of Act March 1, 1895, c. 145, 28 Stat. 693, intoxicating liquor into that part of Oklahoma which was formerly the Indian Territory, a witness, a resident of Texas, from whence the liquors were brought, testified that he found a wagon bound toward the Oklahoma border stuck in the mud and helped pull it out. The witness described the wagon and teams, but was indefinite as to the time, and unable to identify defendants as the teamsters. Testimony by another witness indicated that the wagon in question was one loaded with liquor and afterwards seized in Oklahoma. *Held* that, as one witness may testify to a fact and another show its relevance, the testimony as to the finding of the wagon was properly received.
[Ed. Note.—For other cases, see Indians, Cent. Dig. § 66; Dec. Dig. ⟸38(5).]

2. INDIANS ⟸38(5)—INTOXICATING LIQUORS—OFFENSES—EVIDENCE—SUFFICIENCY.
In prosecution, under Act March 1, 1895, for introducing from without intoxicating liquors into that part of the state of Oklahoma formerly 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; Ralph E. Campbell, Judge.

Jim Chancellor was convicted of introducing from outside intoxicating liquor into that part of the state of Oklahoma which was formerly the Indian Territory, in violation of Act March 1, 1895, and he brings error. Affirmed.

James C. Denton, of Muskogee, Okl. (Frank Lee, of Muskogee, Okl., on the brief), for plaintiff in error.

W. P. Z. German, 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 HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. Jim Chancellor, the plaintiff in error, and others, were convicted of introducing intoxicating liquor from outside the state of Oklahoma into that part of the state which was formerly Indian Territory, in violation of Act March 1, 1895, 28 Stat. 693. A wagon containing 21 kegs of whisky was driven from Texas into Okla-

homa across the Red river at Freeman's Ferry on the night of March 11, 1914. It was seized by the officers shortly after its arrival on the Oklahoma side, and several men, including the plaintiff in error, were placed under arrest. They were afterwards severally indicted and convicted upon a joint trial.

[1] Complaint is made of the admission and refusal to strike out the testimony of one Bird Comer. The witness, a resident of Texas, told how he found a wagon bound from the direction of Gainesville, Tex., toward the Oklahoma border, stuck in the mud, and at the instance of those in charge he hitched to it and helped pull it out. He described the wagon and the teams and some other circumstances, but was indefinite as to the time, and was unable to identify the men there with any of those on trial. The objection made is in effect that no connection appeared in Comer's testimony between the occurrences he related and the offense charged. But the jury were fully warranted by the testimony of other witnesses, particularly that of Hickman, in believing that the wagon Comer described was the one loaded with liquor and afterwards seized on the Oklahoma side of the river. One witness may testify to a fact, and another may show its relevance. It is not essential that each should know both the fact and its bearing on the case. If counsel's contention were sustained, we should have to do away with the law of circumstantial evidence.

[2] Complaint is also made of the denial of a motion for a directed verdict. While the evidence of Jim Chancellor's participation in the offense was more circumstantial than direct, we think it was substantial. He was camped at the ferry on the Oklahoma side the night the wagon load of liquor was brought across. Those who were there and those with the wagon, one of the latter being his brother, made a common party on its arrival. His knowledge of the situation was indicated by his statement to the officers that certain of the men arrested had nothing to do with it; and they were released on his word. There was also testimony that one of his horses was used in hauling the wagon. All the circumstances need not be set forth. In the aggregate they were quite persuasive of his guilt.

The other objections presented relate to some instructions and comments of the court upon the evidence. They are too clearly without merit for discussion.

The sentence is affirmed.

CHANCELLOR v. UNITED STATES.

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

No. 4426.

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Ed. Chancellor was convicted of violating Act March 1, 1895, by introducing intoxicating liquor from without into that part of the state of Oklahoma which was formerly Indian Territory, and he brings error. Affirmed.

James C. Denton, of Muskogee, Okl. (Frank Lee, of Muskogee, Okl., on the brief), for plaintiff in error.

W. P. Z. German, 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 HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

HOOK, Circuit Judge. The plaintiff in error complains of a conviction and sentence for violating Act March 1, 1895, c. 145, 28 Stat. 693, by introducing intoxicating liquor from Texas into a part of the state of Oklahoma which was formerly Indian Territory. The circumstances are similar to those of the case of Jim Chancellor, No. 4425, 237 Fed. 193, — C. C. A. —, decided at this term. The evidence against the present plaintiff in error was so much more direct and convincing that it need not be referred to in detail. The other questions of law are the same and are accordingly found against him.

The sentence is affirmed.

RICHARDSON, Treasurer of Porto Rico, v. FAJARDO SUGAR CO. (two cases).

(Circuit Court of Appeals, First Circuit. November 8, 1916.)

Nos. 1164, 1165.

1. COURTS ⟸405(3)—GROUNDS OF REVIEW—PRESENTATION IN LOWER COURT.
The decision of the Porto Rico Supreme Court as to a matter of local law will not be disturbed by the federal Circuit Court of Appeals for the First Circuit, unless clearly erroneous.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1097, 1099; Dec. Dig. ⟸405(3).]

2. APPEAL AND ERROR ⟸173(2)—REVIEW—ASSIGNMENTS OF ERROR.
In an action to recover taxes paid on the theory that they were assessed in violation of Pol. Code Porto Rico, § 290, exempting certain property, the contention that the property assessed was not of the kind exempted cannot for the first time be raised in the appellate court by assignment of errors.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 1120; Dec. Dig. ⟸173(2).]

In Error to and Appeal from the Supreme Court of Porto Rico.

Action by the Fajardo Sugar Company against Allan H. Richardson, Treasurer of Porto Rico. A judgment for plaintiff was affirmed by the Supreme Court of Porto Rico, and defendant brings error and appeals. Judgment affirmed, and appeal dismissed.

Samuel T. Ansell, of Washington, D. C. (Howard L. Kern, Atty. Gen., of Porto Rico, on the brief), for plaintiff in error and appellant Richardson.

Joseph W. Murphy, of New York City (Lorenzo D. Armstrong, of New York City, on the brief), for defendant in error and appellee.

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

BROWN, District Judge. The writ of error brought by the treasurer of Porto Rico, in case No. 1164, seeks to review the judgment of the Supreme Court of Porto Rico in a case relating to the assessment of taxes under the local laws, to the exemption from taxation in sec-

tion 290 of the Political Code of Porto Rico of book credits, promissory notes, and other personal credits, and to the application of such exemption to certain items contained in the schedules of the Fajardo Sugar Company's assets.

[1] Both the District Court and the Supreme Court of Porto Rico upon appeal gave due consideration to the questions of law, and agreed in the conclusion that, upon a proper construction of the provisions of the Code, the disputed items or "credits" were not taxable.

We find no reason for disagreeing with the judgments of the local courts as to the local law, and have no doubt that their construction of the provisions of the Code is correct.

The plaintiff in error has failed to produce that "conviction on our part of clear error committed," which, according to the opinion in Cardona v. Quinones, 240 U. S. 83, 88, 36 Sup. Ct. 346, 60 L. Ed. 538, is necessary in order to disturb the action of the court below as to questions of local law.

[2] It is also urged that the judgment of the District Court is entirely unsupported by fact, and that the courts of Porto Rico merely assumed that the credits in question were included in the tax, and that in the agreed statement of facts there is no basis for an inference that the assessment made by the board of review and equalization under section 310 of the Code included the credits in controversy.

We find in the record of the District Court nothing to indicate that the point was argued in the trial in the District Court.

These credits were assessed by the treasurer. The assessment was protested, and an appeal specifying this assessment was taken to the board of review and equalization. In view of the provisions of section 310 of the Code as to the procedure upon appeal, and of the stipulation as to the action of the board, it is apparent that the appeal did not result in a correction of this error.

It is an agreed fact that the board made but one deduction from the total capitalization, to wit, $606,919, representing capital employed in New York.

Upon an examination of the entire record of the courts below, we are of the opinion that the question now raised as to the effect of the stipulation is an afterthought, and is a question not presented to the District Court or to the Supreme Court of Porto Rico.

Passing the objection that there is no proper assignment of error as a basis of the contention, the rule stated in Missouri Pac. R. Co. v. Fitzgerald, 160 U. S. 556, 575, 16 Sup. Ct. 389, 40 L. Ed. 536, would be applicable, even if error were properly assigned:

"An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised and passed on in the court below."

In No. 1164: The judgment is affirmed.

In No. 1165: The appeal is dismissed, without costs.

CENTRAL RY. SIGNAL CO. v. METALLIC SHELL & TUBE CO.

(Circuit Court of Appeals, First Circuit. October 17, 1916.)

No. 1206.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT.
The Jackson patent, No. 824,019, for a track torpedo, claims 2 and 3, are void for lack of invention, in view of the prior art; also *held* not infringed, if conceded validity.

2. PATENTS ⇐328—INFRINGEMENT—RAILWAY TORPEDO.
The Beckwith reissue patent, No. 12,396 (original No. 790,879), for a railway torpedo, *held* not infringed.

Appeal from the District Court of the United States for the District of Rhode Island; Arthur L. Brown, Judge.

Suit in equity by the Central Railway Signal Company against the Metallic Shell & Tube Company. Decree for defendant, and complainant appeals. Affirmed.

For opinion below, see 228 Fed. 909.

A. S. Pattison, of Washington, D. C. (James H. Thurston, of Providence, R. I., on the brief), for appellant.

Horatio E. Bellows, of Providence, R. I., for appellee.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

BINGHAM, Circuit Judge. The complainant, the Central Railway Signal Company, is the owner of United States letters patent No. 824,019, issued to Wilton D. Jackson, June 19, 1906, on his application filed December 26, 1903, and No. 12,396, granted to Charles E. Beckwith, the same being a reissue of patent No. 790, 879, and issued May 30, 1905, on an application originally filed October 5, 1903, and complains of their infringement by the defendant, the Metallic Shell & Tube Company.

The two patents relate to torpedoes used for railway signaling purposes. Speaking broadly, a railway signal torpedo comprises, first, a torpedo proper, and, second, means of attaching the same to the rail. The torpedo proper consists of a shell containing explosive material. Various materials are used for the shell, such as paper, fiber, lead foil, tin foil, and the like. If hard metal is used, danger is likely to result from flying particles. To secure the torpedo to the rail, means are employed which will engage both the rail and the torpedo. Flexible metal strips of a pliable nature, such as lead or wire, are commonly used for straps. When a nonmetallic substance is used for the shell, it is customary to waterproof it, by applying varnish, paraffin, or some such waterproofing compound. When metal strips are used for the straps, and the material for the shell is of a fibrous nature, or different from the metal straps, various methods are resorted to for securing the shell to the strap; but it is obvious that, when the straps and the shell are made of the same material and in one piece, the problem of devising means to secure the straps to the shell does not exist.

In the patents in suit the strap and shell are made of different ma-

terials, and the chief problem confronting the patentees consisted in devising means of attaching the strap to the shell or container.

The claims in the Beckwith patent, No. 12,396, in issue in this suit, are Nos. 2, 7 and 9:

"2. A torpedo of the class described, comprising a tubular envelope of substantially flat cross-section, the ends thereof being closed over upon the body of the envelope, and a carrier for such envelope, said carrier adapted to clamp the turned-over ends to close the same moisture-tight, said carrier adapted to be clamped to the rail."

"7. In a torpedo, a substantially flat tube closed at its ends by having said ends doubled over upon it, an explosive compound contained in said tube and retained therein by said closed-over ends, a carrier member for the envelope thus constructed, the same adapted for clamping the envelope to the rail."

"9. An improved torpedo, comprising a case composed of a section of a fiber tube with open ends, a carrier applied thereto and extending longitudinally the tube, the ends of the carrier bent over upon, clamping and holding the ends of the tube closed."

The claims of the Jackson patent, No. 824,019, here in issue, are Nos. 2 and 3:

"2. As a new article of manufacture, a track torpedo, comprising a casing of paper having a filling of detonating material exploding under pressure, means for securing said torpedo to the head of a rail, and means encircling the body of said torpedo for retaining said securing means thereto.

"3. As a new article of manufacture, a track torpedo of tubular shape, having a filling of detonating material exploding under pressure, means for securing it to the head of a rail, and means encircling the body of the torpedo for retaining said securing means thereto."

In the Jackson patent, the patentee states the construction of his device to be as follows:

"The torpedo, made in accordance with my invention, consists of a tube *1*, which may be of paper, fabric, papier-mâché, wood, or other similar substance suitably prepared, and in the present instance I prefer to use waterproof paper. Within this waterproof tube is carried a detonating material *2*, * * * and to secure this material in place I provide plugs *3* for the ends of the tube, which plugs may be of wood, the material of which the tube is composed, or of any suitable friable substance. The tube is preferably varnished, and the plugs are also varnished, so as to insure a waterproof condition and render the torpedo available for use in all kinds of weather. The torpedo is held to the rail by means of a strip of flexible material, such as lead, * * * and while the lead may be held in place in several different ways, I prefer to provide a secondary or supplementary tube *5*, which will encircle the tube *1*, carrying the detonating material, and will thereby provide an inexpensive method of securing the lead in place. * * * In lieu of a complete tube I may provide tubular bands to secure the lead strips in place."

In the Beckwith patent, No. 12,396, the patentee describes the construction of his device thus:

"In the figures, *A* is a container for the usual explosive compound. * * * Said container consists, preferably, of a short length of tube, as shown in Fig. 5, which may be of a good weight of paper of tough quality, or of other suitable material that will break easily by the expansion of the explosive therein contained. In practice I employ a fiber paper, such as cartridge paper or the like, though, as stated, other material may be employed to good advantage—such, for instance, as sheet lead. It is to be kept in mind, however, that my purpose, in addition to the objects above stated, is to provide a torpedo that, when exploding, will have no pieces of solid material likely to in-

jure any one, even when close to it, so that it is important that the container *A* be of some substance that will tear open rather than fly into fragments. The tubes are cut into the desired length, and then by means of a suitable press or other implement the short lengths are flattened substantially, as shown in Figs. 7 and 8, the ends *a a* being turned up and over at the same time, so as to form a permanent crease, whereby the ends so turned will naturally close over by the stiffness of the paper and normally remain in that position. The envelopes or containers thus formed may now be immersed in any waterproofing fluid—such, for instance, as paraffin, asphaltum, varnish, or the like—after which they are filled with the explosive mixture and are then ready to be attached to a suitable carrier. * * * This carrier (designated by *C*) consists of a piece of sheet metal formed with upturned ends *D* and of substantially the same length as the container and within which the latter is placed. However, before placing said container within the carrier, a clip composed of a strip of lead *F* is first laid upon the carrier, there being points pressed in the said carrier from the back, as at *E*, to form a retaining means for the said strip. * * * The said strip, when clamped between the container and the carrier, is held tight enough to hold it in place and in turn properly holds the torpedo to the rail; but I prefer to use the points *E* to form more friction on the strip when so clamped in place, especially if the clip be of lead."

He then stated that the parts are assembled—

"by first providing the carrier *C* with its projections *E*, then placing the strip *F* upon it, followed by the container *A*. When thus put together, they are placed beneath a die, which when descending serves to close down the ends *D* of the carrier upon the turned-over ends *a a* of the container in a tight manner, and, in fact, this is so firmly done that it is an impossibility for any moisture, however slight, to enter the container. If preferred, the device thus completed may be dipped into a waterproofing material and is then ready for use."

In the defendant's device the explosive material is placed in a small envelope of thin paper in such quantity as will permit it to be rolled in a cylindrical form to be placed within a tube of thin lead foil. The end portions of the foil tube are flattened to form lead straps of sufficient thickness to serve for connection with the rail; the flattening beginning such a distance from the ends of the cylindrical package as not to rupture the lead tube.

In the District Court it was found (1) that claims 2 and 3 of the Jackson patent were invalid, and (2), if valid, they must be limited to what was new with Jackson, and, so limited, the defendant did not infringe. And as to the Beckwith patent, No. 12,396, that if the claims were valid, the defendant did not infringe them, as they had no application to a structure like the defendant's which involved no problem of uniting a separate case to a separate leaden strap.

[1] We think that the conclusions reached by the District Court as to both patents are right. The materials used had long been employed and were well known in the art at the time the patents in suit were applied for, and, if the particular means adopted in the Jackson patent for connecting the torpedo to the strap were not disclosed in the prior art, we are of the opinion that, inasmuch as the disclosure consisted in nothing more than passing a band or bands of greater or less width about the metal strap and the body of the torpedo or shell, a thing obvious to any one attempting to solve the problem, if it can be called a problem, it does not involve invention. If, however, this were not so, the prior art as disclosed in the patents issued to E. G. Beckwith, No.

501,399, and to Hickman, No. 173,291, clearly discloses means anticipating the broad claims of the Jackson patent here in issue.

In Beckwith, No. 801,399, the shell or torpedo, as disclosed in Fig. 1, is an elongated tube, the flat end of which is closed in any suitable manner. The large end of the tube is closed by a wooden plug or other suitable material, and encircling this end is a "metal band." The metal strap employed to hold the shell or container to the rail is secured to the shell by passing a tack through the metal strap, the metal band and into the plug. The metal band encircling the shell serves as an aid in strengthening and securing the tube to the strap the same as the band or tube does in the Jackson patent, and the device presents the three elements of a container for the explosive, a strap and the encircling means to connect the strap to the container.

The patent to Hickman, No. 173,291, involved the same problem of connecting a torpedo to a strap where the container and strap were not integral. In this patent the torpedo proper or container is spoken of as a pellet. It is there said:

"*A* represents the usual case or pellet covered by a cap *B*; and *C* is a ductile metal strip passed between the case and the cap, and extending below the case for attaching the torpedo to the rail in the usual manner."

Here the ductile strap passed over and around the case or torpedo and was secured in position by recesses formed in the cap which encircled the case or torpedo. It is apparent that in this patent the case was a complete container in itself and that the cap did not form a component part of it. We have here, then, a container, a strap, and means encircling the container for the purpose of connecting the two together, which are the three elements claimed by the complainant as constituting the Jackson device.

The claims of the Jackson patent here in issue are broad claims and embrace, as we have shown, devices of the prior art. If, however, the particular device disclosed in the patent involved inventive thought, and the claims of the patent could be sustained by limiting them to that specific device, the defendant does not infringe, for its device does not involve the problem of providing means of connecting structures composed of different materials. It was old in the art to construct the encircling member and the strap of the same material and in one piece, as shown in the patent granted to Hickman, No. 150,431—a method of construction which the patentee in the Jackson patent precludes himself from using by expressly providing that his torpedo shall be "constructed of nonmetallic material," such as "paper, fabric, papier-mâché, wood, or other similar substance suitably prepared," and that his strap or straps shall be of "lead," or "in lieu of the strip of lead * * * some suitable form of metallic wire or band to secure said torpedo in place." Furthermore, it seems to us, notwithstanding the testimony of the experts, that the pellet spoken of in Hickman, No. 160,431, is the "usual case or pellet" spoken of in Hickman, No. 173,-291, of which the cap *B* is not a component part, and that the complainant cannot take the position that, if the defendant's device contains the three elements above spoken of, its construction is the equivalent of that of Jackson, and infringes it.

[2] In the Beckwith patent in suit, No. 12,396, claim 9 relates simply to a case of fiber tube and a carrier applied longitudinally to the tube, with its ends bent over upon and clamping and holding closed the ends of the tube. It does not lay any claim to means for connecting the torpedo to the rail. Claim 7 calls for a flat tube closed at its ends by having them doubled over upon the tube, and a carrier member adapted for clamping the envelope to the rail. This claim is specific so far as it relates to the construction of the container, but, so far as it relates to the character of the carrier and its adaptation for securing the container to the rail, it is general. Claim 2 is specific as to the construction of the container and also of the carrier, so far as it relates to its attachment to the container and the function it is to perform by being attached thereto; but as to the means for attaching the shell or container to the rail it is general.

The defendant's structure does not infringe claim 9. Its metallic tube does not clamp and hold the ends of the explosive container, if the thin paper envelope of the defendant's device can be called a torpedo proper or container. This proposition applies equally well to claim 2, and in neither claim 9 nor 2 does the carrier encircle the container. In claim 7 the ends of the flat tube or container are closed simply by doubling them over upon the body of the tube without the employment of any other means for closing them or holding them closed. The defendant does not infringe this claim, for, if its thin envelope may be called a container, its ends are closed by other means than simply turning them over upon the body of the envelope; and, if the claim is to be limited to the specific construction set forth in the specification of the patent, the defendant's device does not infringe, for the ends of the envelope are not closed and held by a clamping device as in the patent to Beckwith.

We are also of the opinion that the District Court was right in holding that the defendant's device does not contain the three elements of the patents in suit; that the ordinary paper envelope containing the explosive, which is rolled into cylindrical form and placed within the leaden tube, does not constitute the defendant's torpedo. As said by the District Court:

> "The torpedo of the defendant consists, not only of the explosive charge in a paper envelope, but of the protective shell or lead foil which completely incloses the paper envelope and explosive."

And as it does not involve the three elements of the complainant's device, it does not infringe.

The decree of the District Court is affirmed, with costs to the appellee.

FOWLER CAR CO. v. CHICAGO, B. & Q. R. CO.

(Circuit Court of Appeals, Seventh Circuit. August 29, 1916.)

No. 2364.

1. PATENTS ⟸328—VALIDITY—BOX CAR BODY.
The Fowler patent, No. 13,561 (original No. 962,425), for a box car body, having the side planks adjustably secured to the frame, so that in case of shrinkage they may be forced together to close the joints and a draw strap for effecting such compression, claims 1, 15, 16, and 17, *held* void for lack of patentable novelty.

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—BOX CAR BODY.
The Murray patent, No. 967,412, for a box car body equipped with wedges as a means for tightening the side planks after shrinkage, *held* not infringed, if so construed as to give it validity.

3. PATENTS ⟸235—INFRINGEMENT—OMISSION OF PARTS.
A patent for an article of manufacture, which includes as an important and permanent part of the structure a device for keeping it in repair, cannot be construed to cover a structure having no such element; its function being performed by a separate tool having no connection with the structure itself.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 371; Dec. Dig. ⟸235.]

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

Suit in equity by the Fowler Car Company against the Chicago, Burlington & Quincy Railroad Company. Decree for defendant, and complainant appeals. Affirmed.

From a decree dismissing its bill for infringement of certain patents, plaintiff appealed.

Appellant is the owner of the Murray patent, No. 967,412, issued August 16, 1910, and also of the Fowler reissue patent, No. 13,561, issued May 13, 1913. The original Fowler patent, No. 962,425, was issued June 28, 1910.

Appellee denied both validity and infringement of the original Fowler patent, the Fowler reissue patent, and the Murray patent. An added defense to the Fowler reissue patent is that the reissue was invalid, because application was not promptly filed and the delay not reasonably excused, intervening rights were acquired, and there was no accident, mistake, or inadvertence in the application for or issuance of the original patent.

The claims alleged to be infringed are 1, 15, 16, and 17 of the Fowler reissue patent, and claims 2, 4, 5, and 7 of the Murray patent.

Both patents relate to the bodies of single sheath box cars. The Fowler patent purports to be for such a car side having its planks adjustably secured to the frame, so that in case of shrinkage they may be forced together in order to close the joints, and provided with means (a draw strap) for effecting such compression. The Murray patent was for such a car side, but provided with wedges for pressing the planks together.

The inventor describes the Fowler patent as "a novel construction of box cars and has for its general object to simplify, lighten and cheapen the construction of box cars, more particularly the side walls and floors thereof by doing away with the necessity for double sheathing, especially in grain cars; a further important object being to provide a means for counteracting the effects of shrinkage and preventing the formation of cracks at the points between the planks."

The method of preventing leaks is described by the inventor as follows: "As a means for drawing the side planks together to prevent the formation of cracks at the joints as well as to counteract shrinkage in the side planks and render the joints tight I employ a novel device in the nature of a tightening strap, which in its preferred form, is characterized by a hook or an equivalent device at its upper end, which engages over the upper edge of one of the

series of side planks, preferably the topmost, and a threaded lower end which passes through an anchorage below the side wall and receives a nut for securing and adjusting purposes."

The Murray patent referred to is described by the inventor as being "an invention pertaining to novel and useful tightening means for forcing such boards (car sides) together after shrinkage whereby to maintain the joints or seams between the same closed at all times."

Claim No. 5 of the Murray patent reads in part as follows: "In a railway car body wall, the combination of a plurality of boards disposed edge to edge, a roof beam and wedge means acting on said boards and disposed between the top board and said roof beam whereby the shifting of said wedge means may be employed to close the joints between the boards."

The appellee caused 500 cars to be constructed which were in use, the sides of which were single sheathed and means were provided, by means of jackscrews, to force the boards together, which boards were in turn maintained in such position by means of bolts extending through elongated bolt holes. No special kind of wedge was required, nor were the jackscrews in any way a part of the car side.

Charles C. Linthicum, of Chicago, Ill., for appellant.

Louis K. Gillson and Charles B. Gillson, both of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] It clearly appears from the testimony that the single sheath car was in use long prior to the application by Mr. Fowler for the patent in question. Moreover, the adjustable side wall was not patentable in 1910, for long prior thereto it had been covered by the Marshke patent, No. 684,611, issued October 15, 1901. This latter patent covered a grain tank or box for wagon, and the object of the invention is described by the inventor as being:

"An improvement to provide a simple and durable form of wagon body which is so constructed that the boards when shrunken may be drawn together and the grain thereby prevented from escaping therefrom."

Marshke shows that the means provided in his patent for tightening the grain wagon box was the same as that provided by Fowler in his patent. He says:

"The ribs are secured together by a series of bolts and the apertures in the ribs through which said bolts are inserted are made slightly larger than the bolts or preferably slightly elongated so as to permit them [the bolts] to move with the series of boards as they are drawn together."

We conclude that the Fowler reissue patent, No. 13,561, is invalid so far as the claims here involved are concerned.

[2, 3] The claims of the Murray patent involved herein cover the means for tightening the boards on the side of the box car. The mere use of a wedge as such for pressing boards together is not patentable. If the wedge in the Murray patent can be sustained as a valid claim, it must be by reason of its being a permanent part of the car side. A complete answer to appellant's claim in this respect is that appellee's cars were not equipped with the wedge as a part of the car side. The jackscrew in appellee's cars was merely used as a means—a tool, separate and distinct from the car itself—whereby the boards of the car side were pressed together.

It follows, therefore, that, so far as the claims of the Murray

patent are concerned, they were either invalid or not infringed. If construed so as to cover wedges generally, they were not valid, as they involved no patentable novelty. If restricted so as to be an integral part of a car side, they were not infringed by appellee.

Appellant contends that the structure for which protection was given by its patents should not be considered singly, but as a completed unit. As such, appellant contends the patented structure includes a single sheathed car, a single wall of sheathing made adjustable and capable of being tightened and a novel tightening means per se. Appellants concede that a single sheathed car alone is not patentable, but they contend patentability of the invention becomes apparent when a single sheathed car has its planks so adjusted as to be capable of being tightened, and that the claim of patentability is strengthened when in addition thereto a novel tightening means is provided. Granting that its invention should be considered as a unit, we are unable to discover novelty or originality in the claims when viewed in the light of the patent to Marshke heretofore referred to. The addition of the Murray patent merely provides a particular novel means for pressing the planks together, and affords appellants no aid, for properly construed the claims in issue under the Murray patent are in no way infringed by appellees.

The decree is affirmed.

SNOOK-ROENTGEN MFG. CO. v. STETSON HOSPITAL OF PHILADELPHIA.

(District Court, E. D. Pennsylvania. December, 1914.)

No. 1359.

PATENTS ⊜328—VALIDITY AND INFRINGEMENT—X-RAY MACHINE.

The Snook patent, No. 954,056, for an X-ray machine, which is of a different type and operates upon different principles from those of the prior art, but accomplishes superior results, *held* not anticipated by prior publication, valid, and infringed.

In Equity. Suit by the Snook-Roentgen Manufacturing Company against the Stetson Hospital of Philadelphia. On final hearing. Decree for complainant.

C. D. Ehret, of Philadelphia, Pa., for plaintiff.

Wm. B. Linn and Paul M. Elsasser, both of Phildelphia, Pa., and O. Ellery Edwards, Jr., of New York City, for defendant.

DICKINSON, District Judge. This case involves the validity of letters patent No. 954,056 for an improved X-ray machine. The controversy is between two makes of machine. One is that of the plaintiff. The other is that of the Waite & Bartlett Manufacturing Company, which is the real defendant in the case, in that it has undertaken the defense. The defendant of record is a mere user, and in a real sense a nominal defendant.

The defense is a denial of infringement, which is, however, involved in the defense of anticipation—a denial that the plaintiff's patentee was the first inventor. Both machines are made under the licensed use of the Lemp patent, No. 774,090. The plaintiff defends

its proprietary right from a position which is entrenched by admitted, as well as proven, facts which makes its position a strong one.

The facts are that the machine which embodies the claimed invention is one which is highly useful and of almost incalculable benefit to mankind; it has met the supreme test of commercial success, and the field upon which the defendant machine seeks to enter was previously in the sole occupancy of the plaintiff. The users of such machines, who are a highly trained class of men, well equipped to exercise discriminating judgment of the merits of such devices, had accorded the plaintiff the practical tribute of their patronage. The Snook apparatus has further won a recognized place in the world literature of the art.

The admission of these facts, although frankly and ungrudgingly made by the makers of defendant's device, is forced by not only the commercial record of the plaintiff's device, but by the further fact that the two machines are to all practical intents one and the same. Defendant must therefore accord a full meed of praise to the device of the plaintiff or condemn its own. This carries also the admission of the fact of infringement, unless the claims of plaintiff's patent are so restricted as to exclude all machines which embody the one feature in which the defendant's device differs from that of the plaintiff. This difference will be referred to later.

We are relieved from any special consideration of the allowance of particular claims, because the admission is further frankly made that the plaintiff is entitled to all it claims or to nothing. This concession is the child of the contention of defendant that the file wrapper of the patent in suit shows that as the cost of securing its patent the meaning of its claims was restricted to a type of machine which excludes that of the defendant. If the claims are so read, the defendant has not infringed, and the patent of plaintiff goes unchallenged by defendant. It may therefore have all its claims allowed. If, however, the reading of the claims is made so broad as to take in the defendant's machine, then it is asserted the patent is invalid, because the plaintiff's patentee was not the first inventor, but merely constructed a machine which had been invented and fully described by Von F. S. Koch, of Dresden, whose firm of Koch & Sterzel were German competitors in the same field of activity with both the plaintiff and defendant. If such be the fact, the plaintiff takes nothing.

To grasp the thought upon which each of these positions of no infringement or no patent is based, we must consider both of them in the first instance together. The startling suddenness with which the accidental discovery of Roentgen aroused the astonished admiration of the world, and the possibilities of usefulness which the discovered fact was at once universally recognized to have, has made what the X-ray machine can do familiar to all. It has enabled the eye to see and photographs to be taken of what was before hidden under a hopelessly impenetrable veil. When the fact that this miracle could be wrought was once known, a machine to do the work was soon constructed. There was in none of these machines, considered as mere machines, a single novel element. Every one was too eager to

produce the result to lose any time over devising the best means as long as the well-known means would suffice. Since then all efforts have been directed principally along the line of so adapting and improving these well-known means as to take a better picture and shorten the time of taking it, and to protect the machine itself and render its use less hazardous to the operator. The scientific minds, among those which were employed in the problem presented, at once busied themselves in ascertaining the principles in accordance with which the phenomena presented appeared.

There would seem to be reason to believe that there is not yet an entire concord of opinion. Indeed, some of the difficulties presented in the decision of this case arise out of such differences. The courts, of course, have no mandate to settle scientific controversies, and the danger always exists that the discussion of the scientific or mechanical principles may crowd out of consideration the legal principles involved. The former principles, however, may comprise the facts out of which the law of the case arises, and to this extent, at least, they must be grasped and mastered.

The machines with which we are concerned may be roughly classified as induction coil and transformer types of machines. It would seem to be a fact (although one of no legal value) that there is yet a difference of opinion of the comparative merits of these types. At all events, they are both still in use. The one first in use was the induction coil. The operation of this type of machine was commonly understood to depend upon certain electrical principles. Indeed, one of the obstacles to the introduction of the Snook machine, which was the first and soon became a widely known example of the transformer type, was the criticism that it was built on wrong principles. It won a place for itself by the practical demonstration of good work results rather than by the conversion of its users to an acceptance of the principles of its operation.

Upon the discussion of these scientific features we will not presume to enter, but will leave this to the trained minds of the experts, including counsel. For the application of the legal principles with which we are more directly concerned, a few of the scientific facts will suffice.

Every one knows that light—light as commonly known—will penetrate certain substances and will not others. To express these facts we have the words "transparent" and "opaque." The discovery of Roentgen has, in most important measure, done away with this difference between substances. We know that what we call the X-ray will penetrate substances which ordinary light will not. This power of penetration is associated in the mind with the idea of intensity. It would seem that we must have this intensity of rays. To get them a tube is constructed from which the air has, so far as possible, been exhausted. This gives us a high vacuum chamber. An essential agent which these machines are designed to employ is electricity, and a current of electricity is made to pass through the tube. The tube, however, must be specially constructed. The thought of just what takes place within the tube is difficult for the untrained mind to grasp and more difficult to express in words. The accepted conception seems to

be that it is a bombardment from a machine gun at one end of the tube pouring out missiles of almost inconceivable minuteness, projected with a like almost inconceivable swiftness of progression and force against a target at the other end. One to be expected result is a manifestation of heat. There is supposed also to be an effect produced upon the ether, or whatever we call the contents of the tube, after the so-called vacuum is produced. What is ultimately accomplished is that objects hidden behind what would otherwise be opaque substances become visible and may be photographed. This power of penetration and intensity of rays presupposes a powerful current of electricity, and this conception of a bombardment implies the current to be in the one given direction. There must be no reverse current, or "reverse," as it is termed. The desirability and practical necessity for this absence of "reverse" is obvious.

It is not pretended that the last word has as yet been spoken on the subject of these machines. Whatever the relative merits of the two types, the first or induction coil type was at the time of the introduction of the Snook or transformer type confessedly short in performance. Exhaustive efforts were being made to improve it. These efforts were largely, if not wholly, directed to improvements of the tube and to giving the operator the aid of accurate measuring devices. It is at least not clear that any one before Snook thought of abandoning the induction coil and having resort to the transformer type. So fully is Snook identified with the latter type that it is commonly known as the Snook machine. One of the advantages sought was to shorten the time of exposure in the taking of photographs. Another was to produce a ray which would penetrate denser substances than before. Still another was to prevent reverse. Perhaps it would be more accurate to say that the problem was to accomplish the first two results without increasing the risk of reverse, and, if possible, to reduce the risk. The testimony of Dr. Manges presents in a clear light just what Snook accomplished.

The validity of the claims in issue is found to turn upon the principles upon which the Snook machine depends for its success. As already observed, whether a machine so constructed is of less, equal, or greater value than a machine constructed upon different principles, is a matter of no moment. Utility is found because abundantly proven and admitted. An inquiry into the principles of its construction is, however, imperative because the scope of the claims depends upon these principles. The inquiry best begins with a few general electrical facts and then a contrast between the two types of machine. Whether we conceive of electricity as a substance or a force, as a current of something flowing or a force causing a flow, the electricians have brought the idea conveyed by the words "volt" and "ampere" within the common grasp. The further conception of a wave form of movement is likewise familiar. We can present to the mind an alternating current in the well-known sinusoidal wave form, alternately above and below a base line. We can think of these waves as compressed or pinched into sharper peaks, with intervals between the crests. We can catch the thought of the difference between taking only a part of alter-

nate waves and of taking the whole of every wave, and of a relation between the intensity of the current and of the developed X-rays. What is taken may be measured in degrees electrically, the whole being represented by 180 degrees. Mechanically this is divided by two, and in the discussion is spoken of as 90 degrees. Prior to Snook, emphasis was laid upon three things. The sinusoidal wave must be pinched into sharp peaks, only a small part of which must be taken, and to assure results, and no reverse, to have a choke coil, high magnetic leakage, and an arc of less than 50 degrees.

The claimed merit of the Snook machine is that it is constructed with the thought of rejecting all of these features and accepting the opposite. The whole, or as much as possible, of the wave is utilized, the use of a choke coil is avoided, the effort is to get as low a magnetic leakage as can be, and the arc is as near 90 degrees as the danger of inverse and other conditions will permit. The question of just what the measurement will show, or need show, apparently cannot be categorically answered. In the plaintiff's machine it is 67 degrees, and in the defendant's 52 degrees or 54 degrees. Invention could not be denied to one who thus rejected all accepted principles of construction and resorted to their opposites and produced a thing of value. This is what Snook at least thinks he did. Nor is this an afterthought, brought up to buttress his patent, because the same thought is expressed in his application and hammered home again and again throughout the proceedings in the Patent Office. This is, we think, clear. Some principles of the construction of these machines are of universal acceptance. A high pressure flow is demanded. The flow must be continuously in the one and same direction. It is said to be easy to secure this unidirectional flow in a current of low pressure. It is difficult to preserve it under high tension. The use of an alternating current has its advantages. One is to meet the high tension requirement. A low pressure direct current would seem to best meet the other requirement of direction of flow. An effective combination is made by taking from some supply source a current of low pressure flow, turning this into an alternating current of high tension, rectifying it, when introduced to the tube, again into a direct current, but one of high pressure and of such volume and continuity of flow as to produce the desired intensity of rays without reverse.

That the induction coil machines were and still are highly useful machines is not in dispute. That they have their limitations is acknowledged. Whether these limitations are due to the induction coil itself, to the tube, or to what they are due, seems to be still a matter of difference of opinion among experts. One of the accepted principles of their construction was that there passed through the tube these hairpins of current at intervals. Inverse could not be avoided, or at least was difficult to avoid. The plan of opening the secondary current at the time this inverse tried to pass was devised. An attempt was also made to increase the number of these hairpins of current, to decrease the interval between them. Improved tubes also helped some. The problem had not, however, been solved, nor has it yet. One difficulty seems to be a difference of diagnosis. Another is the want of

agreement in the method of treatment, or rather in the philosophy of the method. Some thought, and evidently still think, the trouble to lie in the tube; others, that it rested in the induction coil. Many thought, and evidently, at least, some still think, there is value in this idea of the sharp-peaked waves. This is really aside from the real problem, or at least the whole of the real problem, which perhaps cannot be presented until it is known what goes on in the tube during the intervals between impulses.

Snook's idea was that, when the result to be achieved was the prevention of inverse, the current should be taken from the tip of the sharp peak of a wave; when intensity of rays was desired, the whole wave should be taken. As it was a necessity to have both these results, how much of the wave you would take, or how near to 90 degrees your arc would measure, could not be definitely stated in degrees. An analysis of any one of the system claims in the Snook patent and the application itself discloses this as the thought Snook endeavored to express. The avoidance of reverse was a recognized necessity, and he recognized that he must achieve this at whatever expense in loss of intensity or otherwise. He lays heavy and repeated emphasis, however, on the other requirement of intensity of rays, and the latter is the essential result which his machine was designed to accomplish. He appreciated the fact that the readiest means at hand of reaching one result was destructive of the other, or at least made its accomplishment more difficult. To get the desired intensity he wanted the whole wave, or a 90-degree arc. To avoid reverse he receded to a less arc. The machine which he constructed was, in view of accepted principles, a heretic. He rejected the induction coil. He rejected the hairpin points of current, and boldly essayed to take the whole wave. It is admitted that he produced results, and it cannot be denied that he made an advance, and a bold one, in the art. That, if he has correctly formulated the principles upon which his construction proceeds, he has revolutionized the art, to the extent of the success which has attended him in supplanting the old type of machine with the new, is attested by the reception which the introduction of his machine met. It was, as already stated, condemned because constructed on wrong principles. This, if a true criticism, would deny utility. If not true, it most loudly proclaims invention. Indeed, it proves invention, whether the criticism be just or not. As the machine is an admitted success, it must be that its construction does not conflict with the correct principles of proper construction. Whether the inventor has fully comprehended and accurately analyzed and formulated those principles is of no legal moment. He has conceived and shown us how to produce a new and useful thing, and to what he has produced the law gives him as his reward the exclusive title for the time limited by law.

All we need further inquire is into what this invention is. As set forth in his patent application and claims it is this: A machine to produce more intense X-rays than machines before in use would produce. A machine in which this is accomplished by providing means for exciting—the operation going on within—an X-ray tube to a much

higher current intensity, so that the required time of exposure is reduced and the power is conferred of penetrating masses of greater density than before. Such a machine is constructed by a combination of parts, by bringing together functional elements consisting of a transformer having a minimum magnetic leakage—a rectifying switch so driven as to keep in time and have definite phase relations with the current supply generator, which is preferably accomplished by mechanically connecting the rotary member of the switch with that of the current generator; assuring by these or equivalent means the absence of reverse current and the passage of all current waves through the tube, to which latter purpose the feature of keeping as close as may be to a 90-degree arc is emphatically emphasized. The result is that we have a machine incorporating a high tension transformer of low magnetic leakage; a synchronous rectifying switch; the utilization of the whole wave current, while preserving the unidirectional flow of the current without reverse, and avoiding the latter; and having the switch and generator so connected as to assure synchronism of action. The feature of the new machine, as contrasted with the old, in that it discarded and rejected the idea of peaking the waves of current and snipping off merely the tips, and substituted for this the opposite idea of taking the whole wave, is emphasized again and again by demanding that the arc be well up to 90 degrees, expressing the thought by the phrases of "nearly 90 degrees," "slightly less than 90 degrees," and equivalent terms.

In the plaintiff's machine (as already noted) this arc is 67 degrees, and in the defendant's at least 52 degrees. This (if there was no challenge of novelty) would bring us directly to the question of infringement. A comparison of the two machines for the purposes of this case reduces the differences of the two machines to the one already adverted to of the difference between 67 degrees and 52 degrees. On the face of the figures neither is 90 degrees, or "nearly so." The expression, however, is only one in degrees, not of degrees. The thought back of it is of ideas, not only different, but antagonistic. The difficulty in finding definiteness of expression for it is a difficulty the expression of which is itself hard to compress into a phrase. There is a territory which was in the occupancy of the prior art. There is a territory which the plaintiff has attempted to mark out for his own. These lie, not in a plane, but on the surface of a globe. To give Abraham the land which lies to the East and Lot that which extends to the West is to avoid conflict between their herdsmen; but if they travel far enough they are bound to come together. In this sense East and West are a twain which do meet.

Some expressions have no meaning except a relative one, and no accuracy except as illustrative. The defendant had the undoubted right to construct such a machine as was then known to the art. This would possess the feature of the utilization of a small part of each alternate wave of current flow. We are assuming he had no right to a machine, the construction of which was based upon the feature of a utilization of the whole of the current wave. These two types of machine are in principle of construction not only different, but opposite; and this

is true although they may become very much alike by the one which is built on the principle of taking little of the current taking more and the one built upon the principle of taking much of the current taking less.

The real question of to which class a machine belongs is to be determined by the principle of construction involved, and not by a measurement of the quantity of current in the absolute. Determined in this way, the defendant's machine is of the Snook type, and not of the prior art type, and we find infringement.

This leaves only in the case the question of anticipation. The defense is in this aspect that what Snook claims to have invented, Koch had before both thought of, described and published in a printed writing. It is, of course, admitted that the Snook invention must have possessed, not merely novelty in the sense of originality, but novelty in the sense also of priority. It is further, of course, conceded that every inventor must be presumed to have known all of what had been described in publications of the art. Nevertheless the basic thought on which the prior publication doctrine rests is that it does not apply to a claimant to a patent who has made a real contribution to the art and one which originated with himself. If he has in fact originated and made this real contribution, he is not to be deprived of his reward, because in the light of his disclosed invention the germ of the same idea can be found to have been hidden away in the writing of some one before him. The inventor of the telegraph was not anticipated because some one before Shakespeare's time had written of a circle around the globe. Just how much of the Snook idea can be seen in the Koch publication depends largely upon the keenness of vision of the investigator. For how much of what he sees he is indebted to the illuminating light shed by the Snook disclosure even he probably does not know. What we do know is that, if Koch had a conception of the Snook machine, he himself did not have in mind to describe or disclose it. If he described the Snook machine, it was unintended, and in this sense accidental. The minds of those skilled in the art were directed to improvements in the tubes, toward the elimination of moving parts in the construction of the machine, and toward facilitating its use by physicians and others, who were not trained electricians, and whose minds were on the work done by the machine, not its workings, by providing them with measuring devices. What Koch had in mind to do was, not to revolutionize the principles on which the induction coil machines were constructed, but to describe an improved tube, of which he had conceived, and to provide the operator with more accurate and dependable means of current measurement.

We find the Koch publications not to have been such an anticipation of the Snook machine as to destroy the patentability of the latter, and nothing in any of the defenses urged which overcome the prima facies of the letters patent owned by the plaintiff.

A decree embodying these findings may be submitted.

BRONSON v. BOARDS OF SUP'RS OF EMMET AND KOSSUTH COUNTIES, IOWA, et al.

(District Court, N. D. Iowa, C. D. November 27, 1916.)

1. COURTS ⟸299—FEDERAL COURTS—JURISDICTION.
Within Judicial Code (Act March 3, 1911, c. 231) § 24, subd. 1, cl. "a," 36 Stat. 1091 (Comp. St. 1913, § 991), giving the District Court jurisdiction of all cases arising under the Constitution or laws of the United States, a suit arises under the Constitution or laws of the United States only when the plaintiff's statement of his cause of action shows that it is based on some provision of the Constitution, or some law of the United States; and, if it does not so appear, it cannot be shown by the answer of defendant, or any subsequent pleading in the case, not even by a petition for removal of the cause from the state to the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. ⟸299.]

2. COURTS ⟸299—FEDERAL COURTS—JURISDICTION.
Plaintiff's bill, seeking damages for injuries to his land by reason of the overflow and destruction thereof in the construction of a joint drainage ditch by two counties under Iowa laws, alleged that the damages amounted to $3,000, and that the laws under which the ditch was constructed were invalid under the federal Constitution, because not providing for notice to plaintiff, a landowner, whose property would be injured, but was not included in the district. *Held* that, as a denial of the damage would be a complete defense, and as the question of the illegality of the laws might not be even raised, the case was not one arising under the federal Constitution or laws, within Judicial Code, § 24, subd. 1, cl. "a," giving the District Courts jurisdiction over such cases; the averment as to the illegality of the Iowa law merely anticipating a defense.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 841; Dec. Dig. ⟸299.]

3. EQUITY ⟸364—DISMISSAL—LACK OF JURISDICTION.
Where a bill in the federal courts shows on its face that the court is without jurisdiction, it should be dismissed by the court on its own motion, though the question be not raised by defendant.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 767; Dec. Dig. ⟸364.]

4. COURTS ⟸327—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.
In a suit for injuries to land by reason of the construction of a drainage ditch, the federal court is without jurisdiction, where damage was less than $3,000, and, if, upon final hearing, that fact appears, suit must be dismissed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 889; Dec. Dig. ⟸327.]

In Equity. Bill by Hugh Bronson against the Boards of Supervisors of Emmet and Kossuth Counties, in the State of Iowa, and others. On motion to dismiss the bill for lack of jurisdiction and want of equity. Motion sustained, with leave to amend on proper showing.

Submitted on motion of the defendants to dismiss the bill for lack of jurisdiction and want of equity. The bill is to recover from the defendants $3,000, as damages to 40 acres of land owned by the plaintiff in Kossuth county, this state, because of the alleged overflow and destruction of said land by the construction of a joint drainage ditch in the counties of Emmet and Kossuth, alleged to have been authorized by the boards of supervisors of said counties in this state acting as drainage boards.

It is alleged in the bill with much detail that the General Assembly of the state of Iowa in 1897 enacted a law, and later amended the same, authorizing the boards of supervisors of the several counties in that state to form drainage districts in said counties and adjacent counties, for the purpose of draining the low and wet lands in said districts; that pursuant to said laws the defendant boards of supervisors of Emmet and Kossuth counties, as such drainage boards, in about 1915, established what is known as joint drainage district No. 2 in said counties of Emmet and Kossuth, and let the contract for the construction of the same to the defendant Clyde A. Walb, who commenced the work of constructing the ditches and drains, and will complete said drainage ditch, to the great damage and injury to the plaintiff, unless restrained from so doing by an injunction or order from this court.

It is further alleged that the drainage district so established, and the ditch to be constructed, were wholly unnecessary and not required, as the land included in the district was and is amply well drained of all surface water, inasmuch as there is flowing through said land a stream sufficiently large to carry off all the surplus water from the land therein; that if said drainage ditch is constructed according to the plans provided therefor it will empty the surface water from the land in said district into the Des Moines river at a point about 1½ miles above the point where such surface water now empties into said river; that the plaintiff is the owner of 40 acres of land in Kossuth county not within said drainage district as so established, but if the drainage ditch is constructed as now planned the land of the plaintiff will be subject to overflow, because of the surface water of the land lying within said drainage district being emptied into the Des Moines river at the point mentioned, the land of plaintiff will be subject to overflow or backwater from the Des Moines river, to which plaintiff's land is not now subject, and will be servient to and liable to overflow from the waters of said river, and plaintiff will suffer great and irreparable injury to his land because thereof; that said plaintiff was never notified of the proposed drainage district, or of any of the proceedings relating to the establishment thereof and construction of said ditch; that the laws of Iowa hereinbefore mentioned, purporting to authorize the establishment of such district and construction of said ditch, make no provision for notifying the plaintiff, or any other landowner whose land is not within the proposed drainage district, and whose land would be affected by the construction of said proposed improvement.

It is further alleged that the laws of Iowa under which said drainage ditch is proposed to be constructed are absolutely void and of no effect, because the same were and are in conflict with the provisions of the Constitution of the United States, and particularly the Fifth and Fourteenth Amendments thereto; that said statutes attempt to vest the boards of supervisors, acting as drainage boards, with jurisdiction to change natural water courses and the natural course of drainage, and to render land in one watershed servient to the land in a different watershed from which it had been theretofore exempt, thereby causing said property to be damaged, destroyed, and taken without in any manner providing for compensating the owner therefor, and without due process of law. There are some other averments of the bill alleging the invalidity of the Iowa statute because in conflict with the federal Constitution; but the foregoing abridgment of the allegations of the bill is sufficient to show the alleged grounds of the jurisdiction of this court to entertain this suit.

The prayer is that it be adjudged and decreed that the drainage laws of Iowa, referred to in the bill, are unconstitutional and void, and for other and further equitable relief; that writs of injunction, temporary and permanent, issue against the defendants, enjoining and restraining the construction of said ditch in drainage district No. 2, and for general equitable relief.

Bronson, Donnelly & Sullivan, of Bancroft, Iowa, for plaintiff.

D. M. Kelleher, of Ft. Dodge, Iowa, for defendants, appearing specially to challenge the jurisdiction of the court.

REED, District Judge (after stating the facts as above). The jurisdiction of the court is invoked by plaintiff solely upon the ground that

plaintiff's cause of action "arises under the Constitution or laws of the United States." The first and third grounds of the defendants' motion are the only ones that need be considered, and they challenge the jurisdiction of the court as a federal court upon the ground (1) that plaintiff's suit is not one that arises under the Constitution or laws of the United States; and (3) that the amount in controversy is not within the jurisdiction of this court.

[1-3] It is the settled interpretation by the Supreme Court of the words of clause "a" of subdivision 1 of section 24 of the Judicial Code that a suit "arises under the Constitution or laws of the United States" only when the plaintiff's statement of his cause of action shows that it is based upon some provision of the Constitution or some law of the United States; and if it does not so appear from the plaintiff's petition or complaint, it cannot be shown by the answer of the defendant, or any subsequent pleading in the case, even a petition for the removal of a removable cause from the state court to a federal court. Tennessee v. Union & Planters' Bank, 152 U. S. 454, 14 Sup. Ct. 654, 38 L. Ed. 511, and cases there cited; Chappell v. Waterworth, 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; Oregon Short Line, etc., Ry. Co. v. Skottowe, 162 U. S. 490, 16 Sup. Ct. 869, 40 L. Ed. 1048; Florida Central, etc., Ry. Co. v. Bell, 176 U. S. 321, 20 Sup. Ct. 399, 44 L. Ed. 486; Louisville & Nashville Ry. Co. v. Mottley, 211 U. S. 149, 29 Sup. Ct. 42, 53 L. Ed. 126, and cases cited; and In re Winn, 213 U. S. 458, 29 Sup. Ct. 458, 53 L. Ed. 873. In Louisville & Nashville Ry. Co. v. Mottley, above, it is said:

"It is not enough that the plaintiff alleges some anticipated defense to his cause of action and asserts that the defense is invalidated by some provision of the Constitution of the United States. Although such allegations show that very likely, in the course of the litigation, a question under the Constitution would arise, they do now show that the suit—that is, the plaintiff's original cause of action—arises under the Constitution" (citing many cases).

In that case the question of jurisdiction was not raised by either of the parties, but the suit was dismissed by the court upon its own motion for want of jurisdiction. In this case the plaintiff seeks to recover damages to his land (which is not embraced within drainage district No. 2) because by the construction of the ditch in that district it would cause his land outside of the district to be overflowed by the waters of the Des Moines river into which the water from the lands in the district will be emptied. A complete defense to this claim would be a denial that the water of the river overflows the plaintiff's land, or that the overflow, if any, was not caused by the construction of the ditch, or defendant might allege some other defense that would not involve the question of the constitutional validity of the Iowa statute authorizing the construction of drainage districts. It is quite obvious that the allegation of the bill that the Iowa drainage law is in conflict with the Constitution of the United States is made in an attempt to evade or to avoid the effect of the cases above cited; and it would be the duty of the court to dismiss the petition for the reasons stated, even if the defendants had not challenged its jurisdiction.

[4] The third ground of the motion is that the amount in controversy is not within the jurisdiction of the court. The plaintiff alleges

an injury, or damage to 40 acres of land in Kossuth county, this state, that may be overflowed by backwater from the Des Moines river, if the drainage ditch is completed. It is possible that 40 acres of land near that river might be damaged in excess of $3,000 by backwater from the river or overflowed by it; but unless the damage was in excess of that amount the court, of course, would be without jurisdiction to determine this suit. There is no evidence, however, of the value of this land, or the extent of such damage, if any should occur, before the court except the allegations of the bill; but if, upon the final hearing, the damage to the land was not shown to be in excess of that amount, the suit would have to be dismissed for want of jurisdiction.

Plaintiff's counsel have cited some authorities, including Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.) 932, 14 Ann. Cas. 764, and Cohens v. Virginia, 6 Wheat. 279, 5 L. Ed. 257. The cases cited other than these two do not touch the question of jurisdiction as presented in this case, and are therefore inapplicable. In Ex parte Young the jurisdictional question relied upon by the petitioner clearly appeared upon the face of his petitions, which were for writs of habeas corpus and certiorari, to relieve him from a judgment for contempt imposed by the lower court, but his petitions were dismissed. Cohens v. Virginia was a writ of error by defendant to a judgment of a state court wherein he claimed the protection of an act of Congress, which claim was denied, and the judgment of the state court affirmed. Both of these cases are also inapplicable to the question presented here.

The motion to dismiss the bill for want of jurisdiction of this court as a federal court must therefore be and is sustained, because it does not appear from plaintiff's petition that his alleged cause of action arises under the Constitution or any law of the United States, and it is accordingly so ordered, to which order the plaintiff excepts.

Plaintiff's counsel have requested that, if the bill is dismissed, they have leave to amend, and leave is granted them to amend the bill within 30 days, after the filing of this order, if they shall then so elect; but if an amendment is filed the amendment must show with reasonable certainty that the amount in controversy is within the jurisdiction of this court.

It is ordered accordingly.

DEUTSCH v. ALASKA GASTINEAU MINING CO. et al.

(District Court, W. D. Washington, N. D. December 20, 1915.)

No. 3091.

1. REMOVAL OF CAUSES ⇐49(3)—SEPARABLE CONTROVERSIES—WHAT CONSTITUTES SEPARABLE CONTROVERSY.

In a servant's action against a master and vice principal or general foreman, financially interested in the work being done, for injuries received through the negligence of the master and vice principal, there is no separable controversy, the tort being a joint one, and where the servant and vice principal were residents of the same state, the master,

though a resident of another state, has no right to remove the cause to the federal courts on the ground of a separable controversy.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 97; Dec. Dig. ⊂⊃49(3).]

2. REMOVAL OF CAUSES ⊂⊃61—RIGHT TO REMOVAL—FRAUDULENT JOINDER.

While the cause of action, the subject-matter of the controversy, is whatever plaintiff declares it to be in his complaint, nevertheless, where a fraudulent joinder of a party defendant to defeat the right of removal to the federal court is charged in the petition for removal, that issue forms the basis upon which the proper forum is to be determined.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 115; Dec. Dig. ⊂⊃61.]

3. REMOVAL OF CAUSES ⊂⊃36—FRAUDULENT JOINDER OF DEFENDANTS—WHAT CONSTITUTES.

For a servant of a mining company, who sued in a state court for injuries by the detonation of an unexploded charge of dynamite to join the master's vice principal with the master on the theory that the vice principal, who was financially interested in the work was reckless and negligent, does not show a fraudulent joinder intended to defeat the jurisdiction of the federal court, though the vice principal was a citizen of the same state as the servant and the master was a citizen of another state, there being such a relation between the master and vice principal as would make the tort a joint one.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊂⊃36.]

4. REMOVAL OF CAUSES ⊂⊃36—RIGHT TO REMOVAL—MATTERS TO BE DETERMINED.

In determining the right of a defendant, charged with a joint tort, to remove the cause to the federal court, on the ground that the joinder with his codefendant was fraudulent, the questions of defendant's liability, or the sufficiency of the pleadings to show liability, cannot be decided; those being matters for the trial court, and not affecting the right of removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⊂⊃36.]

At Law. Action by George Deutsch against the Alaska Gastineau Mining Company and Pat O'Neill, which was removed from the state court. On motion to remand. Motion granted.

John T. Casey and R. J. Boryer, both of Seattle, Wash., for plaintiff.

Ralph S. Pierce, of Seattle, Wash., for defendants.

NETERER, District Judge. This is an action to remand to the state court an action removed to this court upon the grounds of separable controversy and fraudulent joinder. The complaint, in substance, alleges:

That the defendant company is "a corporation having and maintaining an office in Seattle, * * * Wash., and authorized to do business and doing business in said state and in the territory of Alaska, among other things as a mining and railroading concern, and said defendant corporation owns and operates mining property and quartz mines and smelters * * * about Juneau, Alaska, * * * and the defendant Pat H. O'Neill was interested in the work being done by bonuses and otherwise, and was engaged with said defendant corporation in digging and driving a tunnel for the construction of a railroad, * * * and said defendant Pat H. O'Neill is a

resident of Seattle, * * * Wash., and at said time plaintiff was in the employ of the defendants as a laborer in said tunnel. That on said 16th day of July, 1913, plaintiff had been in said employ * * * for a short time only, and was not an experienced miner. * * * The defendants, in disregard and neglect of their duty, furnished * * * an unsafe and dangerous place, and caused the said place to be charged with frozen, unexploded, concealed flasks of powder and dynamite in and about the place where plaintiff was directed to work, and the defendants employed and retained one Pat Miller, with extraordinary powers, to wit, full and complete powers of superintendence as defendants' foreman, superintendent, or representative at such time and place, whose orders plaintiff was bound to obey, and said Miller was a careless, incompetent, and inexperienced man for such work, which was known, or should have been known, to the defendants. * * * And the defendants failed to give plaintiff any notice or warning of such dangerous condition, but, on the contrary, said Pat Miller, on behalf of defendants, assured plaintiff that there were no missed holes in the face of said tunnel, and that the place was safe and free from danger, and then on behalf of defendants ordered and directed plaintiff to work about said dangerous place, where defective caps and rotten and broken fuse had been used, and had failed to explode the charges of powder and dynamite used therein. * * * And defendants, through Pat Miller, knew * * * of the presence of such concealed, unexploded, and deadly charges of powder. * * *"

It is further alleged:

That defendants failed to have adequate ventilation of said tunnel, and failed to adopt proper rules or regulations for work therein, "but said O'Neill, on behalf of himself and codefendant, negligently and recklessly caused too many shots to be put in the breast of such tunnel, and cut and used pieces of fuse that were too short, so that the number of shots could not be correctly counted, so as to know if they were any missed holes, and then hurried plaintiff * * * back to work too soon thereafter, before the smoke and gases were cleared from the place, and before any missed holes could be seen, and said O'Neill directed said Miller to rush the work, and that, if men fell over from suffocation, to get fresh men, and plaintiff, believing said place was safe, from the assurances of the defendants as aforesaid, their officers and agents, started to work in said tunnel, * * * and * * * while plaintiff was so at work * * * an unexploded charge or blast of dynamite or powder * * * went off and exploded against and upon the plaintiff, when the same was drilled into * * * by and under the direction of defendants, acting through said Miller, * * *" and caused plaintiff's injuries.

The petition for removal alleges:

That there is a controversy wholly between citizens of different states, the defendant corporation being a citizen of the state of New York, doing business in Alaska. That the plaintiff is a resident of the state of Washington. "That plaintiff has fraudulently joined Pat H. O'Neill, who is alleged to be a citizen and resident of the state of Washington, for the sole purpose of defeating the jurisdiction of this court." "That said Pat H. O'Neill did not in any manner or degree contribute to the injury to the plaintiff, through his own negligence, or through any joint negligence with the petitioner. That no duty devolved upon Pat H. O'Neill to furnish plaintiff with a safe place to work, or to furnish plaintiff with appliances and explosives used in said work, or to ventilate said tunnel." That said O'Neill was not in the tunnel. That said O'Neill was not entitled to any bonus whatsoever, and did not receive any bonuses. That the attorney for plaintiff had heretofore instituted actions against this defendant for other parties, but in none of those actions was said O'Neill made a defendant.

[1-4] Issue is taken to the facts stated in the petition for removal. Both sides have presented to the court affidavits in support of the issues thus tendered. The complaint seems to have been drafted upon

the theory that the defendant O'Neill is liable as a principal by reason of joint interest with the defendant company in the construction of the work, as the complaint specifically states that the direct cause of the injury was the direction given by Pat Miller, who it is alleged was incompetent, to enter the tunnel and resume the work before the tunnel was cleared of smoke, so as to enable the plaintiff to see any unexploded blasts; the plaintiff being assured by Miller that the tunnel was safe. The manner and method of constructing the tunnel, it was shown, was determined by the engineering department of the defendant company, as was likewise the means of ventilating the tunnel. It is shown that O'Neill had no voice in the purchase of materials used in the construction of the tunnel or explosives, caps or batteries. O'Neill was charged with the duty of a general foreman over all crews in the tunnel covering all shifts, and to report the progress of the work and condition of the tunnel to the manager, and in the performance of such duties would be a vice principal, and would bind the defendant company as well as himself for any wrongful or negligent act done within the scope of his employment.

The citizenship of the defendant O'Neill does not seem to be challenged in the petition for removal, and the issue must therefore be determined upon the question of separable controversy or fraudulent joinder. There is no separable controversy, and the cause is not removable upon that ground. C., B. & Q. v. Willard, 220 U. S. 413, 31 Sup. Ct. 460, 55 L. Ed. 521; Bradshaw v. Bowden, 226 Fed. 323. The cause of action is the subject-matter of the controversy, and that is, for the purpose of the suit, whatever the plaintiff declares it to be in his complaint. Pirie v. Tvedt, 115 U. S. 41, 43, 5 Sup. Ct. 1034, 1161, 29 L. Ed. 331; Sloane v. Anderson, 117 U. S. 275, 6 Sup. Ct. 730, 29 L. Ed. 899; Little v. Giles, 118 U. S. 596, 600, 601, 7 Sup. Ct. 32, 30 L. Ed. 269; Louisville & Nashville R. R. Co. v. Wangelin, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; Torrence v. Shedd, 144 U. S. 527, 530, 12 Sup. Ct. 726, 36 L. Ed. 528; Connell v. Smiley, 156 U. S. 335, 340, 15 Sup. Ct. 353, 39 L. Ed. 443. But where fraudulent joinder is charged in the petition, for the purpose of denying the petitioner the right of the federal court, and issue is taken by plaintiff upon the charge made in the petition, the issue thus raised forms the basis upon which the proper forum is to be determined. Trana v. C., M. & St. P. Ry. et al. (Nos. 3087 and 3088) 228 Fed. 824, filed in this court December 2, 1915.

Issue having been taken upon the charge of fraudulent joinder, and affidavits being submitted by the respective parties, that issue must be determined by this court. The action is for an alleged joint tort, and is therefore not removable because of a separable controversy. Nor do I think that the facts disclosed by the record show that there was a fraudulent joinder. The proofs show that O'Neill was general foreman and in a position of responsibility, and the established facts, together with the statements in the complaint, if true, show a legal liability. O'Neill owed a duty to plaintiff, as well as did his employer, and it is through his negligence that it is sought to hold the defendant company. Whether the facts are properly pleaded, or sufficiently

pleaded, is not for this court to determine upon this hearing. Nor is it for this court in this proceeding, to determine the truth of the statements as to liability; that is for the trial court. The plaintiff may be in error in respect to both facts and law, but fraud cannot be predicated upon his mistaken conclusions. Where sufficient facts appear to disclose a relation upon which to predicate a joint tort, the court cannot conclude that the joinder was fraudulent because of many other facts appearing in the case which would have bearing upon the issue with relation to the joint liability, where admitted facts appear which show that the relation exists from which would flow a joint liability, if the contention of the plaintiff is true, and facts are made to appear in the determination of the issue presented which would preclude this court from finding that there was no liability. In this conclusion, I have in mind, also, the apparent contradictory statements appearing in the complaint with relation to the issue sought to be tendered bv the complaint.

The motion is granted.

CHEW et al. v. FIRST PRESBYTERIAN CHURCH OF WILMINGTON, DEL., Inc., et al.

(District Court, D. Delaware. August 4, 1916.)

No. 344.

1. INJUNCTION ⟸136(3) — PRELIMINARY INJUNCTION — GROUNDS — NATURE AND EXTENT OF INJURY.

   The balance of convenience or hardship frequently is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing a preliminary injunction; but the injunction should usually be granted, where its denial would result in irreparable injury to complainant, if ultimately successful in the suit.

   [Ed. Note.—For other cases, see Injunction, Cent. Dig. § 306; Dec. Dig. ⟸136(3)].

2. PERPETUITIES ⟸8(7)—RELIGIOUS OR CHARITABLE PURPOSES—LIMITATION OF BENEFICIARIES.

   Lands may validly be dedicated in perpetuity for a religious or charitable use, although the enjoyment thereof may not extend to the public at large, but only to the limited portion included in a certain congregation or society, incorporated or unincorporated.

   [Ed. Note.—For other cases, see Perpetuities, Cent. Dig. §§ 63, 64, 66; Dec. Dig. ⟸8(7).]

3. CEMETERIES ⟸13—GIFT TO RELIGIOUS SOCIETY—POWER TO SELL.

   In 1737 the owner conveyed certain real estate in Wilmington, Del., in fee to the trustees, overseers, and elders of the Presbyterian Church and their successors, "for the use of a meeting house, burying ground, and such other pious uses forever." At that time the church was an unincorporated society, having no legal status, but in 1744 an act was passed which confirmed all prior grants for such purposes to Protestant societies, but only for the use of the same religious societies for whom they were first granted, "according to the true intent and meaning" of the grant. In 1787 another act made the trustees of the churches bodies corporate. A part of the property was set apart for a burying ground, and has been maintained as such ever since. There have been 1,000 or more interments

therein, although none in very recent years. The grounds have been kept in good condition, with walks and trees, and there are monuments and a number of tombs thereon. In 1843 the church sold and conveyed to complainants' ancestor and to his heirs and assigns a lot in the cemetery, upon which an expensive monument has been built and a tomb, where such ancestor and other relatives of complainants are buried. *Held*: (1) That the original grant impressed upon the land a religious or pious use in perpetuity, and that defendant church, as successor to the original grantees, holds the title in trust for such use, and as against lot owners without power of alienation for secular uses, even under a subsequent general statute conferring power to convey property; (2) that the conveyance of the lot to complainants' ancestor vested him with title in fee, subject to such proper regulations as might be made for the government of the cemetery.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 14; Dec. Dig. ⟸13.]

4. DEEDS ⟸31—EXECUTION—ERROR IN NAME OF CORPORATION GRANTOR.

A deed *held* not invalid because of its execution in the name of the "trustees of the First Presbyterian Church of the borough of Wilmington," instead of "the First Presbyterian Congregation of the borough of Wilmington," which was the true name; it appearing that the same church corporation was intended.

[Ed. Note.—For other cases, see Deeds, Cent. Dig. §§ 60–63; Dec. Dig. ⟸31.]

5. VENDOR AND PURCHASER ⟸235—RIGHTS OF PARTIES—BONA FIDE PURCHASER.

One who has contracted for the purchase of land and made a very small payment of earnest money, the remainder to be paid on the furnishing of a good title by the vendor, is not protected as a bona fide purchaser.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 567–569, 571–576; Dec. Dig. ⟸235.]

6. EVIDENCE ⟸372(3)—ANCIENT DOCUMENTS—PROOF OF EXECUTION.

A deed to a cemetery lot more than 73 years old, shown to have been in proper custody, and under which the grantee and his successors have since used and improved the lot for burial purposes, proves itself as an ancient document.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1615; Dec. Dig. ⟸372(3).]

7. CEMETERIES ⟸20—TITLE AND RIGHTS OF OWNERS OF LOTS—ENJOINING WRONGFUL TRESPASS.

A court of equity at the instance of proper parties has power to restrain the threatened wrongful destruction or removal of tombs, vaults, monuments, or bodies from a cemetery, or wrongful injury thereto or to the burial premises.

[Ed. Note.—For other cases, see Cemeteries, Cent. Dig. § 22; Dec. Dig. ⟸20.]

8. COURTS ⟸343—PARTIES—SUIT BY REPRESENTATIVE OF A CLASS.

Under equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix) one lot owner may maintain such a suit in behalf of himself and other owners, where the threatened injury affects all.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 915, 916, 919, 920; Dec. Dig. ⟸343.]

In Equity. Suit by Emily Cleland Townsend Chew, Sidney Jordan, Ethel Jordan, Vincent Jordan, and Archie N. Jordan against the First Presbyterian Church of Wilmington, Del., Incorporated, and Arthur L. Bailey. On motion for preliminary injunction. Motion granted.

Robert G. Harman and George Lodge, both of Wilmington, Del., for complainant.

Andrew C. Gray, of Wilmington, Del., for defendant First Presbyterian Church.

John P. Nields, of Wilmington, Del., for defendant Bailey.

BRADFORD, District Judge. This is an application by Emily Cleland Townsend Chew and others, citizens of states other than Delaware, suing on behalf of themselves and others, for a preliminary injunction to restrain, until the further order of the court, the First Presbyterian Church of Wilmington, Delaware, Incorporated, a corporation of Delaware, from entering or in any way trespassing upon the burial lot or vault wherein the bodies of the relatives of the complainants are buried in the cemetery of the corporation defendant between Ninth, Tenth, Market and King Streets in Wilmington, for the purpose of removing or in any wise disturbing the bodies or the remains of the relatives of the complainants now buried in that lot or vault, and from removing the monument thereon erected, the coffin and vault therein placed and built, the tombstone, coping, fences and chains on or surrounding the same, and from mutilating, cutting, destroying or removing the trees, shrubbery, flowers and earth in and upon the same, and also from removing or disturbing all or any of the other bodies buried in the said cemetery and from removing or disturbing all or any of the other coffins, vaults, tombstones, monuments, copings, fences, trees, shrubbery, in and upon the said cemetery, and also from conveying to the defendant Arthur L. Bailey, of Wilmington, Delaware, or to any person or persons whomsoever, the whole or any part of that rectangular portion of the land of the corporation defendant having a front of ninety feet on Market Street and a front of ninety feet on King Street and extending along the southerly side of Tenth Street from the easterly side of Market Street to the westerly side of King Street, with the right, privilege and easement of the free passage of air and light over and upon a certain other rectangular portion of the said land adjoining the lot above described and having a front of fifteen feet on Market Street and a front of fifteen feet on King Street. It appears from the bill, affidavits and exhibits on which the application for a preliminary injunction is based that the corporation defendant intends, in consideration of the sum of $225,000, to sell and convey to Bailey, in fee and clear of incumbrances, if possible, the above described rectangular lot running from Market to King streets with a frontage of ninety feet on each street, and to grant to him an easement for the passage of light and air in the above described strip of land having a frontage of fifteen feet on each street; the same to be used for the erection and maintenance of a public library. Pursuant to this intention the corporation defendant prior to the filing of the bill commenced, and thereafter and until the awarding of a restraining order, continued, to remove tombstones, trees and shrubbery, and otherwise to dismantle the cemetery.

[1] The granting or withholding of a preliminary, in contradistinction to a perpetual or permanent, injunction calls for the exercise of

sound judicial discretion, regulated and controlled by certain principles peculiarly applicable to temporary injunctive relief, and so firmly established as to render unnecessary any discussion of the particular decisions on which they rest. Regard should be had to the nature of the controversy, the object for which the injunction is sought, and the comparative hardship or convenience to the respective parties involved in the awarding or denial of the injunction. The ultimate object of a preliminary injunction, preventive in its nature, is the preservation of the property or rights in controversy until the decision of the case on a full and final hearing upon the merits, or a dismissal of the bill for want of jurisdiction or other sufficient cause. The injunction is merely provisional. It does not, in a legal sense, finally conclude the rights of parties, whatever may be its practical operation under exceptional circumstances. In a doubtful case where the granting of the injunction would, on the assumption that the defendant ultimately will prevail, cause greater detriment to him than would, on a contrary assumption, be suffered by the complainant through its refusal, the injunction usually should be denied. But where, in a doubtful case, the denial of the injunction would, on the assumption that the complainant ultimately will prevail, result in greater detriment to him than would on the contrary assumption, be sustained by the defendant through its allowance, the injunction usually should be granted. The balance of convenience or hardship frequently is a factor of controlling importance in cases of substantial doubt existing at the time of granting or refusing the preliminary injunction. Such doubt may relate either to the facts or law of the case, or to both. Where the sole object for which a preliminary injunction is sought is the protection of property or the maintenance of the status quo until the question of right between the parties can be decided on final hearing the injunction properly may be allowed even though there be serious doubt of the ultimate success of the complainant. And especially is this true where a mistaken refusal to award the injunction will result in irreparable injury to him. Among the many cases in this and other courts in support of these principles are Russell v. Farley, 105 U. S. 433, 438, 26 L. Ed. 1060; City of Newton v. Levis, 79 Fed. 715, 25 C. C. A. 161; Glascott v. Lang, 3 Myl. & C. 451, 455; Hadden v. Dooley, 74 Fed. 429, 431, 20 C. C. A. 494; Great Western R. Co. v. Birmingham, etc., R. Co., 2 Phil. Ch. 597; Shrewsbury & Chester R. Co. v. Shrewsbury R. Co., 1 Sim. N. S. *410, *426, *427, *432; Denver & R. G. R. Co. v. United States, 124 Fed. 156, 59 C. C. A. 579; Buskirk v. King, 72 Fed. 22, 18 C. C. A. 418; Sanitary Reduction Works v. California Reduction Co. (C. C.) 94 Fed. 693; Southern Pac. Co. v. Earl, 82 Fed. 690, 27 C. C. A. 185; New Memphis Gas & Light Co. v. Memphis (C. C.) 72 Fed. 952; Indianapolis Gas Co. v. Indianapolis (C. C.) 82 Fed. 245; Georgia v. Brailsford, 2 Dall. 402, 1 L. Ed. 433; Gring v. Chesapeake & Delaware Canal Co. (C. C.) 129 Fed. 996; Hoy v. Altoona Midway Oil Co. (C. C.) 136 Fed. 483; Harriman v. Northern Securities Co. (C. C.) 132 Fed. 464; Wilmington City Ry. Co. v. Taylor (D. C.) 198 Fed. 159. Do or not these principles require the awarding of a preliminary injunction as prayed to maintain the status

quo and prevent irreparable injury should the complainants be right in their contention?

The title of the corporation defendant to the cemetery was mediately acquired from Timothy Stidham who by deed dated December 30, 1737, conveyed in fee land including the same to James Chalmers and others, and their successors, the trustees, overseers and elders of the "Presbyterian Church," to have and to hold "for the use of a Meeting House, Burying Ground and such other pius uses forever" as they or a majority of them should "at any time hereafter see most fitting and convenient, and to no other use, intent or purpose whatsoever." At the time of the execution of the above-mentioned conveyance the "Presbyterian Church" was an unincorporated religious society. Nor was there then any authority vested in its trustees, overseers and elders enabling them in the absence of legislation,—which did not then exist,—to convert or erect themselves into a corporation.

[2] Stidham in and by his conveyance created and imposed upon the land therein described a valid charitable or pious use or trust in perpetuity. State v. Griffith, 2 Del. Ch. 392; Griffith v. State, 2 Del. Ch. 421; Doughten v. Vandever, 5 Del. Ch. 51; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; Hopkins v. Grimshaw, 165 U. S. 342, 17 Sup. Ct. 401, 41 L. Ed. 739. It is unnecessary to multiply citations in support of this proposition, as it is beyond controversy and, indeed, has been admitted by both of the defendants. In First Presbyterian Church of Wilmington, Delaware, Incorporated, v. Bailey, 97 Atl. 583, decided by the court of chancery of Delaware May 8, 1916, the complainant,—the corporation defendant here,—set forth in its bill the above mentioned deed from Stidham and averred that it, the complainant, "became and was and now is seized in fee and possessed of said lot or parcel of land * * * under and subject to the following religious uses and trusts * * * viz.: 'For the use of a Meeting House, Burying Ground and such other pius uses forever as to the said' First Presbyterian Church of Wilmington, Delaware, Incorporated, 'shall at any time hereafter see most fitting and convenient and to no other use, intent or purpose whatsoever.'" The uses and trusts thus admitted as in force at the date of the verification of the bill in that case, namely, April 25, 1916, are, with the exception of an immaterial clerical error and the substitution of the name of the church for the names of Chalmers and others, and their successors, trustees, overseers and elders of the Presbyterian Church, identical with those set forth in the deed from Stidham. Bailey in his answer to the bill in that case averred that "said lot, piece and parcel of land, together with the easement appurtenant thereto, was and still remains impressed with and subject to the religious uses and trusts set forth and contained in paragraph 1 and paragraph 5 of said bill of complaint"; that is to say, the uses or trusts set forth in the conveyance from Stidham. The fact that the general public was not the beneficiary of the trust or use created by Stidham is unimportant; for it has become so well settled as to require no citation of authority that lands may validly be dedicated in perpetuity for a pious or charitable use although the enjoyment thereof may not extend to the public at large, but only to

the limited portion of the public included in a certain congregation or society, incorporated or unincorporated.

[3] The significance, force and effect of the pious or charitable trust or use created and declared by Stidham with respect to the beneficiaries thereunder as against those constituting the agency or instrumentality through which the contemplated beneficent ends were intended to be accomplished, will hereinafter be considered with some particularity. Under and pursuant to that trust and use a meeting house now known as the Historical Society Building was erected in 1740 on the land conveyed by Stidham, and subsequently there was also erected thereon a church building now known as the First Presbyterian Church. With the exception of the two portions devoted respectively to the Historical Society Building and the First Presbyterian Church, all of the land conveyed by Stidham was pursuant to the trust appropriated to the use of and was used as a burying ground, and immemorially has been maintained by the grantees in the Stidham deed and their successors in title, including the corporation defendant, as a cemetery. The land so maintained for that purpose includes the larger part of that which the corporation defendant intends to convey in fee to Bailey as above stated and also the above-mentioned strip of land 15 feet wide in which it proposes to give an easement for the passage of light and air. There have been a thousand or more interments in the cemetery, the bodies still remaining buried therein, and it contains many burial lots, vaults, tombstones, monuments, copings, iron fences and other fixtures and ornaments appropriate to and customary in burying grounds. It also contains ornamental trees, shrubbery and flowers; and paths have been laid out, and the premises beautified and kept in good condition as a cemetery. Ever since the year 1843 the complainants, their ancestors and other relatives have held, cared for and maintained a burial lot 15 feet square, situate in the northerly portion of the cemetery and within 20 feet from the southerly side of Tenth Street. This lot contains a family vault known as the Nelson Cleland vault and one of the largest and most costly monuments in the cemetery. In the vault have been and remain buried the bodies of Nelson Cleland and Christiana Cleland, the grandfather and grandmother of the complainants, and of other relatives. The lot, with its monument and fixtures, has been preserved and kept in excellent condition and frequently visited by the complainants. The right and practice of burial in the family lot and vault by the complainants and their relatives have been agreed to and known and acquiesced in by the corporation defendant and its predecessors in title to the cemetery. The Cleland lot and vault are included in the land which the corporation defendant intends to sell and convey to Bailey.

At the time of the execution of the deed from Stidham there was no law in force in the three lower counties on Delaware providing for the incorporation and regulation of religious societies, nor was there then any statutory enactment defining or limiting their powers. It was not until more than six years later,—October 20, 1744,—that an act was passed, entitled "An Act for the enabling religious societies

of Protestants within this Government, to purchase lands for burying-grounds, churches, houses for worship, schools," etc. 1 Del. Laws 271. Its preamble down to the enacting clause is as follows:

"Whereas sundry religious societies of people within this government, professing the Protestant religion, have, at their own respective costs and charges, purchased small pieces of land within this government, and thereon have erected churches, and other houses of religious worship, school-houses, and inclosed part of the same lands for burying-grounds; and whereas the said lands were purchased and paid for by the said respective societies in the name or names of persons, at that time being of, or professing themselves to be of the same religious persuasion with the societies who made use of the names of the said persons as trustees for and in behalf of the said societies; and whereas some of the said trustees, or their heirs, having afterwards changed their opinions, and joined themselves to other religious societies, of a different persuasion from the people by whom the said persons were at first intrusted, and, upon pretext of their having the fee-simple of the lands so purchased in their names vested in them, have, contrary to the true intent and meaning of the first grant, or gift, attempted (by granting away the said lands, houses of religious worship and burying-grounds) to deprive the society of people in possession of the same of the right and use of the said houses of worship and burying-grounds, to the great disquiet and uneasiness of many of the good people of this government; and others, being intrusted in the like manner, may hereafter do the same. For remedy whereof, and for the better securing the several religious societies in the quiet and peaceable possession of their churches, houses of worship, school-houses, alms-houses, and burying-grounds within this government," etc.

Section 2 provided as follows:

"That all gifts, grants, or bargains and sales, made of lands or tenements within this government, to any person or persons in trust for societies of Protestant churches, houses of religious worship, schools, alms-houses, and for burying-grounds, or for any of them, shall be, and are hereby ratified and confirmed to the person or persons to whom the same were sold, given, or granted, their heirs and assigns in trust, and not otherwise, but for the use of the same religious societies for whom they were at first so sold, given, granted, or purchased, according to the true intent and meaning of such gifts, grants, or bargains and sales; and that every sale, gift, grant, or devise of any such trustee or trustees, or any person or persons, in whose name or names the said lands for erecting churches, houses of religious worship, schools, alms-houses, or burying-grounds, within this government, were purchased, taken, or accepted, or the heirs or assigns of such trustees shall be, and are hereby declared to be for the sole use, benefit and behoof of the said respective societies, who have been in the peaceable possession of the same, for the space of seven years next before the first day of April in the year of our Lord one thousand seven hundred and forty-four, or for whose use the same were at first given, granted, or devised, and no other."

Section 3 provided:

"That it shall and may be lawful to and for any religious societies of Protestants within this government, to purchase, take, and receive by gift, grant, or otherwise, for burying-grounds, erecting churches, houses of religious worship, schools and alms-houses, for any estate whatsoever, and to hold the same, for the uses aforesaid, of the lord of the fee by the accustomed rents."

Section 4 contains the following proviso:

"That nothing in this act contained shall be deemed, taken, or construed, to enable any of the said religious societies of people, or any person or persons whatsoever, in trust for them, or to their use, to purchase, take, or receive, any lands or tenements by gift, grant, or otherwise, for or towards the maintenance or support of the said churches, houses of worship, schools, or alms-hous-

es, or the people belonging to the same, or for any other use or purpose, save for the uses in this act before mentioned."

The deed from Stidham was not executed under or pursuant to the act of 1744 for the simple reason that, as already stated, the statute did not come into existence until over six years afterwards. A valid charitable or religious trust or use in perpetuity having been created by the deed aside from any statutory enactment, the question is presented whether the act of 1744 in any manner defeated, impaired or rendered defeasible such trust or use. I find nothing in the act declaring, indicating or suggesting that a valid religious, charitable or pious use or trust theretofore created should be defeated, impaired or rendered defeasible thereby. The contrary is to be gathered both from the preamble and the body of the act. It appears from the former that one of the principal objects of the act was to provide a remedy for breaches of trust theretofore committed by those charged with the duty of observing and carrying into effect religious and charitable uses and trusts for the benefit of Protestant religious societies. And it was largely to provide a remedy for this condition of things that the act was passed, and not with a view to defeat or destroy valid religious, charitable or pious uses or trusts theretofore created. Section 2, which immediately follows the preamble, negatives any idea that such valid uses or trusts theretofore created should be destroyed or injuriously affected; for it provides in substance that conveyances of lands to persons in trust for "societies of Protestant churches, houses of religious worship, schools, alms-houses, and for burying-grounds, or for any of them," should be and were thereby ratified and confirmed to the persons to whom the same were granted, their heirs and assigns, in trust, and not otherwise, but for the use of the same religious societies for whom they were at first so granted, "according to the true intent and meaning of such gifts, grants, or bargains and sales." There was thus an express ratification and confirmation of prior conveyances of lands for churches, houses of religious worship, schools, alms-houses and burying-grounds, for Protestant religious societies; the same to be held in trust "according to the true intent and meaning" of such gifts and conveyances. The remaining portion of section 2 deals with the case of alienation by trustees of land constituting the subject of the trust. Sections 3 and 4 are prospective and consequently have no application to the conveyance from Stidham. The conveyance from Stidham prior to the act of 1744 having been to trustees for an unincorporated religious society, namely, the "Presbyterian Church," of land in fee for the use, among others, of "a Meeting House" and "Burying Ground," received the ratification and confirmation of section 2 to the extent at least of such trust or use, if any were required.

I have neither found nor been referred to any legislation in the three lower counties on Delaware or in the state of Delaware divesting the land conveyed by Stidham of the religious, charitable or pious trust impressed upon it with respect to its use for houses of worship and as a burying ground. The legislation relating to religious societies strongly points in the opposite direction. The act of February 3, 1787, 2 Del. Laws 878, entitled "An Act to enable all the religious denomina-

tions in this state to appoint trustees, who shall be a body corporate, for the purpose of taking care of the temporalities of their respective congregations," provided for the first time in Delaware for the corporate management of the temporal affairs of religious societies or congregations. While providing for the election of trustees who should be a body corporate for the purpose of caring for the temporalities of the religious society or congregation, with power to acquire and dispose of property for its use or benefit, and to have and use a common seal and "as often as they shall judge expedient, break, change, and new-make the same or any other their common seal," in section 5 it was declared as follows:

"Sec. 5. All lands, tenements, hereditaments, and real estate, bona fide given, granted, conveyed, or transferred, by any last will in writing, deed of gift, bargain and sale, or other lawful conveyance, to any religious society or congregation, or to any person or persons in trust for them, and to their use, before the twentieth day of October, in the year of our Lord one thousand seven hundred and forty-four, the said congregation, or any person in trust for them, or expressly for their use, having hitherto continued in the peaceable and quiet possession of the same hereditaments and real estate, and for the recovery whereof no action or actions hath, or have, been brought by any person or persons against any such religious societies, or congregations, or their trustees, shall be, and hereby are declared to be, to and for the use of the same, according to the purport and effect, true intent and meaning of such last will, deed of gift, or bargain and sale, or other lawful conveyance, and to and for no other use, intent or purpose whatsoever."

Under and pursuant to the above act the congregation of the "Presbyterian Church," a predecessor of the corporation defendant, elected December 23, 1789, trustees who became a religious corporation in the name of "The First Presbyterian Congregation of the Borough of Wilmington." Chapter XXXIX of the Delaware Revised Code of 1852, entitled "Of Religious Societies," while providing in section 3 that the trustees should have "power to purchase, receive, hold and enjoy property, real and personal, for the use of the said society or congregation, their ministers or members, or for schools, alms-houses or burying grounds," also declares in section 12 which contains a proviso not material in this connection, that "all real estate, bona fide given, or granted by will, deed, or other conveyance to any religious society, or congregation, or to any one in trust for them, or to their use, before the twentieth of October, A. D. 1744, shall be for the use of the same, according to the intent of the donor or grantor, and the form and effect of the will, deed, or conveyance." So, in Chapter 68 of the Delaware Revised Code of 1915, p. 1038, it is provided in section 4 that the trustees shall have "power to purchase, receive, hold, mortgage and enjoy property, real and personal, for the use of the said society or congregation, their ministers or members, or for schools, alms-houses or burying grounds"; and in section 12, concluding with a proviso not material to consider in this connection, there is a provision identical with that contained in section 12 of chapter XXXIX of the revised code of 1852 giving effect to the "intent of the donor or grantor, and the form and effect of the will, deed, or conveyance."

In view of the foregoing facts and legislation there can be no reasonable question that the land conveyed by Stidham was impressed

with a valid religious, charitable or pious use, and was held by the corporation defendant and its predecessors in title in trust to be used as a burying ground or cemetery, and for the erection and maintenance of churches or meeting houses, or for one or more of the other uses set forth in the above legislation touching religious societies and embraced within "other pius uses" as that phrase is employed in the Stidham deed. Indeed, this is not denied, but admitted on the part of the defendants. But while conceding that the land was and is subject to such trust or use so long as it continues to be held by the corporation defendant, and that while continuing to hold it the corporation defendant could be compelled by the beneficiaries under such trust or use or others having sufficient interest therein, faithfully to observe the same, it is strenuously urged that the power of alienation is under the laws of Delaware possessed by the corporation defendant and that a conveyance by it in fee of the land theretofore subject to such trust or use would operate to vest in the grantee a title to the land absolutely discharged from such trust or use. And special stress is laid upon the provision in section 8 of the above act of February 3, 1787, that the trustees of a religious society

"shall and may give, grant and demise, assign, sell and otherwise dispose of, all or any of their messuages, houses, lands, tenements, rents, possessions, and other hereditaments, and real estate, and all other goods, chattels, and other things aforesaid, as to them shall seem meet, for the use and benefit of the society or congregation to which they shall respectively belong."

But I am not aware of any rule of statutory construction or principle of law supporting the proposition that under and solely by virtue of such a general power of alienation the trustees of a religious society possessed authority or power to sell and convey land of the corporation free and discharged from a valid charitable, religious or pious trust or use in perpetuity impressed upon or attaching to such land at the time of such sale and conveyance. Ability to accomplish such a result solely under and by virtue of such a general power of alienation could no more exist than could power to nullify or get rid of a valid lien or encumbrance on the land to secure the payment of money not yet due. If the maintenance of a cemetery under a valid charitable or pious trust in perpetuity should prove detrimental to the public health, that use, so far as so detrimental, could be controlled or terminated by a proper exercise of the branch of sovereignty known as the police power of the state. So, should the land impressed with such trust or use be required for a public purpose inconsistent with its continuance it could be condemned and taken upon the making or securing of just compensation, through an exercise of the sovereign power of eminent domain, and thereupon the trust or use would terminate with respect to the land so condemned and taken. And equally, if at the time land is conveyed by way of a valid charitable or pious trust or use, there be a statutory provision for the termination of such trust or use or for the conveyance of the land free and discharged therefrom, upon compliance with certain requirements, not only the creator of the trust or use, but in the absence of grant, contract, estoppel or other special circumstances enuring to their protection, individuals subse-

quently becoming beneficiaries thereof or interested therein, as the case may be, must be treated as having created the trust or use or as having acquired rights therein in subordination to the right to terminate the trust or use or to convey the land discharged of the same upon such compliance, and consequently to have consented thereto. Persons in entering into a contract must be held to adopt as part thereof existing substantive law relating to its subject matter. But here there has been no attempt to invoke the right of eminent domain, or the police power for the protection of the public health, nor was there in existence prior to the conveyance from Stidham nor at any time since nor is there now any statutory provision for the termination of the trust or use in question or for the conveyance of the land free and discharged therefrom.

Counsel on this application have taken a wide range in their arguments and have raised a number of points unnecessary now to be decided. This is not a suit by the heirs of Stidham or by others claiming under him for the establishment of a resulting trust in the land included in the cemetery or any portion of it. Nor is it a suit for the recovery of land for breach of a condition subsequent. No question of resulting trust or of breach of condition subsequent is properly before this court. Aside from the attempted sale and conveyance to Bailey for the purposes of a public library, there has been no abandonment by the corporation defendant or any attempt by it to abandon the pious or charitable use or trust under the deed of Stidham with respect to the whole or any part of the land in the cemetery. It appears, it is true, that since the year 1906 there have been no interments there; but the cemetery, until the contract to convey to Bailey, always continued to be properly cared for and kept in repair, and maintained as a cemetery. It is well settled that it is not necessary to the continued existence of an established cemetery or to the protection of bodies, graves, vaults, monuments, and other structures within it, or to the right of the owners or holders of burial lots therein, that there should be no cessation of interments. The fact that human remains repose in the soil in numbers not safely or lawfully to be exceeded affords no justification or excuse for dismantling and desecrating the resting place of the dead, removing or destroying the memorials erected by affection to departed worth, or violating or disregarding the pious or charitable use and trust impressed upon the land and the right of owners or holders of burial lots or the relatives of those buried in the cemetery to have the same preserved in its integrity. This suit does not proceed upon any theory of the expiration or extinction, through abandonment or otherwise, of the pious and charitable use and trust created by Stidham, but on the contrary is brought to restrain the violation thereof by the corporation defendant acting in conjunction with Bailey.

Language has been employed in some of the decisions touching the relations between cemetery companies or religious societies owning burying grounds, and persons holding burial lots therein, which if applied to this case would be palpably inaccurate and unsound. It has been said that such lot holders possess only a mere license or priv-

ilege to use and maintain their lots during the continuance of the cemetery or burial ground as such. But such a doctrine is wholly inapplicable to the relation between the corporation defendant and the holders of lots in its cemetery. They have much more than a mere license or privilege to use the lots appropriated or assigned to them. Were it otherwise their right to continue in the possession of burial lots would be revocable and determinable at any time at the whim or pleasure of the corporation defendant. A mere license or personal privilege to enter upon and occupy land is not only revocable and terminable at any moment, but is non-assignable and non-descendible. If not earlier ended it terminates with the death of the licensee. In De Haro v. United States, 5 Wall. 599, 627 (18 L. Ed. 681), the court said:

"There is a clear distinction between the effect of a license to enter lands, uncoupled with an interest, and a grant. A grant passes some estate of greater or less degree, must be in writing, and is irrevocable, unless it contains words of revocation; whereas a license is a personal privilege, can be conferred by parol or in writing, conveys no estate or interest, and is revocable at the pleasure of the party making it. There are also other incidents attaching to a license. It is an authority to do a lawful act, which, without it, would be unlawful, and while it remains unrevoked is a justification for the acts which it authorizes to be done. It ceases with the death of either party, and cannot be transferred or alienated by the licensee, because it is a personal matter, and is limited to the original parties to it. A sale of the lands by the owner instantly works its revocation, and in no sense is it property descendible to heirs. These are familiar and well-established principles of law, hardly requiring a citation of authorities for their vindication."

But if what would otherwise be a mere license has for its object the permanent occupation of land, and its accomplishment involves the expenditure by the person to whom granted of money upon or in connection with the land, and the circumstances attending and surrounding the grant clearly evince an understanding and intention by both parties that its operation shall be permanent and not confined to the lifetime of the person to whom granted, and money be expended accordingly, there is presented the case of a license so executed as to constitute in equity, if not at law, an irrevocable contract good as against the original parties and their heirs or successors. This principle was recognized by the late Chancellor Bates in Jackson & Sharp Co. v. P. W. & B. R. R. Co., 4 Del. Ch. 180, though the facts disclosed in that case did not permit its application. There it was held that the construction of a side-track connecting with the railroad at the expense of a manufacturing company and the subsequent expenditure of money by the latter in the erection of car-works from which cars were delivered from the side-track, did not render a license to connect it with the railroad irrevocable, for the reason that there was no express contract that there should be a permanent indefeasible right to so connect, and the nature of the business of the railroad company was such as to indicate that the connection of the side-track was "a voluntary accommodation, to abide the good will and mutual interests of the parties." The principle was forcibly enunciated by Justice, afterwards Chief Justice, Gibson in Rerick v. Kern, 14 Serg. & R. (Pa.) 267, 16 Am. Dec. 497. He said:

"A license may become an agreement on valuable consideration; as, where the enjoyment of it must necessarily be preceded by the expenditure of money; and when the grantee has made improvements or invested capital in consequence of it, he has become a purchaser for a valuable consideration. Such a grant is a direct encouragement to expend money, and it would be against all conscience to annul it, as soon as the benefit expected from the expenditure is beginning to be perceived. * * * A right under a license, when not specially restricted, is commensurate with the thing of which the license is an accessory. Permission to use water for a mill, or anything else that was viewed by the parties as a permanent erection, will be of unlimited duration, and survive the erection itself, if it should be destroyed or fall into a state of dilapidation; in which case the parties might perhaps be thought to be remitted to their former rights. But having had in view an unlimited enjoyment of the privilege, the grantee has purchased, by the expenditure of money, a right, indefinite in point of duration, which cannot be forfeited by non user, unless for a period sufficient to raise the presumption of a release. * * * But it is otherwise, where the object to be accomplished is temporary. Such usually is the object to be accomplished by a saw-mill, the permanency of which is dependent on a variety of circumstances, such as an abundance of timber, on the failure of which the business necessarily is at an end. But, till then, it constitutes a right for the violation of which redress may be had by action."

So, in Swartz v. Swartz, 4 Pa. 353, 45 Am. Dec. 697, the same judge, in referring to Rerick v. Kern, said:

"The principle of the case is, that the revocation would be a fraud; and that to prevent it, a Chancellor will turn the owner of the soil into a trustee ex maleficio. It is in substance the same which postpones the title of one who is studiously silent as to the existence of it, in the presence of a purchaser from a third person; or of one who suffers another to build ignorantly on his ground without informing him of his mistake."

The above principle depends for its application in any given case upon the intent, expressed or presumed, of the party granting the right or privilege that it shall be commensurate with the attainment of the object for which it is granted, and not constitute merely an arrangement dependent upon and measured by the continuing will of the parties. This principle, I think, is not without application to the present case and, as will presently more fully appear, requires a recognition by this court of the right of lot owners and others directly interested in burial lots, graves, vaults, monuments and other burial fixtures, in the cemetery of the corporation defendant, to be undisturbed in their possession and enjoyment of the same subject to the "rules and regulations necessary for keeping the aforesaid graveyard or burying ground in general good condition and repair," until the cemetery shall lawfully and by proper authority be discontinued and the land applied to other purposes.

The land conveyed by Stidham to the trustees of the Presbyterian Church was for several uses, namely, for the use of a meeting house and of a burying ground, and such other pious uses as the managing body of that unincorporated religious society should deem proper. There was, however, no provision in the deed determining what quantity or proportion of the land conveyed should be devoted to any one of the pious or charitable uses therein referred to or indicating its situation with respect to the rest of the tract. It was, therefore, left to the society in the exercise of its discretion to determine the parts

and proportions of the land and their locality which respectively should be devoted to the several uses for which it was intended. Accordingly, as before stated, a portion of the land was set apart and appropriated to the use of a meeting house, now known as the Historical Society Building, and subsequently another part of the land was set apart and appropriated to the use of a church building known as the First Presbyterian Church, now occupied and used by the corporation defendant. With the exception of the two portions so set apart the land included in the deed from Stidham has immemorially been held for the purposes of and in great part used as a burying ground or cemetery. The corporation defendant is not nor was either of its predecessors in title, the Presbyterian Church and The First Presbyterian Congregation of the Borough of Wilmington, engaged in the business of making or raising money for distribution among its members. In this regard the corporation defendant and its predecessors in title have occupied a different position and status from cemetery companies or associations having beneficial features of a pecuniary character, as to which doubt has been expressed whether the purpose for which they exist is included among charitable uses. Stidham having by his conveyance created a charitable use or trust with respect to the portion or portions of the land intended, under the selection and ascertainment by the grantees and their successors in title, to be used and maintained as a burying ground and cemetery, that use or trust has ever since continued impressed and fastened upon such portion or portions. But though the use and trust with respect to the land so appropriated and devoted to the use of a cemetery is clear and definite, the trust is necessarily indefinite and uncertain with respect to the individuals who may acquire a right of sepulture or to burial lots, graves and vaults and to maintain, ornament and keep the same in good condition. In this respect the lack of certainty as to the individuals who may secure rights or benefits under the trust presents that uncertainty which is incidental to and characteristic of charitable uses in their strict legal sense. Jurisdiction in England over charitable uses belongs to the King as parens patriæ, but in Delaware to the State. The judicial branch of such jurisdiction is exercised by the court of chancery as being best adapted in that behalf by its constitution and powers. The exercise of the ministerial branch may be the subject of legislative regulation. After the conveyance by Stidham and prior to the act of 1744 the trustees; overseers and elders of the "Presbyterian Church" had power and discretion to select and ascertain the individuals who should be permitted, upon proper compliance with rules and regulations, to acquire burial rights, and after the act of 1744 the corporation defendant and its predecessors in title under and by virtue of the legislation hereinbefore recited possessed the same power and discretion.

Land set apart for the decent interment of the remains of friends and relatives, the erection of tablets, and monuments to commemorate their lives and virtues, and the beautifying of the grounds consecrated to them by the tears of their survivors is in the truest sense dedicated to a pious and charitable use. Though there be no strict property in a human corpse or the ashes representing it, when those having the

control and management of a cemetery execute the pious and charitable use by allowing, whether under a deed or other formal contract or only a permit, written or oral, the acquisition of a burial lot or space, and the interment of such remains therein and the incurring of expense in or about the interment, or the construction of vaults or erection of memorials or the suitable ornamentation of the grounds, the friends or relatives of the departed, being or representing those who obtained such deed, contract or permit, are vested with a right, of which they cannot arbitrarily be deprived, to possess, care for and maintain the burial lot or space until that right is lawfully and by proper authority terminated. When one applies for a burial lot or space and the right of interment it is to be assumed, in the absence of a stipulation or clear understanding to the contrary, that both parties contemplate and intend that he should possess a permanent right of occupation of the spot allotted for the last resting place of the dead. Even in the absence of a deed or other written muniment of title such right should be enforced in equity as a right growing out of an executed license as above mentioned.

[4] There is in evidence a deed bearing date February 1, 1843, purporting to be from the "Trustees of the First Presbyterian Church of the Borough of Wilmington" to Nelson Cleland, his heirs and assigns, for the lot on which stands the Cleland monument, "for the use and purpose of a private cemetery or burying ground for the dead, and to and for no other use or purpose whatever: the same to be subject to and chargeable with a due proportion of all future expenses and the rules and regulations necessary for keeping the aforesaid graveyard or burying ground in general good condition and repair." The attestation clause, seal and signatures are as follows:

"Witness the corporate seal of the said 'Trustees of the First Presbyterian Church of the Borough of Wilmington' hereunto affixed this first day of February, Anno Domini one thousand eight hundred and forty-three.

"Sealed and delivered in the presence of
James Riddle
John Brown

James Gardner
President of the
Board of Trustees."

Cleland died in 1854 leaving a will, duly proved, allowed and recorded, which contains the following provision:

"I hereby appropriate the sum of $3,000 for the construction of a vault and the erection of a monument on the lot owned by me in the burying ground attached to the 'First Presbyterian Church' on Market Street between 9th and 10th Streets in the City of Wilmington, and I direct my remains shall be

deposited in the said vault. I appropriate said sum for the purpose of manifesting my regard for the Presbyterian religion and with the wish of adorning and beautifying the ground in which are interred the remains of many near and dear relations, and where I trust my descendants may repose peacefully by my side."

It is clear from the affidavits and exhibits that the name "First Presbyterian Church of the Borough of Wilmington" was through inadvertence or otherwise inserted in the deed in lieu of "First Presbyterian Congregation of the Borough of Wilmington," the correct name of the predecessor in title at that time of the corporation defendant. There is in evidence a certified copy of an assignment, bearing date February 10, 1840, by "The First Presbyterian Congregation of the Borough of Wilmington" of a mortgage, the same being executed by "James Gardner, President of Board Trustees," and by him acknowledged to be the act and deed of the corporation. The deed to Cleland was executed in the name of "First Presbyterian Church of the Borough of Wilmington," but by "James Gardner, President of the Board of Trustees." The defendants have offered no evidence tending to show that there were two distinct corporations in Delaware at the time the deed was executed, one being the "First Presbyterian Church of the Borough of Wilmington" and the other the "First Presbyterian Congregation of the Borough of Wilmington," each having or claiming title to land including the fifteen feet square lot conveyed to Cleland; and in the absence of such evidence the two designations must be held to apply to one and the same religious corporation, namely, the immediate predecessor in title of the corporation defendant. The variation between "Congregation" and "Church" in the name is not such as in any manner to invalidate or injuriously affect the deed; for it is well settled that so long as the corporate entity is the same, its acts and deeds are not vitiated by such a departure from the corporate name. Absolute accuracy in the corporate name or title is not essential to a valid exercise of corporate power; and whether the corporate entity is the same is to be determined by the facts and circumstances. Kent states the rule thus:

"The general rule to be collected from the cases is, that a variation from the precise name of the corporation, when the true name is necessarily to be collected from the instrument, or is shown by proper averments, will not invalidate a grant by or to a corporation, or a contract with it." 2 Kent, Com. *292.

It is, however, on several grounds contended that the deed to Cleland was not the deed of a predecessor in title of the corporation defendant. One ground is that it appears from an affidavit on behalf of the defendants made by Joseph S. Hamilton, one of the trustees of the corporation defendant, that he examined its records as well as those of its immediate predecessor in title both before and since the year 1843, and was unable to find any grant of authority to James Gardner, president of the board of trustees, to execute or deliver the deed to Cleland. Even if the above averment were equivalent to a statement that from such examination it did not appear that the board of trustees authorized the execution of such a deed by the proper officer or

officers, the statement is without probative force in view of the uncontradicted allegation in the affidavit of Nathaniel B. Culbert, who was secretary of the immediate predecessor in title of the corporation defendant for about twenty-five years from and after the year 1863 or 1865, as to the custom and practice of burning, with the consent and knowledge of the trustees of the church, the books and records of the corporation when the same became filled up.

It is also urged that the seal on the deed does not appear to be the corporate seal of the grantor; and attention is drawn to a minute adopted at a meeting of the trustees of the First Presbyterian Congregation of the Borough of Wilmington, held November 12, 1792, as follows:

"Doctr. M'Kinly our Chairman being appointed at a former meeting to provide a Seal for the Corporation, did now produce one about two Inches diameter with the device of an open Book in the center with the inscription SCRIPTURA SACRA & around the whole CONGREG. PRIMÆ PRESBYTEn. MUN. W. SIGILm., being contractions of the following, viz: Congregationis primae presbyterianae Municipii Wilmingtoni Sigillum—which being approved it was thereupon resolved that the same should be the seal of the corporation and remain in the keeping of the chairman."

It is argued that as the deed does not bear the corporate seal described in the above minute, it cannot be assumed that it was executed under the seal of the grantor, or operated to vest any title, interest or estate in Cleland. But the attempt to discredit the deed has beyond all reasonable question failed. The verified bill which has been used as an affidavit on this occasion states in substance that interments were lawfully made in the Cleland burial lot by virtue of a deed to him from the "defendant corporation or its predecessor in title" dated February 1, 1843. Notwithstanding this averment, there is no denial in any affidavit or exhibit that James Gardner was the president of the trustees of the First Presbyterian Church of the Borough of Wilmington, or First Presbyterian Congregation of the Borough of Wilmington, or that he was authorized to execute and deliver as the act and deed of the alleged grantor the conveyance bearing that date. As has been stated, by the act of February 3, 1787, under which the trustees of the First Presbyterian Congregation of the Borough of Wilmington became a body corporate, it was provided that religious societies incorporated thereunder should have and use a common seal and "as often as they shall judge expedient, break, change and newmake the same or any other their common seal." While it appears that a corporate seal as above described was adopted November 12, 1792, by the predecessor in title of the corporation defendant, there is neither evidence nor allegation that such seal was in existence February 1, 1843, or indeed had ever been used, or that it had not at any time since its adoption and before the date of the deed been changed. The original deed was produced by consent of counsel for inspection by the court. It bears a seal referred to in the attestation clause as the corporate seal of the grantor. It is circular in form and contains the words circumferentially arranged "First Presbyterian Church Wilmington Del." There is no allegation or evidence that it was not the corporate seal of the grantor February 1, 1843. Nor is there any alle-

gation or evidence that any examination of the minutes or records of the corporation was made by its secretary or any other person to ascertain whether another corporate seal had not been adopted.

[5] The defendants, on the assumption that the deed to Cleland was valid as against the grantor and its successor, the corporation defendant, contend that it is ineffectual as against Bailey on the ground that it was not recorded and he is a bona fide purchaser for value. But I do not think he is such a purchaser. He entered into the contract to purchase and paid at the time of the execution $500, or only one four hundred and fiftieth part of the amount of the purchase price, presumably to bind the bargain, and to operate as part payment of the price of $225,000, should a good and sufficient deed "in fee simple, clear of all liens and incumbrances" be tendered to or received by him. But he has neither paid anything further, nor has he received the deed. Under these circumstances he does not come within the rule protecting bona fide purchasers for value, for it is well settled that, in the absence of some doctrine touching equitable titles not obtaining in Delaware, to constitute him such a purchaser it is necessary that he should have acquired legal title and have paid the whole or a substantial portion of the purchase price. But he has done neither. The defendants have not referred to any case in support of their contention. Further, in his answer in First Presbyterian Church of Wilmington, Delaware, Incorporated, v. Bailey, supra, as already said, he stated that "the said lot, piece and parcel of land, together with the easement appurtenant thereto, was and still remains impressed with and subject to the religious uses and trusts" set forth in the deed from Stidham. Being thus informed, when not too late to protect himself, that the land which included the Cleland burial lot was still subject to the religious uses and trusts referred to, the conspicuous and costly monument on that lot was sufficient to cause any reasonably prudent man, contemplating a purchase and using ordinary circumspection, to make inquiries of the heirs or other representatives of Nelson Cleland as to the existence of a deed serving as an inducement to the erection of such a monument. But it does not appear either that he made inquiry of such heirs or representatives, or attempted to learn from the corporation defendant or any individual where such heirs or representatives could be found. Thus, even were it assumed that the contract to purchase and his payment of the $500 constituted him a purchaser for value, he was not a bona fide or innocent purchaser within the meaning of the rule of protection.

[6] The deed to Cleland was executed more than seventy-three years ago and is therefore an ancient document. And the evidence shows that it has always been in proper custody. On the death of Nelson Cleland it passed into the possession of his widow, Christiana Cleland, and was held by her until her death, when it was received by her daughter, Mary E. Jordan, who held it until her death, when it passed into the possession of her son, Sidney S. Jordan, with whom it remained until May 13, 1916, when it was delivered to Archie N. Jordan, who on the same day turned it over to the solicitors for the complainant in the bill as originally filed. Nelson Cleland, as has appeared, in

and by his will asserted his ownership of the burial lot in question; and his heirs-at-law have under the deed and the right and title conferred by it from the date of his burial in 1854 until the present day exercised acts of ownership over the burial lot therein described and have erected and constructed at large expense, and have maintained in proper condition, the monument, vault and copings above mentioned. As an ancient deed coming from the proper custody the deed proves itself. 1 Greenl. Ev. § 570. In Lay v. Carter, 151 N. Y. Supp. 1081, it was held that where a family used part of a lot of land for burial purposes for more than seventy-five years with no record title, the record owners, who knew of such user and by silence consented to it, would be deemed to have dedicated for a cemetery so much of the lot as was actually so used.

The deed to Cleland having been to him, his heirs and assigns forever, "for the use and purpose of a private cemetery or burying ground for the dead and to and for no other use or purpose whatever," subject to a share of the expense and to the rules and regulations for maintaining the cemetery in good condition, he had a base fee thereunder, subject to restriction relative to expense and rules and regulations. Pitcairn v. Homewood Cemetery Co., 229 Pa. 18, 77 Atl. 1105. In that case, decided in 1910, a cemetery company was restrained from preventing the erection of a mausoleum by a lot owner on a portion of the lot on which it was intended to be placed. The court said:

"What is the interest of the plaintiff in this lot? * * * The conveyance is, in terms, of the lot itself, not of a mere interest therein. The deed is for the consideration of $9,000, and purports to 'grant, bargain, sell and convey,' said lot to 'Robert Pitcairn, his heirs and assigns,' to have and to hold the same to him, 'his heirs and assigns forever,' subject to the conditions, etc., 'specified in the rules and regulations hereto annexed,' together with a warranty. * * * By the terms of the deed itself, the lot is to be held subject to the rules and regulations annexed. Thereby, the use of the lot is limited to the use of the burial of the dead. The purchaser cannot erect improper improvements, he cannot transfer or assign the lot without the consent of the defendant, and he holds the lot subject to the rules which may from time to time be adopted by the board of managers. * * * But there is no restriction upon the power of the owner to devise the lot by will, nor is there any restriction which will prevent its descent according to the law of inheritance. Hence we conclude that the estate which vested in Robert Pitcairn, by virtue of said deed, is more than was acquired by the conveyances, considered in Kincaid's Appeal, 66 Pa. 411 [5 Am. Rep. 377] in Hancock v. McAvoy, 151 Pa. 460 [25 Atl. 47, 18 L. R. A. 781, 31 Am. St. Rep. 774] and that line of cases. * * * We are thus unable to agree with the defendant that Robert Pitcairn acquired but a license or easement in the lot aforesaid."

Cleland's estate under the deed in question being transmissible and descendible, the complainants have inherited from two of his three children to whom the burial lot was devised equally in fee two-thirds of the right, title and interest conveyed to him.

I think there is something wrong in point of law as well as in point of morals involved in the proposition that Cleland, after the execution and delivery of the deed to him, and the receipt by the owner of the cemetery from him of valuable consideration therefor, and the expenditure by his descendants of labor and money in the construc-

tion and erection of a vault, monument and other improvements, is to be treated as having obtained a mere license or privilege, determinable at any moment the owner of the cemetery may find it advantageous or profitable to dispose of it or a part of it for some foreign purpose. If it be assumed in accordance with the contention of counsel that the corporation defendant has the right, were it not for the deed to Cleland, to convey in fee a portion of the cemetery to Bailey for the purposes of a public library, I fail to perceive why the predecessor in title of the corporation defendant had not a right to convey in fee a portion of the cemetery to Cleland for proper burial purposes. The suggestion that under the deed to Cleland there was only a right to hold and maintain the burial lot so long as the cemetery should remain as such does not affect the question whether the owner of the cemetery did not preclude itself from discontinuing the cemetery as such, in the absence of proper legislative authority to that end. The argument on the score of hardship advanced on the part of the defendants has, I think, but little force, especially under the circumstances of this case. No complaint has been made of the cemetery. It has been maintained in excellent order and condition; and no reason appears, unless the desire to receive the purchase money contracted to be paid by Bailey, why the cemetery, or a large portion of it, should now be dismantled, aliened and applied to other uses.

In Brick Presbyterian Church, 3 Edw. Ch. (N. Y.) 155, it was held that where a religious corporation had acquired land in fee for the purposes of a church and a grave yard, it could grant in fee a portion of the land for a burial vault, and that the same could not be sold against the objection of the grantee. The point was raised and sustained that "no sale or alienation of the property, by which it is to be converted to secular purposes, can be made, without infringing vested legal rights." The court distinguished between pew-holders and vault owners; recognizing that the right of the former would fall with the destruction or removal of the church building, but that a conveyance in fee of the land for a vault gave a permanent and substantive right to the soil. It said:

"Since, then, there may be a right of property acquired in monuments or tombs erected by a faculty or grant, why may not such a right be acquired by purchase from the corporation of a religious society? A vault, in reference to interment, is but a place to entomb; and when so used, becomes a tomb; a receptacle for the dead—a last resting place. A grant of such a place gives an exclusive right; and why may it not be perpetual? * * * It is certainly competent for a man, at this day, to buy the fee simple of an estate in land for the purposes of sepulture; and when converted to that use, the title may descend or be again the subject of sale. The conveyance * * * to the church * * * was a conveyance of the fee of the land, a base or determinable fee, being subject to a quit rent and to a condition that the land should be appropriated to a particular purpose—that of a church and cemetery. This renders it a conveyance to a pious and charitable use; but it was still a conveyance of the land and conferred on the grantees an estate and interest in land for the purposes intended. In appropriating this land to such intended purposes, it was competent for the trustees to dispose of it as they might think proper not inconsistent with the grant and the use for which they expressly held it, namely, on a part of the ground to erect a church edifice; in another part to construct vaults for public use, reserving a space for graves to be opened, on such terms as they might think proper to pre-

scribe; and the residue to lay out for private vaults and to sell the sites or ground for that purpose. And such sales might be of the fee of the land;—true, only a base fee, such as had been conveyed to them. * * * The intention obviously was, to sell and dispose of *the land;* and not to grant a mere temporary use or privilege to construct vaults in the land with a reserve of the title to the church. * * * I cannot but conclude that the deed and the lease in question confer title to the land, and not a mere easement or privilege to inter the dead. If I am correct in this, it can make no difference that any further interments are now prohibited within these vaults, and certainly no argument drawn from this circumstance can give the petitioners any right to resume the control of the vaults, to break them up or desecrate the ground."

The case before this court is stronger for the complainants than that of Brick Presbyterian Church in that, while here there has been no legislative action for the discontinuance of the cemetery, there an application for the sale of the entire property was made under the New York statute of March, 1806, (Laws 1806, c. 43) authorizing the Chancellor upon application of any religious corporation to order the sale of its real estate and direct the application of the proceeds to "such uses as the same corporation, with the consent and approbation of the chancellor, shall conceive to be most for the interest of the society to which the real estate so sold did belong." While the existence of that statute has led to some contrariety of view as to the force of the decision in Brick Presbyterian Church, its reasoning applies in full force to the case in hand. Windt v. German Reformed Church, 4 Sandf. Ch. (N. Y.) 471, was decided with reference to the act of April 11, 1842 (Laws 1842, c. 215), which provided as follows:

"Sec. 2. It shall not be lawful for any person or persons to remove any dead body or human remains from any burying ground, for the interment of which compensation shall have been received by any church or religious corporation, or by any officer or officers thereof, and which shall have been used for that purpose during the last three years, with the intent to convert the said burying ground to any other purpose, without having first obtained the consent in writing of three-fourths in number of the congregation or society of such church or corporation; and which consent shall be proved or acknowledged and recorded in the manner prescribed by the first section of this act, before any such removal shall be commenced or attempted."

Notwithstanding the above act, the provisions of which had been fully complied with, the complainants sought to restrain the church from removing the remains of relatives from the burial lots in which they had been interred. No one of the complainants had any deed of a vault or a portion of the ground, or any title thereto. The court distinguished between the rights of those who held title to vaults or burial lots and those who did not, and while holding that a sale effected pursuant to the statute was good as against the latter, said:

"Where vaults or burying lots, have been conveyed by religious corporations, rights of property are conferred upon the purchasers. This was the case with the corporation of the Brick Presbyterian Church, 3 Edw. Ch. 155. The right is like that to any other real estate, and is as perfect without sepulture, as it is where the grantee has used it for that purpose."

[7] The right of property of those acquiring burial lots under conveyances in fee is recognized in many other cases, among which are New York Bay Cemetery Co. v. Buckmaster, 49 N. J. Eq. 439, 24 Atl. 2, where the conveyance of the burial lot was "subject, however, to the conditions and limitations and with the privileges specified in the rules and regulations now made, or that may hereafter be made, and adopted by the managers of the said cemetery for the government of the lot-owners and visitors to the same." Rosehill Cemetery Co. v. Hopkinson, 114 Ill. 209, 29 N. E. 685; Clark v. Rahway Cemetery Co., 69 N. J. Eq. 636, 61 Atl. 261, where the conveyance to the lot owner was "subject to such rules and regulations as the trustees thereof have or may adopt respecting the said cemetery and its management."

A court of equity at the instance of proper parties has power to restrain the threatened wrongful destruction or removal of tombs, vaults, coffins, human remains, or monuments in or from a cemetery, or wrongful injury thereto, or to the burial premises. Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; Boyce v. Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481; Roundtree v. Hutchinson, 57 Wash. 414, 107 Pac. 345, 27 L. R. A. (N. S.) 875; Kelly v. Tiner, 91 S. C. 41, 74 S. E. 30; Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699; Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428, 42 L. R. A. (N. S.) 1216.

[8] The several owners and holders of lots in a cemetery have a common interest in its decent and proper maintenance as a whole. Clark v. Rahway Cemetery Co., 69 N. J. Eq. 636, 640, 61 Atl. 261; Tracy v. Bittle, 213 Mo. 302, 112 S. W. 45, 15 Ann. Cas. 167; Rosehill Cemetery Co. v. Hopkinson, 114 Ill. 209, 29 N. E. 685. For, while each owner or holder is directly and immediately interested in the lot controlled by him, he is at the same time interested that its surroundings shall be those appropriate to a well ordered resting place for the ashes of the dead, and not converted into a waste place or a dumping ground for refuse matter or the accumulation of débris, or into a site for the erection of buildings foreign to the pious or charitable use to which the land has been dedicated and devoted. There is an implied contract to this effect between those owning or controlling the cemetery and those acquiring the ownership or possession of burial lots therein. And so long as the cemetery continues as such it is immaterial that interments may have ceased by reason of overcrowding or considerations touching the public health or other cause. In Stockton v. Newark, 42 N. J. Eq. 531, 541, 9 Atl. 203, 208, the court said:

"The object of burial is not to put the dead away temporarily, merely, but to place them in a final resting-place. When land is given in trust for a burial-place, it obviously can by no means be said that the trust is at an end when the last body which can be buried in it has been deposited. The expectation in the burial of the dead is that they are to remain permanently, and the unauthorized disturbance of their remains is regarded with abhorrence as a desecration, and is criminal. A trust for a burial-place devotes the ground to the perpetual repose of the remains of the dead."

There is abundant authority to the effect, not only that a wrongful threatened destruction or dismantling of a cemetery may be the subject of injunctive relief at the hands of any one or more of those directly and immediately interested therein, but also that persons having relatives and friends buried in a cemetery may maintain a suit to enjoin the defacing or desecration of the graves, monuments, etc., and to preserve the premises as a cemetery. Wormley v. Wormley, 207 Ill. 411, 69 N. E. 865, 3 L. R. A. (N. S.) 481; Beatty v. Kurtz, 2 Pet. 566, 585, 7 L. Ed. 521; Boyce v. Kalbaugh, 47 Md. 334, 28 Am. Rep. 464; Tracy v. Bittle, 213 Mo. 302, 112 S. W. 45, 15 Ann. Cas. 167; Roundtree v. Hutchinson, 57 Wash. 414, 107 Pac. 345, 27 L. R. A. (N. S.) 875; Kelly v. Tiner, 91 S. C. 41, 74 S. E. 30; Ritter v. Couch, 71 W. Va. 221, 76 S. E. 428, 42 L. R. A. (N. S.) 1216; Davidson v. Reed, 111 Ill. 167, 53 Am. Rep. 613; Mitchell v. Thorne, 134 N. Y. 536, 32 N. E. 10, 30 Am. St. Rep. 699; Lay v. Carter, 151 N. Y. Supp. 1081.

The right of the complainants to sue on behalf of themselves and others is supported by equity rule 38 (198 Fed. xxix, 115 C. C. A. xxix) which provides:

"When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole."

This rule accords with the principle, laid down by Pomeroy, permitting such a suit—

"where a number of persons have separate and individual claims and rights of action against the same party, but all arise from some common cause, are governed by the same legal rule, and involve similar facts, and the whole matter might be settled in a single suit brought by all these persons uniting as co-plaintiffs, or one of the persons suing on behalf of the others, or even by one person suing for himself alone."

That the jurisdictional amount is involved in this controversy, whether treated as relating to the cemetery as a whole or only to the Cleland burial lot with its vault, monument, etc., is clear and unquestioned.

The defendants in support of their contentions have cited a number of cases, to some of which reference will now be made, decided under or in view of statutory enactments. Unless read in connection with the statutes these cases are misleading and embarrassing; but when so read it will be found they lend little, if any, support to the propositions for which they are cited. In Richards v. Northwest Protestant Dutch Church, 32 Barb. (N. Y.) 42, an injunction against the removal of the remains of the plaintiff's relatives from a certain vault in a church yard and the destruction of the vault was refused. The decision was under the New York statute of March, 1806, above referred to in connection with the case of Brick Presbyterian Church. The religious corporation had conveyed a piece of ground in the church-yard to the grantee, "his heirs and assigns, forever," to be used "for the purpose of a burial place, and for no other purpose whatever," and on the lot so conveyed the vault in question was constructed. The lot was conveyed and the vault constructed in the face of the above statutory

provision. Proceedings for the sale of the church premises, including the lot and vault, were duly had pursuant to the statute. The court said:

"Every person purchasing either a pew in a church edifice, or a grave in a church-yard, appendant to a church, does so with the full knowledge and implied understanding that change of circumstances may, in time, require a change of location; and that the law, (a positive statute which has been in existence nearly half a century,) looking to such exigency, authorizes the corporation, when it arrives, as the representative of all interests, with the sanction of the court, to sell the soil in absolute fee, discharged of all easements, and to make some other more appropriate investment or disposition of the proceeds."

Went v. Methodist Protestant Church, 80 Hun, 266, 30 N. Y. Supp. 157, was decided under the New York statute of April 12, 1893, which provided:

"The Methodist Protestant Church of the Village of Williamsburgh is hereby authorized to remove or cause to be removed from said land the remains of all bodies buried and now remaining therein and all monuments, headstones and lot or plot fences thereon, to some cemetery or other suitable place or places; and to procure by purchase or otherwise, other land to be used for cemetery purposes; and to sell, at public or private sale, the said land now belonging to said Methodist Protestant Church of the Village of Williamsburgh, and by good and sufficient deed or deeds to convey the same to the purchaser or purchasers thereof, and to apply so much of the proceeds of such sales as may be required for such purpose toward payment of the expenses of said removal and the procuring of a suitable place or places to which such removal may be made as herein provided for."

A judgment restraining the defendants from selling the cemetery or in any manner interfering with or using it except for cemetery purposes was reversed, the court saying:

"The power of the Legislature to prohibit interments in or to remove the dead from cemeteries which in the advance of urban population may be detrimental to the public health or in danger of becoming so, is not at this day a debatable question. * * * My conclusion is that the act of 1893 was a valid exercise of legislative power, and the action of defendants thereunder cannot be restrained."

Craig v. First Presbyterian Church, 88 Pa. 42, 32 Am. Rep. 417, was decided under the Pennsylvania act of April 18, 1877 (P. L. 54). On a petition by the trustees of the church for the removal of the remains of the dead from a portion of its burial grounds, a decree was granted accordingly, the court holding that the statute authorized such action, and stating:

"The right of the legislature to authorize the removal of the remains of the dead from cemeteries is well settled. So it may delegate such power to municipalities. It is a police power necessary to the public health and comfort."

The constitutionality of the statute was assailed. But it is wholly immaterial so far as present purposes are concerned whether it was valid or invalid; for the fact remains that the decree was expressly based upon the statute. In the course of the opinion the following significant language was used:

"The record does not show, nor does Mr. Craig allege that he has buried any dead in the grounds, or that he has any right to do so. Mr. Guthrie alleges that he has relatives buried there, but in no part of the record does he

show that he has any rights of sepulture in said grounds or any contract relation with the church. * * * We have no accurate information as to the precise nature of the relations between the church and those privileged to bury in its grounds. It does not appear that any one of them had any right to or title in the soil, nor any right of sepulture in any particular lot or place in the yard."

In this case Chief Justice Agnew delivered a forcible dissenting opinion. His views, however, did not prevail as against the provisions of the act. But some of his language is peculiarly appropriate to the case in hand, where there is or has been no such statute. He said:

"To coin money out of the bones of the dead, is to violate a purchaser's right of sepulture, contrary to the instincts of the race and the keenest sensibilities of the heart. Among all tribes and nations, savage and civilized, the resting places of the dead are regarded as sacred. There memory loves to linger and plant the choicest flowers; there the sorrowing heart renews the past, rekindles into life the viewless forms of the dead, revives the scenes where once they moved, and recalls the happy hours of love and friendship. There parent and child, husband and wife, relatives and friends, with broken spirits and crushed hopes, revisit often the spot where they deposited their dead. Who does not feel the fountains of his heart broken up and the warm gushings of emotion, when standing over the green sod which covers the departed. Wherever the simple stone is placed, or the marble monument is reared, spontaneous thought inscribes upon it 'sacred to the memory." * * * Can a private association, corporate or unincorporate, sell a right of sepulture to-day, and to-morrow or next year retake the ground for a lecture or a school room? It is immaterial whether a grant of sepulture confers an estate or privilege; it is a purchased right founded in contract, which no law can violate, except for a public necessity. * * * It has no analogy to the privilege of a pew and cannot fall with the building. Its occupancy is permanent, not like that of a pew, periodical and temporary. If the building fall, is burned, destroyed or rebuilt, the pew right falls with it. But the purchased grave has no such necessary and intrinsic weakness of title. There the body is laid away, according to the rites of Christian burial, and in the acts of Christian faith, to await the resurrection morn, when its dust, reanimated by the Creator's call, shall rise to meet the Lord. Then why should a Christian congregation violate instinct and law, on the ground of privilege? * * * This is a contract privilege not dependent on a building. If I buy the privilege of running water, or a right of way, or a right to open my windows over my neighbor's yard, what law justifies its violation?"

Partridge v. First Independent Church of Baltimore, 39 Md. 631, was decided under the Maryland statute of March 28, 1868 (Laws 1868, c. 211), which provided for the sale under a decree of court of "any ground dedicated and used for the purposes of burial in which lots have been sold and deeds executed or certificates issued to the purchasers of such lots, provided such lots shall be no longer used for burial purposes"; and further provided as follows:

"That a decree passed in a proceeding for the sale of a burial ground shall be valid to pass the title to the purchaser or purchasers of the same or any part thereof free, clear and discharged of and from the claims of the corporation or trustees who may hold the same for the purposes aforesaid, their successors or assigns and of all persons [having] an interest as lot holders in such ground whether they are entitled as original lot holders and whether they be residents or nonresidents, adults or infants."

It was conceded that the "proceedings for the sale * * * were in all respects regular, and in conformity to the requirements of that act." The claimants of the burial lots did not hold deeds therefor but

only certificates "signed by the chairman of the trustees, and attested by the register"; and the court said:

"What right or interest did this certificate confer upon its holder? We think it clear that it conferred no title or estate in the soil; nor could it operate as a grant of an easement, because it was not under seal, nor was it acknowledged and recorded, so as to be effective to convey such an interest. * * * Whenever, therefore, by lawful authority, the ground ceased to be a place of burial, the lotholder's right and privilege ceased, except for the purpose of removing the remains previously buried."

Schier v. Trinity Church, 109 Mass. 1, was decided under chapter 221 of the Massachusetts statutes of 1871, which provided in the first section that the church might sell and convey at private or public sale the land upon which the church building then stood, together with the buildings thereon standing, and might give to the purchaser or purchasers "good title, free of any trusts," and in the second section for the appraisal of pews in the church and of the rights in tombs under the same, and in the third section for the application of the balance of proceeds of sale over and above the payment of debts of the proprietors of the said pews and rights in tombs, toward the purchase of land for the erection of a new church, to be held "upon the same trusts, if any, as the estate and church in Summer Street are now held." It was held that where real estate "is held in trust for the general purposes of the religious society, and cannot otherwise be conveyed, the Legislature has constitutional power to authorize the trustees to convert their real estate into personal, in order that the avails may be reinvested or otherwise appropriated to the purposes of trust." The court added:

"The defendants contend that the rights in tombs are mere licenses, and revocable at any time. * * * But it is not necessary to decide that question, as the legislative act justifies this removal of the tombs."

In Brendle v. German Reformed Congregation, 33 Pa. 415, on which some stress has been laid, certain members of the congregation sought to restrain it and its trustees from mortgaging real estate which had been conveyed by Casper Wistar to certain persons in fee simple, who shortly thereafter executed a declaration of trust to the effect that the land was granted to them by direction of members of the Dutch Reformed Church or Congregation, at Tulpehocken, and that they held the same in trust, "for the benefit, use, and behoof of the poor of said Dutch Reformed Congregation, at Tulpehocken, aforesaid, forever; and for a place to erect a house of religious worship, for the use and service of the said congregation; and if occasion shall require, for a place to bury their dead." The court below found that "the congregation furnished the purchase-money, and the grantees originally took the conveyance for its use." A church was built upon the land and a portion dedicated for a grave yard. Long afterwards it was resolved by the congregation at a regular church meeting to pull down the old church and build a new one on its site, and also another new church in a different locality; and it was determined to borrow money for the accomplishment of the end in view. The court below said:

"There is nothing in the original conveyance of the hundred acres of land, even tending to show that Casper Wistar conveyed it to the persons therein named as a charity, or for any such use or purpose. On the contrary, it purports to be an absolute sale, for a full and adequate consideration, without any trust whatever. When the congregation became the owners of the property, through the purchase of their trustees, they had a right to give it such direction as they thought proper—authorize it to be sold again, held for the erection of a church, a school, a burial place, or any other useful purpose. * * * We do not consider that any founders of this charity intended that their bones or those of their descendants should ever be sold or mortgaged to strangers, under any pretext of expediency or necessity. * * * We fully agree with all the sentiments so beautifully expressed by Mr. Justice Woodward, in Brown v. Lutheran Church, 11 Harris [23 Pa.] 495, and believe with him, 'that the resting-place of the dead should be hallowed ground.' * * * We believe it our duty to restrain, by injunction, this congregation from selling, or encumbering by mortgage or judgment, so much of the hundred acres of land described in the bill as has been set apart for a grave yard."

A decree was accordingly made restraining the defendants from selling, mortgaging or encumbering the burial ground, or the old church, but permitting them to sell, mortgage or encumber the rest of the property. No appeal was taken from the injunctive feature of the decree, but only from that part which granted the above permission. The decree was affirmed. The above case is radically different from that in hand, in that here there was no plain conveyance by Stidham in fee simple, without the expression of any charitable or pious use or trust, and, further, in that such use or trust had been created and constituted before the act of 1744 was passed. In Rayner v. Nugent, 60 Md. 515, the court dealt with a mere certificate for a burial lot, signed by the secretary of the board of trustees of a religious corporation, but without the corporate seal or other formality of execution. It was held that when the corporation decided that the cemetery was no longer desirable as a place of interment, "that decision operated to revoke the certificate or license, and the right of further interment was extinguished," and, the bodies of those buried in the cemetery having been removed, the lot holders had no interest in the premises. It was further held that the fact that a corporation made a private sale of the property, and not one under a bill filed pursuant to the act of 1868, did not distinguish the case in principle from Partridge v. First Independent Church of Baltimore, 39 Md. 631. In my opinion, the decision in Rayner v. Nugent is very questionable; but, however that may be, the facts here disclosed clearly distinguish the present from the Maryland case. Kincaid's Appeal, 66 Pa. 411, 5 Am. Rep. 377, was decided under the Pennsylvania statute of April 13, 1867 (P. L. 1234), authorizing the vacation and sale of a cemetery by commissioners and the removal of the bodies to other land to be purchased with the proceeds, and, after defraying expenses, the payment of the balance to the lot holders according to their rights to be ascertained by arbitrators appointed by a court. A preliminary injunction had been granted restraining the defendants, who claimed to act under the statute, from "digging up and removing the dead," etc. The decision was based upon the statute, the court saying:

"We have come, then, to the conclusion that the act of assembly of April 13th, 1867, was constitutional and valid, and that the preliminary injunction below ought not to have been awarded."

And Sharswood, J., in delivering the opinion of the court, drew attention to the fact that the certificate for burial lots, though under the corporate seal, did not contain "words of inheritance." Pitcairn v. Homewood Cemetery, 229 Pa. 18, 77 Atl. 1105, serves to distinguish Hancock v. McAvoy, 151 Pa. 460, 25 Atl. 47, 18 L. R. A. 781, 31 Am. St. Rep. 774, from the case in hand. In Riggs v. New Castle, 229 Pa. 490, 78 Atl. 1037, 140 Am. St. Rep. 733, the ancestors of the plaintiffs entered, as parties of the first part, into a written agreement under seal with the borough of New Castle that the borough and its assigns might and should occupy forever for "purposes of wharf" a strip of land on the west side of Neshannock creek, in consideration that the parties of the first part, and their heirs and assigns, forever, should and might occupy a certain piece of land then owned by the borough. The court recognized as a general rule that "a declaration in a grant to a corporation that land is conveyed for certain purposes does not necessarily import a limitation of the fee," and that the phrase "for purposes of wharf" in the absence of any provision for "a forfeiture or termination of the estate" or of any "words which must be taken as a condition" could not be construed as a limitation of the estate. The case has no application to the situation of lot owners in a cemetery arising from their contractual rights as such with the owner of the cemetery or from their ownership in fee of burial lots. In Burton's Appeal, 57 Pa. 213, a religious corporation applied to the court of common pleas for the sale of real estate owned by it for the payment of its debts and a sale was accordingly ordered and made pursuant to the provisions of the Pennsylvania statute of April 18, 1853 (P. L. 503), which expressly authorized the same. In Stuart v. Easton, 170 U. S. 383, 18 Sup. Ct. 650, 42 L. Ed. 1078, a Pennsylvania statute provided that a lot of land should be acquired in fee "in trust, and for the use of the inhabitants of the said county [Northampton], and thereon to erect and build a court house and prison, sufficient to accommodate the public service of the said county, and for the ease and convenience of the inhabitants." Subsequently a patent was executed for the lot in fee, "in trust, nevertheless, to and for the erecting thereon a court house for the public use and service of the county, and to and for no other use, intent, or purpose whatsoever." A court house was built upon the lot and remained there until 1862 when it was removed. Entry was made and an action of ejectment was subsequently brought by the sole heir of the original grantors for the recovery of the possession of the lot for breach of an alleged condition as to its use. The court, among other things, said:

"The proper construction of the patent in question is free from difficulty when construed in connection with the act of the assembly to which the patent refers. The act of 1752 constituted the authority of the trustees for acquiring the land in question, and that authority was to the individuals named in the act 'to purchase and take assurance to them and their heirs of a piece of land situate in some convenient place in the said town of Easton, in trust

and for the use of the inhabitants of the said county.' * * * The provision following the authorization to acquire the land, 'and thereon to erect and build a court house and prison,' was no more than a direction to the trustees as to the mode of use to be made of the land after it had been purchased."

The question in the case was one of condition subsequent between the heir of the original grantors and the public, and, as stated in connection with Riggs v. New Castle, the decision is inapplicable to lot owners in a cemetery. Wright v. Morgan, 191 U. S. 55, 24 Sup. Ct. 6, 48 L. Ed. 89, recognizes the doctrine of Stuart v. Easton, but does not apply to the facts in the present case. Rawson v. Inhabitants of School District No. 5 of Uxbridge, 7 Allen (Mass.) 125, 83 Am. Dec. 670, was a writ of entry to recover land in Uxbridge. The demanded premises were included in a deed to the inhabitants of Uxbridge, dated March 20, 1737, "to have and to hold the said given and granted premises, with all ye appurces, and priviledges and commodities to the same belonging or in any wise appertaining, to the said town of Uxbridge forever, to their only proper use, benefit and behoofe, for a burying-place forever." The town entered upon the conveyed premises and occupied the same for a burial place for many years. In 1860 the town after a vote for that purpose sold the premises and the purchasers entered upon and enclosed the same "within their schoolhouse lot, and removed the remains of persons buried there, and lowered the grade of the earth, and appropriated the land to use for school purposes, and no other." It was held that the demandant was not entitled to recover possession of the premises as the conveyance was not upon a condition subsequent. In Hopkins v. Grimshaw, 165 U. S. 342, 354, 17 Sup. Ct. 401, 41 L. Ed. 739, the above case was distinguished from that before the Supreme Court; but wholly aside from this circumstance the Massachusetts case did not present or involve any controversy between owners or holders of burial lots and those seeking to dismantle or injure the same or remove remains therefrom. Krauczunas v. Hoban, 221 Pa. 213, 70 Atl. 740, was decided under the Pennsylvania statute of April 26, 1855 (P. L. 328), and does not bear upon the present case. In State v. Wiltbank's Adm'r, 2 Harr. (Del.) 18, it was held that a "devise" of money arising from land "to the trustees of the Methodist Episcopal Church in Dover, by whatever name or style they may be known in law, to be by the said trustees of the said M. E. Church applied in such manner as they shall devise, towards educating poor children of members of said church," was void; that it could not take effect under the act of February 3, 1787, as under it "all devises of land to religious corporations are void"; nor could it be sustained under the act of 17 Geo. II, on the ground of its being a devise for charitable purposes,

"for by the 4th section of that act it declared, that such societies, or any persons in trust for them or to their use, shall not be authorized by that act to take or receive any lands, etc., by gift, grant, or otherwise, for or towards the *maintenance* or *support* of the said churches, houses of worship, *schools*, or almshouses, or the *people belonging* to the same, or for any *other use or purpose*, save for the *uses in that act mentioned*. * * * Under the act of Geo. II, such a corporation had the political capacity to take lands by devise, prior to the act of 1787: it authorized them to take in this way, for certain pur-

poses which are enumerated, and for certain purposes only; the maintenance and support of schools is not one of these purposes, and is so expressly declared."

In my opinion State v. Wiltbank's Adm'r has no application to a conveyance in 1737 to unincorporated trustees of an unincorporated religious society of land for the pious and charitable use of a burial ground in perpetuity.

Griffitts v. Cope, 17 Pa. 96, and several other decisions cited by the defendants recognizing the doctrine there laid down form a class by themselves. That case was an action of ejectment brought to recover possession of certain real estate on the ground that the trust or charity on and for which it had been devised had been abandoned by the donees. The nature of the devise was stated by the court as follows:

"Striking out the machinery by which this devise is to be effectuated, we discover that the substance of it may be stated as follows: If the Quaker Meeting shall agree in good faith to accept the lot on Pine street, for the purpose of building a Meeting-house upon it, then I devise the same to them and their successors. Both the language of the devise and the influence of the act of 1731, for enabling religious societies to hold land, constrain us to consider this lot as given and accepted for a place of religious worship. * * * Let it be remarked, that a conveyance of land to a religious society implies a religious use, and that, by our act of 1731, a religious society could hold to no other use. * * * All religious societies hold land for a qualified purpose, because the law does not allow them to hold for general purposes. But this qualification has place only as between the public and the holders, and not between the grantors and the holders. It is not a qualification of the estate as granted, but of the uses to which, in such hands, it may lawfully be applied. It is not intended to prevent alienation to general purposes, but to prevent a religious society from using land for general purposes. It defines a duty of religious societies to the state, not to their grantors. The use to which the granting clause declares that this land is to be applied is of the character which the law requires, and is the most ordinary purpose for which religious societies require land. The presumption would therefore appear fair and obvious, that, by that declaration, the devisor merely meant to make the grant lawful upon its face. This construction fully satisfies all parts of the devise. The devisor uses words of fee simple; and the other words, that truly describe all such estates in such hands, cannot be construed to reduce a fee simple to a qualified fee. To produce this effect it is necessary that other words be added, showing clearly that the testator intended that the land should revert on the abandonment of the particular use. These grants are, as between the grantor and grantees, fees simple, and as between the trustees and beneficiaries they are trusts."

These views were prefaced with the statement that

"our law discourages the fettering of estates and putting them into mortmain, and therefore favors the construction which relieves from restraints upon alienation."

It was held that the plaintiffs were not entitled to recover as title had passed to the purchaser from the Monthly Meeting. The doctrine of Griffitts v. Cope involves the proposition that in Pennsylvania since the passage of the act of February 6, 1731 (1 Smith's Laws, p. 192), which is similar to the Delaware statute of 1744, a grantor, in conveying land in fee to a religious society or corporation for expressed charitable or religious uses for which the society or corporation is authorized to hold and employ land, will, in the absence of clear evidence to the contrary, be presumed to intend, not to impress by his con-

veyance upon the land a charitable or religious use, but to vest the land in the society or corporation in fee subject to alienation by it for general purposes, but which, so long as not aliened, shall be used only for the purposes for which under the law of its being it is empowered to use and employ land. It is not denied in Griffitts v Cope or kindred cases that by the use of suitable terms land may be conveyed to an incorporated religious society to be held in perpetuity for a pious or charitable use falling within the corporate purposes in such manner that an abandonment of the use may either constitute a breach of a condition subsequent or give rise to a resulting trust. But it must be clear that such was the intention of the grantor. Presumptively no religious or charitable use is created by the grantor, but whatever use of the kind exists results from the ownership of the land by the society or corporation, and its necessary subjection to the purposes, limitations and restrictions imposed by the law of its being. I do not see how the doctrine of Griffitts v. Cope can apply to this case. For, as before stated, more than six years before the enactment of the Delaware statute of 1744 an admittedly charitable or pious use in perpetuity was created by the conveyance from Stidham; and when that act was passed, ratifying and confirming that conveyance "according to the true intent and meaning" of the same, the land continued impressed with the trust and use created by Stidham (Stockton v. Newark, 42 N. J. Eq. 531, 539, 9 Atl. 203), and was not destroyed by that act, as would necessarily have been the case had the doctrine of Griffitts v. Cope been applicable and operative. Further, that case did not deal with a burial ground or cemetery or the rights acquired by individuals to sepulture therein.

I recall no case in which it has been held that the title of a burial lot owner under a deed in fee to him for burial purposes can be destroyed or taken from him unless under the police power, the right of eminent domain, or a statute explicitly authorizing it, enacted in the exercise of the legislative power over charitable uses. In Trustees for Baptist Church v. Laird (Del. Ch.) 85 Atl. 1082, specific performance was decreed of an agreement to purchase land held for church and burial purposes. There was, however, "no allegation or evidence that the land had been used as a burial place." Further the Delaware statute of April 6, 1911, 26 Del. Laws, ch. 252, provided that the trustees of the church, who were then "the duly elected and constituted trustees under the trusts contained" in the original conveyance from Joseph Stidham and his wife,

"are hereby authorized and empowered to sell, either at public or private sale, on such terms as they may deem expedient, all or any part of the tracts, pieces or parcels of land belonging to, or held in trust for the members of The First Baptist Church of the Borough of Wilmington, and described in the two indentures recited in the preamble to this act, and convey the same, in fee simple, to the purchaser or purchasers, by good and sufficient deed or deeds, free from all trust, and without any liability on the part of said purchaser or purchasers for the application, non-application or mis-application of the purchase money. The net proceeds of said sale or sales, after paying costs thereof, and any liens of record against said property, shall be held by the said trustees and their successors in office hereafter, under and subject to the same

trusts and for the benefit of the same persons as are set forth and provided in and by the said indenture executed by Joseph Stidham and Rebecca Stidham, his wife."

With respect to this statute it may be said that it amounts to a declaration by the law making body of the necessity or propriety of suitable legislation in such a case, and further, that it recognizes that the trustees of the church were the trustees "under the trusts contained" in the original conveyance from the Stidhams. In First Presbyterian Church of Wilmington, Delaware, Incorporated, v. Bailey, supra, it was decided that the corporation defendant had power to grant and convey to Bailey in fee, clear of incumbrances, the portion of the cemetery contracted to be sold to him, together with the easement above described. I do not think that decision controls the present case. The complainants here were not parties to that suit nor in any legitimate sense represented by the corporation defendant; for it was there attempting to disregard the pious or charitable use for the protection and preservation of which the complainants here now sue. Further, there was no statement in the bill or evidence in that case that the property in question had been used as a burying ground, or that the ground covered by the agreement had any buildings erected on it; nor was there any statement or evidence as to the use which the purchaser was to make of the land. In Trustees for Baptist Church v. Laird reference was made to section 4 of the Delaware statute of March 22, 1887, as subsequently amended. 20 Del. Laws, ch. 115. The title of the chapter is "Of the settlement of personal estates," and that of the statute "An Act concerning investments by guardians and trustees." Section 4 is as follows:

"Section 4. That upon petition of any trustee having the legal title to any property, real, personal, or mixed, setting forth that the sale and conversion thereof would be beneficial to the persons interested in the trust, the Chancellor may, by order made thereon in his discretion, authorize and direct such trustee and (to?) sell the whole, or so much as may be proper, of such trust property, and to transfer and convey the same to the purchaser thereof, absolutely and in fee simple, freed from any trust and without liability on the part of such purchaser as to the application of the purchase money; provided, that in cases where the sale or conversion of trust property has been or may be expressly prohibited by the instrument creating the trust, no sale or conversion shall be taken to be hereby authorized; and provided, moreover, that the proceeds of all sales made under the authority of this act shall be held under and subject to the same trusts as those to which the property sold was subject, and in cases where real property is to be sold the trustees thereof shall first give sufficient bond, with surety to be approved by the Chancellor, for the preservation and protection of the proceeds of such sales for the purposes of the trust and subject to the orders and decrees of the Chancellor in the premises."

Palpably this section has no application to the case of rights acquired by individuals to sepulture, vaults, tombs, monuments, etc., in a burial ground or cemetery. The Chancellor did not hold that it had such application, for "there was no allegation or evidence that the land had been used as a burial place." Further, the section is restricted to the case of the "petition of any trustee * * * setting forth that the sale and conversion * * * would be beneficial to the person interested in the trust." To seek to apply it to burial rights and prop-

erty acquired and held by individuals in the cemetery of the corporation defendant would not only be repugnant to the plain sense of the section, but at variance with the contention that under the doctrine of Griffitts v. Cope the original charitable use or trust has been superseded by corporate ownership for the religious or charitable purposes for which land can be held. For under that doctrine the trustees of the religious corporation could not constitute a "trustee" in the sense in which that word is employed in section 4. Again, the section contemplates that the sale and conversion authorized by it "would be beneficial to the person interested in the trust." The phrase "person interested in the trust" as employed in the section can have no application to a person who has as an owner or holder of a burial lot acquired a legal right to enjoy the same through contractual relations with the religious society or corporation on which has devolved the general superintendence and administration of the charitable use or trust. And it is proper to add that the conversion authorized by the section is one "beneficial to the person interested." The change of trust investments for the benefit of the cestui que trust clearly comes within the jurisdiction of chancery; but obviously the principle cannot be applied to deprive individuals against their consent of burial rights legally acquired in a well-ordered cemetery. It is precisely the lot, the vault, the monument, etc., and not any income or revenue therefrom, or any substitution therefor, which the lot owner is entitled to hold and enjoy in the cemetery of the corporation defendant, and I think it would be a perversion of language to assert that the destruction of that right and the substitution of something else would amount only to a conversion within the meaning of section 4.

It was admitted during the oral arguments that the corporation defendant could not deprive those holding burial lots in which interments have been made of the right to maintain the same, unless upon the making of compensation in some form or furnishing suitable burial lots elsewhere for the reception of the remains which may be removed from the existing cemetery. But this cannot be effected in the absence of proper legislative authority, save by consent.

On the whole I am satisfied that the showing made by the complainants is such as to justify and require the awarding of a preliminary injunction to maintain the status quo until the case can be finally disposed of on plenary pleadings and proofs. An interlocutory decree for the complainants in accordance with this opinion may be prepared and submitted.

THE BRANDON.

(District Court, D. Maryland. October 26, 1916.)

COLLISION ⊜94—OVERTAKING VESSELS—FAULT OF OVERTAKING VESSEL.

A collision occurred in the daytime between the steamships Samarinda and Brandon, both passing out from the port of Baltimore loaded. The Samarinda was much the larger and the faster ship, and, gaining on the Brandon, which started first, signaled her intention to pass to port of the Brandon, which was assented to. When she was alongside, and perhaps 300 feet distant, the two vessels continued for two miles in that position. At a turn in the channel the Samarinda took a course converging on that of the Brandon and increased her speed. The latter, when she came nearer, stopped, and then went ahead at slow speed, but suddenly sheered, and struck the other vessel near the stern. Where the courses turned, the channel was wider, and the Samarinda could have given the Brandon more, instead of less, room. *Held* that, in failing to do so, she, as the overtaking vessel, assumed the risk, and was solely in fault for the collision, which was apparently due to suction; no fault being found in the navigation of the Brandon.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 197–199; Dec. Dig. ⊜94.]

In Admiralty. Suit for collision by C. W. Visser, master of the steamship Samarinda, against the steamship Brandon, with cross-libel. Decree for respondent on the cross-libel.

R. E. Lee Marshall, of Baltimore, Md., for libelant.

Edward E. Blodgett and Blodgett, Jones, Burnham & Bingham, all of Boston, Mass., for respondent.

ROSE, District Judge. At 4:25 on the afternoon of last Decoration Day two steamships came together in the Turn Channel, connecting the Brewerton with the Cut-Off Channel. The weather was clear. The ships had been in sight of each other during all the hour or more which had passed since they left the harbor of Baltimore, outward bound. The Brandon, the smaller of the two, was the first to leave her anchorage. She is an American vessel, 244 feet long, with a beam of 43 feet, and a gross tonnage of 2,431. She was heavily laden with coal, and drew between 20 and 21 feet.

The Samarinda flies the Dutch flag. She is much larger than the Brandon. Her length over all is 449 feet, with a beam of 55 feet; her gross tonnage 6,825. She, too, had on board a full cargo, which in her case consisted of grain belonging to the Dutch government. Both ships were seriously injured, and the owner of the cargo of the Samarinda suffered loss and was put to expense. The Brandon was libeled, both by the master of the Samarinda and by the kingdom of the Netherlands. Her owners replied by a cross-libel against the Samarinda. The usual order of consolidation has been made.

The matters in controversy, although difficult and important, lie within a narrow compass. When the Brandon entered the Fort McHenry Channel, she was three-quarters of a mile or more ahead of the Samarinda. The latter is a faster ship, and as the engines of both

were running at full speed the Samarinda gained on the Brandon. By the time the former had passed the turn buoy marking the intersection of the Fort McHenry with the Brewerton Channel, she was not more than from a quarter to half a mile behind the latter. Naturally enough the speedier boat wanted to pass the slower, and when at the point last mentioned so signified by sounding two blasts. The Brandon assented by returning the signal. The Samarinda came up with the Brandon about opposite the entrance to the Sparrows Point Channel, which is slightly over a mile and a half from the point at which the Samarinda was when the signals were exchanged. If at the time of signaling the Brandon was only a quarter of a mile ahead, the Samarinda must have traveled a mile and a half while the Brandon went a mile and a quarter. In other words, their relative speeds must have been about 6 to 5. But after the Samarinda caught up to the Brandon, and began to run along opposite her, a curious thing happened. The engines of neither of the steamships were touched until shortly before the collision, and then those of the Samarinda were speeded up somewhat, and those of the Brandon first stopped all together, and then put slow ahead. Nevertheless, for two miles the two vessels remained side by side. Shortly before the collision, as a result of the speeding up of the Samarinda and the stopping and slowing down of the Brandon, the bow of the former began to draw ahead, and then, before her stern had gotten past the Brandon's stem, the collision took place.

None of the facts stated are in dispute. By the time the Brandon reached the point of collision, the Samarinda should have been two-fifths of a mile beyond her. Why was she not? While the two ships were running down the channel side by side, the American boat was toward the starboard, that is, the southern and western, side of the center line of the channel; the Dutch, on the port, or northern and eastern, side. Each says, and each doubtless believes, that it kept within from 40 to 75 feet, or thereabouts, of the buoys on its side. The distance between the buoy lines of the Brewerton Channel is 600 feet. If each of the ships was as close to the buoys on its own side as it thinks it was, the distance between them must have been between 350 and 400 feet. The witnesses for the Samarinda, however, say that the distance was only 300 feet, and the impression of some of those who testified for the Brandon is that it was even less. I do not think it was ever more than 300 feet, and there is some reason to suspect that it may have diminished even before the two vessels changed their courses in passing out of the Brewerton into the Turn Channel. One of the experienced navigators produced as an expert by the Samarinda testifies that when two ships move along side by side in a narrow channel, as the Samarinda and the Brandon did, the tendency is for them to draw closer to each other. However that may be, it is certain that before the collision the Samarinda did approach the Brandon. When opposite bouy 3B, the two vessels changed their courses in passing from the Brewerton Channel to the Turn Channel. The outward bound course of the Brewerton Channel is southeast by east five-eighths east. The line of the bouys on the southernmost and westernmost side of the Turn Channel runs southeast one-eighth south; that is to say,

the latter course is 1¾ points of the compass more southerly than the former.

When the Brandon came to the turning bouy 3B, she accordingly made this 1¾ point change of course. She could not make a greater, for she was already running close, perhaps within 50 feet, to the bouys on her side of the channel. The Samarinda, when opposite bouy 3B, began to change her course 2 points to the south, and, according to the estimate of her pilot, completed that change and steadied on her new course in the time in which she went 50 feet forward. As a result, the Samarinda ceased to move on a course parallel to that of the Brandon, but adopted one which, to the extent of one-quarter of a compass point, converged upon it. The effect of this amount of convergence in the distance between 3B and 1B, about opposite to which latter point the collision took place, was necessarily to reduce the distance between the ships by 140 feet. If before the change took place they were as much as 300 feet apart, they would at the time of the collision, if nothing else had happened, have come within 160 feet of each other; and if the original distance separating them was only 200 feet, the new course would have brought them at the time of the collision within 60 feet of each other. Doubtless the 2 point change by the pilot of the Samarinda was the one usually there made. Under ordinary circumstances, it is a convenient one. An inspection of the chart will show that such change would bring the Samarinda to the entrance to the Cut-Off Channel on the starboard side of that channel, the proper position for her to take with reference to vessels which might be coming up inward bound. But the same inspection will show that there was no necessity to make such a change in course when it was made, for the buoy line on the northern and easternmost or Samarinda side of the Brewerton Channel extends more than half a mile beyond 3B to 14K, and there was plenty of room for the pilot of the Samarinda to keep entirely clear of the course of the Brandon. In view of the proximity of the latter vessel, the Samarinda had no right to put herself on a course which would necessarily converge upon that of the Brandon.

Of course, if the Samarinda drew ahead of the Brandon sufficiently to be clear of her before she came close enough in any wise to embarrass her navigation, no harm would result; but when the Samarinda chose unnecessarily to lay her course toward that of the Brandon, she, the overtaking vessel, assumed any risk which that maneuver might occasion. In view of the way in which the two vessels had kept side by side for two miles or more, the pilot of the Samarinda was not justified in assuming that before the two courses came close together he would be well ahead of the Brandon and out of her way. It is true that the Samarinda was the faster vessel, and he not unlikely knew that fact; but, if he did know it, he should also have appreciated that something out of the ordinary was happening, when the two ships had for so long kept side by side. The widening of the channel at the turn gave him an opportunity to break whatever force was keeping the two vessels together, by putting a greater distance between them. He decided to bring them closer together. Just about the time the

change of course was made the captain of the Samarinda had directed the engineer to speed up his engines, and two more revolutions were given to them. About the same time, probably a little later, those on the Brandon noticed that the course of the Samarinda was approaching theirs. They became somewhat apprehensive, and her master stopped the engines for one minute, and then went slow ahead, in order, as he explains, to keep control of his ship. As a result of speeding up on the Samarinda and of the stopping and slowing down of the Brandon, the Samarinda began to draw ahead. At the moment at which the thing happened which was the immediate cause of the collision, it is probable that about two-thirds of the length of the Samarinda, or say 300 feet of that ship, was forward of the stem of the Brandon.

Up to this point there is no special conflict in the testimony. Estimates of distances of course vary, but within quite moderate limits. Nor is there any controversy as to what next happened, although the cause of it is much disputed. The ships being in the relative position just stated, the bow of the Brandon was seen to turn in toward the Samarinda, and so sharply that she presently struck the Samarinda with her anchor and the bluff of her bow, about 68 feet forward of the Samarinda's stern. The turn the Brandon made was so sharp that the pilot on the bridge of the Samarinda as the vessels came together was able to see the Brandon's propeller along the starboard side of that ship. The sheer was one apparently of unusual suddenness and extent. What caused it? The Samarinda suggests two alternative answers. A number of its people claim to have seen the man at the wheel on the Brandon steering directly into the Samarinda. That might have happened; but it is highly improbable, and such an explanation is not to be accepted, unless it is clearly made out. Now, the trouble about accepting it at all is that the men who swear they saw it swear also to have seen much that they, by no possibility, could have seen. The best that can be said for them is that they have allowed their imagination to run far beyond their observation. They swear to have seen between one-half and one-third of the wheel, or 15 inches of the wheel, or a foot and a half of the wheel, 2 feet of the wheel, and so on, when the unquestioned and unquestionable fact is that, even if the vessels had been 442 feet apart, instead of probably less than 200, no part of the wheel proper, and only 2 inches of the upper part of its spokes, could possibly have been seen by any one of them. This explanation of the disaster may be definitely rejected.

The other contention advanced by the Samarinda to explain what took place is that the Brandon had an insufficient area of rudder, and in consequence steered badly, and was liable to get out of hand, and did so. The Brandon had originally been built for the lake trade. She was then equipped with a balanced rudder, the aggregate area of which was about 112 square feet. Since the outbreak of the European War, many lake vessels have been brought around to the coast. The Brandon was one of them. Her balanced rudder was then taken out, and she was equipped with a form of rudder generally used in

the ocean service. These changes were made under the direction of Mr. George Simpson, a naval architect of national reputation. The area of the new rudder was some 78 to 80 feet. Mr. Laverie, the chief surveyor to the Bureau Veritas, and Mr. Babcock, a consulting engineer and naval architect, testified that in their opinion the new rudder had not sufficient surface. There are standard tables, of one set of which Mr. Simpson is the author, which give rudder areas required for ships of various sizes, shapes, speeds, etc. The experts for the Samarinda do not attempt to say that the ocean rudder of the Brandon did not come up to these requirements. They say, however, that what is the necessary area of a rudder is, after all, a matter of experience and to some extent varies with each vessel; that, if the Brandon had 112 square feet of rudder on the lakes, it was presumably because it was there found she needed 112 square feet, and, in their view, she would need no less on the ocean. Mr. Simpson replies that the part of the balanced rudder forward of the stock is of little or no use in going ahead. Its purpose is to make the boat answer quickly when she is going astern, and there is little occasion for such a rudder in ocean work. Then there is testimony that, after the Brandon was equipped with her original ocean rudder, there was difficulty in steering her in heavy seas and strong tidal currents. There is no doubt that both she and her sister ship were very unsteady under such conditions. This made them uncomfortable, and in rough water reduced both their speed and their steering qualities. For the purpose of correcting these defects, their owners, by the advice of Mr. Simpson, last spring had them fitted with bilge keels, and a plate some 9 or 10 feet in area was added to the upper part of the rudder, so that it approached nearer the surface of the water.

In the position in which this addition was placed, the experts for the Samarinda say that under ordinary conditions it would have little or no effect in improving the steering qualities of the vessel. Mr. Simpson says that no improvement in those qualities in ordinary conditions was wanted. The purpose was to assist the bilge keels in keeping the ship steadier in heavy seas and strong currents, and by so doing to improve her steering qualities. The equipping of the Brandon with the bilge keels and the additional rudder piece took place a month or more before the collision. Since then she has been in very nearly continual service between Baltimore and Boston, and has made quite a number of voyages. She has docked and redocked in Baltimore, with tugs and without them, and alone and with tugs has, ladened and unladened, traversed channels only a hundred feet wide. She has repeatedly gone through the Cape Cod Canal without assistance, and with one exception all the witnesses, who have testified from actual experience or observation of her since she was so equipped, say she has steered well—quite as well as ordinary ships. The man at the helm at the time of the collision says he had trouble in steering her down from Baltimore that afternoon, but he afterwards explained that all he meant was he had to watch her to keep her on her course. The contention of the experts for the Samarinda is that if she steered badly before the bilge keels were put on her, and the piece added to

her rudder she would continue to steer badly afterwards; but I think a sufficient answer to that contention is that there is no evidence that she did steer badly before those changes were made, except under conditions which did not exist in the smooth waters of the Patapsco river on a pleasant spring day, and that the changes which were made did tend to remove the cause which had led her to steer badly under other and more difficult circumstances. From the testimony I cannot find that any defect in the steering apparatus of the Brandon caused or contributed to the collision.

What explanation does the Brandon give of her change of course? She says that she was the victim of what the books call the force of suction, a name which, in the opinion of those believed to be expert in the phenomenon, does not describe with precise accuracy what actually takes place. There does not seem to be any special difference among the theoretical experts, the practical seamen, and the reported cases that this force may manifest itself in various ways. When a larger vessel overtakes a smaller, the bow of the latter may be thrown violently away from the former, and necessarily her stern drawn closer. If this tendency fails to manifest itself, or, manifesting itself, is controlled, and the overtaking vessel comes up abeam of the overtaken, and they proceed on parallel courses, beam to beam, or nearly so, the overtaking vessel may accelerate the speed of the overtaken. For 20 years or more practical mariners have known that this sometimes takes place, and when it does they say one ship tows the other. The Ohio, 91 Fed. 551, 33 C. C. A. 667.

In this tendency must be found the explanation of how it was that these two ships of unequal speed kept together for the two miles or more from Sparrows Point to, or nearly to, the place of collision. And then sometimes, when the larger, faster, and overtaking vessel draws ahead, the bow of the smaller and overtaken vessel is drawn in toward its neighbor. It is only rarely that anything of this kind happens, and yet all agree that when it does happen, and when the movement once starts, it sometimes cannot be stopped at all, and, if it gets well under way, never can be stopped. Why it should manifest itself sometimes, and much more frequently should not, why it should exhibit itself so suddenly and irresistibly on some occasions as to defy all efforts to counteract it, and on others so slowly that it can be checked, nobody knows. The relative sizes, shapes, and speeds of vessels, the width of the channel, the conformation of the bottom, and other things have their influence. It is sufficient, however, for the purpose in hand, that the danger of the smaller and overtaken ship being rendered unmanageable by the movements of the larger, faster, and overtaking ship is a known one, the possibility of the happening of which the overtaking ship is bound not unnecessarily to increase. Perhaps it would be accurate to state its duty in still more onerous terms, but that question may remain unanswered until the occasion for its answer arises. In this case it is enough to say that, as has already been pointed out, the Samarinda came unnecessarily close to the Brandon, and was thereby in fault, and from that fault the collision followed.

The duty of the overtaken vessel is to keep her course and speed.

Some criticism has been made by the Samarinda of the action of the captain of the Brandon in first stopping and then going slowly ahead; but his critics are not at one as to what he should have done. One thinks he should have reversed; the other that he should have simply slowed down, and not have stopped. I am not prepared to find any fault in what he did, even if it is possible, as is not shown, that something else might have turned out better. The other vessel was crowding down on him. It had created the difficulty. The master of the Brandon was forced by the Samarinda to take some measures of precaution. The testimony does not satisfy me that those he took were not such as would commend themselves to a capable and experienced mariner under the circumstances in which he found himself, and, moreover, I think it most unlikely that what he did in any wise contributed to the collision which followed shortly thereafter.

It follows that the libels against the Brandon must be dismissed, and that of its owners against the Samarinda sustained. The Brandon may have a reference to ascertain its damages, if they cannot be otherwise determined.

KEY et al. v. WEST KENTUCKY COAL CO. et al.

(District Court, W. D. Kentucky, at Owensboro. December 2, 1916.)

1. REMOVAL OF CAUSES ⟸110—REMOVAL AFTER REMAND—FILING SECOND PETITION.

Where an action against a citizen of the same state as plaintiff and a foreign corporation was remanded to the state court, after removal on the ground of separable controversy and collusive joinder of parties to prevent removal, a second petition for removal on the same grounds, but alleging that no cause of action was stated against the citizen, which petition was filed before the trial, and while the citizen was still a party, did not entitle plaintiff to removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 236; Dec. Dig. ⟸110.]

2. REMOVAL OF CAUSES ⟸86(3)—PETITION—NECESSITY.

A foreign corporation, jointly sued with a citizen of the same state as plaintiff, is not entitled to removal on a motion after a trial at which the verdict was in favor of plaintiff against the foreign corporation only, no petition sufficient under the statute having been filed after the verdict, particularly where the cause had been remanded by the federal court after removal on a prior petition alleging separable controversy and fraudulent joinder of the parties.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 171; Dec. Dig. ⟸86(3).]

3. REMOVAL OF CAUSES ⟸107(4)—EFFECT OF REMAND—REVIEW OF SUBSEQUENT PROCEEDINGS IN STATE COURT.

Where a cause removed on the grounds of separable controversy and collusive joinder is remanded, the federal court cannot review the testimony presented to the jury in the state court, or act upon it, even if it establishes either of the grounds urged for removal.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 227; Dec. Dig. ⟸107(4); Appeal and Error, Cent. Dig. § 725.]

4. REMOVAL OF CAUSES ⊂⊃110—REMOVAL AFTER REMAND—SECOND PETITION.
A second petition for removal cannot be filed, except where before trial on the merits the suit is changed by plaintiff's act, so as to be for the first time brought within the removal statute.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 236; Dec. Dig. ⊂⊃110.]

5. REMOVAL OF CAUSES ⊂⊃79(7)—TIME FOR FILING PETITION—EFFECT OF AMENDMENT.
If a petition for removal is filed promptly after the plaintiff by amendment first brings the cause within the removal statute, it is in time.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 145; Dec. Dig. ⊂⊃79(7).]

6. REMOVAL OF CAUSES ⊂⊃107(6)—PETITION FOR REMOVAL—AMENDMENT.
Leave to file an amended petition for removal cannot be sustained at the hearing of the motion to remand.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 178, 229; Dec. Dig. ⊂⊃107(6).]

At Law. Action by Clarence Key and his guardian, Joseph Waggoner, against the West Kentucky Coal Company and another. On motion to remand to the state court. Motion sustained.

C. J. Waddill, of Madisonville, Ky., for plaintiffs.
W. J. Cox, of Madisonville, Ky., and W. P. Sandidge, of Owensboro, Ky., for defendants.

EVANS, District Judge. This action was commenced in the Webster circuit court on June 16, 1915, on a claim for $30,000 damages for personal injuries to an infant employé. The plaintiffs and the defendant Elswick are citizens of Kentucky. The West Kentucky Coal Company (which we shall call the Coal Company) is a citizen of New Jersey by virtue of its incorporation in that state. It filed its petition for the removal of the cause upon the two grounds, stated generally, of separable controversy and the joinder of Elswick as a defendant with the fraudulent intent to thereby prevent the removal of the case to this court. This petition was filed on July 5, 1915, and a proper bond was tendered and approved by the state court. On the same day that court denied the petition for removal, but in its order doing so reserved the right of further control over the matter after the case had been tried on the merits. The Coal Company then demurred specially and also generally to the petition, but neither demurrer was sustained by the court, and on the same day the Coal Company filed its answer. On that day, also, Elswick filed a general demurrer to the petition, which being overruled, his separate answer was filed. On July 20, 1915, the plaintiff filed a reply to the answer of the Coal Company. Afterwards a transcript of the record was filed in this court by the Coal Company, and the plaintiff moved to remand the action to the state court. This court, being in doubt about its jurisdiction, followed the general rule obtaining in such situations, and on November 29, 1915, sustained the motion to remand.

Subsequently the case was set for trial in the state court on the 11th day of April, 1916. On that day, and before the trial was begun, the Coal Company filed another petition for removal, stating therein, but

more in detail, the same general grounds as those stated in the original petition for removal, and tendered another bond, which was also approved by the state court. On April 12, 1916, this petition for removal was also denied by the state court, and thereupon the Coal Company filed an amended answer to the merits. On April 13th the trial of the case before a jury was begun. On the 14th, the case having been heard, the jury, by a vote of nine of its members, returned a verdict in favor of the plaintiffs for $10,000 damages against the Coal Company, but said nothing as to the issue between plaintiffs and Elswick. The state court, from this silence, inferred a verdict for Elswick, and accordingly adjudged that the plaintiffs recover $10,000 against the Coal Company, but nothing from the defendant Elswick, and dismissed the action as to him. Before the case was submitted to the jury the defendant Coal Company had moved the court to instruct a verdict in its favor, and defendant Elswick had also made a similar motion, but these motions were overruled. After the verdict had been rendered, but before the judgment thereon had been entered, though without filing another petition for removal, the Coal Company "re-entered" its "motion" to remove the case to this court. This motion was overruled. In this situation the Coal Company again filed a transcript of the record in this court, and the plaintiffs have again moved to remand the case to the state court. It is thus that the interesting questions before us have been raised.

As has been seen, the Coal Company, on July 5, 1915, filed its petition for the removal of the suit to this court. This was within the time for answering as fixed in the state practice, and conformed, in that respect, to the provisions of the removal act. When on the same day the state court denied the petition for removal, the Coal Company filed its answer to the merits—a step which did not waive its rights under the petition for removal. Railroad Co. v. Koontz, 104 U. S. 14, 26 L. Ed. 643. The second petition for removal set up grounds substantially similar to those stated nearly a year before in the first petition for removal, except that in the second petition it was alleged that no cause of action was stated in plaintiffs' petition against Elswick. The latter fact, however, is not a statutory ground for removal, though it sometimes becomes an important factor in considering grounds that are statutory, as, for example, it may show that a defendant is a mere nominal party, whose presence, for that reason, should not prevent removal.

[1] Was the second petition filed within the time prescribed by the removal statute? and did the status of the case *at the time it was filed* justify that proceeding? are two important inquiries. Certainly it did not *then* appear from the record or the petition for removal that there had been any change in the situation of the parties since the final disposition of the first effort to remove, and the plaintiffs had taken no step which dismissed out of the case the defendant Elswick. In the case of Powers v. Chesapeake & Ohio Ry. Co., 169 U. S. 93, 18 Sup. Ct. 264, 42 L. Ed. 673, there had been filed a petition for the removal of the action to the Circuit Court because of a separable controversy and the fraudulent joinder of certain local defendants. The transcript of the record having been filed in the Circuit Court, the plaintiff moved

to remand the case. This motion was sustained. Afterwards, when the case came before the state court, the plaintiff, in advance of a trial, voluntarily dismissed the action against the citizens of Kentucky, as to whom it had been alleged that there was a separable controversy and a fraudulent joinder. At once, but after that dismissal, the non-resident defendant filed another petition for the removal of the case, therein disclosing a right to remove by showing that the suit had become one which was solely between a plaintiff and a defendant of diverse citizenship. The case being thus removed to the Circuit Court, a trial was had there, with the result that judgment was rendered in favor of the defendant. After a hearing in the Circuit Court of Appeals, the question of jurisdiction was certified by it to the Supreme Court, which sustained the removal, and affirmed the judgment rendered by the Circuit Court, upon the distinct ground that the second petition for removal showed that *when it was filed* there existed the requisite diverse citizenship, and that the last petition was in time, because it had been filed in the state court as soon as the difficulty in the way of a removal had been taken out of the case by the plaintiff himself. The Supreme Court held that not until after the dismissal of the case against the Kentucky defendants had the record shown a state of fact which authorized the removal, but that simultaneously with that dismissal there for the first time appeared a controversy solely between a citizen of Kentucky and a citizen of another state, which state of fact was shown in the last petition for removal. But, while sustaining the right to file a second petition under such circumstances, the Supreme Court distinctly held that such step must be promptly taken in order to bring the case within the time fixed in the removal act. So that we see from that opinion that two things must concur to vindicate the filing of a second petition for removal, namely, the appearing in the record for the first time of a state of fact which authorizes the removal and the prompt filing by the defendant of a new petition showing the facts as they then exist.

The Coal Company here did not wait until the obstacle had been removed, but in advance of a trial on the merits, and when the result of such a trial could not be known, filed the second petition. It did this at a time when the *record,* so far as the grounds of removal based on separable controversy and fraudulent joinder were concerned, was in the same situation as when the first petition had been filed, except that the question on those grounds had become res adjudicata so far as this court had power over it. In no way can we see how the case was open to removal at the time the second petition was filed, because, first, the status had not been changed since it was first removed, and, second, because the last petition for removal did not itself show a controversy solely between citizens of Kentucky on one side and a citizen of New Jersey on the other; Elswick, a citizen of Kentucky, being still a defendant.

[2] While a different situation, at least of fact, was presented after the verdict in favor of Elswick, it in no way aided the Coal Company's claim of right to remove. The action had been tried in invitum and on its merits by the jury, and while the verdict was against the Coal

Company it was in favor of Elswick. Nevertheless there had been a trial on the merits and a verdict which covered the case against both defendants equally.

The case of Fred. Springer v. American Tobacco Co. (D. C.) 208 Fed. 199, heard in this court in October, 1913, was a case where there had been a second petition to remove it from the state court. The last one of these was filed after the latter court, during the trial and after plaintiff's testimony had all been heard, had instructed a verdict in favor of that one of the defendants whose situation was similar to that of Elswick in this case. The verdict having followed this direction, a judgment was rendered in favor of that defendant. After that point had been reached, the American Tobacco Company, before any other step was taken in the trial against it, moved the court to remove the case to this court "on the petition heretofore filed." When the transcript was filed in this court the plaintiff moved to remand the case upon the grounds, first, that the defendant had failed to file a petition for such removal, and, second, had failed to file a sufficient petition therefor. In the opinion then delivered we said:

"It is difficult to escape the conclusion, and we must hold, that the judgment of this court on the motion to remand was a final, and, because not appealable, was an uncontestable adjudication of the question of the right to remove the case upon the petition filed in July, 1912. Certainly it was so upon the case as then presented by the record, and we cannot see how the Removal Act of 1887 or the Judicial Code has authorized a second petition for removal '*upon the same grounds*,' any more than did the Removal Act of 1875, as to which the Supreme Court expressed its judgment in St. Paul & Chicago R. R. Co. v. McLean, 108 U. S. 217, 2 Sup. Ct. 498, 27 L. Ed. 703. In Huskins v. Cincinnati, etc., R. R. Co. (C. C.) 37 Fed. 504, 3 L. R. A. 545, and other cases where the plaintiff, after the time for answering in the state court had expired, amended his petition so as to cause, for the first time, the amount claimed by him to exceed the jurisdictional amount prescribed in the act, it was held that the defendant, who theretofore had no right to remove the case, might at once present his petition and obtain that relief. It was held in Powers v. C. & O. Ry. Co., 169 U. S. 92, 101, 102, 18 Sup. Ct. 264, 42 L. Ed. 673, that, if the plaintiff discontinues his suit against one defendant who has the same citizenship as the plaintiff, the other defendant, whose citizenship is diverse to that of the plaintiff, may file even a second petition to remove the case, because theretofore the act and conduct of the plaintiff alone had kept the case from being one in which a removal was authorized. Such second petition would not be upon the same grounds as the first, but upon another. When the plaintiff voluntarily acts, and himself eliminates the only obstacle to a removal of the case, and thereby for the first time leaves the case open to that remedy, there seems to be no doubt that the right to remove may be made available, and in such cases the plaintiff is estopped from insisting that the petition to remove comes too late. Differing from those instructive cases, there was here, after the action was remanded, a trial on the merits, and by the judgment of the court, upon Gunther's motion, and not upon the motion of the plaintiff, Gunther, upon plaintiff's testimony, was adjudged not to be liable for plaintiff's demand, and we think this disposition of the case on the merits as between the plaintiff and Gunther did not give the American Tobacco Company the right again to remove the case to this court. This question seems to be expressly ruled in Whitcomb v. Smithson, 175 U. S. 637, 20 Sup. Ct. 248, 44 L. Ed. 303; and see, to the same general effect, Kansas City, etc., R. R. Co. v. Herman, 187 U. S. 63, 68, 69, 23 Sup. Ct. 24, 47 L. Ed. 76."

It resulted that the motion to remand the Springer Case was sustained, as no petition for its removal had been filed adjusted to the lat-

est status. We see no reason to change the views then expressed, as the authorities cited were clear and explicit.

The present case differs from the Springer Case in this: That there the "motion" was made during the trial, but before the case had been disposed of as between the plaintiff and the Tobacco Company, while here the "motion" was "re-entered" by the Coal Company after both petitions for removal had been denied, and after the verdict as to both defendants had been returned by the jury, though before the judgment had been rendered thereon. This case, therefore, is hardly as strong in favor of removal as was the Springer Case. As it was in that case, so it is here, no petition had been filed showing a pending and untried suit solely between citizens of Kentucky and a citizen of New Jersey, whereby the defendant could, if possible, have met the condition which arose after the verdict of the jury had been returned. The filing of such petition was indispensable, if the defendant desired to present the question. A mere motion was not sufficient.

It seems, therefore, that nothing was open to the Coal Company except to ask, as it did, that the state court exercise any control it had left open to itself in the order of July 5, 1915. That court, in exercising this control, denied the motion to remove, and the Coal Company, of course, has the right to appeal the whole case to the Kentucky Court of Appeals, where the questions properly involved in the case may be heard and disposed of.

[3] There is, in such cases, no right of appeal to this court, and it is out of our power to review the testimony heard by the jury, or to act upon it, even if, after reading it, we should conclude that it was sufficient to establish either of the two grounds urged for the removal of the case.

[4, 5] Thus we find that several general propositions are very clearly established by the authorities cited, among them, that the removal statute does not authorize nor permit the filing of a second petition for removal, except where, before a trial on the merits, the plaintiff changes the parties by a dismissal of the local defendant, or where before, or even during, the trial he amends his pleading, and thereby increases the amount in controversy to a sum exceeding $3,000, exclusive of interest and costs, or himself does some other thing analogous to those mentioned. If plaintiff's suit is thus changed by his act, he thereby for the first time brings it within the removal statute. Then, if a petition is promptly filed showing those facts, it will be in time as well as effective, and the situation entitling defendant to remove will be the result of plaintiff's own acts, and not of a judicial decision made during a trial in invitum, such, for example, as an instructed verdict for the local defendant at the close of plaintiff's testimony.

It follows inevitably, we think, that the motion to remand the case to the Webster circuit court must be and is sustained.

[6] At the hearing of the motion to remand the Coal Company tendered and asked leave to file an amended petition for the removal of the action. We think this motion cannot be sustained at this stage, and it is overruled.

NELSON v. BLACK DIAMOND MINING CO. et al.

(District Court, W. D. Kentucky, at Owensboro. December 8, 1916.)

1. REMOVAL OF CAUSES ⟸36—DIVERSITY OF CITIZENSHIP—FRAUDULENT JOINDER TO PREVENT REMOVAL.
Where a citizen is fraudulently and collusively joined as codefendant with a foreign corporation with the sole intent to prevent a removal, the foreign corporation is entitled to removal.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 79; Dec. Dig. ⟸36.]

2. REMOVAL OF CAUSES ⟸86(10)—PETITION IN STATE COURT—ALLEGATIONS OF FACT—NECESSITY OF DENIAL.
Where there is no denial of the allegations of the petition for removal, they must be taken as true.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 179; Dec. Dig. ⟸86(10).]

3. REMOVAL OF CAUSES ⟸110—PETITION—NECESSITY—REMOVAL AFTER REMAND.
A case cannot be removed on a motion made in a state court, particularly after the motion to remand has been sustained by the federal court, but a petition conforming to the statutory requirements at the time must be filed.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 236; Dec. Dig. ⟸110.]

4. REMOVAL OF CAUSES ⟸90—ORDER BY STATE COURT—NECESSITY.
When a sufficient petition for removal is filed in the state court, and the proper bond given and approved, the cause is ipso facto removed, and no order of the state court is necessary.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 198, 199; Dec. Dig. ⟸90.]

5. REMOVAL OF CAUSES ⟸17—WAIVER—SUBSEQUENT PROCEEDINGS IN STATE COURT.
A defendant does not waive his right to insist on the removal of a cause of action by following the case in the state court after it is denied the right to remove.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 10; Dec. Dig. ⟸17; Courts, Cent. Dig. § 150.]

6. REMOVAL OF CAUSES ⟸109—JURISDICTION AFTER REMOVAL—EFFECT OF AMENDED PETITION.
The filing of plaintiff's amended petition on the merits after removal of the cause by defendant does not affect the jurisdiction of the federal court.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 235; Dec. Dig. ⟸109.]

7. REMOVAL OF CAUSES ⟸107(1)—FILING COPY OF RECORD—DELAY.
The failure to file the copy of the record in the federal court within the time required does not affect the jurisdiction of the court, and where the delay was caused by the continued prosecution of the case in the state court by plaintiff, and plaintiff filed an amended petition in the federal court, and then a motion to remand, not based, however, on the delay in filing the record, the court will exercise its discretion to permit the copy to be filed, and will not remand on that ground.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 228; Dec. Dig. ⟸107(1).]

At Law. Action by O. P. Nelson against the Black Diamond Mining Company and another. On motion to remand to the state court. Motion overruled.

D. M. Roll, of Greenville, Ky., and B. F. Proctor, of Bowling Green, Ky., for plaintiff.

S. C. Eaves, of Greenville, Ky., and W. P. Sandidge, of Owensboro, Ky., for defendants.

EVANS, District Judge. This action was brought in the Muhlenberg circuit court on August 14, 1914, by O. P. Nelson, a citizen of Kentucky, against the Black Diamond Mining Company (which we shall call the Mining Company), a citizen of Delaware, and W. B. Franklin, a citizen of Kentucky, for the recovery of $15,000 for personal injuries. On September 7, 1914, the Mining Company, after proper notice, filed in the state court its petition for the removal of the action to this court. This petition alleged that the citizenship of the respective parties was as above shown, and stated in detail facts which, not being controverted, amply show that the joinder of Franklin as a defendant was altogether fraudulent and collusive, and was made with the sole intent thereby to prevent a removal of the action.

[1] This petition, therefore, was sufficient in law under the rulings in Chesapeake & Ohio Co. v. Cockrell, 232 U. S. 146, 154, 34 Sup. Ct. 278, 58 L. Ed. 544, Russell v. Champion Fiber Co. (C. C. A.) 214 Fed. 965, and many other cases. The proper bond was given at the time and was approved by the state court. The case was thus effectively removed to this court, regardless of the fact that Franklin, a citizen of Kentucky, was a party defendant.

[2] No denial of any of the allegations of the petition for removal was in any manner made by the plaintiff, and they must be taken as true. Atlanta, etc., Ry. v. Southern Ry., 153 Fed. 122, 126, 82 C. C. A. 256, 11 Ann. Cas. 766; Dishon v. Cincinnati, etc., Ry. Co., 133 Fed. 471, 66 C. C. A. 345; Kentucky v. Powers, 201 U. S. 34, 26 Sup. Ct. 387, 50 L. Ed. 633, 5 Ann. Cas. 692.

The state court having refused to enter an order removing the case, proceedings progressed to a trial, at which that court instructed a verdict for both defendants. Judgment having been rendered accordingly the case was taken to the Court of Appeals, which court in January, 1916, reversed the judgment of the lower court as to the Mining Company, but affirmed it as to Franklin. The case was remanded by the Court of Appeals to the Muhlenberg circuit court, and on April 21, 1916, a motion was made and sustained to remove the case to this court. On May 15th for the first time a transcript of the record was filed here by the Mining Company.

[3] As we have very recently held in Key v. West Kentucky Coal Co., 237 Fed. 258, a case cannot be removed on a mere "motion" made in the state court, and particularly after (the transcript having been filed) a motion to remand the case has been sustained by the federal court. The statute does not authorize the removal of a case on motion. That must be done upon a petition which conforms to the requirements of the law at the time it is filed. Here, as we have seen, the case was

actually removed in September, 1914, though no attempt was made by either party to file a transcript of the record in this court until after all the proceedings in the state court to which we have referred had been had.

[4] However, as the petition for removal was per se sufficient, and as the proper bond was given and approved by the state court when the petition was filed, no order of the state court removing the case to this court was necessary. It was, ipso facto, removed by the filing of the petition for removal and the giving of the bond. Crehore v. Ohio, etc., Ry., 131 U. S. 243, 9 Sup. Ct. 692, 33 L. Ed. 144; Marshall v. Holmes, 141 U. S. 595, 12 Sup. Ct. 62, 35 L. Ed. 870; Stevenson v. Illinois Central R. R. (C. C.) 192 Fed. 958, and cases cited. Accordingly we shall treat the removal of the case as completed in September, 1914.

[5] The Mining Company lost none of its rights by following the case in the state courts, as has been clearly settled by the authorities. Powers v. Chesa. & Ohio Ry. Co., 169 U. S. 103, 18 Sup. Ct. 264, 42 L. Ed. 673, and cases there cited and many others. As has been stated, no transcript was filed in this court until May, 1916, nor was any motion made to remand the case until the one we are now considering was entered by the plaintiff on November 27, 1916. No question as to delay was raised, or perhaps thought of, when the transcript was filed here. Instead of afterwards objecting to the filing of the transcript, because of its being too late, the plaintiff, on June 22, 1916, filed an amendment to his own petition, endeavoring thereby to more perfectly state his cause of action against the Mining Company.

The plaintiff's motion to remand is in this language:

"Comes the plaintiff, O. P. Nelson, and moves the court to remand the above-styled cause to the Muhlenberg circuit court in and for the county of Muhlenberg and state of Kentucky on the grounds that this court is without jurisdiction to hear and determine this cause for the fact that plaintiff's petition alleges and plaintiff's proof shows a cause of action in favor of the plaintiff against each of the said defendants on account of the joint and concurrent negligence therein set out and therein contained, and that the said petition and proof show that the said defendant W. B. Franklin was and is a resident of the county of Muhlenberg and state of Kentucky, in which county and state said petition was filed."

It will be noted that in his motion plaintiff does not make the delay in filing the transcript a basis for his motion to remand the case. In this situation only two questions need be considered.

[6] First. Did the filing of the plaintiff's amended petition on the merits affect the *jurisdiction* of the court? We think not, as the statute does not so provide. Filing the amendment may, in effect, have been a consent by the plaintiff to the court's jurisdiction, and if no one of the parties to the action had been a citizen of Kentucky it would have been held to be binding under the ruling in Ex parte Moore, 209 U. S. at page 496, 28 Sup. Ct. 706, 52 L. Ed. 904, 14 Ann. Cas. 1164. Here, however, the plaintiff is a citizen of Kentucky and the defendant a citizen of Delaware. In the respect that one of the parties is a citizen of the state in which the suit was brought, this case differs from the Moore Case, and possibly it may be doubtful whether that ruling

applies, as, ordinarily, consent cannot give jurisdiction to the courts of the United States. If, however, the Moore Case does apply, our jurisdiction cannot be doubted.

[7] Second. The long delay in filing the transcript not being jurisdictional, what effect did that delay have on the rights of the plaintiff? Four circumstances should be noticed, namely, the fact that the delay was caused by the proceeding in the state court; the fact that at the time of amending his petition the plaintiff did not object to the delay in filing the transcript; the fact that the filing by the plaintiff of the amended petition was intended to perfect his cause of action in his own pending suit; and the fact that the plaintiff did not in his motion to remand insist upon the delay in filing the transcript as a ground for remanding the case. When these circumstances are considered together, we think the plaintiff must be held to have waived any objection to the delay in filing the transcript, and the court, in its discretion, may accept that waiver as binding upon the plaintiff. St. Paul, etc., R. R. Co. v. McLean, 108 U. S. 216, 2 Sup. Ct. 498, 27 L. Ed. 703; Railroad Co. v. Koontz, 104 U. S. 14, 17, 26 L. Ed. 643. Especially may this be so, as the continued prosecution of the case in the state court by the plaintiff after the removal may have caused the delay in filing the transcript here. 108 U. S. 216, 2 Sup. Ct. 498, 27 L. Ed. 703. While the statute requires great promptness in filing the *petition for removal* in the state court, later proceedings are regarded as modal and not jurisdictional. For this reason the court may exercise the discretion we have shown it to possess, and permit the filing of the transcript at a later date than the first day of the next succeeding term of the federal court, to which the case must go. Upon the facts appearing here we think the court's discretion may be as well exercised now as it could have been exercised at the time the transcript was filed.

In the opinion of the court the facts and circumstances to which we have referred and the authorities which we have cited justify the overruling of the motion to remand made on November 27, 1916, nearly six months after the filing of the plaintiff's amended petition.

The motion to remand is overruled.

MINDS et al. v. PENNSYLVANIA R. CO.

BULAH COAL CO. v. SAME.

(District Court, E. D. Pennsylvania. November 6, 1916.)

Nos. 2422, 2424.

1. PARTNERSHIP ⇐258(2)—INTERSTATE COMMERCE ACT—ACTION BY SHIPPER FOR DAMAGES—ABATEMENT.

The right of action given by the Interstate Commerce Laws to a partnership to recover damages suffered by it through the discriminatory acts and unfair practices of a railroad carrier is not lost in whole or in part by the death of one of the partners.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 564½, 590, 591; Dec. Dig. ⇐258(2).]

2. CARRIERS ⟸36—INTERSTATE COMMERCE ACT—ACTIONS BY SHIPPER FOR DAMAGES.

The damages in such an action are to be found by the jury on all the evidence, including the findings of the Interstate Commerce Commission, and in assessing such damages the jury may consider as an element the lapse of time between the incurring of the damages and the rendering of the verdict, not exceeding the equivalent in amount of lawful interest.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. ⟸36.]

At Law. Actions by James H. Minds and others and by the Bulah Coal Company against the Pennsylvania Railroad Company. Sur rules in arrest of judgment and for a new trial. Rules discharged.

Patterson & Gleason, of Clearfield, Pa., Henry W. Moore and John H. Minds, both of Philadelphia, Pa., and George M. Roads, of Pottsville, Pa., for plaintiffs.

Henry Wolf Bikle and Francis I. Gowen, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. These cases were, by agreement, submitted to the one jury and tried together. They arise out of the Interstate Commerce Laws and the Elkins Act (Comp. St. 1913, §§ 8563–8604). The controlling principles of law involved may be thus formulated:

[1, 2] After an order has been made by the Interstate Commerce Commission in favor of a complainant shipper against a railroad carrier for the payment of a damage award, proceedings brought in court because of the refusal of the carrier to comply with the order are properly for the damages sustained by the complainant (limited to the amount set forth in the pleadings), and such proceedings are de novo, and the damages are to be found by the jury under all the evidence, including the findings of the Commission, which are made evidence by the acts of Congress. The right of action given by the Interstate Commerce Laws to a partnership to recover damages suffered by it through the discriminatory acts and unfair practices of a railroad carrier is not lost in whole or part by the death of one of the partners. The common-law rule that personal actions die with the person has no application. The jury, in assessing damages, may consider as an element the lapse of time between the incurring of the damage and the rendering of the verdict, and allow for this in the assessment. Such element of damage, however, could not exceed the equivalent in amount of lawful interest. These principles are in consonance with and can be deduced from the rulings in a number of cases, of which it is sufficient to refer to Texas Ry. Co. v. Abilene Co., 204 U. S. 442, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075; I. C. C. v. Alabama Ry. Co., 168 U. S. 174, 18 Sup. Ct. 45, 42 L. Ed. 414; Western N. Y. v. Penn Co., 137 Fed. 343, 70 C. C. A. 23; P. R. R. v. Clark, 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406. We can get a sufficiently clear view of the instant cases to which these broad principles are to be applied through an outline statement of the main facts, followed by a more particular statement of the special points now made.

The plaintiffs are mine owners or operators. The defendant is a railroad carrier, within the meaning of the law regulating interstate commerce. The plaintiffs deemed themselves the victims of discriminatory rules and practices of the defendant in its car distribution. A complaint was made to the Commission. This coupled a request for administrative rulings with a demand for an award of damages. The Commission condemned the regulations of the defendant and formulated the just rule of car distribution, convicted the defendant of discrimination, and found the plaintiffs to have been damaged, and the amount of the damage. An order was accordingly made in favor of the plaintiffs. This order was not complied with by the defendant, and it was followed by the bringing of these actions. The basic question, the answer to which supplies answers to most of the questions now involved in the cases, is presented in these queries: What is the plaintiffs' right of action? Is it an action for damages, or is it limited to an enforcement of the order of the Commission so far as in favor of the plaintiffs? Important obvious consequences flow from the answer to this question. The answer must be sought in the acts of Congress.

The genesis of these laws will afford us some light. The evils which it was the purpose of the law to suppress are too glaring to call for statement. They arose out of the acts and practices of the carriers. The law condemns them as unlawful, imposes a penalty, and gives (which is the feature with which we are now concerned) a right of action to any person injured. Many, if not the main, features of such a law must be administrative and remedial. In consequence the carriers were required to file schedules of the rates and regulations adopted. A commission was constituted to determine the fairness of such rates and regulations, to annul them if unjust or discriminatory, and formulate just regulations in their stead, and modes of redress to the injured party were provided. It is to be observed that the carriers in the first instance may file, and, indeed, are required to file, schedules and regulations approved only by themselves. The responsibility, however, is imposed upon them to see to it that the regulations comply with the law. If they do, although loss results, there is no injury in the legal sense. If they do not, the resulting damage becomes a legal injury, for which a right of action is given.

The remedies provided are these: Any form of action, otherwise open to the injured party, is preserved to him. He is given the right to resort to an action at law, or he may, at his option, ask the Commission to award him damages. If he brings his action at law, it is necessarily based upon two propositions: One is that the regulation of which he complains is unlawful, and the rule which he seeks to have established is the proper one. Whether this be a conclusion of law or a finding of fact is an academic distinction, but it must in fact appear. The other is the fact and amount of his damage. The first is an administrative question, and for obvious reasons is committed to the Commission, and to the Commission alone, to find. The second is a juridical question, which may be submitted to the courts, or to any tribunal having

the lawful power to determine it. The consequence follows that recourse to the Commission is only in part optional.

The administrative questions must be first determined by the Commission, because, if an action were brought at law, without this first finding, the plaintiff could not make out his case. His real option is this: He may submit the administrative question alone to the Commission, and thus, having established his right to recover his damages, may bring his action at law, and prove both his injury and the amount of his damages, or he may exercise the right given him by the statute by submitting both questions to the Commission. If he takes the first course, the action is one for damages and subject to well-known rules. If he takes the second course (as these plaintiffs did), what results? Had the right of trial by jury not been involved, Congress would doubtless have given the award of the Commission the effect of a judgment. The complainant, being a volunteer, is concluded by what the Commission does. The defendant is not concluded. If the defendant complies with the order, the plaintiff is done. If the order is not complied with, the plaintiff may have recourse to the courts (federal or state), setting forth his injury, the fact of his complaint to the Commission, and the order made thereon, and that it has not been complied with. In the words of the statute, the cause then proceeds as an action for damages, except that the findings of the Commission are made evidence, and the defendant must pay costs and counsel fees.

If this language of the statute is taken at its face value, and the action regarded as one for damages, the whole proceeding is simplified. If the view now presented by the defendant is taken, a host of baffling queries rush upon the mind. The obstacles which shut out this view may be summed up in the observation that, if such be the law, the defendant is given the undeserved advantage of being in a position in which it may gain, but cannot lose, and all it risks in this speculation are costs and counsel fees. In this view the jury would be required to find under all the evidence (including the order), not the damages (up to the limit of the award), but how much of the damage found by the Commission is shown by the evidence of the defendant at the trial to have been improperly allowed. Without meaning it as a statement of defendant's position, the practical effect may be presented by this illustration: If the Commission found a loss in tonnage of 1,000 tons, and a money loss of $2 per ton, and a consequent damage of $2,000, the plaintiff would be bound by each of these findings, but the defendant would not. If the defendant showed at the trial that the money loss per ton was only $1, the jury must apply this to the 1,000 tons found by the Commission, and could not render a verdict for over $1,000, notwithstanding that it also further appeared at the trial that the Commission had made another mistake, and that the true tonnage was 2,000 tons, and the actual damage $2,000. In other words, any mistakes made by the Commission against the defendant must be corrected by the jury; but mistakes made against the plaintiff cannot be corrected, notwithstanding the fact that one may offset the other.

This is inconsistent with the rulings in the cited cases, and under them we do not feel at liberty to consider the question an open one.

The action is one for damages, the proceedings in which are de novo, and in the nature of an appeal, with the added consequences ingrafted upon it by the act of Congress. Whether the jury could award a larger sum in damages than the Commission allowed does not arise here. It might be conceded that under the act of Congress the plaintiff was so limited, without affecting the character of the action as one for damages. This disposes of practically all of the questions raised. A formal disposition is made of all of them in the order in which they are set forth in the reasons for a new trial.

(1) We do not think the verdict excessive. There was a substantial reduction from the sum awarded by the Commission. This, under the act of Congress, would have been a supporting basis for a larger verdict. As the order is evidence, it cannot be said the verdict has no support in the evidence.

(2–6) The proposition advanced in the points upon which are based reasons 2, 3, 4, 5, and 6 is that a partnership, which suffers injury, loses its right to recover (in whole or in part) if one of the partners dies. We think this proposition was properly negatived. The minor point made as to the interregnum from April to October was in effect waived, and because of this not answered. Under the facts of the case there was no justification for insistence upon it. To have submitted it to the jury would have merely been confusing. To obviate the necessity of instructions the trial judge inquired of counsel whether there was any dispute over the dates as of which the damages were to be assessed. The reply was there was none. The main point was ruled against the defendant. It was invited, if not satisfied with the general answer, to ask for a specific answer to any point submitted. No answer was requested to this point. This waived the minor point, and we do not recognize the right of defendant to now complain.

(7–13) The points referred to in reasons 7 to 13, both inclusive, were answered in the general charge. Specific answers were waived by defendant. The point now made we understand to be that the charge was erroneous. Whether it was or not is determined by the correctness of the theory on which the case was submitted to the jury. The points submitted were affirmed, except in so far as they required the jury to find, not what the damage was (up to the limit of the award of the Commission) under all the evidence (including the award), but what the damage was under the findings of the Commission as corrected by the evidence submitted by the defendant. This has been sufficiently discussed. The points could not be affirmed categorically, because they ignore the provision of the act of Congress which makes the findings of the Commission (including the amount of the damages) evidence. They are as much evidence as are the items of which the damage is made up.

(13 and 14) Points 16 and 17 here referred to were affirmed.

(15) This point asked for binding instructions to the jury to find for the defendant. The point was negatived, and we still think properly so.

(16) The eighteenth point was based upon nothing in the case, and the court was not asked to answer it. If it is meant to invoke the rule which pertains in Pennsylvania of the consequences of delay in pay-

ment due to an unconscionable demand, the attention of the court should have been directed to this feature. In these cases no such question was raised.

The remaining 16 reasons are really duplications of those discussed (being stated separately in each case), except the sixteenth. This complaint has a real basis. We would not, however, feel justified in subjecting the parties to the delay and expense of a new trial because of the inadequacy of the charge in this feature. The reason is this: The testimony referred to was that of an intelligent and fair witness, with a firm grasp of the facts to which he testified. These were all bookkeeping or mathematical facts as he had no knowledge except that derived from the figures submitted to him. The trial judge had in mind the definite purpose to advert to this testimony and its application to the case, but he was diverted from this purpose, and it was forgotten. Counsel for defendant were in no way responsible for this lapse, and their client should not suffer for it. Nevertheless the fact is they did not call attention to the oversight. Neither was it the fault of the plaintiffs, and they are in no default, and the loss should not fall on them.

The rule for a new trial is discharged, and plaintiff may enter judgment in each case on the verdict.

HILLSDALE COAL & COKE CO. v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. November 9, 1916.)

No. 2446.

1. CARRIERS ⟸36—INTERSTATE COMMERCE ACT—ACTIONS BY SHIPPER FOR DAMAGES.

Any person claiming to have been damaged by a discriminating or otherwise illegal act of an interstate railroad company is given a right of action for damages by Interstate Commerce Act Feb. 4, 1887, c. 104, § 9, 24 Stat. 382 (Comp. St. 1913, § 8573), and his failure to first apply to the Interstate Commerce Commission is not jurisdictional, but affects only the matter of proof. If the act complained of is in accordance with a duly established and filed system or rule, he can only prove its unjust or discriminatory character by procuring a finding of such fact by the Commission, which has exclusive power to make such finding, and he may at the same time ask for an award for damages as provided in section 16 of the act, as amended by Hepburn Act June 29, 1906, c. 3591, § 5, 34 Stat. 590 (Comp. St. 1913, § 8584); but, if the act complained of is a departure from such established rules, he may prove such fact without resort to the Commission.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. ⟸36.]

2. CARRIERS ⟸36—INTERSTATE COMMERCE ACT—ACTIONS BY SHIPPER FOR DAMAGES.

Such an action, brought after an award by the Commission, is not one to enforce such award, but is in the nature of an appeal, taking into court only the original complaint or cause of action presented to the Commission, and triable de novo like any other civil suit for damages, except that, as provided by section 16 of the act, as amended by Hepburn Act

June 29, 1906, c. 3591, § 5 (2), 34 Stat. 590 (Comp. St. 1913, § 8584), the findings and order of the Commission are admissible, and are conclusive upon the administrative facts found, and prima facie evidence of the other facts therein stated.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 95; Dec. Dig. ⊂=36.]

At Law. Action by the Hillsdale Coal & Coke Company against the Pennsylvania Railroad Company. Sur rule for new trial. Rule discharged.

A. L. Cole and A. M. Liveright, both of Clearfield, Pa., for plaintiff.

Henry Wolf Biklé and Francis I. Gowen, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case is ruled by the principles of law discussed in Minds v. P. R. R. Co., 237 Fed. 267, in its larger aspect. The minor questions as set forth in the reasons for a new trial will, because of their number, be grouped into classes and disposed of in the order in which discussed by counsel.

[1] We are in entire accord with that part of the argument of counsel for defendant wherein the essential elements of a case at law are discussed. The point is often made as if it were one of jurisdiction. It is not that, but one of the presence or absence of the elements necessary to make out a case. A plaintiff, who brings his action at law for a cause of action arising under the provisions of the Interstate Commerce Law, must (as every plaintiff must) make out his case. If he has been damaged by a car distribution made in accordance with a system or rule of distribution adopted by a railroad carrier and filed with the Commission in accordance with the requirements of the statutes, he has not suffered a legal injury, unless the distribution be one of the character condemned by law. This he must prove, and he can prove it only by a finding of the Commission. In consequence he is driven to go first to the Commission for all the administrative findings. The reason for this lies on the surface of things. When, however, these have been found, either on complaint of our supposititious plaintiff or of some one before him, then he may bring his action at law and can recover. He can recover, because he can make out his case first by proving (through the finding of the Commission) that the system of car distribution enforced by the carrier defendant was unjust and discriminatory; and, secondly, that he has been damaged thereby, and to what amount. He is only compelled to go to the Commission when his case depends upon the administrative finding that the rule of car distribution of which he complains is an improper one. If the carrier has adopted and filed a fair and proper rule, or one has been found by the Commission, and the cause of action arises out of an unjust and discriminatory departure from it, causing damage, this fact may be established in an action at law, and no preliminary recourse to the Commission is necessary. The adjudged cases make clear the distinction by which it may be readily determined whether such recourse is necessary.

[2] The distinction indicated is not only consistent with, but is to be found in, the section of the act and the cases to which we have

been referred: Section 9, Act to Regulate Commerce; P. R. R. v. Clark, 238 U. S. 456, 35 Sup. Ct. 896, 59 L. Ed. 1406; Proctor v. U. S., 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091; Riddle v. Railroad, 3 Interst. Com. R. 230; P. R. R. v. International, 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; P. R. R. v. Puritan, 237 U. S. 121, 35 Sup. Ct. 484, 59 L. Ed. 867; Railroad v. Penn, 137 Fed. 343, 70 C. C. A. 23. To which may be added Barrett v. Gimbel Bros., 226 Fed. at page 631, 141 C. C. A. 379, the approved ruling being reported in (D. C.) 215 Fed. 1004, reference to which latter ruling is made merely as an expression of the views of this court already made. This further distinction is, of course, also clear, emphasizing the distinction already made. The complaining party is given an option or choice of the tribunal he will ask to assess his damages. When he has once made his election, he is (again of course) bound by it. He cannot follow an unsuccessful resort to one tribunal by taking the same claim of damages before another. What he can do, and what he must do, are sometimes coupled, and sometimes not. Both of them may be thus summarized:

1. If the question he asks to have determined is an administrative one, he has no option, but must make his complaint to the Commission, and cannot take it elsewhere.

2. If the questions are all and wholly juridical, he has the option (under the rulings of the courts, although the Commission has suggested a different view) of either bringing his action at law or complaining to the Commission.

3. If the questions necessarily arising are some of them administrative and some juridical, then he must first go to the Commission to have the administrative questions determined, but as to the juridical questions he still retains his alternative or optional right.

4. He may first apply to the Commission to have the administrative questions determined, limiting his complaint to this feature, and, if determined in his favor, may bring his action at law, establishing what may be called the administrative facts by putting in evidence the finding of the Commission and proving the juridical facts by any evidence at his command; or—

5. He may include in his complaint to the Commission both the administrative and the juridical elements of his case, and have them determine both and everything involved in his complaint.

If there had been no right of trial by jury involved, the supply of remedies provided by the act would doubtless have been stopped at this point. Because it was involved, Congress saw that something further was required. As the right of trial by jury was not involved in the administrative questions, the findings of the Commission as to them were made to conclude everybody. As the plaintiff would not bring the juridical questions before the Commission, except as a volunteer, the findings of the Commission were made to conclude him. As the defendant was not a volunteer, and as Congress wished to give to the carriers (whether it was a constitutional right or not) the right to a jury trial, the findings of the Commission were not made to conclude them. The carrier was therefore left at liberty to pay or not pay the award as it might elect. If it paid it, the complaint of the plain-

tiff was satisfied, and of course silenced. If it did not pay it, the plaintiff must have a further remedy, and this rei necessitate must be by a proceeding at law, because in no other way could the carrier be brought before a jury. He is therefore given (or there is restored to him) a right of action at law. To make use (as far as could be done) of the fruits of the labor and time expended in securing the report of the Commission, the findings are made evidence, and the plaintiff is allowed his costs and counsel fees. If, to paraphrase the language of Congress, this action, to which the act of the defendant has driven the plaintiff, is treated in all respects as an action for damages, except that all the findings of the Commission are made evidence, etc., all or nearly all troubling questions are eliminated. If the action is regarded as one to enforce the findings of the Commission, and they are further regarded as binding upon the plaintiff, but open to any attack by the defendant, then a veritable legal chaos reigns.

It will be seen to follow that in such final action the administrative findings must (as in the case of a first action at law) conclude everybody and settle the administrative facts. The facts to be found by the jury must be open ones to the defendant, and (at least may) be alike open to the plaintiff. The simplest view which might be taken of such a proceeding is that it is to be tried (with the exceptional features noted) precisely as the action for damages would have been tried, had the plaintiff gone first to the Commission to determine the administrative facts, and then brought his action; the administrative findings included in the report being treated as such preliminary findings. This would, however, open to the plaintiff the opportunity to go beyond the cause of action presented to the Commission, and would be inconsistent with some of the provisions of the act of Congress. All such inconsistencies disappear, however, if the proceedings are treated as in the nature of appeal proceedings, taking into court only the original complaint or cause of action presented to the Commission, but otherwise de novo, except for the evidentiary and other features ingrafted upon it by Congress, and with the administrative features conclusively established by the findings of the Commission, and the juridical facts open to be established by any otherwise proper evidence, and to be found under all the evidence, in the body of which is embraced the findings of fact by the Commission.

This question, so far as concerns the action of this court, is determined by the ruling just made in the case of Minds v. P. R. R. Co., tried before the instant case. The defense here was urged upon the same theory there presented. To present it as it strikes us (although it must be confessed not adequately) we will have recourse again to a few supposititious facts for illustrative purposes: A mine operator complains that the car distribution system of a carrier is unjust and condemned as unlawful by the Interstate Commerce Law; that under a proper regulation he would have received more cars than were supplied to him; that because of the unjust discrimination to which he has been subjected he lost 120,000 tons in tonnage shipment, and that in consequence he suffered a damage of $1 per ton on 70,000 tons of interstate shipments, or $70,000 in all. He submitted this complaint to

the Commission. They find with him on the first branch of his complaint, and find the carrier's system to be unjust and discriminatory. They find with him on the second proposition, and that the just and proper rule of distribution is that for which he contends, and that he was entitled to the number of cars he claims. They find against him in part, however, on the tonnage lost, by finding the total shipments lost were 90,000 tons, of which 30,000 were state and 60,000 interstate, and award him $60,000 damages. The carrier refuses to pay the award, and the complainant brings his action. At the trial the evidence shows the complainant had recovered for 50,000 tons in a state action for intrastate shipments. The carrier, therefore, asks that these 50,000 tons be deducted from the 90,000 total shipments found by the Commission, thereby reducing the interstate shipments to 40,000 tons, and the damages to $40,000. This he asks, notwithstanding it is also shown at the trial that the total shipments were 110,000 (not 90,000) and the interstate 60,000 tons, and the damages $60,000, as found. This is upon the theory, before stated, that the finding of 90,000 tons concludes the complainant, but does not conclude the carrier.

This theory runs through all the points submitted. Our conclusion, already several times stated, is that it is erroneous. A feature of the case which brings the concrete effects of the two theories in sharp contrast is afforded by the D. E. Williams & Co. complaint. The plaintiff had incorporated in its complaint a claim, not only for a reduction in the number of cars to which it was entitled under a proper rating, but also a further claim that Williams & Co., competitors of plaintiff, had been given more cars than the number to which they were justly entitled. The Commission found against the plaintiff on the fact. He sought to introduce evidence at the trial in support of this part of his complaint. The evidence was objected to on the same ground, that the plaintiff was concluded by the finding, and that this part of the claim was no part of the order. It was admitted, and its admission is now asserted to be error. If the action is merely to enforce the order made by the Commission, the logic of the rejection of this claim is irrefutable. If it is an action to recover the damages included in the claim upon which the Commission passed, the evidence is just as clearly admissible. This is the very thought expressed in the quoted phrase from the opinion in Railroad v. Penn, 137 Fed. 343, 70 C. C. A. 23. Everything is included in the order, which was in the complaint submitted to and determined by the Commission.

We do not see that the special statute of limitations written into the act affects the question. Unquestionably the plaintiff would not have this right, unless given to him. All the significance the limitation has is to compel him to resort to it within the named time. P. R. R. v. Clark, supra, is not in point in this respect. All the case rules in this aspect of it is that no action can be maintained in a state court unless the Commission has made an order. This right to sue in a state court is only another advantage given the plaintiff to compensate him for the nonenforcement of payment of the award. This disposes, so far as concerns this court, of 13 of the reasons filed—17, 18, and 23 to 33, both inclusive.

The effect of the judgment recovered in the state court has already in its main aspect been considered. It is embraced in five of the reasons filed—2, 3, 9, 15, and 16. The offer of this evidence and its effect would seem from the oral argument to have a triple aspect. There could by no possibility (meaning by this, legal possibility) have been a recovery in the state court for anything which by a like possibility could be recovered here. What was recovered in the state court is therefore now wholly irrelevant. Again the tonnage of intrastate shipments recovered for in the state courts would have no bearing upon the interstate shipments, unless the plaintiff is precluded by the finding of the Commission of the total tonnage. The evidence was offered, and its effect discussed, and the points submitted embraced only these two aspects. At the oral argument something was said (although abandoned in the written brief) of the proceedings in the state court being evidential of the interstate shipments because, the total shipments being shown, the greater the intrastate shipments, the less the interstate tonnage; and although we are not interested in the former for itself, we are concerned with it as evidence of the latter. The evidentiary basis is that of any self-disserving declaration.

Subscribing to the proposition, we do not feel justified in granting a new trial because of this for three reasons: We think this evidence should have been offered as such, and it is too late to now make the point. Again, all that was offered was the record of the verdict and judgment. This was proof of nothing, except the fact of recovery of the amount. Neither the statement of claim nor any averment of the tonnage was offered. In the third place, the evidence (although formaliy overruled) was admitted, and the fact sought to be proven was treated as in the case, because it was already in through the findings of the Commission. The evidence was therefore superfluously cumulative.

The measure of damage complaint is embraced in the twenty-second reason.

The charge to the jury was in accord with the rule laid down by the Supreme Court of Pennsylvania. This rule of admeasurement has been said to be open to a question of its correctness. Partly for this reason, but chiefly because there was no necessity to do so, the rule thus laid down was not followed as the rule of measurement to be applied. One way of proving damage would be that suggested by counsel for defendant. Ordinarily damages could be proved in no other way. Here, however, they were proven in another way, to wit, by the award of the Commission. The value of the coal not shipped and subsequently sold by the plaintiff may have been an element in the assessment of the damages, and gone to their reduction. The plaintiff was not bound to show what the proper amount of this reduction was, if the damage could be otherwise proved, and certainly the defendant could not claim the reduction without showing what it was.

The reasons for a new trial which counsel have grouped under the headings IV, V, and VI all go to the amount of the damage. As there was evidence, and sufficient and satisfying evidence, to support

the verdict, we cannot disturb it. It was the jury's place to find the amount of damage, and they have done so.

The final complaint is embraced in the reasons which go to the "delay in payment" item of damage. The charge does not happily express the accepted doctrine on this subject. We cannot find, however, that it took from the jury the power to find the amount of the damage, or misled them as to their duty. The quoted expressions from the opinions in the cited Pennsylvania cases are to be understood in the light of the facts to which they were addressed. There is nothing in the facts of this case to justify us in finding that the jury erred in this feature of their award of damages.

The rule for a new trial is discharged, and plaintiff may enter judgment on the verdict.

T. W. JENKINS & CO. v. ANAHEIM SUGAR CO.

(District Court, S. D. California, S. D. November 6, 1916.)

No. 355.

CONTRACTS ⊂=10(4)—VALIDITY—ENFORCEMENT.

Plaintiff, a wholesale grocer, agreed to buy all the sugar that it would require during the month of August from defendant at a fixed price. Ordinarily plaintiff required for its trade about 4,800 bags of sugar. Sugar greatly increased in price, and defendant declined to furnish the sugar desired by plaintiff. *Held*, that the contract was invalid for want of mutuality, for, notwithstanding the rule that a detriment to the promisee will operate as a consideration, the agreement by plaintiff to purchase only from defendant was no consideration, for plaintiff's business was such that it would not desire or require sugar unless it could be resold at an advance, and therefore plaintiff could not be required to purchase any sugar so long as it refrained from purchasing from others than defendant; this being true despite the validity of contracts to furnish necessary commodities for an established business which regularly requires a more or less definite quantity of such commodities.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 37; Dec. Dig. ⊂=10(4).]

At Law. Action by T. W. Jenkins & Co., a corporation, against the Anaheim Sugar Company, a corporation. On demurrer to the complaint. Demurrer sustained.

Carroll Allen and Bertin A. Weyl, both of Los Angeles, Cal., for plaintiff.

Gray, Barker & Bowen, of Los Angeles, Cal., for defendant.

BLEDSOE, District Judge. This is a suit for damages in the sum of $13,020, alleged to be due plaintiff because of defendant's breach of contract.

The complaint shows that plaintiff, in June, 1914, the time of the execution of the contract, was engaged in the wholesale grocery business in the state of Oregon, and that, in the carrying on of said business, it had many thousands of customers to whom it sold goods, wares, merchandise, and sugar. Apparently, from the allegations of

the complaint, it had no other business than that above mentioned. It is alleged that the defendant, at all times in question, was aware of the general nature and character and mode of the carrying on of the wholesale grocery business conducted by plaintiff.

Plaintiff also alleges that usually and ordinarily it required during the month of August each year, and had so required during the month of August for many years past, sugar, in bags, for sale by it to its customers at wholesale, in excess of 4,800 bags, and that defendant, at the time of the execution of the contract in question, was aware of the requirements of plaintiff in the behalf just referred to. Under these circumstances, on the 13th of June, 1914, plaintiff and defendant entered into an agreement in writing whereby defendant, a manufacturer of sugar, agreed to sell, and plaintiff, as a wholesale vendor of groceries, agreed to buy, all of plaintiff's "August requirements" of sugar at a fixed price of $4.20 per bag. No other terms, material to this controversy, were inserted. It is than alleged in appropriate language that plaintiff's requirements during the aforesaid month of August were, and it ordered of defendant, 4,800 bags of the sugar described in the agreement above referred to, but that in response to such order and demand defendant shipped and delivered to plaintiff only 600 bags of the sugar. Plaintiff then alleges that it was compelled, because of such refusal and default of defendant, to go into the open market and purchase 4,200 bags of such sugar, at a price amounting to $3.10 per bag in excess of the contract price, and it is because of such excess for the sugar so purchased that the action is maintained.

The case is before the court on demurrer, both general and special, to the second amended complaint, and I am persuaded that, in accordance with a ruling heretofore rendered by the court upon the original complaint, the general demurrer should be sustained at this time. The claim of defendant, of course, is that the contract as entered into is not supported by sufficient consideration to give it vitality; that it is void because lacking in mutuality; that it is one-sided in its entirety, in that the defendant, under any and all circumstances, could be compelled to furnish the sugar covered by the contract, but that plaintiff could in no wise be compelled by defendant to order and accept any sugar thereunder.

After very careful consideration of the particular circumstances of the case, upon reason as well as upon authority, I am constrained to accept defendant's contention. The books are full of cases, and the most important of them have been cited herein by plaintiff, to the effect that a contract binding one party to sell, and the other party to buy, all of the "requirements" of the latter's *established business* as to a given commodity, will be enforced, and this because of the fact that the ascertainment of such requirements is possible with sufficient definiteness and certainty; the subject-matter of the contract being thus rendered certain, in the face of the positive reciprocal obligations complete mutuality is secured, and a breach by either party can be the basis of relief to him who tenders or has given full performance. As a necessary element of this wholesome conclusion,

however, the courts have been forced to indulge in the presumption that the parties intended that the established business of the purchaser was to be carried on, substantially as of the time of contract, and that the purchase and *use* therein of the commodity forming the subject-matter of the contract would be but an *incidental* feature of the carrying on of such established business. Thus, contracts for the purchase and sale of all the ice needed for a hotel, all the coal required for a line of steamships, all the castings required for a certain manufactured product, have been upheld and enforced. It will be observed that the principle involved, and which is reflected in all of the cases, with the exception of but one or two to which attention will be directed, has to do with a purchase by, and a sale for the use of, an established business, in which, presumably, as above adverted to, the use of the commodity purchased is but an *incident* to the carrying on of the business itself, and because of which fact, therefore, the presumption can be indulged in that the business will be carried on, and the incidental use of the commodity will continue, substantially as intended by the parties, entirely irrespective of any rise or fall in the price of the commodity itself.

At the very threshold of the present case, however, we are met by the fact that the business of plaintiff is not that of manufacturing, or of similar import, in which its use of sugar would form but an incident of its general business, but it is that alone of *selling* sugar and other articles at wholesale. It buys such sugar, presumably, only as it can sell at a profit at current market prices, and it refrains from buying sugar which, because of a fall in price, it will be unable to sell, except at a loss to itself. Here the presumption which is indulged in and is referred to in many of the cases cited has no application or play, because of the fact that the purchase and use of the commodity in question becomes, under such circumstances, not an incident to the main business of the purchaser, but the main business itself. Any fluctuation in the price of the commodity, especially if of generous proportions, as in the case at bar, inevitably affects the use of the commodity by the purchaser, and tends to negative the presumption that the business will continue substantially as intended by the parties. In this view of the case, the supposed "requirements" of the plaintiff in its wholesale business are not the requirements of an established manufacturing or similar business, as the phrase is used in the reported cases. Presumably plaintiff, during a given period, will "require" in its business just the amount of sugar it can sell. It will sell the amount of sugar it can dispose of at a profit; the greater the profit, the more it will dispose of; if it can dispose of none at a profit, it will require none.

The situation can be stated concretely in a few words; plaintiff had contracted for all the sugar it would "require," meaning, of course, in its particular business, all it could sell, at the fixed price of $4.20 per bag. Before the contract became operative, the price of sugar in the market rose to $7.30 per bag. It needs no argument to show that, with an unlimited supply—its "requirements"—at $4.20, there would be brought into play no particular effort or business sagacity on the

part of plaintiff to effect sales at a handsome profit with the general market price firm at $7.30. To presume that it would not so conduct itself is to go counter to human experience. On the contrary, if the market price had fallen considerably, plaintiff would have refused to sell, save at a profit on its own purchase price, in which event none would have been so foolish as to buy, or it would have instructed its solicitors that it had no sugar at all to sell. In either event, its "requirements" would have been the same, to wit, practically nil. It would have bought no sugar from third persons, and would therefore have committed no breach of its engagement with defendant. To presume otherwise would be to disregard the most obvious motives of self-interest.

The exact position of the parties and the consequent invalidity of the contract relied upon is portrayed with such clearness and cogency in the decision of the Circuit Court of Appeals for the Seventh Circuit in Crane v. Crane, 105 Fed. 869, 45 C. C. A. 96, that further comment upon it herein would seem to be a work of mere supererogation. Speaking of a similar contract, which was held invalid, Judge Grosscup said:

"Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued. On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error —whose whole interest is embodied in the prices obtainable—in a situation to either go on, or to discontinue, as such interest develops."

The cases relied upon by plaintiff are Lima Locomotive & Machine Co. v. National Steel Castings Co., 155 Fed. 77, 83 C. C. A. 593, 11 L. R. A. (N. S.) 713; Manhattan Oil Co. v. Richardson Lubricating Co., 113 Fed. 923, 51 C. C. A. 553; Marx v. American Malting Co., 169 Fed. 582, 95 C. C. A. 80; Golden Cycle Mining Co. v. Rapson Coal Mining Co., 188 Fed. 179, 112 C. C. A. 95; A. Klipstein & Co. v. Allen (C. C.) 123 Fed. 992; Sterling Coal Co. v. Silver Spring Bleaching & Dyeing Co., 162 Fed. 848, 89 C. C. A. 520. These, and other cases based upon similar states of fact, which have been examined, though not cited by plaintiff in its brief, announce the doctrine adverted to hereinabove, and with which this court is in entire harmony, that an agreement to buy and sell the "requirements" of an established business, in which the use of the thing "required" is but incidental to the carrying on of the business itself, is valid and will be upheld. It is also true, as contended by plaintiff, that the

courts have departed from their earlier holdings (e. g., Bailey v. Austrien, 19 Minn. 535 [Gil. 465]); and that the well-established tendency now is to hold contracts for the purchase of an article "required," or "needed," or "wanted" for such an established business to be valid. If the amount of the commodity to be purchased under the contract is determinable by the mere "wish," "desire," or caprice of the purchaser, the courts are still unyielding in their disapproval. Kirk Soap Case, 68 Fed. 791, 15 C. C. A. 540.

No court, however, in so far as I have been able to ascertain, with the exception of the two cases now to be mentioned, has held that a contract for purchase, not for use in an established business, but for sale only, under circumstances similar to the case at bar, is valid. The Supreme Court of Illinois in Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774, 31 L. R. A. 529, did hold that a contract for the purchase and sale of the "requirements" of defendant coal company "engaged in the purchase, *use*, and sale of coal in its business" was valid. Aside from the fact that the purchaser in that case not only expected to sell coal, but to use it as well, the point considered herein and determined adversely to plaintiff's contention in Crane v. Crane, supra, was not made or considered therein. In addition, the conclusion of the court with respect to this branch of the case is based entirely upon the cases of National Furnace Co. v. Keystone Manufacturing Co., 110 Ill. 427, and Smith v. Morse, 20 La. Ann. 220, both of which had to do with circumstances similar to those in the cases cited by plaintiff, and in which the requirements were for an established business other than that of the sale of the precise commodity in question. The same situation existed in Hickey v. O'Brien, 123 Mich. 611, 82 N. W. 241, 49 L. R. A. 594, 81 Am. St. Rep. 227. The only authority therein cited in support of the conclusion reached was the National Furnace Company Case, which was not applicable under the circumstances shown. The conclusion of the Circuit Court of Appeals of the Seventh Circuit in the Crane Case, hereinabove referred to, finds support, in my judgment, in A. Santaella Co. v. Otto F. Lange & Co., 155 Fed. 719, 84 C. C. A. 145, Cold Blast Transp. Co. v. Kansas City Bolt & Nut Co., 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696, and Higbie v. Rust, 211 Ill. 333, 71 N. E. 1010, 103 Am. St. Rep. 204.

I have not overlooked the point made that a sufficient consideration—"detriment to the promisee"—existed, in that plaintiff obligated itself to buy none of its "August requirements" from any person other than defendant. Obviously, however, if its obligation had been to buy, not what it "required," but what it merely "desired," from defendant alone, during August, the same sort of consideration—an agreement not to purchase from any one else—would have subsisted. Notwithstanding this, under the principles referred to in all the cases, even those relied upon by plaintiff, the contract would have lacked validity, not from a want of consideration, but, as herein, from a lack of mutuality.

The demurrer will be sustained.

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

(District Court, N. D. California, First Division. November 11, 1916.)

Nos. 5870, 5885.

1. CONSPIRACY ⊜27—OVERT ACT—NECESSITY.
A violation of the Sherman Act (Act July 2, 1890, c. 647, 26 Stat. 209) is complete, where a conspiracy to do acts in restraint of trade is entered into, though no overt act is committed.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec Dig. ⊜27.]

2. CONSPIRACY ⊜27—OVERT ACTS—NECESSITY.
The offense denounced by Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), declaring that if two or more persons conspire to commit any offense against the United States or to defraud the United States, and one or more such parties do any act to effect the object of the conspiracy, each shall be punished, is not completed until an overt act is committed.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 38, 39; Dec. Dig. ⊜27.]

3. CRIMINAL LAW ⊜620(2)—TRIAL—CONSOLIDATION OF INDICTMENTS.
Defendants were charged with a conspiracy to do acts in restraint of trade, in violation of the Sherman Act, and also with a conspiracy, under Criminal Code, § 37, to violate section 13 (Comp. St. 1913, § 10177), declaring that whoever, within the territory or jurisdiction of the United States, begins or sets on foot, or provides or prepares the means for, any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state or people with whom the United States are at peace, shall be punished. The indictment under the Sherman Act charged no overt act, but charged that the conspiracy was entered into within the district, while the indictment under section 37 charged the commission of an overt act within the district, although the contemplated activities would take a wide range. Both conspiracies were directed against the munitions trade of the United States with France, Russia, England, and Japan, and defendants' purpose was to prevent the shipment or transportation of munitions of war to such countries, either by destroying munition plants in the United States or destroying ships and railroads outside of the United States engaged in carrying munitions. *Held* that, as there was an identity of parties and of subject-matter, and both conspiracies were entered into in the same district, though defendants were indicted under the Sherman Act for their conspiracy against munition plants in the United States, the indictments should be consolidated and tried together for convenience.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1376; Dec. Dig. ⊜620(2).]

Franz Bopp and others were charged with conspiracy to do acts in restraint of trade, in violation of the Sherman Act, and with conspiracy under Criminal Code, § 37, to violate section 13, and the government moves to consolidate the two indictments. Motion granted.

See, also (D. C.) 230 Fed. 723; (D. C.) 232 Fed. 177.

John W. Preston, U. S. Atty., and Annette Abbott Adams, Asst. U. S. Atty., both of San Francisco, Cal.

J. P. O'Brien, of San Francisco, Cal., and Samuel Platt, of Carson City, Nev., for defendants Cornell and Crowley.

George A. McGowan, of San Francisco, Cal., for defendant Von Brincken.

Sullivan & Sullivan and Theo. J. Roche, of San Francisco, Cal., for defendants Bopp and Von Schack.

DOOLING, District Judge. Each of two indictments pending in this court charges the defendants Bopp, Von Schack, Von Brincken, Van Koolbergen, Cornell, Crowley, and Smith with a conspiracy. The first, No. 5870, charges a conspiracy to do certain acts in restraint of trade, in violation of section 1 of Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, § 8820), commonly known as the Sherman Act. The second, No. 5885, charges a conspiracy under section 37 of the Criminal Code to violate section 13 of the same Code; that is to say, a conspiracy to begin and set on foot, and provide and prepare the means for, certain military enterprises to be carried on from within the territory and jurisdiction of the United States against the territory and dominions of the king of Great Britain, a foreign prince with whom the United States was at peace. To each indictment the defendants Bopp, Von Schack, Von Brincken, Cornell, and Crowley have interposed a plea of not guilty, and the causes, being at issue, have both been set for trial for December 4th of this year.

[1-3] The government has moved that the court order that the two indictments be consolidated and tried together, under section 1024 of the Revised Statutes (Comp. St. 1913, § 1690), which is as follows:

"When there are several charges against any person for the same act or transaction, or for two or more acts or transactions connected together, or for two or more acts or transactions of the same class of crimes or offenses, which may be properly joined, instead of having several indictments, the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

This motion is resisted by the defendants.

The government claims that these indictments may be consolidated, because they come within all three of the provisions of section 1024; that is to say, that they are charges which may be properly joined, and (1) that they are against the same persons for the same acts or transactions; (2) that they are against the same persons for acts or transactions connected together; (3) that they are against the same persons for acts or transactions of the same class of crimes or offenses.

Affidavits have been presented in support of the motion and also in opposition thereto. However, the question as to whether the indictments do fall within any or all of the provisions above set forth may be determined here from an inspection of the documents themselves, unaided by any extraneous evidence. Turning to the indictments, it appears therefrom that each charges a conspiracy on the part of all the defendants and none others; that both conspiracies were entered into at the same time and place, and that each was directed against the commerce then carried on between the United States and foreign nations, particularly between the United States and France, Russia, England, and Japan, which nations were at war with Germany

and Austro-Hungary; that the ultimate purpose of each was to prevent the shipment or transportation of munitions of war to the countries last named; that the methods by which such shipment or transportation was to be prevented, as set forth in each indictment were the same, and this was to be accomplished by blowing up, by means of bombs, dynamite, and other explosives, the plants in this country that were engaged in the manufacture of such munitions of war, and various ships and railroads here and in Canada that were engaged in transporting them.

In so far as these activities were to be directed against the manufacturing plants, in this country, and railroads and ships generally engaged in the transportation of such munitions of war as were manufactured therein, it is claimed that a conspiracy existed in violation of the Sherman Act; and it is so charged in indictment No. 5870. In so far as the activities were to be directed against railroads in Canada, and certain designated ships belonging to some one or other of the nations mentioned, for the purpose of preventing the transportation of men, horses, and munitions of war to such nations, it is claimed a conspiracy existed to set on foot a military enterprise; and this is the charge contained in indictment No. 5885. This brief statement of the matters embraced in the two indictments seems to me sufficiently to show that the charges contained in them are charges for acts and transactions connected together within the meaning of section 1024, and I am also satisfied that they are such charges as may be properly joined.

In the indictment (5870) charging a violation of the Sherman Act no overt act is averred, as under that statute the offense is complete when the conspiracy is entered into. In the other indictment (5885) certain overt acts are alleged, as the offense of conspiracy under section 37 of the Criminal Code is not complete until such overt act is done by one of the conspirators to effect the object thereof. The defendants are not charged with actually having set on foot a military enterprise, but with having conspired to do so, and while the indictment alleges a conspiracy directed against railroads in Canada, and vessels belonging to the various nations, Great Britain, Russia, France, and Japan, the location of which is not given, yet this conspiracy is averred to have been entered into at San Francisco, in this district, and every overt act charged, save one, is alleged to have been committed here, so that, while the contemplated activities as charged would, if carried out, have taken a wide range, the real things against which the defendants are called upon to make defense are alleged to have occurred here. In the alleged violation of the Sherman Act the conspiracy is averred to have been entered into here. The cases, therefore, would present no more difficulty than is frequently encountered where there are several counts in a single indictment.

The government claims that there will be a great number of witnesses in attendance, whose testimony will bear directly upon the matters charged in each indictment; that the proofs offered in support of one will to a great extent support the other; and that it would be to the real interest of both the government and the defendants that both charges be heard together. Defendants contend that they will be

greatly prejudiced as to each if both indictments are tried together, for the reason that such testimony as is admissible in support of but one of the indictments would necessarily affect the minds of the jury adversely upon the other. This is not necessarily true, and may not be true at all. But to the extent that it may be true in the present instance it would seem to be true in every instance where different charges are tried together, whether embraced in a single indictment, or in two or more indictments consolidated for trial. I can conceive of no possible injury that defendants will suffer by the submission of both indictments to the same jury, and see no reason why this should not be done, and many reasons why it should. The motion will therefore be granted and the indictments consolidated for trial; and it is so ordered.

I am authorized to say that Judge HUNT, with whom I have conferred, agrees with this conclusion.

CONLEY et al. v. INTERNATIONAL PUMP CO.

GUARANTY TRUST CO. OF NEW YORK v. SAME.

(District Court, S. D. New York. September 14, 1915.)

No. E-11-382.

1. CORPORATIONS ⊂⊃482(3)—MORTGAGES—FORECLOSURE—DENIAL.
A foreclosure of a mortgage on corporate property cannot be attacked by a few of the corporate stockholders on the ground that the plan of reorganization proposed out of court is inequitable, though a chancellor may refuse to sign a final decree intended to carry out a grossly unfair settlement.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1881; Dec. Dig. ⊂⊃482(3).]

2. CORPORATIONS ⊂⊃482(3)—MORTGAGES—FORECLOSURE—RIGHT TO INTERVENE.
Holders of the preferred stock of defendant corporation applied to intervene in a suit to foreclose a mortgage given by defendant, alleging that the defaults which occasioned the necessity for foreclosure were the result of a conspiracy between the bondholders of the corporation and officers of the same, intended to precipitate foreclosure, when in fact the corporation was solvent and able to pay the interest and other charges. The stockholders had previously procured the appointment of a receiver in the state court, who had appeared and was defending the foreclosure suit. *Held* that, though the charge was serious, and would ordinarily entitle the stockholders to intervene and protect their interests, they should not be allowed to intervene to advance a defense which they had not even communicated to the receiver, and which he could advance.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1881; Dec. Dig. ⊂⊃482(3).]

In Equity. Bill by William N. Conley and others against the International Pump Company, consolidated with a bill by the Guaranty Trust Company of New York, as trustee, against the same defendant. On application of Roger S. Sturgis and others, as holders of preferred stock of defendant, for leave to intervene. Application denied.

See, also, 231 Fed. 594, —— C. C. A. ——.

Motion on behalf of Roger S. Sturgis and others, describing themselves as holders of the preferred stock of defendant International Pump Company, for leave to intervene in the above action, to be made parties thereto, and to file such answers and to take such other proceedings as they may be advised, and to that end that the receivers herein be instructed to grant petitioners inspection of all the records of the company and of the receivership until the expiration of the time within which said petitioners shall be permitted to file answers as aforesaid.

W. Bourke Cockran, of New York City, and J. Merritt Lane, of Jersey City, N. J., for petitioners.

E. M. Leventritt, Paul D. Cravath, and Allen Wardwell, all of New York City, and Gilbert Collins, of Jersey City, for all parties of record.

HOUGH, Circuit Judge. The first of the actions above entitled is a creditors' bill; the second is the foreclosure of a mortgage.

One of the reasons for petitioners desiring to intervene is to assert the alleged infirmity of jurisdiction in respect of the creditors' bill. It appears by inspection of the mortgage under which the Guaranty Trust Company is proceeding that the pump company agreed to maintain an office in the city of New York (although a New Jersey corporation), and it was not denied upon the hearing that such office was maintained. As the interest coupons of the bonds issued under the Guaranty Trust Company mortgage were payable at the office or agency of the pump company in the city of New York, it is obvious that such office or agency had to be kept up.

The sole object of the foreclosure suit is to realize upon the mortgage, and the Guaranty Trust Company is a New York corporation. The requisite diversity of citizenship existing, it is too plain for argument that the trust company had a right to proceed in this jurisdiction, so that a voluntary appearance by the pump company in the foreclosure suit was no more than compliance with the exigency of a subpœna which might easily have been taken out.

The order of consolidation was a mere convenience; the suits could again be severed, if desired. As intimated upon the argument, I should be inclined under almost any circumstances to permit the intervention of any persons or parties having a real interest in the defendant in the creditors' suit. But that action has been completely swallowed by and absorbed in the foreclosure suit, so that the substantial question here is this, viz.: Upon the showing made, are the moving preferred shareholders entitled at the present time to intervene in the foreclosure action in order to advance any or all of the propositions revealed in their moving papers?

[1] The major part of the moving papers is taken up with complaints of the inequity of a proposed plan of reorganization. I do not think that courts sit to redraw or modify or make suggestions concerning such voluntary business arrangements as reorganization plans. There have been circumstances, and they may arise again, when a chancellor may bluntly refuse to sign a final decree which is intended to

carry out a grossly unfair settlement; but it is certainly a curious conception of practice which leads a small body of shareholders to seek to answer a foreclosure bill merely because they are dissatisfied with what the foreclosing complainant says out of court it hopes or even intends to do after the final decree is procured.

[2] Indeed, I think prolonged argument reduced the petitioners' application to one proposition, namely, that they should be allowed to show by answer and evidence that the defaults which occasioned the necessity for foreclosure were the result of a conspiracy between the bondholders of this defendant and the officers of the same; the object of such conspiracy being to precipitate foreclosure when as matter of fact the company was solvent and able to pay the interest and other charges, failure in respect of which is the gravamen of the foreclosure bill.

These are very serious allegations, and are said to require the favorable action of the court, under the controlling authority of Louisville Trust Co. v. Louisville, etc., R. R., 174 U. S. 674, 689, 19 Sup. Ct. 827, 832 (43 L. Ed. 1130). The ground of that decision, however, is thus stated:

"While not intending any displacement of the ordinary rules or rights of a mortgagor or mortgagee in a foreclosure, we believe that under the circumstances as presented by this record there was error; that the charge, alleged positively, *and supported by many circumstances*, of collusion, * * * was one compelling investigation."

It is in my judgment entirely obvious that, while these petitioners make the charge of collusion positively, they fail to support their charge by any circumstances or proof whatever. Yet in many cases I should incline to admit as parties defendant those making charges of such moment, upon their giving reasonable security to make good the expense caused by their intervention, if unsuccessful.

In this instance, however, I shall not do so, because of what I believe to be the underlying principle of intervention in equity. Necessary parties to a proceeding are those without whose presence a binding decree could not be made. Interveners are (generally speaking) those who show an equitable claim to present their own individual demands, because and only because the parties already in the action do not, will not, or cannot properly and efficiently present the intervening interests.

In this instance there has been appointed at the instigation of some or all of the present proposed interveners a statutory receiver under the acts of New Jersey. I have been favored with a copy of Vice Chancellor Stevenson's remarks upon granting the application for receivership, and am more than willing to accept his views as to the function of receivers under the statutes aforesaid. That receiver (Judge Collins) is already a party to this foreclosure suit. He is at liberty to advance such defenses as to him seem just and well founded, or such as he may be advised to present by the court of his appointment. Any defense which Receiver Collins desires to advance will doubtless be admitted to the record and put in shape to be considered by this and higher courts.

It is an unseemly and an unnecessary act to permit a few stockholders, who applied for and obtained a receivership in the company's own state, to intervene in the same suit to which the receiver is a party, and advance a defense which they have not communicated to the receiver himself. He is charged with the duty of protecting their interests, if they have any worthy of protection, and it is in my judgment advisable that they should lay their complaint before him, and if, after consultation with Judge Collins and possible application to the Chancery Court of New Jersey, their complaint is not deemed worthy of being advanced through Judge Collins, it is not worthy of being advanced at all.

I understand that complainant trust company and its solicitors agree that the New Jersey receiver shall have time to decide as to what course he will pursue, and to that end they are willing to make the following stipulation:

"The complainant herein is not to close the case before the special master until Receiver Collins has had an opportunity to obtain instructions from the Vice Chancellor of New Jersey and to act upon such instructions when obtained, provided that the receiver make his application and proceed with the same promptly. This cause before the special master is in no event to be closed, except upon at least one week's notice to Receiver Collins, and the time of the special master in which to file his report shall be correspondingly extended."

This stipulation is approved, and, if desired, the substance thereof may be embodied in an order.

The application of the petitioners is denied.

TATSUUMA KISEN GOSHI KAISHA (TATSUUMA S. S. CO., Limited), v. PORT OF SEATTLE et al.

(District Court, W. D. Washington, N. D. September 8, 1916.)

No. 3170.

MUNICIPAL CORPORATIONS ⇐752—LIABILITY FOR INJURY BY SERVANT—CONTRACT TO PERFORM WORK FOR ANOTHER.

A stevedoring company, having a contract to load a cargo of steel rails which were delivered on the pier in cars, contracted with the port of Seattle, which maintained an electric crane on the pier under charge of an engineer and assistants, who were its employés, to move the rails from the cars to the pier at a stated price per ton, and also to furnish the use of the crane and its attendants to deliver the rails on the vessel for an agreed price per hour. The operation of the crane was wholly in charge of the engineer. *Held*, that he did not become a servant of the stevedoring company, but remained the servant of the port, in the performance of the work, and that the port was liable for damages to the vessel caused by his negligent operation of the crane.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1583; Dec. Dig. ⇐752.]

In Admiralty. Suit by the Tatsuuma Kisen Goshi Kaisha (Tatsuuma Steamship Company, Limited) against the Port of Seattle, a municipal

corporation, and the Griffiths & Sprague Stevedoring Company, Incorporated. Decree for libelant against the Port of Seattle.

Hughes, McMicken, Dovell & Ramsey, of Seattle, Wash., for libelant.

France & Helsell, of Seattle, Wash., for respondent port of Seattle.

Daniel B. Trefethen, of Seattle, Wash., for respondent Stevedoring Co.

NETERER, District Judge. Libelant alleges that the port of Seattle, for the purpose of loading and unloading cargo, operates an electric Gantry crane, a large and complicated mechanism, which is capable of being moved from place to place on the dock; that forming a part thereof is an apron, extending about 35 feet beyond the face of the pier, so constructed as to enable the vessels to pass alongside, or to allow the moving of the crane alongside a vessel moored at the pier, and is operated by electric power and machinery situated in a cage, and requiring technical skill in its operation; that the port of Seattle retains in its employ a skilled and competent electrical engineer for the operation of such crane, and also hook tenders and other necessary servants; that respondent Griffith & Sprague Stevedoring Company is engaged in the stevedoring business at the port of Seattle; that on the 30th of July, 1915, one of libelant's ships anchored alongside one of the docks of the port of Seattle, for the purpose of receiving a cargo of steel rails; that the respondent Stevedoring Company was under contract with the charterers of said vessel and engaged in loading the cargo; that in the course of the loading into hatch No. 2, "situated just abaft the foremast, it was necessary to obtain additional portions of said cargo by taking the same out of a freight car situated on the railway track on said dock a short distance sternward of said hold; that thereupon said operator moved said crane over the car, where the tackle was made fast by the hook tenders to a load of rails (consisting of about three rails), whereupon the operator took the load and moved the crane forward opposite the hatch and ran the load out on the apron, from which it was lowered to the hold; and after two or three of said loads had been lifted from said car and carried to said boat and stowed in said hold, the engineer of said crane, for his greater convenience in handling said freight, caused the cargo hook of said crane to be made fast to said freight car, and thereupon, while attempting to move said car forward to a point opposite said hold, neglected to raise said apron, and so carelessly and negligently operated said crane that said apron was caused to strike the foremast of said ship and thereby buckling and breaking said mast;" and that it was damaged in the sum of $2,919.98, and states it is unable to state which of the respondents is liable, and asks that process issue, the parties be cited to appear, and that the court decree the payment of damages as law and justice shall direct.

The respondents have appeared and answered, each denying liability; the port of Seattle claiming that the stevedoring company is liable, and vice versa.

The testimony shows that the stevedoring company had a contract with the libelant to load a cargo of steel rails from the cars of the railway company upon the vessel, and that the stevedoring company made a contract with the port of Seattle to unload the rails from the car to a suitable place for loading them into the vessel, for the sum of 12½ cents per ton, and a further agreement to furnish the use of the Gantry crane, together with the engineer for its operation, and two hook tenders, being equipment for the operation of such crane, at the agreed price of $2.25 per hour for loading from the dock into the vessel. It is also shown by the evidence that the rails were loaded into hatch No. 2 of the vessel, and when the said hatch was nearly filled it became necessary to take some rails from a freight car situated near the vessel, from which the rails had not been removed, and to obtain the rails it became necessary to move the crane along the track upon which it operates to the car, obtain the rails, and move back to a suitable place opposite hatch No. 2. After two or three loads had thus been obtained, the engineer and hook tenders concluded it would be advisable to move the car from its position to a place opposite the hatch, and take the rails from the car and lift them to the hatch without moving the crane along the track. The crane was thereupon moved along the track to the car, and by use of a lever or "shifting stick," one end of which was placed against the car and the other against the crane, the car was moved by the crane 12 or 15 feet beyond the place where it should have been taken, and the apron above referred to, not being raised, was caused to strike the foremast of the ship, causing the damage.

The superintendent in charge of the dock at the time testified that in taking the rails from the dock the work and operation of the crane was under the direct supervision of the engineer, and this responsibility continued until the loaded sling reached the vessel, when the orders were given by the supercargo, or man in charge of the hatch. It is also shown that the engineer and men were paid by the port of Seattle, and that the stevedoring company had no control of the men, except as it might operate through the port of Seattle. All the work in loading was done by employés of the stevedoring company, except work on the dock and the operation of the crane. The question to be determined is whether the engineer was a servant of the port of Seattle or of the stevedoring company, as upon this depends the liability; the master being responsible for the negligent acts of the servant.

In order to relieve the port of Seattle from liability, it must appear that the relation of master and servant, which was established, had been, for the time, suspended, and a new relation created between the stevedoring company and the engineer. It would seem from the evidence that this change is not established. The port of Seattle, it would seem, furnished the work for an agreed price, rather than the men and the appliances. The relation between the engineer and the port at no time changed. The stevedoring company at no time acquired any supervisory authority over the engineer other than mere suggestions as to details or the necessary co-operation with relation

to the taking of the rails from the dock and stowing them in the hold of the vessel. One who agrees to furnish the completed work through servants over whom he retains control is responsible for their negligence in the conduct of the work, though it is done for the ultimate benefit of another, and the determining factor is usually the power to control and direct the servants in the performance of the work. I think it is established beyond question that the performance of the work and the operation of the crane with relation to rails upon the dock and until they had reached the vessel was under the direction of the engineer. The manner of the work on the dock being under the control of the engineer, and the act complained of having transpired while in the conduct of work within his exclusive province, the liability is that of the port of Seattle.

This view is fully sustained by Standard Oil Co. v. Anderson, 212 U. S. 215, 29 Sup. Ct. 252, 53 L. Ed. 480. George A. Fuller Co. v. McCloskey, 228 U. S. 194, 33 Sup. Ct. 471, 57 L. Ed. 795 is to the same effect, as is also New Orleans-Belize S. S. Co. v. United States, 239 U. S. 202, 36 Sup. Ct. 76, 60 L. Ed. 227, and C., R. I. & P. Ry. Co. v. Bond, Adm'r, 240 U. S. 449, 36 Sup. Ct. 403, 60 L. Ed. 735.

UNITED STATES v. PHILADELPHIA & R. RY. CO.

(District Court, E. D. Pennsylvania. November 28, 1916.)

Nos. 162, 163.

1. CRIMINAL LAW ⊜263—CRIMINAL PROSECUTIONS—FEDERAL COURTS—JURISDICTION.

In view of Rev. St. § 716, authorizing the federal courts to issue any appropriate process, a District Court has jurisdiction to issue a writ of venire facias against a defendant.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 610, 611; Dec. Dig. ⊜263.]

2. COURTS ⊜76—CRIMINAL PROSECUTIONS—TERMS OF—TIME OPEN.

The federal District Court is open from the beginning of each session to its end for the return of writs on the criminal side, notwithstanding an adjournment sine die as a criminal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 250–254; Dec. Dig. ⊜76.]

3. CRIMINAL LAW ⊜263—CRIMINAL PROSECUTIONS—TRIAL—ANSWER.

A writ of venire facias is in its very nature an ad respondendum proceeding, giving defendant who is indicted his day in court, in order that his defense may be heard, and whether his response be denominated an answer, demurrer, or plea is a mere matter of nomenclature, and the writ will not be quashed because it called for an answer, instead of a plea.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 610, 611; Dec. Dig. ⊜263.]

At Law. Proceeding by the United States against the Philadelphia & Reading Railway Company. Sur motion to quash writ of venire facias. Motion denied.

The motion is as follows:

And now, this 21st day of July, A. D. 1916, comes the Philadelphia & Reading Railway Company, a corporation named as defendant in the above-entitled

bill of indictment, by William Clarke Mason, Esq., its attorney at law, appearing de bene esse for the sole purpose of testing the jurisdiction and power of this honorable court to issue a certain writ of venire facias issuing out of this honorable court as of July 14, A. D. 1916, and respectfully submitting itself to this honorable court for the sole purpose aforesaid, prays that the writ of venire facias issuing out of this honorable court as aforesaid, and served by the United States marshal for the Eastern district of Pennsylvania upon the above-named Philadelphia & Reading Railway Company, be quashed and declared null and void for the following reasons:

(1) That there is no jurisdiction or power in law in the United States District Court for the Eastern District of Pennsylvania to issue the aforesaid writ of venire facias.

(2) That the said writ of venire facias as issued is defective, and of no force and effect, in that it is made returnable to a session of the said court to be holden at Philadelphia on the first Monday in August, A. D. 1916, whereas the United States District Court for the Eastern District of Pennsylvania, sitting as a criminal court, adjourned sine die June 21, A. D. 1916, and the next session of the said court to which any and all writs may be made returnable is the third Monday in September next, to wit, September 18, A. D. 1916.

(3) That the said writ of venire facias is defective and void, in that the Philadelphia & Reading Railway Company, named therein as the accused in a certain bill of indictment under the above term and number, is required to come before the bar of the United States District Court for the Eastern District of Pennsylvania and *to answer* the aforesaid indictment, whereas there is no provision in law authorizing this honorable court to take an answer to a bill of indictment, but, on the contrary, the only pleading known to the law under such circumstances and required of an accused is a plea.

Robert J. Sterrett, Asst. U. S. Atty., and Francis Fisher Kane, U. S. Atty., both of Philadelphia, Pa.

Wm. Clarke Mason, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. [1] We first dispose of the question lying at the threshold of the consideration of the above-stated motion by directing the clerk to file the paper incorporating the motion to quash. The first ground of the motion involves, we think, an overlooking of the distinction between jurisdiction, whether of the subject-matter or of the person, and the process employed in the exercise of that jurisdiction. The criminal jurisdiction of the courts of the United States is restricted to the limits of, first, the Constitution, and after that the statutes. If statutory process has been prescribed, it must be followed. Where, however, the constitutional power exists, and has been exercised through acts of Congress conferring jurisdiction upon the courts, accompanied with authority to issue appropriate process for the assertion of this jurisdiction, the statutory basis of such jurisdiction does not imply that it is withheld whenever specific statutory process is unprovided. This distinction will supply the key to the understanding of the principles upon which the adjudged cases, to which we have been referred, were ruled. Commonwealth v. Lehigh Valley R. R., 165 Pa. 162, 30 Atl. 836, 27 L. R. A. 231.

The court there had jurisdiction of the subject-matter. It was necessary to acquire jurisdiction of the person of the defendant. No appropriate process had been provided by statute. It was held the court had the common-law power to issue process to bring the defendant into court. This ruling is of no direct aid to us because the power

there found courts of the United States do not possess. United States v. Kelso (D. C.) 86 Fed. 304, supports the writ as issued. Congress had provided no specific form of process. The court adopted that prescribed by the state law. This was supported upon the power conferred by Rev. St. § 716, to issue any appropriate process. John Gund Co. v. U. S., 204 Fed. 17, 122 C. C. A. 331, is to the same effect, with the added thought that it was likewise effective as lawful process, although served in another district than that in which the trial was had. U. S. v. Standard Oil (D. C.) 154 Fed. 728, and U. S. v. Virginia Co. (C. C.) 163 Fed. 66, give added sanction to the practice here adopted.

We see nothing in any of these rulings which conflicts with the principle laid down in Jones v. U. S., 137 U. S. 202, 11 Sup. Ct. 80, 34 L. Ed. 691, and cases of like import cited by counsel for defendant. Indeed, Bath Co. v. Amy, 80 U. S. (13 Wall.) 249, 20 L. Ed. 539, and McClung v. Silliman, 19 U. S. (6 Wheat.) 601, 5 L. Ed. 340, emphasize the distinction attempted to be pointed out above. The majority opinion in Rosenbaum v. Bauer, 120 U. S. 450, 7 Sup. Ct. 633, 30 L. Ed. 743, is far from any conflict with the cases supporting the issue of process under R. S. § 716. The proceeding there was instituted in a state court. No federal question was involved. The cause was removed to the United States District Court solely because of the diverse citizenship of the parties. It was remanded to the state court wholly upon the ground that the case as a proceeding was one of which the courts of the United States had no jurisdiction. The question was in no sense a process question, but one of jurisdiction of the proceeding.

One of the grounds upon which the remanding order was made was that the mandamus proceeding, which had been removed into the District Court, was not such a case as could under the statutes of the United States be removed from a state court. This order was affirmed by a majority ruling. The dissenting view was that this was too narrow a construction of the acts of Congress. The ruling and dissenting opinion each discuss the question as one, not of process, but of jurisdiction of the subject-matter. They are in accord in assuming the power of the United States courts to issue writs of mandamus, where such writs are appropriate process. R. S. § 716, was held to be a process provision, not as conferring jurisdiction of the subject-matter in mandamus proceedings. We are concerned with section 716 wholly as authorizing the process employed in the instant case. There is not, and cannot well be, any question raised of the jurisdiction of this court with respect to the subject-matter. All the cases support the proposition that this jurisdiction may be exercised through "appropriate process," and that the process adopted is such.

[2] The second and third grounds upon which the motion is based are alike untenable. The court is open from the beginning of each term or session to its end. Abbott v. Brown, 241 U. S. 606, 36 Sup. Ct. 689, 60 L. Ed. 1199.

[3] A writ of venire facias is by its very nature an ad respondendum proceeding. It gives a defendant his day in court in order that his de-

fense may be heard. Whether his "response" is called an answer, a demurrer, or a plea is a matter of nomenclature, with which we have no further concern.

The motion to quash is denied.

In re ALPERT.

(District Court, E. D. New York. November 14, 1916. On Objections to Composition, December 16, 1916.)

1. BANKRUPTCY ⟸378—COMPOSITION—RIGHT TO.

Bankr. Act July 1, 1898, c. 541, § 14c, 30 Stat. 550 (Comp. St. 1913, § 9598), provides that the confirmation of a composition shall discharge the bankrupt from his debts other than those agreed to be paid by the terms of the composition and those not affected by a discharge. Claimant contended that the bankrupt had misappropriated a large sum of money and that such claim was not a debt dischargeable in bankruptcy. The bankrupt offered a composition and filed a schedule of creditors which did not include the claimant. *Held*, that the composition should not be confirmed until claimant was paid such a dividend as it would be entitled to receive, were its debt dischargeable in bankruptcy, or such sum was deposited in court for its benefit, without prejudice in either case to assertion that the debt is not dischargeable, for any other procedure would result in giving a preference to those creditors whose debts were dischargeable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 601; Dec. Dig. ⟸378.]

On Objections to Composition.

2. BANKRUPTCY ⟸374, 407(1)—DISCHARGE—RIGHT TO.

A bankrupt, who has stolen or fraudulently received a sum of money belonging to another, cannot retain the amount and schedule the claim as a debt, and thereafter obtain a discharge in bankruptcy or effect a composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 575, 729, 737, 738, 741, 750, 751, 758; Dec. Dig. ⟸374, 407(1).]

3. BANKRUPTCY ⟸407(3)—DISCHARGE—PREFERENCE.

The mere receipt of a preference is no bar to a discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 740, 742–749; Dec. Dig. ⟸407(3).]

4. BANKRUPTCY ⟸345, 376—PREFERENCE—PRIORITY.

Where one who has received a preference becomes a bankrupt, the preference cannot be collected in full as a priority claim, either in bankruptcy or on composition by the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540, 598–600, 602; Dec. Dig. ⟸345, 376.]

In Bankruptcy. In the matter of the bankruptcy of David Alpert. On motion to confirm referee's report, approving a composition offered. Report affirmed on condition, and objections overruled.

David Alpert, in pro. per. for the motion.

Ginzberg & Picker, of New York City, for trustee.

Alexander Levine, of New York City, for petitioning creditors, not opposing.

CHATFIELD, District Judge. [1] It appears that the trustee of the estate of Gussie Nankin, in bankruptcy in this court, claims the misuse of a large sum of money delivered to the bankrupt Alpert, by the bankrupt Nankin, and for the recovery of which proceedings in the Nankin estate are now pending. The bankrupt Alpert is offering a composition (which has been approved by the referee), and has filed a schedule of creditors, which does not include the estate of Nankin. The reason for this exclusion appears to be that the estate of Nankin has refused to file a claim in the Alpert estate as a general creditor, upon the theory that its debt is not one dischargeable in bankruptcy, and that it is based upon an act of embezzlement or deliberate concealment of assets, by a trustee of an express trust, from Nankin or her creditors.

Section 14c of the bankruptcy law provides as follows:

"The confirmation of a composition shall discharge the bankrupt from his debts, other than those agreed to be paid by the terms of the composition and those not affected by a discharge."

Under this the Nankin estate should be allowed to preserve its rights if it (in addition to a possible criminal charge) can show a claim not dischargeable in bankruptcy. At the same time the Nankin estate should receive the share of the Alpert estate which it would have if the Nankin debt be dischargeable in bankruptcy, as otherwise the creditors of the Alpert estate, who receive a dividend, would receive a preference over the remaining creditor, whose debt, nevertheless, was not wiped out by the composition. Either the composition should include the payment of this dividend, and the dividend should be paid with an express provision that it is on account of a debt claimed to be not dischargeable, or the bankrupt Alpert must deposit the amount which would be the dividend to be paid upon the amount which is claimed by the Nankin estate, and the amount of this claim may be litigated further.

The present motion to confirm the referee's report upon the composition will be granted, upon deposit by Alpert of the dividend to be paid to creditors generally, estimated upon the total amount of the claim by the estate of Gussie Nankin, and if the claim of the Nankin estate is contested by Alpert, the referee's report upon the composition will be returned, so far as this claim is concerned, in order that testimony may be taken and the claim allowed or disallowed. The result of this allowance or disallowance will be considered without prejudice, however, to future enforcement of the claim (if it be found to exist), without reference to the discharge effected by the composition, except in so far as the amount of the debt may be reduced by the dividend paid.

On Objections to Composition.

David Alpert is offering a composition. He has now by direction of the court included such amount as he may owe to the Gussie Nankin estate, and upon November 15, 1916, the composition was confirmed upon that basis. The special master in the Nankin estate has now reported that Alpert was a creditor of the Nankin estate and received a preferential payment amounting to $432.66. He also reports

that the balance of the moneys in Alpert's hands was turned back by him to Gussie Nankin, and that report has been confirmed so far as Alpert is concerned.

The trustee of the Nankin estate now seeks to further oppose confirmation of the composition in the Alpert estate upon the theory that Alpert received the money from Gussie Nankin as a wrongdoer and that his creditors would have no right to be enriched at the expense of the Nankin estate. Hence it is urged that Alpert cannot receive the benefits of his own wrong by offering a composition and treating the Nankin estate as a creditor, and thus prevent their receiving the full amount of its claim at the hands of the bankrupt, when, as they claim, they would obtain it from the bankrupt's creditors if no composition had been offered.

[2-4] It may be assumed that, if the proceedings in the Nankin estate had shown that Alpert was a wrongdoer in the sense that he had stolen or fraudulently received the sum of $432.66 which belonged to the Nankin creditors, he could not retain that amount and schedule the claim as a debt in his own estate. He could not obtain a discharge in bankruptcy, and hence could not put through a composition. McIntyre v. Kavanaugh, 242 U. S. 138, 37 Sup. Ct. 38, 61 L. Ed. ——, decided in the Supreme Court of the United States December 4, 1916.

But it is now determined that the debt owing from Alpert to Nankin is but the return of a preferential payment. The receipt of a preference is not a bar to discharge, nor can the preference be collected in full as a priority claim, in the event of either bankruptcy or composition by the party receiving the preference. This was directly decided by the order entered November 15, 1916. No appeal or petition to review has been filed, but, as the same question is involved in the final order confirming the composition, the matter has been reconsidered upon the merits.

The objections to the composition will be overruled.

PENINSULA LUMBER CO. v. ROYAL INDEMNITY CO.

(District Court, D. Oregon. December 4, 1916.)

No. 7314.

REMOVAL OF CAUSES ⊜105—NONRESIDENCE OF PARTIES—REMAND.

Action brought in the court of a state of which neither party was a resident, removed on petition of defendant to the federal court for the district of that state, should be remanded; plaintiff not having waived the court's want of authority to entertain jurisdiction in that district, but having appeared specially, and only for purpose of motion to remand.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. § 215; Dec. Dig. ⊜105.]

At Law. Action by the Peninsula Lumber Company against the Royal Indemnity Company. On motion of plaintiff to remand to state court. Motion granted.

James B. Kerr and Richard Sleight, both of Portland, Or., for plaintiff.

Watt, Thornton & Watt, of San Francisco, Cal., and Wilbur, Spencer & Beckett, of Portland, Or., for defendant.

WOLVERTON, District Judge. This action was instituted in the circuit court of the state of Oregon for Multnomah county. The plaintiff is a resident and inhabitant of the state of Wisconsin, and the defendant a resident and inhabitant of the state of New York. Defendant in due time petitioned for a removal of the cause to this court, and the removal was allowed. When the case reached here, the defendant demurred to the complaint. The plaintiff, appearing specially and for the purpose of the motion only, moved to remand the cause to the state court, on the ground that this court is without jurisdiction in the premises.

It is apparent that jurisdiction of the court is based on the ground of diversity of citizenship; but neither of the parties is a citizen and inhabitant of the state of Oregon. The sole question presented is whether this court has jurisdiction to entertain the cause, and to decide the same upon its merits. In the case of Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, arising upon a similar state of facts, the Supreme Court, entertaining jurisdiction by mandamus and prohibition, decided that the cause should be remanded. In the course of the opinion the court said:

"Jurisdiction of the suit could not have obtained, even with the consent of both parties."

This case is decisive of the one at bar, unless it has been overruled by a subsequent decision of the Supreme Court. The contention of defendant is that it has been so overruled, citing to that purpose In re Moore, 209 U. S. 490, 28 Sup. Ct. 585, 706, 52 L. Ed. 904, 14 Ann. Cas. 1164, and Western Loan Co. v. Butte & Boston Min. Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101.

The former case arose upon substantially the same state of facts as the one at bar, except that plaintiff, after removal of the cause to the Circuit Court of the United States, filed an amended petition and signed a stipulation giving time to the defendant to answer, and subsequently entered into successive stipulations with the defendant for continuation of the trial, all in that court. The Circuit Court refused to remand the cause, and in this holding was sustained by the Supreme Court. The Supreme Court held in effect that the federal court has general jurisdiction in all cases where there is diversity of citizenship, and that, if a suit or action is instituted in a state or district of which neither party is an inhabitant, the right of the parties to insist that the suit should be brought in one or the other of such districts may be waived, and it was further decided that such right of both parties, the plaintiff and defendant, was waived in that case, and it was upon that ground that the decision of the Circuit Court, refusing to remand the case to the state court, was sustained. In the course of the opinion the court, referring to the above quotation from the Wisner Case, had this to say:

"There was no pretense of any consent on the part of the plaintiff in that case, and therefore this statement was unnecessary. In order, however, to prevent future misconception, we add that nothing in the opinion in the Wisner Case is to be regarded as changing the rule as to the effect of a waiver in respect to a particular court."

It is as to the declaration in the Wisner Case that "jurisdiction of the suit could not have obtained, even with the consent of both parties" that the Moore Case overrules the Wisner Case; the former holding that general jurisdiction of suits or actions founded solely upon diversity of citizenship exists under the statute, but that, if such suit or action is brought in a state or district of which neither party is a resident, the objection that it was not brought in a particular court may be waived by either or both parties.

The Western Loan Company Case was instituted in the Circuit Court of the United States, and was dismissed for want of jurisdiction. The judge presiding based his action upon the supposed authority of Ex parte Wisner. The Supreme Court declared that the judge was in error, saying that the Wisner Case "is now overruled in In re Moore, in so far as it was said in the Wisner Case that a waiver could not give jurisdiction over a person sued in the wrong district, where diversity of citizenship existed." But this case does not yet supersede the real question decided by the Wisner Case, which was that, the plaintiff not having waived the court's want of authority to entertain jurisdiction in the particular district, the cause ought to be remanded. Inferentially, the principle is reaffirmed in the case of In re Moore.

The case of Ex parte Harding, 219 U. S. 363, 31 Sup. Ct. 324, 55 L. Ed. 252, 37 L. R. A. (N. S.) 392, has no particular bearing on the question at issue, although it disapproves of the Wisner Case at another angle, namely, that the court in that case entertained jurisdiction to review the cause by mandamus, whereas it was without authority for so doing. The question was not raised when the Wisner Case was submitted, nor was the authority of that case on that point disputed until the Harding Case came up.

The plaintiff in the case at bar having appeared specially for the purpose of the motion to remand only, and not having appeared generally, or otherwise waived the lack of jurisdiction of this court over the parties, the motion will be sustained, and the cause remanded to the state court.

In re AUTO SAFETY SIGNAL LAMP CO.

(District Court, E. D. Pennsylvania. June, 1916.)

1. BANKRUPTCY ⇐305—ORDER TO DELIVER PROPERTY OF BANKRUPT—DEFENSES.

The treasurer of a bankrupt company was mentioned in the schedule filed as a debtor, and, after the trustee called on him to turn over a sum of money, the treasurer filed a claim against the bankrupt for a larger sum. The referee disallowed the claim of the treasurer and found his indebtedness at a fixed sum. The report showed that the referee found that the amount stated as a debt was not a mere debt, but was money which the treasurer, without right or title, took from the company while

he was treasurer, and had failed to return. *Held*, that an order directing the treasurer to surrender such sum of money cannot be defeated on the ground that the referee found he was merely indebted to the company; the evidence justifying the finding that he had appropriated the company's funds, and the treasurer having submitted to the court's jurisdiction by filing a claim.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 466–468; Dec. Dig. ⊂⊃305.]

2. BANKRUPTCY ⊂⊃288(1)—AUTHORITY OF COURT OF BANKRUPTCY—JURISDICTION OVER OFFICERS OF BANKRUPT.

Though an officer of a bankrupt company did not submit to the court's jurisdiction, nevertheless, having been an officer, the bankruptcy court has jurisdiction to order him to deliver such of the bankrupt's property as he wrongfully retained.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⊂⊃288(1).]

In Bankruptcy. In the matter of the bankruptcy of the Auto Safety Signal Lamp Company. On petition to review order on W. Bancroft Mellor to turn over money. Order of the referee affirmed.

Daniel J. Shern, of Philadelphia, Pa., for trustee.

H. S. Mesirov and Raymond John, both of Philadelphia, Pa., for petitioner.

WITMER, District Judge. W. Bancroft Mellor was the treasurer of the bankrupt company and was mentioned in the schedule filed as a debtor. After the trustee had called on Mellor to turn over the sum of $598.49, he (Mellor) filed a claim against the bankrupt wherein he admitted having received $598.49 from the bankrupt company, but set off a claim, alleged to be due him, greater in amount, to wit, $2,096.25, leaving an alleged balance in his favor in the sum of $1,497.76. Mellor was examined concerning his claim, and the testimony of other witnesses was taken, resulting in the disallowance of it by the referee, who as a result of such hearing found and reported that Mellor's indebtedness to the bankrupt company as treasurer was $682.74, made up of $598.49 admitted having received and the further sum of $84.25 presented and proved by the trustee.

[1] The finding and report of the referee against Mellor was made November 16, 1914, whereof he had notice. No appeal was taken from the action of the referee, whereupon, December 1, 1914, the trustee filed a petition asking for a rule on Mellor to show cause why an order should not be made, directing him to surrender the assets of the bankrupt company found in his possession. Answer was made, and, after hearing, on December 9, 1914, the referee, resting on his findings in passing on the claim of Mellor, filed his decision ordering Mellor to turn over to the trustee the sum of $682.74. This order the court is requested to review.

Summing up all of the reasons assigned for reversal of the order of the referee, the complaint is that the proceeding is unauthorized and that the evidence is insufficient to support the order in view of the former finding of the referee, that Mellor was a debtor to the bankrupt company as treasurer for the amount which he was directed to turn

over. While it appears that the referee, in disallowing the claim of Mellor, "states his (Mellor's) indebtedness to the bankrupt company as $682.74," nevertheless, showing how he arrives at such amount, he clearly indicates in his former report, as he has since stated, justifying the order, that this amount is not a mere debt due by Mellor to the bankrupt company, but is, in fact, money which Mellor, without right or title, took from the company while he was treasurer, and has since failed to return. The referee's report shows, and the same is borne out by the evidence, that Mellor filled in and made payable to himself certain checks, signed in blank by the president, while he (Mellor) was treasurer of the company, and which payments Mellor charged to commissions pretended to be due him for sale of stock, under an alleged agreement between him and the executive committee of the board of directors. The referee further found that this alleged agreement was never entered into; that Mellor, as treasurer of the company, had no right to draw checks payable to himself for commissions; and that therefore, this sum having been improperly withdrawn from the treasury of the bankrupt company, Mellor had no title thereto, and was accordingly "indebted in that sum to the trustee." The finding that the bankrupt so retained the money stated is justified from the evidence, and, Mellor having submitted to the court's jurisdiction in attempting to establish a claim against the bankrupt company, forms a proper basis for the order that followed. Wiswall v. Campbell, 93 U. S. 347, 23 L. Ed. 923; In re Blake (C. C. A. 8th Cir.) 17 Am. Bankr. Rep. 668, 150 Fed. 279, 80 C. C. A. 167.

[2] Furthermore, without such submission, Mellor having been an officer of the bankrupt corporation, the court has jurisdiction to order a turn-over of such of the bankrupt's property as he wrongfully retained. In re Brockton Ideal Shoe Company (C. C. A. 2d Cir.) 29 Am. Bankr. Rep. 846, 202 Fed. 199, 120 C. C. A. 447.

The order of the referee is affirmed.

HASLINGHUIS et al. v. P. HARRINGTON SONS.

(District Court, New Hampshire, November 29, 1916.)

No. 79.

1. TRADE-MARKS AND TRADE-NAMES ⟸60—INFRINGEMENT OF TRADE-MARK—IMITATION OF LABEL.

A label, the size, shape, and general appearance of which, combined with the appearance of the bottle on which it was placed, are strikingly like the trade-mark placed on a well-advertised article, so as to justify a finding that it was adopted for the purpose of leading the public to believe it was buying the well-advertised article, is an infringement, notwithstanding changes in the name thereof.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 73, 74; Dec. Dig. ⟸60.]

2. TRADE-MARKS AND TRADE-NAMES ⟸98—DAMAGES—REFERENCE TO MASTER.

Where the proofs in a suit for injunction to restrain the infringement of a copyrighted trade-mark showed only one sale of the infringing article

and the possession of other of such articles on defendants' shelves, the court will not exercise its discretion to send the case to a master, but will take the account itself, especially where reference to the master was urged by plaintiffs, so that they might enter upon an examination of defendants' business.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊂=98.]

In Equity. Suit by Jacob Johannes Haslinghuis and others against P. Harrington Sons for injunction to restrain infringement of a trade-mark and an accounting. Injunction granted, and accounting before the court awarded.

Macleod, Calver, Copeland & Dike, of Boston, Mass., for plaintiffs.
P. H. Sullivan, of Manchester, N. H., for defendants.

ALDRICH, District Judge. I think the proofs in this case are such as to justify a decree for an injunction and for ordinary damages, but I see nothing to justify triple damages.

[1] The plaintiffs' trade-marks are shown by a certain heart-shaped label used for the sale of their gin, known as the "Genuine Holland's Geneva." It is a label of long standing and use, and has been several times copyrighted for the protection of the plaintiffs' trade. There is no occasion for particularly describing it, because a copy is attached to the bill of complaint.

The size, shape, form, and general appearance of the defendants' label, combined with the size, shape, and dress of their bottle, are well calculated to mislead the casual buyer and such as do not carefully read into thinking that they are getting the plaintiffs' "Geneva Gin," which has been a long time upon the markets, and advertised through the instrumentality of their copyrighted trade-mark, and I do not think the detailed dissimilarities claimed by the defendants in respect to names only are a sufficient answer to the claim of the plaintiffs that the defendants' bottle and label are in similitude with theirs. The two labels are strikingly alike in their general appearance, and so much so as to justify a finding that the defendants adopted the plaintiffs' label, making detailed changes in the name only, and the shape, size, and dress of the plaintiffs' bottle, for the purpose of leading members of the public into buying the Harrington gin, thinking it was the plaintiffs' Geneva Holland gin.

[2] Now, as to the other branch of the case, in which the plaintiffs claim that the defendants are in unfair competition. In view of what has already been found as to infringement, it would follow, of course, that the defendants are in unfair competition to the extent that the proofs show that they were in trade using the label complained of.

The proofs, however, are limited to one sale of five bottles, and that there were other bottles on the shelves bearing the plaintiffs' label, and bottles bearing the defendants' label.

It results from the foregoing findings that the plaintiffs are entitled to an injunction and an accounting, and it apparently matters little whether the accounting under the proofs comes under the finding of infringement or that of unfair competition. If the accounting is to be under infringement, including the one sale, it would be based upon

damages resulting from such sale, and while the one sale and the circumstances in the case may quite likely sustain the claim of unfair competition to the extent of the proofs, it does not necessarily follow that the case would be sent to a master for an accounting. For aught that appears in this case, there may have been only one sale, and the bottles with the different labels may have been placed on the shelves on the day of the sale. If the damages under either theory of the plaintiffs' case are to be ascertained from the proofs, it could be easily done by the court, because the question of accounting would be very narrow and very simple, and while I have no question of the authority of the court in a case of this kind to appoint a master, I doubt as to the wisdom of doing that, particularly in view of the fact that the plaintiffs urge it in order that they may enter upon an examination of the defendants' business. While not doubting the power to do it, the power is exercised under discretion, and it does not seem justifiable to exercise such discretion under the circumstances of this case and upon proof of a single sale.

The plaintiffs may have an injunction against the defendants' using the heart-shaped label in similitude to that of the plaintiffs, and an accounting before me on the question of damages, and the inquiry will be limited to the sale proven, unless the plaintiffs make out a case for inquiry in respect to further damages.

WEST v. EMPIRE LIFE INS. CO.

In re COLUMBUS SECURITIES CO.

(District Court, W. D. Washington, N. D. September 14, 1916.)

No. 4.

BANKRUPTCY ⊂=299—SUIT BY RECEIVER—RIGHT OF INTERVENTION.

In a suit brought by the receiver of a bankrupt New Jersey corporation in a District Court in Washington by which he had been appointed ancillary receiver to wind up the affairs of a Washington corporation in which bankrupt claimed to be a large stockholder, other claimants of the stock held by the bankrupt may properly be allowed to intervene; the court in Washington, rather than that in New Jersey, being the proper forum in which to determine rights in a Washington corporation.

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

In Equity. Suit by Henry J. West, as receiver in bankruptcy of the Columbus Securities Company, against the Empire Life Insurance Company. On motion by complainant to dismiss petitions in intervention. Denied.

Donworth & Todd, of Seattle, Wash., for plaintiff.

Corwin S. Shank and H. C. Belt, both of Seattle, Wash., for interveners.

NETERER, District Judge. The Columbus Securities Company having been adjudged bankrupt, the plaintiff was by the United States

District Court of New Jersey appointed receiver, and ancillary receiver by this court. The company, at the time, claimed to own 80 per cent. of the capital stock of the defendant, a corporation organized and doing business under the laws of the state of Washington, and having ceased to do business in the state, and certain actions having been commenced in the Washington state court by parties claiming that they have been fraudulently deprived of stock in the defendant corporation by the Columbus Securities Company, the plaintiff, as receiver, was authorized by the District Court of New Jersey and this court to prosecute this action, the purpose of which is to administer the estate of the defendant company and wind up its affairs. Various intervening petitions have been filed with the court's permission by persons claiming to be owners of shares of the capital stock of the defendant company, which, it is claimed, was obtained by the Columbus Securities Company through fraud, and pray that it be so adjudged. Motion is made by the plaintiff to strike these intervening petitions, on the ground that the bankruptcy court in the district of New Jersey is in possession of the stock and has jurisdiction to determine all conflicting claims with reference thereto, and that this court has not jurisdiction.

Many authorities have been cited by both sides, but, in the main, I think, upon matters to which there can be no contention. The situs of the defendant, it being a Washington corporation, is in this district, and this would also be the place where suits concerning title to the stock or attachment and execution may be brought, as stated by Story on Conflict of Laws, § 363. The situs of the corporation is the proper forum to determine the right to ownership of its capital stock, provided jurisdiction can be obtained of the party having the stock. This also seems to have been the opinion of the plaintiff in prosecuting this action, for, with respect to the cases pending in the state court challenging the title to stock of the defendant and asking its adjudication, he says that the matter should be "determined and fixed by the order, judgment, or decree of the United States District Court for the District of New Jersey, *or by this court,*" and since the purpose of the action is to wind up the business and affairs of the defendant company, it would seem that the issue between the contending stockholders should be determined in this action, to the end that distribution can be adjudged to the proper parties, and, the holder of the stock of the Columbus Securities Company being before this court upon the authority and direction of the bankruptcy court, the motion to dismiss the petitions in intervention should be denied.

As I view the issue, Richardson v. Shaw, 209 U. S. 365, 28 Sup. Ct. 512, 52 L. Ed. 835, 14 Ann. Cas. 981, Gorman v. Littlefield, 229 U. S. 19, 33 Sup. Ct. 690, 57 L. Ed. 1047, and Stowe v. Harvey, 241 U. S. 199, 36 Sup. Ct. 541, 60 L. Ed. 953, and Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, decided by the Supreme Court May 8 and June 5, 1916, respectively, have no application.

PITT CONST. CO. v. CITY OF DAYTON.

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

No. 2798

1. PLEADING ⊂⊃343—JUDGMENT ON PLEADINGS—RIGHT TO.
In an action on contract, where defendant's answer set up provisions of the contract relied on to defeat recovery, judgment on the pleadings cannot be granted for defendant, unless some provision of the contract as a matter of law precludes recovery.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1048–1051; Dec. Dig. ⊂⊃343.]

2. MUNICIPAL CORPORATIONS ⊂⊃374(1)—PUBLIC IMPROVEMENTS—CONTRACTS—CONSTRUCTION.
A contract for the extension and improvement of a waterworks system obligated the municipality to furnish a right of way for a pipe line. Other portions of the contract provided that the price should cover all loss or damage arising out of the nature of the work, or from any unforeseen obstructions or difficulties, as well as all risks of any description; that if the contractor should be stopped by an injunction within the time in which he should finish, the work should be extended by as many days as he was stopped, but that if he should be stopped more than three months, the municipality might annul the contract, and that the contractor should accept orders for extra work not included in the contract necessary to the improvement or connected therewith, but that no claim for extra work or materials should be allowed unless ordered and the price agreed upon before the work was done or finished. *Held*, that where the municipality did not furnish the right of way as the contract required, and its failure seasonably to obtain the right of way damaged the contractor, it cannot escape liability for injuries resulting from delay in obtaining the right of way; the provisions relating to loss to the contractor not referring to a breach of the contract by the municipality.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⊂⊃374(1).]

3. MUNICIPAL CORPORATIONS ⊂⊃374(2)—PUBLIC IMPROVEMENTS—CONSTRUCTION OF CONTRACT.
Another provision of the contract declared that all claims for damages or for any other matter or thing for which the contractor might consider himself entitled to extra remuneration, must be made in writing to the director of public service within 14 days from the time the damages or other matters occurred, or the cause for the same should arise, and unless so made, the claims should be waived. *Held*, that in view of the situation of the parties, the provision as to waiver of claims does not apply to a claim for damages arising out of the municipality's own breach of contract in failing to furnish the right of way until after the time for performance of the contract had expired; this being true though the municipality had grounds for believing that it owned the right of way.
[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910: Dec. Dig. ⊂⊃374(2).]

4. CONTRACTS ⊂⊃169—CONSTRUCTION—GENERAL LANGUAGE.
General language of contracts must be construed with reference to the fitness of the subject-matter and person.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 752; Dec. Dig. ⊂⊃169.]

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

Action by the Pitt Construction Company against the City of Dayton. There was a judgment for defendant on the pleadings, and plaintiff brings error. Reversed.

W. B. Turner, of Dayton, Ohio, for plaintiff in error.

W. H. McConnaughey and John S. Shea, both of Dayton, Ohio, for defendant in error.

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

WARRINGTON, Circuit Judge. The Pitt Construction Company, a Pennsylvania corporation, and the city of Dayton, state of Ohio, entered into a written contract, September 16, 1912, for an extension and improvement of the waterworks system of Dayton. The Construction Company was to furnish the material and perform the labor in constructing a line of cast-iron water pipe, with proper connections, along a particular course between the pumping station and the reservoir of the city, including standpipe foundations, according to specifications, plans, and drawings, and for prices attached to the several items as stated in the accepted proposal. In consideration of this the city undertook to furnish the right of way for the improvement, and also to pay the prices named for such material and labor. The improvement was completed to the satisfaction of the city, and was paid for according to prices named, and provided for in the contract; and those features of the contract are not involved in the present controversy.

In the suit below it was sought to recover damages for alleged delay and neglect of the city in furnishing a right of way for a substantial portion of the improvement. The items of damage so alleged are as follows:

(1) Increase in cost of excavation from 72 cents to $1.12 per lineal foot, amounting to $2,168.

(2) Increase in cost of laying pipes from 15 cents to 25 cents per lineal foot, amounting to $542.

(3) Cost of pumping water from the trenches, which would not have been required if such delay and neglect had not occurred, amounting to $2,072.48; cost of supplies required for such pumping, $1,404.17; cost of new pumping equipment, $358.97.

(4) Increase in cost of labor in the sum of $1,396.99.

(5) Cost and expense incurred in management of the business and in keeping the equipment and organization at Dayton instead of elsewhere, in the sum of $4,050.

(6) Cost of moving machinery and appliances from one portion of the improvement to another portion, which but for such delay and neglect would have been unnecessary, $138.60.

(7) A profit of 10 per cent. upon the item of labor and that of pumping, amounting to $346.30.

The alleged consequences of such delay and neglect, as respects the items of damage so claimed, will be better understood through further statement of the terms of the contract and the extent of the delay complained of. The contract required the contractor to commence the work within 30 days after its date, September 16, 1912, and to complete the

improvement by June 1, 1913; and failure in this behalf in terms rendered the contractor liable for wages of inspectors at the rate of $3 a day for each, and for the further sum of $25 a day, not as a penalty, but as liquidated damages, and such sums were to be deducted from moneys accruing to the contractor. The contractor, under direction of the city, placed its equipment in position to commence work September 30, 1912, upon what was known as "Station 53" in the proposed line of improvement, but was on that day prevented from proceeding with the work by an order of injunction issued against the city and the contractor alike, in a suit commenced by Joseph E. Bimm in the Montgomery common pleas court. It developed that the city did not own a right of way for such an improvement as this along the line of Station 53. This resulted in an order on the part of the city, directing the contractor to remove its equipment to another portion of the line, and along which the city owned the right of way. The contractor carried out this order, and there commenced the work. December 19, 1912, the city instituted a proceeding in the Montgomery county probate court to appropriate the right of way through the land in which Bimm claimed an interest; on February 19, 1913, the value of the interest taken and the damage to the residue were assessed at $9,841; and on May 19th final judgment was entered. The judgment, however, was not paid until the following July 2d, a month succeeding the expiration of the period within which the contractor was to complete the improvement. The city's delay in so acquiring the right of way is alleged to have prevented completion of the improvement until December 22, 1913.

The city met these allegations by answer containing ten separate defenses. In its first defense the city set up the written contract above pointed out, admitting, however, prevention from doing the portion of the work which was embraced in the injunction suit of Bimm, that on December 19, 1912, it commenced proceedings to appropriate that portion of the right of way, and that on July 2, 1913, it paid the money assessed therefor, but denying generally all other allegations of the petition. The first defense was pleaded by reference thereto in each of the succeeding defenses; but those defenses each contain additional matter. The second defense alleges that the cost of removing the contractor's equipment from Station 53 to another portion of the work was agreed by the parties to have been the only effect of the injunction, and that such expense was paid in full settlement of all claims arising in that behalf. The third defense alleges that when plaintiff resumed work on the portion of the improvement east of Station 53, it complained of an excess of water in the trench, of losses on account of the delay caused by the city, extra work, high prices of labor, etc., and that these claims were thereupon settled and discharged by an arrangement for changing to the advantage of the contractor the grade along which the pipes were to be laid, and that this arrangement was carried out. The fourth, fifth, sixth, and seventh defenses set up, respectively and in the following order, certain provisions of sections 21, 34, 33, and 31 of the contract, and so present questions of law rather than of fact. These questions will, so far as necessary, be con-

sidered later. The eighth defense denies certain allegations contained in the petition, to the effect that the city, through its officers, had falsely represented to the plaintiff that it had secured the right of way for the improvement, and had so induced plaintiff to enter into the contract, and thereupon avers that the city had, for a consideration, secured the right of way in dispute from a railroad company, and that the city solicitor had advised the city that Bimm (plaintiff in the injunction suit mentioned) had no valid claim against it in respect of such right of way. The ninth defense, in effect, alleges as a bar to recovery the total payment made and received under and according to the contract, and, further, that plaintiff's losses were due "to natural conditions attending the work, the incompetency of plaintiff's employés and the flood of March 25, 1913," and for which defendant denies responsibility. The tenth defense, in substance, recites the city's right in terms reserved in the contract to recover of plaintiff the wages paid to inspectors, and also the penalty of $25 a day during the contractor's delay in completing the improvement, amounting in all to $5,000, and alleges that it was agreed between the parties that the city's waiver of this sum, together with its payment of the other sums mentioned in the answer, should be and were accepted in full discharge of all claims of every kind and character. The issues were closed by plaintiff's reply. This consists of denials of new matter set up in the answer, and also of averments in apparent answer to the sixth defense (which, as before stated, relied on section 33 of the contract), to the effect that plaintiff had complied with section 33 of the contract, requiring claims for damages or extra remuneration to be made in writing to the director of public service of the city within 14 days from the time the damages or other matters might occur.

[1, 2] The case was disposed of below through allowance of a motion of defendant for judgment upon the pleadings, and the question presented here is whether this motion was rightly granted. It is manifest that these pleadings are not open to a motion for judgment unless there are one or more provisions of the contract which forbid the recovery sought; and this was the theory of the decision below. We have seen that certain sections of the contract are, in substance, set out and relied on in the fourth, fifth, sixth, and seventh defenses of the answer. In considering the portions of the contract pleaded in these defenses, it is to be borne in mind that plaintiff's action is bottomed upon the admitted failure of the city to furnish a material portion of the right of way until the time fixed for completion of the improvement had expired. We have seen that it was the belief of its official agencies that the city owned this part of the right of way at the date of the contract; this is the obvious effect of the eighth defense. However, the city's mistake as to its title did not lessen the obligatory force of the covenant contained in the contract: "The city of Dayton will furnish the right of way for said improvement." Since the contractor was bound, under distinct penalties in the form of liquidated damages, to complete the improvement by June 1, 1913, this covenant of the city could have only one ultimate meaning: The city obligated itself to furnish the right of way seasonably. This obligation was fundamen-

tal; for, unless it was performed, the improvement could not be completed within the allotted time. It, therefore, needs only to be stated that the city's failure in any material degree to perform the obligation was a violation of a vital portion of the contract. The precise inquiry, therefore, is whether any contractual provision set up in the defenses mentioned, or, indeed, any other portion of the contract, was intended to apply to damages arising from the city's own breach of its covenant seasonably to furnish the right of way.

(a) The fourth paragraph of the answer sets out section 21 of the contract as a defense. That section, in substance, provides that the total price named in the contract shall be paid and received as full compensation for everything furnished and done thereunder; that the price shall also cover—

"all loss or damage arising out of the nature of the work" or "from any unforeseen obstructions or difficulties encountered in the prosecution of the work, and for all risks of any description connected with the work, and for all expenses incurred by, or in consequence of, the suspension or discontinuance of the work as herein specified."

(b) In the fifth defense reliance is placed on section 34 of the contract. It is there provided:

"If the contractor be stopped * * * by an injunction, then the time within which he is to finish the work, shall be extended by as many days as he is stopped; provided, * * * that if he be thus stopped more than three (3) months, the director of public service shall have the right to annul said portion of this contract; and in case said portion be so annulled, the contractor shall be paid for the amount of work he has done upon that portion of the contract so annulled. In no case will any damages be allowed the contractor if the work be thus stopped."

(c) The sixth defense is founded in part on section 33, which provides:

"All claims for damages, or for any other matter or thing for which the contractor may consider himself entitled to extra remuneration, must be made in writing to the director of public service within fourteen (14) days from the time the damages or other matters occur, or the cause for the same arises; and unless such claims are so presented it shall be held that the contractor has waived such claims, and shall not be entitled to claim or receive any pay for the same."

(d) In the seventh defense section 31 is relied on. This section provides:

"The contractor will be obliged to accept orders for extra work not included in this contract, necessary to be done on the work, or connected with the same. * * * No claim for extra work or materials will be allowed unless it is ordered * * * and the price is agreed upon in a written agreement, before the work is done or the material furnished * * *. If no fixed price can be agreed upon * * * the extra work must be paid for on the basis of ten (10%) per cent. in advance of the actual cost * * * as determined by the engineer."

The learned trial judge in effect held that the provisions of sections 21, 31, and 34 were not designed to excuse the city from the necessary consequences of its own breach of the covenant to furnish the right of way. We are satisfied that this conclusion is sound. The views of the trial judge concerning the provisions of sections 21, 31, and 34 are

sufficiently disclosed in the following portions of his opinion relating to section 34:

"When the defendant stipulated that the contract should be completed by June 1, 1913, and that it would furnish the right of way, it obligated itself so to furnish such right of way as to admit of the completion of such contract on the date named. Section 34 relates to a stoppage caused by some wrongful conduct or act (real or alleged) of the plaintiff and for which the city was not responsible. It does not say 'if the contractor and the city be stopped,' etc. It does not cover a stoppage arising from an error or wrongdoing of the city. It would be a harsh construction which would give the city a right to annul the plaintiff's contract on account of something for which it was in no sense responsible, and which the city itself was bound to do. If the city intended to reserve the right to turn the contractor out, and possibly after he had made all the preparation and incurred all the expense incident to proceeding with and completing his work, it should be so provided in plain terms. If the meaning of section 34 is what the defendant claims, the contractor, however innocent and however much injured by some wrongful or negligent act of the city, is turned away empty handed. This would be casting the loss on the wrong party. * * *

"The contract does not give the city the right to suspend the work pending the acquirement of the right of way, or to extend the time of completion on account of delay in obtaining such right of way. The city did not protect itself in either of these respects. It did not have in contemplation a delay in securing a right of way which would defer the completion of the contract beyond June 1, 1913."

[3, 4] However, the trial judge held that section 33, relied on in the sixth defense, was applicable to the instant case, and that its requirement to present claims for damages within 14 days from the time the right thereto arose had not been observed. But is section 33 applicable? It must be conceded that its language is in form broad; though it is not express, it is general, as respects the present issue. This is true also of those portions of the other sections which were held below to be inapplicable. And if the principle is sound which was there applied in construing the other sections, it is hard to see why the same principle should not also constitute the rule for construing section 33. The section was designed to accomplish some purpose, and so must be given reasonable effect. The contract provides for supervision of the work through directions of specified officials of the city; and it may well be, for instance, that causes for "damages" or "extra remuneration" within the meaning of the section might have arisen through the city's failure rightly to supervise and direct the mode of distributing the materials or of conducting the work itself, and so have entitled the contractor to recover such damages or extra remuneration only by presenting written claims therefor to the officer named and within the time fixed by the section. We do not pause to consider or to pass upon the nature or unreasonableness of a supervision, or of other more or less obvious causes, which would have necessitated the presentation of written claims. The object is simply to indicate a reason for the use of the language contained in section 33. We are confronted with an entirely different question, however, when we are brought to consider the city's violation of a fundamental provision of the contract. It is as true now as it ever was that general language of contracts, as well as statutes, "shall be restrained unto the fitness of the matter and the person." It was said of section 33 by the trial judge that: "It was

competent for the parties thus to stipulate." Admission of this, however, is not decisive of the question. The contention is that, by the language here employed, the parties actually meant to include "damages" or "extra remuneration" based on a breach committed by the city itself of an essential provision of the contract. To contend that such a breach was within the contemplation of the parties is to say the city might break the contract as to a matter which underlay the whole contemplated work and still insist that the contractor should be bound by the contract; in other words, it is to say that the parties understandingly and intentionally declared by the language of section 33 that through the contractor's nonobservance of the 14 days' limitation the city could escape the consequences, indeed take advantage, of its own wrong. This is to strain, not rationally to interpret, the language. The fundamental undertakings of the city were two, one to furnish the right of way and the other to pay for the improvement. The one was as necessary to the end to be achieved as the other; and we cannot think that, when using the language of section 33, the city's breach of its covenant to furnish the right of way, any more than a breach of its promise to pay for the improvement, was within the contemplation of either of the parties. These views would entitle plaintiff to recover, notwithstanding the language of section 33, if it should be proved that the damages claimed were the direct result of the city's breach of its covenant to furnish the right of way; for damages of that kind must be treated as falling outside of the contract. This conclusion is, in principle, sanctioned by well-considered decisions.

In Wood v. Ft. Wayne, 119 U. S. 312, 321, 322, 7 Sup. Ct. 219, 224 (30 L. Ed. 416) Wood had contracted to supply the materials, except "special castings" which were to be furnished by the city, and the labor in constructing waterworks for the city of Ft. Wayne. In the course of the work the city changed the place of crossing the river, altering the plan accordingly, and so imposed upon the contractor a large increase in cost of crossing. The city supplied some defective castings, which resulted in damages to the contractor through delay and additional expense. The nature of the objections urged to the right of recovery in consequence of the city's alteration of the plan and of the expense and delay attending the supply of the defective castings, and also the provisions of the contract relied on by the city, appear in the following portions of the opinion:

"The provision that all loss or damage, arising 'from any unforeseen obstructions, or any difficulties that may be encountered in the prosecution of the' work, 'shall be incurred by the contractor without extra charge' to the city cannot fairly apply to the obstructions and difficulties at the changed place of crossing, resulting from the increased depth of water and the quicksand.

"As to the claim for the $750, the 'special castings' were to be supplied by the defendant from a manufacturer at Ft. Wayne, and not by the plaintiffs. * * * The defendant contends that the clause in the contract which provides that the plaintiffs 'shall have no claim upon the city for any delay in the delivery of pipes or other materials from the manufacturers,' throws the loss from these defects on the plaintiffs. But we do not so think. * * * Nor does any work done by the plaintiffs in altering the castings come under the head of such extra work as required a written order."

The principle of that decision as respects the responsibility of an employer for its own act of changing a plan or for delay and neglect in furnishing something the employer agreed to supply was applied by this court in Wyandotte & D. R. Ry. v. King Bridge Co., 100 Fed. 197, 205, 40 C. C. A. 325, the present Mr. Justice Day saying in respect of abutments which the townships were bound to locate:

"The matters which we have referred to, the work necessitated by the settling of the pier, the wrong location of the abutments, which it was the duty of the authorities to properly locate for the bridge company, are entirely outside of the contract, not within the scope thereof, or in the contemplation of the parties when the contract was signed. They are not within the class of 'extras' which it was the intention of the parties to prohibit unless provided for in writing."

In Gearty v. Mayor, etc., of New York, 171 N. Y. 61, 72, 74, 63 N. E. 804, 807, an action for damages for breach of contract, the city, through its proper officer, had given an order to take up and replace certain street paving, which order was proved to be an arbitrary exercise of power and a breach of the contract; and, in spite of a provision of the contract requiring an engineer's certificate and its filing with the department as a "condition precedent" to the right of the contractor to payment, it was held:

"It is insisted on behalf of the city that the plaintiff, by obeying the orders of the engineer of construction, requiring him to take up and relay the alleged improper work, without making any claim for extra compensation at the time the changes were ordered or made, or without making a new contract, has waived any claim, if he was entitled to any, to extra compensation. This proposition assumes, erroneously, that the plaintiff is seeking to recover extra compensation under the contract. This action is to recover damages for breach of the contract. * * * If this were an action for extra work under the contract, such a certificate would be necessary, but as already pointed out, this is an action to recover damages for a breach of the contract, and the provision requiring a certificate has no application."

In Roemheld v. City of Chicago, 231 Ill. 467, 472, 83 N. E. 291, 293, it was held that additional labor and expense required under changed plans and drawings for the work in hand did not fall within the meaning of a provision in the contract requiring "extra work" to be done only in pursuance of a "written order"; the court followed the rule laid down in Wood v. Ft. Wayne, supra.

In O'Connor & Co. v. Smith & Gething, 84 Tex. 232, 238, 19 S. W. 168, 170, O'Connor & Co. had contracted with the Dallas & Greenville Ry. Co. to grade and repair its roadbed, and had on the same date contracted with Smith & Gething to sublet to them a portion of the work and also to have certain cross-sectioning done to enable the subcontractors to proceed with the work. The principal contractors delayed this work, and the suit was in part to recover damages for such delay. It was provided by the contract between the principal contractors and the railway company, subject to which the subcontractors undertook their work, as follows:

"In case the company shall be delayed in acquiring the title to the lands required by the road, or for any other reason, the contractors shall not be entitled to any damages by reason therof, but shall have such extension of time for the completion of the work as the engineer may deem proper, not to be less, however, than the time lost by the delay."

This provision was interposed to defeat the claim of the subcontractors, but it was held to be inapplicable to delay caused by the railway company itself through the principal contractors, the court aptly saying, 84 Tex. 238, 19 S. W. 171:

"We do not think that the clause of the contract last quoted, in regard to the delay, can be held to have application to the matters in controversy in this suit. The delay therein provided for is one that the railway company might suffer, and not one that it should cause."

See, also, Sheehan v. Pittsburg, 213 Pa. 133, 134, 62 Atl. 642; Horgan v. Mayor, 160 N. Y. 516, 522, 523, 55 N. E. 204; Roberts v. Bury Commissioners, L. R. 5 C. P. 310, 327, 331, 333; Lawson v. Wallasey Local Board, L. R. 11 Q. B. Div. 229, 238, 239. It is to be observed of Sheehan v. Pittsburg, supra, that the city was held liable in damages for failure to obtain complete right of way for a street improvement where the contract was based on the "assumption by both parties" that such right of way had been secured, yet the contract required the contractors to bear "all loss or damage" arising from "unforeseen * * * difficulties" and from "any hindrance or delay from any cause" even though such cause might justify extension of the time allotted for completing the improvement. The theory of the decision was that such language was not applicable to the city's failure to secure a complete right of way. No difference in principle is perceived between an assumption of present ownership and a present contractual obligation seasonably to acquire ownership of a right of way, or between the consequence of a failure in the one case to possess such ownership, and of the failure in the other to acquire such ownership, so as in either case to admit of completion of the work within the time allotted. And in Roberts v. Bury Commissioners, supra (at page 331), it was held that a power reserved to the commissioners to determine the contract by written notice, etc., would not enable them to "acquire, by means of their own wrongful act or default, the right to enforce" the provision, since they could not (at page 333) "take advantage of their own wrong." Further, we do not find any decision which holds that a municipality, or other employer, may resort to provisions of a contract like or similar to those of the present one to defeat a suit for damages caused by the employer's own breach of a vital portion of the contract.

We appreciate the reason why public corporations employ elaborate provisions in their improvement contracts to guard their interests against unjust claims; familiar experience proves that they need such protection. This has resulted in the development of a wide range of contractual provisions looking to the protection of the public interests; indeed, a similar development has, in large measure, reached the domain of private contracts. It is equally well known that these provisions are aimed generally against the contractor and with a view of limiting the cost of an improvement to the sum agreed upon and such additional sums as are specially provided for. Still we are not aware of any sound rule or policy that would permit an employer to use such general provisions of a contract as are here found, to shield himself against damages inflicted by his own breach of a covenant made by him and of as vital a character as the present one. Assuming that he

may legally do so, if an employer wishes to protect himself against his own failure to keep such covenants, he must distinctly say so; and he must advise the contractor of this purpose through specific provision set out in the contract. Roberts v. Bury Commissioners, supra, at page 327. This has not been done here; and in view of the obvious fairness of expressly declaring such a purpose and of the rule of judicial decision before pointed out, we must hold that the contract does not apply to the damages claimed.

It is not necessary to pass upon other questions presented by counsel. Accordingly, the judgment will be reversed, with costs.

UNITED STATES FIDELITY & GUARANTY CO. v. NAYLOR et al.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1916.)

No. 4473.

(Syllabus by the Court.)

1. PRINCIPAL AND SURETY ⟸192—"COSURETYSHIP"—TEST.

The test of cosuretyship is a common liability to the same party or parties for the same debt or duty. Such cosuretyship may arise out of the same writing or transaction, or out of several writings or transactions, at the same time, or at different times. It entitles the cosurety who has paid more than his just proportion of the common liability to contribution from his fellow cosureties who have paid less than their just proportion.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 578–590; Dec. Dig. ⟸192.

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

2. PRINCIPAL AND SURETY ⟸192—CONTRACTS—COSURETIES—WHO ARE.

D. and S., the owners of a bank, made their bond in the sum of $5,000, with a surety company as their surety, for its usual compensation for such suretyship, to a county, conditioned to account for and pay over on demand deposits of county funds made in the bank between January, 1902, and February, 1903, and the county accepted this bond February 3, 1902. S. sold and conveyed his interest in the bank to D. on March 1, 1902. On March 2, 1902, D., as principal, and five individuals, the personal sureties, without compensation other than the friendship of the principal, made their bond in the sum of $10,000, conditioned to pay over on demand deposits of the county funds made in the bank between January, 1902, and February, 1903, and this bond was accepted by the county March 3, 1902. D. told the personal sureties, before they signed their bond, that $5,000 of the deposits in the bank were secured by the bond of a surety company, and asked them to make their bond for him for the excess of the deposits above $5,000, and they did not intend to become liable for that $5,000. But there was no contract between them and the county, nor between them and the surety company, to that effect, and they signed their bond, which, by its terms, secured the entire deposits up to $10,000, without reading it. The bank failed in January, 1903, owing the county on account of deposits $9,443.67. The surety company was compelled to and did pay more than its just proportion of this debt.

Held, the two bonds secured the same debt, and the surety company and the personal sureties were cosureties for its payment, and the former was entitled to contribution from the latter.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 578–590; Dec. Dig. ⟸192.]

3. PRINCIPAL AND SURETY ⟸194(1)—CONTRIBUTION—COMPENSATED AND ACCOMMODATION SURETIES.

Where some cosureties for a common debt or duty were compensated, but not indemnified, for their suretyship, and others became such for the accommodation of their principal or principals, the compensated cosureties, who have paid more than their just proportion of the common debt, may have contribution of the accommodation cosureties.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 605, 609, 610, 613, 614, 619, 620; Dec. Dig. ⟸194(1).]

4. PRINCIPAL AND SURETY ⟸196—CONTRIBUTION—BONDS FOR DIFFERENT AMOUNTS.

Where there are several bonds for different amounts securing the same debt or duty, and the surety on one of them pays more than his proportion of the debt, the contribution between the cosureties on different bonds is in proportion to the penalties of their respective bonds.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 627–631; Dec. Dig. ⟸196.]

5. PRINCIPAL AND SURETY ⟸196—CONTRIBUTION—INSOLVENT SURETIES.

In actions at law, where some of the cosureties liable to contribute are insolvent, have died or are beyond the jurisdiction of the court, the solvent sureties within its jurisdiction are liable for their respective aliquot parts only of the amount all the sureties on their particular bond should contribute.

But in suits in equity, where some of the sureties on a bond are insolvent, have died, or are beyond the jurisdiction of the court, the solvent sureties on that bond are liable to contribute and pay, not only their aliquot parts of the contribution due from the sureties on that bond, but also the parts attributable to their cosureties on the bond who are insolvent, have died, or are beyond the jurisdiction of the court. They are liable for the entire contribution due from all the sureties on their bond.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 627–631; Dec. Dig. ⟸196.]

6. PRINCIPAL AND SURETY ⟸196—CONTRIBUTION—EXPENSES.

Where several cosureties are liable for a common debt or default, and none of them pays without suit, one who is sued, and compelled by the judgment against him to pay court costs and expenses and interest, is entitled to contribution on account of those costs and expenses and the interest to the same extent that he is entitled to contribution on account of the principal of the debt, provided his defense to the suit was not frivolous, but was prudent and hopeful, though unsuccessful.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 627–631; Dec. Dig. ⟸196.]

Trieber, District Judge, dissenting.

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

Suit by the United States Fidelity & Guaranty Company against G. W. Naylor and others. From a decree dismissing the suit, complainant appeals. Reversed and remanded, with directions.

Dickerson and Starrett were copartners doing business in Kansas under the firm name of the Toronto Bank in January and February, 1902, and Dickerson continued to do business under that name until some time in January, 1903. On February 1, 1902, the bank was indebted to Woodson county, Kan., on account of county funds deposited with it, in the sum of $7,917.50, and it remained indebted to the county in various amounts until on January 14, 1903, it failed owing the county $9,443.67. On February 3, 1902, the county accepted and approved a bond of the copartners and the United States Fidel-

ity & Guaranty Company as their surety in the sum of $5,000, conditioned that the bank should promptly pay over on demand all funds of the county deposited with it between January 30, 1902, and January 30, 1903. On March 3, 1902, the county accepted and approved a bond of the owner of the bank, Dickerson, and the defendants Naylor, Thompson, Hoggatt, Gilroy, and Braley, as sureties, in the sum of $10,000, conditioned that the bank should promptly pay over on demand all funds of the county deposited with it during the year commencing February 1, 1902, and ending February 1, 1903. The slight difference in the date of the commencement and conclusion of the terms of the two bonds made no difference in the actual debt secured thereby. The county sued the Fidelity Company on its bond, and recovered the full penalty thereof and interest thereon, amounting to $6,027.30. The Fidelity Company paid this amount, $536.40 court costs and expenses and claimed to have expended $1,000 for counsel fees in that litigation. Out of the assets of the bank the receiver paid to the county $1,669.02 on the debt of the bank, and the remainder owing by the bank, which amounted to about $2,300.22, the sureties on the $10,000 bond paid. The Fidelity Company brought this suit in equity against the sureties on the latter bond for an accounting and contribution, on the theory that they were cosureties with it for the payment of the same debt. During the pendency of the suit the defendant Braley died, and Josie C. Braley, his sole heir, who succeeded to all his property, real and personal, was substituted for him as a defendant. Those alleged to be liable to contribute on account of the bond for $10,000, who are hereafter called the personal sureties, answered, among other things: First, that the bond which they signed was not given to secure the same debt as was the $5,000 bond made by the Fidelity Company, that the latter bond was given to secure the indebtedness of the bank to the county to the amount of $5,000, and the former was given to secure the indebtedness of the bank to the county for the amount in excess of that $5,000; and, second, that the Fidelity Company, in addition to the deposit of the county funds in the bank, received a money consideration for the making of its bond, while the only consideration which the personal sureties received was the deposit of the county funds in the bank to an amount not exceeding $5,000, in addition to the $5,000 which the bank had the right to receive on account of the bond of the Fidelity Company. There was a final hearing of the case upon the pleadings, an agreed statement of facts and the testimony of a few witnesses, and upon it the court sustained the two defenses stated above, and upon that ground dismissed the suit on its merits.

A. M. Keene and W. W. Padgett, both of Ft. Scott, Kan., for appellant.

G. H. Lamb and W. E. Hogueland, both of Yates Center, Kan., for appellees.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] The test of cosuretyship is a common liability for the same debt or burden. This liability may arise at the same time or at different times, out of the same writing or out of many writings. A common interest and a common burden alone are required to create the relation, and to enable the cosurety who has paid more than his due proportion to claim contribution from those who have paid less than their just proportion of the common liability. "If several persons, or several sets of persons, become sureties for the same duty or debt, of, to, and for, the same persons, though by different instruments, at different times, and without a knowledge of the obligations of each other, they will be bound to mutual contribution." 2 Wait's

Actions and Defenses, 297; 4 Pomeroy's Equity Juris. § 1418; Assets Realization Co. v. American Bonding Co., 88 Ohio St. 216, 102 N. E. 719, 720, 725; Dering v. Earl of Winchelsea, 1 Cox's Chan. Cases, 318, 322, 323.

[2] The first question, then, is: Was the bond of the personal sureties given to secure the same liability as the bond of the Fidelity Company? The evidence from which the answer to this question must be deduced consists of the two bonds, the judgments on the bonds, the testimony of Mr. Gilroy, one of the personal sureties, the stipulation that his testimony shall be considered the testimony of the sureties Thompson, Hoggatt, and Naylor, and the testimony of Mr. Gustin, one of the county commissioners. Mr. Gilroy testified that Mr. Dickerson, the principal in the bond the personal sureties signed, told him about March 2, 1902, that he had $5,000 of the county's money that was secured by a bond in a trust company; that he could get more money if he could get more bond; that there would not be much of the time when he would have more than $5,000 of the county's money, but that he had to give a bond to secure it; that Dickerson asked him to sign the bond for the bank; that as a result of this conversation and solicitation he signed the bond for $10,000 without, as he thinks, reading it; that he had no intention of becoming liable for the $5,000 already guaranteed by the Fidelity Company; and that he could not answer the question whether or not he would have signed the bond if the matter had been presented to him as a proposition to sign as additional surety for the $5,000 already guaranteed by the Fidelity Company. Mr. Gustin, the county commissioner, testified that the $5,000 bond was approved by the commissioners February 3, 1902; that on January 1, 1902, the bank was indebted to the county for the county funds deposited with it in the sum of $10,868.20; that after the $5,000 bond was approved Dickerson made application for an additional deposit over and above the $5,000 secured by the Fidelity Company's bond; that the board issued an order to allow him additional money above the $5,000 if he would give another bond, and instructed the county treasurer to deposit nothing above the $5,000 with his bank until the board received more bond to cover the amount the bank should receive; that the board knew when it met that the bank had on hand more than its proportion, and that was one of the things they met for, to give this order that he should give more bond; that they gave the county attorney the facts upon which to prepare the bond; that he prepared it, and the board examined the names of the sureties. There was no other material testimony upon this issue.

The result is that the facts were that the bank had more than $5,000 of the county funds when the county board met and Dickerson asked for more deposits; that the board then knew this fact, and that it had met to make the order that Dickerson should give more bond; that these facts were stated to the county attorney; that the county attorney drew the bond, and the personal sureties signed it without reading it. The bond was signed March 2, 1902, and it was approved March 3, 1902. If it had been given to secure only addi-

tional deposits to be subsequently received by the bank on the faith of this bond, the county attorney, on the state of facts which were given to him, would surely have so drawn it as to limit the liability of the sureties to the repayment of the deposits made subsequent to its date. The facts were, and doubtless they were so stated to him, that the bank was on February 1, 1902, and had been, indebted to the county in more than $5,000; that the board had made the demand of more bonds of the owners of the bank, and the county attorney so drew the bond that the sureties on it covenanted to repay all deposits made in the bank subsequent to January 31, 1902, a date more than a month prior to the date of the signing of the bond by the sureties. There can, therefore, be no doubt that the bond was given to secure all deposits after January 31, 1902, until January 31, 1903. The sureties, therefore, by the express terms of the bond covenanted promptly to pay over on demand the funds of the county deposited with the bank between January 31, 1902, and February, 1903. The bank defaulted in January, 1903. Hence the bond of the personal sureties by its clear terms secured the same debt as the bond of the Fidelity Company.

It is true that Dickerson told the personal sureties before the bond was signed that it secured only the deposits in excess of $5,000, that they signed it in reliance upon that statement, and did not intend thereby to become liable to pay the $5,000 for which the Fidelity Company had become liable. But Dickerson was neither the agent nor representative of the county nor of the Fidelity Company. The personal sureties were charged with the duty as against the county and as against the Fidelity Company to read the bond before they signed it, and if it did not accord with their intentions to modify it so that it did before they executed it. Insurance Co. v. Mowry, 96 U. S. 544, 547, 24 L. Ed. 674; Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 362, 83 Fed. 437, 441. It is conceded that by an agreement between themselves and the county, or by a contract between themselves and the Fidelity Company, they might have limited their liability to the repayment of deposits in excess of $5,000; but they did not do so. And the question here is, not what they might have done, but what they did, and there is nothing in the testimony in this case to overcome the incontrovertible fact, which the two bonds conclusively establish, that each surety on each bond covenanted to pay, up to the amount of the penalty of the bond he or it signed, the entire deposits in the Toronto Bank of the funds of the county between January, 1902, and February, 1903. The bond of the personal sureties was given to secure the same debt as the bond of the Fidelity Company.

This conclusion has not been reached without notice of other contentions of counsel for the personal sureties which have not yet been discussed. They call attention to minor differences in the verbiage of the two bonds, such as that the Fidelity Company's bonds secured the deposits of the county, while the personal sureties' bond secured these deposits and also 2 per cent. interest on daily balances, guaranteed that the bank would do all business of exchange on checks and drafts

without charge, and that it would make all reports required by law; that the surety company's bond guaranteed the payment of all checks and drafts of the treasurer of Woodson county, while the personal sureties guaranteed the payment of all warrants, checks, and drafts legally drawn on said fund; and that the Fidelity Company's bond ran to the board of county commissioners, and the bond of the personal sureties to the county treasurer. All these and other objections of the same class specified in their brief have received consideration. But there was no defalcation of payment of interest on deposits, and none of these objections relates to any accrued liability to the county of any of the sureties, or in any way challenges the controlling fact that each bond and every surety on each bond was bound by the bond he or it signed to pay, up to the penalty of the bond, to the county the debt for its deposits which has occasioned this litigation. The foregoing suggestions are therefore immaterial.

Counsel argued that the principals in the bond were not the same, because "the body corporate, the Toronto Bank," was specified as principal in the Fidelity Company's bond, and that bond was signed by "The Toronto Bank, W. P. Dickerson, Cashier," while "The Toronto Bank, W. P. Dickerson and C. H. Starrett, as owners of said bank," is named as principal in the personal sureties' bond, and it is signed as principal by W. P. Dickerson, who, at the date of his signature on March 2, 1902, had purchased and become the owner of the interest of Starrett in that bank. But the contention is baseless, for the personal sureties in their answer and in the stipulation of facts admitted that the Toronto Bank was owned by W. P. Dickerson and C. H. Starrett, doing business as partners under its name in the year 1902, until on March 1st in that year Dickerson purchased the interest of Starrett therein, and the condition of the bonds was that the respective sureties thereon would pay over on demand the county funds deposited in that bank between January, 1902, and February, 1903, and the bank continued in operation and received deposits until its defalcation in January, 1903.

They invoke the rule that sureties for joint principals are not liable for one of them acting independently, or after subsequent changes are made in the members of the firm, or by the dissolution thereof, and argue from these propositions that the personal sureties were not liable for the same debt as the Fidelity Company. There are two reasons why this position is untenable: First, the change in the membership of the Toronto Bank by the purchase by Dickerson of Starrett's interest was made on March 1, 1902, the personal sureties did not sign their bond until March 2, 1902, and by the terms of that bond they covenanted to repay all the deposits of county funds in the bank between January, 1902, and February, 1903, although the bank was owned by Dickerson when they made their bond, and it had been owned by Dickerson and Starrett before that date, and they knew it; and, second, prior to the making of the personal sureties' bond Dickerson and Starrett had contracted with the county to repay to it all deposits of its funds with the Toronto Bank made between January, 1902, and February, 1903, and the personal sureties knew that fact. With knowl-

edge of this fact they covenanted in their bond to repay to the county the deposits made by the county with that bank during the same time, and where sureties have become liable for the performance of a particular contract by a partnership, its subsequent dissolution before the completion of the contract will not release them from liability for each of the former partners so far as that particular contract is concerned. Abbott v. Morrissette, 46 Minn. 10, 48 N. W. 416; Freeman v. Berkey, 45 Minn. 438, 440, 48 N. W. 194; Kaufmann v. Cooper, 46 Neb. 644, 650, 65 N. W. 796. The Fidelity Company, notwithstanding the subsequent sale by Starrett of his interest in the firm to Dickerson, remained liable on its bond for the repayment of the funds of the county deposited with the bank between January, 1902, and February, 1903, and the personal sureties, by their execution of their bond subsequent to the sale of Starrett's interest to Dickerson, by the clear terms of the covenants therein, made themselves liable for the same debt. No logical or rational avenue of escape is perceived from the conclusion that the bond of the personal sureties was given to secure the same debt as that of the Fidelity Company, and this conclusion is verified by the fact that in the strenuously contested action of U. S. Fidelity & Guaranty Co. v. Woodson County, 145 Fed. 144, 76 C. C. A. 114, in the court below, that court adjudged the Fidelity Company liable to pay these deposits up to the amount of the penalty of its bond, and that judgment was approved by this court, and in a similar action by Woodson county against the personal sureties, Naylor, Thompson, Gilroy, and Hoggatt, on their bond, a judgment was rendered against them for the part of the deposits in the Toronto Bank secured by both bonds that was not paid by the Fidelity Company and others.

[3] The next contention of the counsel for the personal sureties is that, although they were liable for the same debt as was the Fidelity Company, the latter is not entitled to contribution from them, because it received a money consideration for assuming its liability, while they received nothing but the deposit of the moneys of the county with their friends Dickerson and Starrett, for whose accommodation they signed their bond. The argument is that the right to contribution rests on principles of equity, and primarily on the thought that equality is equity, and that the personal sureties are not placed on an equality with the Fidelity Company if they are required to pay their proportion of the common debt, because they received nothing for their obligation but the accommodation of their friends, while the company received its regular premium for its suretyship. The record fails to disclose the amount paid to the Fidelity Company for its bond, nor does it show what the value in actual, substantial, or sentimental benefit the friendship of the owners of the bank, doubtless induced or fostered by the accommodation of the personal sureties, was to these sureties, so that the court cannot, if it would, place these parties on an absolute equality. Certain it is, however, that its refusal to compel contribution from the personal sureties would, even if the amount of money received by the company for its suretyship were known, result in the payment by the Fidelity Company of thousands of dollars more, and the payment by the personal sureties of thousands of dollars less, than

their just and lawful proportion of the common liability, and would leave these parties in a more gross and unjust inequality than the enforcement of contribution.

The true answer to this contention of counsel, however, is that the principle and practice of contribution among cosureties are neither founded upon nor do they require absolute equality among the sureties. They do not undertake to investigate, review, reform, or give consideration to the motives, considerations, or inducements that caused the cosureties to become such, nor do they attempt to equalize the contracts they made, and for that reason the consideration, or the lack of it, which sureties may have received, except where they receive practical indemnity, is immaterial. The principle and practice of contribution take the cosureties as they find them after their contracts have been made, and they are founded on the proposition that, where some of such cosureties have paid more than their proportion of the common liability, it is just and equitable that those who have paid less than their proportion thereof should contribute to the former sufficient to make the proportion paid by each cosurety just and equitable. Hence, where some of the cosureties for a common debt have been compensated, but not indemnified, for their suretyship, and others became cosureties for the accommodation of their principals, that fact is immaterial, and the compensated cosureties, who have paid more than their proportion of the common liability, are entitled to contribution from the accommodation cosureties. United States Fidelity & Guaranty Co. v. McGinnis, 147 Ky. 781, 145 S. W. 1112, 1115; Frost on Guaranty Insurance, § 284; Lewis, Adm'r, v. United States Fidelity & Guaranty Co., 144 Ky. 425, Ann. Cas. 1913A, 564, 138 S. W. 305, 306; Fidelity & Deposit Co. v. Phillips, 235 Pa. 469, 84 Atl. 432, 434. If the rule were otherwise it would necessarily follow that an accommodation cosurety who had paid more than his proportion could not have contribution from a compensated cosurety, for the inequality suggested inheres in the contracts and exists in one situation as well as in the other. And the conclusion is that the Fidelity Company may have contribution from the personal sureties.

[4] Many other questions relevant to the settlement of the decree which must be rendered have been discussed by counsel in their briefs and have been considered by the court, and our opinion upon them will be briefly stated. Both bonds were given pursuant to section 1704, General Statutes of Kansas 1901, which provides that when the bond of a surety company is given it must be "in an amount aggregating the largest sum which may be on deposit at any one time," and that when a personal bond is given "it must be double the largest approximate amount that may be on deposit at any one time." Counsel for the personal sureties cite this section, and contend that, because the personal bond of $10,000 must be presumed to have been given for double the amount that might be on deposit at any one time and the bond of the Surety Company for $5,000 for only the amount of such deposit, each of the bonds was given for only $5,000, and the proportion of the common debt which the Fidelity Company should pay is the same as that which the personal sureties should pay. The proposition cannot

be sustained. Notwithstanding the provisions of the statute, the personal sureties expressly covenanted to pay the common debt to the amount of $10,000, and the Fidelity Company covenanted to pay it to the extent of $5,000 only, and the proportion of it which the personal sureties should pay is two-thirds, and that which the Fidelity Company should pay is one-third, of the debt. Where there are several bonds securing the same debt, and the surety or sureties on one of these pays more than his proportion of the debt, the contribution between the sureties must be in proportion to the penalties of their respective bonds. Story's Equity Jurisprudence, par. 497; Armitage v. Pulver, 37 N. Y. 494; Jones v. Blanton, 41 N. C. 115, 51 Am. Dec. 415; Loring v. Bacon, 57 Mass. (3 Cush.) 465, 468; Dering v. Winchelsea, 2 Bos. & Pul. 270; Bosley v. Taylor, 35 Ky. (5 Dana) 157, 30 Am. Dec. 677; Moore v. Boudinot, 64 N. C. 190.

[5] Another question is whether the solvent sureties on the $10,000 bond within the jurisdiction of the court are liable to pay the entire amount which the sureties on that bond should contribute, although some of the sureties are insolvent, or beyond the jurisdiction of the court, or may escape by paying only their aliquot part of the amount which all the sureties on that bond were liable to contribute. The answer is that while in an action at law, where some of the sureties liable to contribute have died, or are beyond the jurisdiction of the court, or are insolvent, the solvent sureties within the jurisdiction of the court are liable for their respective aliquot parts only of the amount which all the sureties on that particular bond are liable to contribute, the rule is otherwise in equity. In suits in equity the solvent sureties within the jurisdiction of the court are liable to contribute the entire amount which all the sureties on their particular bond were liable to contribute, where some of the sureties are insolvent, or have died, or are beyond the jurisdiction of the court. And the court in equity may render its decree for the payment by the respective sureties of the amounts they owe, and retain jurisdiction of the case and render supplemental decrees until the entire amount which all the sureties were liable to contribute has been paid by the solvent sureties, or some of them. In the case at bar the solvent sureties within the jurisdiction of the court are liable to pay the entire amount which all the sureties on the bond of the personal sureties would have been liable to contribute, if they had all been alive, solvent, and within the jurisdiction of the court below. 1 Story's Equity Jurisprudence (13th Ed.) § 496; Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, 93, 10 Am. St. Rep. 635; Riley v. Rhea, 5 Lea (Tenn.) 115; Brandt on Suretyship & Guaranty, § 314; Boutin v. Etsell, 110 Wis. 276, 85 N. W. 964, 965; Smith v. Mason, 44 Neb. 610, 63 N. W. 41; Stallworth v. Preslar, 34 Ala. 505; Werborn's Adm'r v. Kahn, 93 Ala. 201, 9 South. 729; Faurot v. Gates, 86 Wis. 569, 57 N. W. 294; Hardell v. Carroll, 90 Wis. 350, 63 N. W. 275.

[6] The Fidelity Company alleged that, at the conclusion of the action of the county against it, it was compelled to and did pay $536.40 in court costs and expenses and $1,000 in attorney's fees that were reasonably and fairly worth $1,000 in the conduct of that liti-

gation. The personal sureties admitted the averment regarding the court costs and expenses, but denied that regarding attorney's fees, and the record contains no proof of the payment of the attorney's fees, or of their value. On account of the absence of any such proof, the attorney's fees cannot be allowed, and the discussion concerning them is disregarded. Is the Fidelity Company entitled to contribution from the personal sureties to the payment of the court costs and expenses in the suit of the county against it which it was compelled to pay? When the bank defaulted, and the principals in the bonds failed to pay on demand their debt to the county, it was the duty of the personal sureties toward the Fidelity Company to pay two-thirds of that debt, and it was the duty of the Fidelity Company toward the personal sureties to pay one-third of it. "By becoming sureties," said Appleton, C. J., "each impliedly promised the other that he would faithfully perform his part of the contract and pay his proportion of loss in case of the insolvency of the principal." Hichborn v. Fletcher, 66 Me. 209, 210 (22 Am. Rep. 562). And it was the duty of the personal sureties towards the county to pay the entire debt, because that debt was less than the $10,000, the penalty of their bond, while it was equally the duty of the Fidelity Company towards the county to pay $5,000 of the debt. None of the sureties paid anything without suit. The county sued the Fidelity Company, recovered judgment, and compelled it to pay $536.40 court costs and expenses of that litigation. The personal sureties might have prevented that suit and those costs and expenses by the simple discharge of their duty, by the payment of the debt which they had agreed with the county to pay, and probably by the payment of their two-thirds of it. The defense which the Fidelity Company made to the suit against itself was not frivolous, although it did not prevail. It presented serious issues of law and of fact, was prudent and hopeful, one which counsel might well have made with reasonable expectation that it might succeed. United States Fidelity & Guaranty Co. v. Woodson County, 145 Fed. 144, 76 C. C. A. 114. In this state of the case the Fidelity Company is entitled to contribution from the personal sureties on account of its payment of these court costs and expenses, and for like reason it is entitled to contribution on account of the interest, which was included in the judgment against it and which it also paid, to the same extent that it is entitled to contribution on account of the principal of the debt. Where several cosureties are liable for a common debt or default, and none of them pays without suit, one who is sued and compelled to pay the judgment, to pay court costs, expenses, and interest, is entitled to contribution on account of those costs and expenses and that interest to the same extent that he is entitled to contribution on account of the principal of the debt he has paid, provided his defense to the suit was not frivolous, but was prudent and hopeful, though unsuccessful. Carter v. Fidelity & Deposit Co., 134 Ala. 369, 32 South. 632, 633, 92 Am. St. Rep. 41; Fletcher v. Jackson, 23 Vt. 581, 593, 56 Am. Dec. 98; Gross v. Davis (Tenn.) 11 S. W. 92, 93, 10 Am. St. Rep. 635; 1 Brandt on Suretyship & Guaranty (3d Ed.) § 309; Davis v. Emer-

son, 17 Me. 64; Boutin v. Etsell, 110 Wis. 276, 85 N. W. 964, 965; Backus v. Coyne, 45 Mich. 584, 8 N. W. 694; Van Winkle v. Johnson, 11 Or. 58, 5 Pac. 922, 924, 50 Am. Rep. 495; Briggs v. Boyd, 37 Vt. 533, 536.

We turn to the facts of the case and the liabilities which they establish and limit. The evidence satisfies that C. H. Starrett was a principal and not a surety on the bond of the Fidelity Company, that he never signed and was not a party to the bond of the personal sureties, that any cause of action which any of the parties to this suit ever had, or might have had, against Odenia E. Starrett as administratrix of his estate, or against her, Nina E. Hull, Chas. Sidney Starrett, Clyde Horace Starrett, Marion Fedora Starrett, and Hazel Fern Starrett, as the heirs at law of C. H. Starrett, is barred by the statute of limitations, and that as against them this suit should be dismissed on its merits.

The fact that the Fidelity Company did not present and prosecute a claim against the estate of Starrett in the probate court to compel the payment of Starrett's liability to the county does not constitute such laches as bars its recovery in this suit against its cosureties. The duty of the personal sureties to prosecute such a claim was as imperative as was that of the Fidelity Company, and the latter company had not paid anything on account of its bond, and therefore had no accrued and due cause of action against the estate or the heirs of Starrett prior to the time when the statute of limitations had run against the claims against the estate.

As between the Fidelity Company and the defendant Josie Braley, the evidence satisfies that the Fidelity Company has the right to a decree for the payment by her of such an amount, not exceeding $700, the value of the estate of the surety, F. C. Braley, deceased, which came to the hands of Josie Braley as his heir, as may be required to complete the payment of his proportion of the common debt of the cosureties on account of which he paid $740.63 on February 3, 1903. But as between Josie Braley and the defendants G. W. Naylor, E. T. Thompson, J. R. Hoggatt, and Z. Gilroy, the latter agreed with F. C. Braley in his lifetime, and are legally liable, to pay, as against him and Josie Braley, his sole heir, the amount for which F. C. Braley was, or Josie Braley is, or may be, liable to the Fidelity Company, or any other party, on account of the bond of the personal sureties.

The record establishes the fact that the common debt of the cosureties to the county has been paid in part out of the assets of the bank, in part by the principal Starrett, and in part by the cosureties. The amounts paid by the cosureties were as follows:

F. C. Braley, on February 3, 1903	$ 740.62
G. W. Naylor, on December 31, 1904	389.90
E. T. Thompson on December 31, 1904	389.90
Z. Gilroy, on December 31, 1904	389.90
J. R. Hoggatt, on December 31, 1904	389.90
The Fidelity Company, on June 7, 1906	6,563.30

The date when Naylor, Thompson, Gilroy, and Hoggatt paid appears in their pleading and in the agreed statement of facts to be

on the ——— day of ——— 1904, and as the burden was on them to prove the date the court assumes that they made their payment on the last day of that year. Crediting the personal sureties with interest on the amounts they respectively paid from the dates of their respective payments until June 7, 1906, when the Fidelity Company made its payment, in order to place them on an equality, as nearly as may be, with that company, their payments as of that date were:

F. C. Braley	$ 851.99
G. W. Naylor	419.53
E. T. Thompson	419.53
Z. Gilroy	419.53
J. R. Hoggatt	419.53
Aggregate	$2,530.11
The Fidelity Company paid	6,563.30
All the sureties paid	$9,093.41

The personal sureties should have paid two-thirds of the amount which all the sureties were required to pay, or $6,062.27, and the Fidelity Company should have paid one-third of the amount that all the sureties were required to pay, or $3,031.14. The Fidelity Company, therefore, paid on June 7, 1906, $3,532.16 more than its just and equitable proportion of the common debt, and the personal sureties had paid as of that date $3,532.16 less than their proportion thereof, and the Fidelity Company is consequently entitled to a decree for the recovery of $3,532.16, interest thereon from June 7, 1906, to the date of the entry of the decree, and the costs of this suit, from the defendants Naylor, Thompson, Gilroy, and Hoggatt, jointly and separately, until the full amount is paid, and to an execution to enforce this recovery. And in case the full amount decreed to be owing by Naylor, Thompson, Gilroy, and Hoggatt is not and cannot be collected of these four sureties, or either of them, then the Fidelity Company is entitled to a decree against Josie Braley for the sum of $700, or such part of this $700 as shall be required to completely satisfy the decree against Naylor, Thompson, Gilroy, and Hoggatt.

Let the decree below be reversed, and let this case be remanded to the District Court, with instructions to enter a decree in favor of the Fidelity Company and to take further proceedings in this suit in pursuance of the views expressed in this opinion.

TRIEBER, District Judge (dissenting). I am constrained to dissent from so much of the majority opinion which holds that the appellees are liable to contribute two-thirds of the amount due from the two bonds, and from that part of the opinion which holds that they are liable for any part of the costs paid out by the appellant in the suit brought by the county. In my opinion each of the bonds must be treated as being for the sum of $5,000, and therefore the sureties on each of the bonds are liable for one-half. The statute of Kansas under which these bonds were executed (section 1704, General Statutes of Kansas 1901) reads as follows:

"*Deposit of Money in Other Counties.*—That in all counties having a population of less than twenty-five thousand inhabitants, the county treasurer may deposit all public moneys in some responsible bank or banks within the state of Kansas, to be designated by the board of county commissioners, in the name of said treasurer as such officer, which bank or banks shall pay such interest on average daily balances as may be agreed upon by the board of county commissioners: Provided, that in no case the rate of interest shall be less than two per centum per annum on such average daily balances. Before making such deposits, the said board shall take from said bank or banks a good and sufficient bond in a sum double the largest approximate amount that may be on deposit at any one time, or the bond of some surety company empowered to do business in the state of Kansas, in a sum aggregating the largest sum which may be on deposit at any one time, conditioned that such deposits shall be promptly paid on the check or draft of the treasurer of said county; but in no case shall more than one-half of the amount of said bond be subscribed by the officers of said bank; and such bank or banks shall, on the first Monday of each month, file with the county clerk of such county a statement of the amount of money on hand at the close of business each day during the previous month, and the amount of interest accrued thereon to said date: Provided, that it shall be unlawful for the board of county commissioners of any county to deposit any funds of their county in any bank in which the county treasurer, or any member of the board of county commissioners, shall be the owner of any stock or otherwise pecuniarily interested therein."

It seems to me that there can be no room for doubt that the liability of the appellees was only for $5,000, although the bond being executed by individuals, and not by a surety company empowered to do business in the state of Kansas, it had to be for double the amount of the largest approximate amount that may be on deposit at one time. The deposits by the first order, when appellant executed its bond, were limited to $5,000, and later the deposits were increased by an additional $5,000, making the largest amount which could be deposited with the Toronto Bank $10,000, secured by the two bonds, or $5,000 for each. I can hardly conceive that it was the intention of the Legislature of the state of Kansas to place a greater burden on its own citizens, who would sign bonds merely for accommodation, than on foreign corporations, engaged in the business of becoming sureties on bonds, for compensation. To me the language of the statute is plain that the sole object of requiring the penalty of the bond to be double the amount of liability which could possibly accrue, when the bond is signed by individuals, was that it would make the bond safer, and thus protect the county from loss, in case of the insolvency of some of the sureties; while, on the other hand, if the bond is executed by a surety company, which was absolutely safe by reason of its compliance with the laws of the state of Kansas, there was no likelihood of inability to respond to any loss for which it may become liable. Had the second bond been also signed by a surety corporation, the penalty would only have been $5,000, and appellant could in that case have asked for contribution of one-half only. The effect of the majority opinion is as if the Toronto Bank had been required to give a bond for $15,000, and appellant had assumed responsibility for $5,000 and appellees for $10,000. As this was not what either the statute or the orders of the board of commissioners required, my opinion is that appellees are only liable for one-half of the amount paid by appellant on its bond, less one-half paid by them.

On the question of contribution of costs, the law, as I understand it, is that when one of the sureties is sued, and in good faith contests the suit, with reasonable cause to believe that the defense is good in law, and the result of the contest, if favorable to that surety, would inure to the benefit of his cosureties, whether parties to that action or not, he is entitled to contribution for the costs and attorney's fees necessarily expended by him, although he may not be successful, or if the cosureties are as responsible for the necessity of a suit, by reason of a refusal to pay, as the surety sued is. On the other hand, if the claim is contested by the surety upon grounds which would inure solely to his own benefit if successful, and by reason thereof, in all likelihood, throw a greater burden on his cosureties, or its success could in no event benefit them, such a surety is not entitled to contribution from his cosureties for the costs and attorney's fees paid out by him in defense of the action.

The authorities cited in the majority opinion are clearly distinguishable from the facts in the instant case. In Carter v. Fidelity Deposit Co., 134 Ala. 369, 32 South. 632, 92 Am. St. Rep. 41, the facts were that the surety seeking contribution had resisted the suit, which was to recover $23,063.51, and by reason of the contest the claim was reduced to $13,797.69, a saving of nearly $10,000, of which the cosureties were the beneficiaries, as much as he was.

In Fletcher v. Jackson, 23 Vt. 581, 56 Am. Dec. 98, it was held:

"Whether the costs and attorney's fees may be recovered depends altogether on the question of whether such defenses were made under circumstances as to be regarded as hopeful and prudent."

If the suit was needless, neither attorney's fees nor costs can be recovered. John v. Jones, 16 Ala. 454.

In Gross v. Davis, 87 Tenn. 226, 11 S. W. 92, all the sureties made a common defense, and counsel were employed by the plaintiff for the benefit of all the sureties, with their knowledge and consent. The defense was for the benefit of all the sureties, and, if successful, would have benefited his cosureties fully as much as him.

Brandt on Suretyship and Guaranty, § 309, says:

"Whether the surety can recover from his cosureties contribution for costs of a suit from him, for collection of a debt, depends upon the circumstances of each case."

In Davis v. Emerson, 17 Me. 64, the court found:

"The failure to pay, which occasioned the costs, was imputable to the defendant, as much as to the plaintiff."

And therefore it was held that the defendant was liable for half the costs.

In Boutin v. Etsell, 110 Wis. 276, 85 N. W. 964, a surety was permitted to recover attorney's fees paid by him to make a compromise of the liability assumed by all the sureties. A very favorable compromise was effected and a considerable sum of money saved to all the parties. The court upon these facts held that the defendant ought to contribute toward the expenses incurred by the plaintiff in good faith, of which they were beneficiaries as much as he was.

In Backus v. Coyne, 45 Mich. 584, 8 N. W. 694, the court said:

"The foundation for the right of contribution in such cases (employment of counsel and costs of suit) is the fact that the expense was incurred in defending for the common benefit. This will not, therefore, permit him to incur expense in uselessly resisting a legal demand, or in creating needless or unnecessary costs and expenses."

In Van Winkle v. Johnson, 11 Or. 58, 5 Pac. 922, 50 Am. Rep. 495, the general rule that a surety, who defends in good faith for the benefit of all the sureties, is entitled to contribution from his cosureties is followed.

In Briggs v. Boyd, 37 Vt. 533, there was no question but that the defense, if successful, would have inured to the benefit of all the sureties.

In this case the defense made by the appellant in the suit of the county against it (United States Fidelity & Guaranty Co. v. Board of Com'rs of Woodson County, 145 Fed. 144, 76 C. C. A. 114) could in no wise have benefited the appellees, if it had succeeded. In fact it would have thrown a greater burden on them, because the appellant would have been relieved of all liability, and the appellees would have been responsible for the entire amount of the bond. The defenses made by the appellant in that case, as shown by the pleadings, which are a part of the record of this case, were:

A demurrer assigning as grounds: (1) That the court had no jurisdiction of its person. (2) That it had no jurisdiction of the subject-matter of the action.

The demurrer having been overruled, it answered, denying all liability upon the following grounds: (1) That the application for the bond by the bank falsely represented it as a corporation, when in fact it was a partnership. (2) That the bond by its express terms bonded the bank as a corporation when in fact it was a private bank, and that the board of county commissioners knew of this fraud at the time the bond was executed. (3) That one of the owners of the bank had sold his interest in the bank to his partner, without the knowledge or consent of the surety company, although that fact was known to the board of county commissioners. (4) That the board of county commissioners, after the execution of the bond by appellant had accepted a new bond in the sum of $10,000; "the bond" referred to being the bond signed by the appellees.

Which of these defenses, if successful, could have benefited the appellees? There can be but one answer to this: None. On the contrary, if the surety company had been successful, it would have been free from all liability, and the entire burden of the failure of the depositary bank would have fallen upon the appellees.

WILLIAMSON et al. v. CITY OF CLAY CENTER (two cases).*

WILLIAMSON v. CITY OF CLAY CENTER et al.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

Nos. 4492–4494.

1. JUDGMENT ⊜707—PERSONS CONCLUDED—MORTGAGES—MORTGAGEE NOT PARTY.

A mortgagee of an electric light plant is not bound by a decree holding void a provision of the ordinance under which the plant was operated relating to a renewal of the franchise, where it was not made a party to the suit.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1230; Dec. Dig. ⊜707.]

2. FIXTURES ⊜18(5)—MACHINERY ATTACHED TO REALTY—INTENT OF PARTIES TO MORTGAGE.

An electric lighting plant was operated by dynamos placed in the power house of a mill operated by water power, other property of the same owner. The dynamos were fastened to the mill timbers by bolts, and connected with the line shaft of the mill by bolts. During a series of years the owner gave chattel mortgages at various times on the light plant, and also mortgaged the mill, land, and water power as separate property. *Held* that, as against a mortgagee of the mill property who had full knowledge of such facts, the dynamos were not included as fixtures.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. §§ 38–41; Dec. Dig. ⊜18(5).]

3. MORTGAGES ⊜133—PROPERTY INCLUDED—"APPURTENANCES."

The light plant did not pass under a clause of the mortgage covering "appurtenances," no part of it having any connection with the operation of the mill.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 260, 264, 265; Dec. Dig. ⊜133.]

4. MUNICIPAL CORPORATIONS ⊜680, 681(1)—CONTROL OVER STREETS—USE BY ELECTRIC COMPANIES.

Under Comp. Laws Kan. 1885, § 834, relating to cities of the second class, and giving to the city council, among other powers, general control over the streets, such council had power to permit an electric light company to occupy streets with its poles and wires, and without such permission they could not lawfully be so occupied.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1459; Dec. Dig. ⊜680, 681(1).]

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

Quo warranto by the City of Clay Center against the Clay Center Light & Power Company, the Merrimack River Savings Bank, and F. L. Williamson. Decree for complainant, and defendants Williamson and the Savings Bank bring error and also appeal. Affirmed.

Action at law for damages by F. L. Williamson against the City of Clay Center and others. Judgment for plaintiff for less than his claim, from which he brings error. Affirmed.

D. R. Hite, of Topeka, Kan., and F. L. Williams, of Clay Center, Kan. (Mulvane & Gault, of Topeka, Kan., on the brief), for plaintiffs in error and appellants.

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

*Rehearing denied December 12, 1916.

R. C. Miller, of Clay Center, Kan. (F. B. Dawes, of Clay Center, Kan., on the brief), for defendant in error and appellee.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

BOOTH, District Judge. Nos. 4492 and 4493, entitled F. L. Williamson and Merrimack River Savings Bank v. City of Clay Center, represent respectively a writ of error and an appeal in a case, No. 8940 in the court below, entitled City of Clay Center v. Clay Center Light & Power Company, Merrimack River Savings Bank, and F. L. Williamson. The defendant Clay Center Light & Power Company disclaimed in the court below, and the other defendants have pursued their remedy, both by writ of error and by appeal from the decision of the court below.

No. 4494, entitled F. L. Williamson v. City of Clay Center et al., represents a writ of error in a case, No. 8991 in the court below, in which F. L. Williamson was plaintiff and the City of Clay Center and certain individuals were defendants.

No. 8940 was a proceeding instituted by the City of Clay Center against Clay Center Light & Power Company and the Savings Bank and Williamson, for the purpose of having it adjudged that the right of the defendants to operate a certain electric light plant in the city, had expired, and for an order requiring defendants to remove their poles and other property from the streets of the city. The cause was originally commenced in the Supreme Court of the State of Kansas as a quo warranto proceeding. It was duly removed to the United States District Court for the District of Kansas, First Division, and is sometimes known as the "ouster suit." In this suit the defendant Light & Power Company disclaimed, and the defendant Savings Bank interposed a cross-bill, asking for equitable relief. The court below found in favor of the plaintiff city against both said Savings Bank and Williamson.

No. 8991 below was an action at law to recover damages against the city and certain of its officers for wrongful destruction of certain property belonging to the plaintiff Williamson, consisting of electric lights, poles, wires, etc., and for interfering with and damaging plaintiff's property with intent to injure and destroy plaintiff's business. The court below found in favor of the plaintiff, and assessed the damages at $1,000. Judgment was entered, and the plaintiff, being dissatisfied with the amount, sued out a writ of error.

The above-mentioned controversies involved to some extent the same questions, and were tried together in the court below upon the same evidence. The main questions involved in the law action were: (1) Whether the plaintiff, Williamson, had a right to use and occupy the streets of the city of Clay Center with his electric poles, wires, etc., at the time when they were destroyed by the city authorities. (2) Whether the damages for the destruction were to be measured merely by the value of the actual physical property destroyed, or whether the plaintiff had also rights in a going business concern, which were injured by the acts of the city. The ouster suit involved the further question whether the mortgage held by the defendant Savings Bank

upon certain property covered the electric light plant and franchises, so as to make the Savings Bank an interested party in the controversy between Williamson and the city. The court below held that the mortgage of the Savings Bank did not cover the electric light plant, and consequently dismissed the cross-bill of said bank.

A brief statement of the facts concerning the history of the electric light plant and franchises is necessary.

In 1876, Alonzo F. Dexter was the owner of two strips of land, one on each side of the Republican river, near Clay Center, Kan. About that date he erected a dam across said river at this point. Dexter also owned a tract of land known as Dexter's mill block; and about the same date he erected a water power flouring mill upon this block. He also built a flume and a power house for the operation of his machinery by water power. From 1876 until 1886, Dexter carried on the business of operating the mill. In 1886, the city of Clay Center, a city of the second class under the laws of Kansas, passed the following ordinance, which is sometimes referred to as Ordinance No. 87, and sometimes as Ordinance No. 26:

"Ordinance No. 26.

"An ordinance providing for lighting the city of Clay Center, Kansas, by electricity.

"Be it ordained by the mayor and councilmen of the city of Clay Center:

"Section 1. That Alonzo F. Dexter, of Clay Center, Kansas, his successors and assigns, are hereby granted the right of way and authorized to use the streets, avenues, alleys and public grounds of this city for the purpose of erecting and maintaining poles and running wires thereon for the conveyance of electricity to furnish light and power for the use of the said city and its inhabitants. Said poles shall be erected on the outside limits of the sidewalks on all streets and avenues and on the sides of the streets, avenues and alleys designated by the city council.

"Section 2. The poles mentioned in the preceding section shall be as large, or larger than those ordinarily used for telegraph poles, and the wires shall be insulated and placed high enough above the ground so as not to interfere with public travel, on any of the public or private property of said city.

"Section 3. That the said Alonzo F. Dexter, his successors and assigns, shall not charge for light furnished any of the inhabitants of this city a sum greater than the equivalent of best coal gas at two dollars per thousand cubic feet, or a sum not greater than one hundred dollars per annum per arc light of two thousand candle light power, or twenty dollars per annum for incandescent light of sixteen candle power.

"Section 4. The said Alonzo F. Dexter, his successors and assigns, shall establish within the city limits electric light works of sufficient power at all times to furnish all the light needed for the use of said city and the inhabitants thereof, and shall furnish both arc and incandescent lights at prices not to exceed those named in the second section of this ordinance.

"Section 5. The said Alonzo F. Dexter, his successors and assigns, shall not charge the city of Clay Center for light furnished to light its streets or public buildings a sum greater than an equivalent of best coal gas at one dollar and seventy-five cents per thousand cubic feet, either for incandescent or arc lights.

"Section 6. That Alonzo F. Dexter, his successors and assigns, shall furnish arc lights for the use of this city, of two thousand candle light power at a sum not to exceed one hundred dollars per annum per light, and shall furnish incandescent lights of sixteen candle power for the use of said city for a sum not to exceed twenty dollars per light per annum; provided the city shall take and use not less than five such arc lights or thirty such incandescent lights. The said Alonzo F. Dexter, his successors and assigns, to

furnish everything necessary and light and extinguish the lights; said lights to be kept burning all night except nights when the moon gives sufficient light to light the city.

"Section 7. That the city of Clay Center reserves the right to grant equal and like privileges to any other person or company during any or all the time covered by this ordinance.

"Section 8. That the said Alonzo F. Dexter, his successors and assigns shall at all times furnish light for the use of this city, and the inhabitants thereof at as cheap a rate as electric light is furnished any city or inhabitants thereof in the United States.

"Section 9. That the rights and privileges hereby granted are for a term of twenty-one years: Provided, the said Alonzo F. Dexter, his successors and assigns, shall begin the erection of said electric light works within ninety days from the passage of this ordinance, and shall complete the same and have the same in working order within one year from the passage of this ordinance; and provided, further, that if at the expiration of twenty-one years the city shall refuse to grant a further continuance of these privileges, the said city shall purchase said works at their appraised value, the same to be appraised by three disinterested electors of the state of Kansas, one of whom shall be chosen by the city, one by Alonzo F. Dexter, his successors and assigns, and the two so chosen shall select a third, and the amount agreed upon, upon their oaths, by the three so chosen shall be the price to be paid therefor; and provided, further, that the city of Clay Center shall have the right to revoke the privileges herein granted, at any time, if the said Alonzo F. Dexter, his successors and assigns, shall fail to comply with all the provisions of this ordinance.

"Section 10. This ordinance shall take effect and be in force from and after its passage, approval and publication in the Dispatch."

Pursuant to said ordinance and during the year 1886, Dexter occupied certain of the streets and alleys and public grounds of the city of Clay Center with electric light poles, and strung wires upon said poles, for the purpose of conveying electric current and furnishing light to the city and the inhabitants thereof. Dexter placed his dynamos or electric generators in the power house of his mill plant. Said dynamos were firmly fastened to the timbers and framework of the power house by bolts; and said dynamos were attached to the line shaft extending from the water wheel to the shaft of the mill proper by belts extending from said line shaft to the dynamos. From 1886 until 1910, said electric plant was operated, either by Dexter or the succeeding owners, by the water power of the mill, in the manner above stated.

Mortgages were placed upon the above-described property, or some portion thereof, as follows:

(1) August 10, 1886, a chattel mortgage by Dexter to the Western Electric Company amounting to $4,900; property covered:

"Two 25 light dynamos, 50 arc lamps, wires, and poles belonging to Dexter electric light plant in Clay Center."

(2) December 10, 1886, a chattel mortgage by Dexter to the Western Electric Company amounting to $2,450; property covered:

"Three electric generators and appurtenances, and all lamps, globes, wires, and poles used in maintaining electric light in Clay Center."

(3) July 27, 1887, a chattel mortgage by Dexter to Western Electric Company amounting to $1,500; property covered:

"Four electric dynamos used by Dexter in operating electric light plant in said city of Clay Center; all lamps, wires, fixtures, and poles."

(4) June 6, 1889, a chattel mortgage by Dexter to Wickstrum & Swenson, amount $5,000; property covered:

"All dynamos, wires, all arc and incandescent lamps, poles, and attachments, and all machinery connected with the electric light plant of Clay Center."

This last-mentioned mortgage, with the note which it secured, were duly assigned by Wickstrum & Swenson to the defendant Savings Bank.

(5) August 5, 1891, a chattel mortgage by Dexter to the First National Bank of Clay Center, amount $5,000; property covered:

"The Clay Center electric light plant, poles, arc and incandescent lamps, dynamos, wiring, fixtures, machinery, tools and belting belonging to and in use by said party of the first part in producing or to produce electric light in the city of Clay Center, Kansas, subject, however, to a prior mortgage held by Wickstrum & Swenson on said property, dated June 6, 1889; also franchises granted to said party of the first part by the city council of said Clay Center embodied in Ordinance No. 26, approved April 23, 1886."

(6) August 20, 1891, a mortgage by Dexter to Crippen, Lawrence & Co., amount $15,000; property covered:

The land above mentioned as being owned by Dexter, and being described specifically, and "known as the Dexter water power mill, together with all the buildings connected therewith, all the tenements and appurtenances and machinery thereunto attached and belonging, and all water rights, privileges, water power, and other motive power for operating said mill, including water wheels, machinery, and fixtures appertaining thereto; also all the structure called the Dexter milldam, * * * all water and water privileges by said dam, and all easements and franchises; * * * all the following personal property in and about said mill and its appurtenances, used in the operation of said mill, and constituting in part the tools and machinery belonging thereto [specially described]; * * * also the electric light plant owned and operated by said Alonzo F. Dexter in Clay Center, together with all the electric lights, and dynamos used in the operation of the same, with all line wire, lamps, fixtures, globes, and carbons, and all machinery and tools, including poles and all other apparatus and appliances belonging to and used in connection therewith, and all rights and privileges granted to said Alonzo F. Dexter by the city of Clay Center; also the right to use the water power attached to said Dexter mill in running and operating said electric light plant, * * * hereby granting and assigning to said grantees for the purpose of this conveyance all the rights, privileges, franchises, and advantages granted to said Alonzo F. Dexter by Ordinance No. 87 of the city of Clay Center. * * * All other rights, privileges, and franchises which may be hereafter granted by said city to said Alonzo F. Dexter or his assigns relating to said electric light plant, with the appurtenances, and all the estate, title, and interest of the said party of the first part therein."

This mortgage, together with the note secured thereby, was duly assigned to the Merrimack River Savings Bank.

(7) August 20, 1891, a mortgage by Dexter to Crippen, Lawrence & Co., amount $2,250; property covered: The same as in mortgage No. 6. This last-mentioned mortgage was expressly made subject to mortgage No. 6 above, and was duly assigned, with the note it secured, to Peter Sanborn.

(8) June 21, 1892, a mortgage by Dexter to Crippen, Lawrence & Co., amount $8,000; property covered: The same as in Nos. 6 and 7. This mortgage was expressly made subject to three prior mortgages,

two to Crippen, Lawrence & Co., Nos. 6 and 7, and one to Wickstrum and Swenson, No. 4 above.

In September, 1892, the First National Bank of Clay Center commenced suit in the district court of Clay county, Kan., to foreclose its mortgage, No. 5 above. In the course of the litigation answers were interposed by Crippen, Lawrence & Co., Peter Sanborn, and the Merrimack River Savings Bank. The court entered its decree adjudging that the Merrimack River Savings Bank had a first lien upon the chattels described in its mortgage No. 4, and a first lien upon the lands described in its mortgage No. 6. It made further findings in regard to the liens of the other parties, and ordered a sale to be made separately of the electric light plant, poles, fixtures, etc., and of the real estate, milldam, and mill. In November, 1894, sale was made by the sheriff; the electric light plant was purchased by P. M. Wickstrum, and the real estate and mill by A. H. Hale. Said electric light plant subsequently became the property of F. L. Williamson & Co., and for several years and until about 1906 was operated by that company. In June, 1906, F. L. Williamson & Co. sold the electric light plant, appurtenances, and fixtures, "up to but not including the line shaft," to the Clay Center Light & Power Company. In November, 1910, said last-named company resold the property to F. L. Williamson.

In January, 1896, A. H. Hale conveyed the real estate and mill properties purchased by him at the sheriff's sale to Joseph J. Crippen, trustee. On January 2, 1899, Crippen, trustee, conveyed the same properties to William Williamson, and on the same day William Williamson and wife, to secure the payment of the purchase money, executed a mortgage thereon to the Crippen-Lawrence Investment Company. The real estate was described in detail, and then follows this language:

"Known as the Dexter water power mill, together with all the buildings connected therewith, and all the tenements and appurtenances thereunto belonging, including the milling fixtures and the machinery thereunto attached and belonging, and all water rights and privileges, water power, and other motive power for the operation of said mill, including water wheels and the machinery and fixtures appertaining thereto. Also the structure called the Dexter milldam erected and maintained across the Republican river, within the boundaries of the tracts of land hereinbefore described for the purpose of furnishing water power for the operation of said mill and the race and water course from the said river through Huntress creek, including all water rights, right of flowage of water on lands of other persons, and all water and water privileges created by said dam, and all easements and franchises in the county of Clay, in the state of Kansas, together with all the appurtenances."

This last-mentioned mortgage, together with the indebtedness secured thereby, was duly assigned to the defendant Savings Bank, present owner of the same.

In 1907, as the contract of the city contained in the ordinance was about to expire, the Clay Center Light & Power Company, being the then owner of the franchise, brought suit in the state court of Kansas to enforce the provision of section 9 of said ordinance. The trial court rendered judgment in favor of the company, but its judgment was reversed by the Supreme Court of the state of Kansas. See Clay Center v. Light Company, 78 Kan. 390, 97 Pac. 377. The Supreme Court

held that the contract contained in the ordinance, in so far as it attempted to impose an obligation upon the city either to renew the franchise or to purchase the electric light plant, was beyond the power of the city to make and consequently void.

Thereafter the Savings Bank brought suit in the United States District Court to restrain the city from cutting down and removing the property of the Light Company from the streets. A restraining order was issued, but upon further hearing an injunction was denied for want of jurisdiction. The restraining order was continued in force pending appeal. An appeal was taken by the bank to the Supreme Court of the United States, but the appeal was dismissed for want of jurisdiction. After the decision, but before the mandate had been sent down, the city, through certain of its officials, cut down and removed certain of the poles and wires belonging to the Light Company. For this act the parties implicated were adjudged by the Supreme Court to be in contempt. Merrimack River Savings Bank v. City of Clay Center, 219 U. S. 527, 31 Sup. Ct. 295, 55 L. Ed. 320, Ann. Cas. 1912A, 513.

After the decision in Clay Center v. Light Company, 78 Kan. 390, 97 Pac. 377, and on November 14, 1910, the Light Company conveyed the electric light plant and its appurtenances to F. L. Williamson, and within a day or two thereafter the city instituted the ouster suit in the Supreme Court of the state, being No. 8940 above mentioned. In April, 1911, Williamson commenced his action at law against the city and certain individual defendants to recover damages by reason of the action taken by the city and its officials in cutting down the poles and wires. This last-mentioned action is No. 8991 above referred to. In the ouster action the Savings Bank filed a cross-complaint, setting up its mortgage of January 2, 1899, made by William Williamson and wife to Crippen-Lawrence Investment Company, claiming that Ordinance No. 87 was valid, and claiming, further, that in order to protect its mortgage it had a right to have the electric light plant operated; further, that it was entitled to a decree against the city to make good the damages done in cutting down the poles, wires, etc.

[1] The Savings Bank was not a party to the litigation in Clay Center v. Light Company, 78 Kan. 390, 97 Pac. 377, and if the mortgage under which the Savings Bank claims is a valid and subsisting lien upon the electric light plant, including the franchise rights, the decision in the case last mentioned, holding Ordinance No. 87 void, would not be binding upon the Savings Bank, but it might again litigate the question of the validity of said ordinance. Old Colony Trust Co. v. Omaha, 230 U. S. 100, 33 Sup. Ct. 967, 57 L. Ed. 1410; Keokuk Western R. R. v. Missouri, 152 U. S. 301, 14 Sup. Ct. 592, 38 L. Ed. 450; Louisville Trust Co. v. City of Cincinnati, 76 Fed. 296, 22 C. C. A. 334; Baltimore Trust Co. v. Mayor, etc. (C. C.) 64 Fed. 153.

[2] The question therefore arises whether the mortgage under which the bank claims covers the electric light plant. The description of the property contained in the mortgage does not in terms cover the electric lighting plant. It is claimed, however, that the dynamos and other property upon the real estate belonging to the mill company and at-

tached thereto were fixtures, and passed with the mill property, land, and buildings. It is further claimed that the language used in the description in said mortgage, viz. "all easements and franchises in the county of Clay, state of Kansas, together with all appurtenances," is sufficient to carry the electric light plant. It is unnecessary to discuss at length the various tests for determining when personal property becomes fixtures and passes under a mortgage covering the realty. The all-important question is to determine the intention of the parties. Other tests are simply aids in determining the intention. In the instant case that portion of the electric light property which was placed upon the mill real estate was in no sense accessory to the milling plant. It did not assist in the operation of the milling plant, nor was it placed there for the benefit of the milling plant. The milling plant was entirely independent and complete without the presence of the electric light machinery. Furthermore, the electric light plant and the milling plant had been for years treated as separate properties by the owners thereof, and to the knowledge of the Savings Bank. The Savings Bank had taken an assignment of a chattel mortgage (No. 4 above) on the electric plant only. The Savings Bank had taken another mortgage, covering both the milling property and the electric light property, described specifically and in detail as separate properties (No. 6 above).

In the litigation attending the foreclosure of these two mortgages, the Savings Bank had notice and knowledge of other mortgages, some of which covered the electric lighting plant only, and others which covered both the electric lighting plant and the milling plant, but with a separate and specific description of each. There were two sales upon the foreclosure of the mortgages held by the Savings Bank; one a sale of the real estate and milling property, and the other a sale of the electric light plant. The purchaser of the real estate and the milling property was an officer of the Savings Bank. He thereafter conveyed the property which he purchased to Crippen, who held it as trustee for the Savings Bank, and conveyed it, as such trustee, to William Williamson. William Williamson gave a purchase-money mortgage to the Crippen-Lawrence Investment Company, and this in turn was assigned to the Savings Bank. Meanwhile the electric light plant had passed at the sheriff's sale to P. M. Wickstrum, and thereafter to F. L. Williamson & Co., and was operated by that company for several years. In view of these facts, it is idle to contend that there was any intention, either on the part of Dexter, the original owner, or on the part of any of the persons who thereafter became owners or mortgagees of either the milling property or the electric light plant, that they should be considered in any way except as separate, distinct properties.

[3] As to the use of the word "franchise" in the mortgage of January 2, 1899, under which the Savings Bank claims, it is sufficient to say that it has reference to the milling property and the water power connected therewith. That this is certain is shown by comparing the language with similar language used in the mortgage of August 20, 1891 (No. 6 above), in which last mortgage both the mill property and the electric light plant are described in detail and separately; yet in connection with the description of the mill properties occurs the lan-

guage "and all water and water privileges by said dam, and all easements and franchises." No one would contend that the use of the word "franchises" at this point in mortgage No. 6 above had any reference to the electric light plant. It is equally untenable to hold that it has reference to the electric light plant in the mortgage of January 2, 1899. Nor was the electric light plant covered by the word "appurtenances" in the mortgage of January 2, 1899. As already stated, the electric light plant was not necessary to the milling plant. The two plants were entirely distinct, except that they both used the same water power. Neither plant could properly be called appurtenant to the other. Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473.

In our opinion, the trial court was fully justified in holding that the mortgage of January 2, 1899, under which the Savings Bank now claims, did not cover, and was not intended to cover, the electric lighting plant. It follows that the Savings Bank had not shown itself entitled to any interest in the property in litigation between Williamson and the city, and that the cross-bill of the Savings Bank was properly dismissed.

[4] We will next examine the rights of Williamson to maintain the electric light poles, wires, etc., in the streets of the city at the time of their destruction in 1910. In the case of Clay Center v. Light Co., supra, the Supreme Court of the state of Kansas had decided that the contract contained in the ordinance, in so far as it attempted to impose upon the city the obligation to extend the franchise, or to purchase the lighting plant, was void. The franchise expired by limitation in 1907. The rights of the Light Company, therefore, in so far as they depended upon the ordinance in question, were terminated. Williamson purchased back from the Light Company the plant which he had sold to it, with full knowledge of the litigation between the Light Company and the city, either during the period of the litigation, or just after its termination. He was, therefore, bound by the judgment in the case, and could thereafter predicate no rights under said ordinance.

But it is contended on the part of Williamson that, quite apart from the ordinance, Dexter, the original owner of the electric light plant, had a right to erect and maintain poles and wires in the streets of the city, and that this right became a vested one, which could not be destroyed by subsequent legislation, and that he (Williamson), as successor to Dexter, had acquired this vested right, was the owner thereof, and entitled to maintain his poles and wires in the streets of the city in 1910. This contention on the part of Williamson raises the question of the powers of the city (it being of the second class) over its streets in 1886; whether the city had the power to grant to an individual the right to erect poles and wires in the streets, and the complementary power to refuse such right; or whether an individual could thus occupy the streets without consent of the city.

It is claimed on the part of Williamson that the decisions of the Supreme Court of Kansas have decided that the city had no such power. It is claimed on the part of the city that the decisions are to the

opposite effect. Had this question been passed upon by the Supreme Court of Kansas, we should follow such decision, as being one expounding its own local statutory law. We do not, however, find that the Supreme Court of Kansas has passed upon the exact question raised in the instant case; nor has such question been presented to it in any of the cases which have been called to our attention. Among the provisions of the statute of Kansas relating to the powers of cities of the second class, as existing in 1886, we find the following:

Chapter 19, Compiled Laws 1885:

"Sec. 31. *Power of Mayor and Council.* The mayor and council of each city governed by this act shall have the care, management and control of the city, and its finances, and shall have power to enact, ordain, alter, modify or repeal any and all ordinances not repugnant to the Constitution and laws of this state, and such as it shall deem expedient for the good government of the city, the preservation of the peace and good order, the suppression of vice and immorality, the benefit of trade and commerce, and the health of the inhabitants thereof, and such other ordinances, rules and regulations as may be necessary to carry such power into effect."

Section 55 of the same chapter contains, among other provisions, the following:

"The council shall have power to open, widen, extend or otherwise improve any street, avenue, alley, or lane, and also to vacate or discontinue the same whenever deemed necessary or expedient."

Section 56 reads as follows:

"*Encroachment on Sidewalks, etc.* The council may prohibit and prevent all encroachments into and upon the sidewalks, streets, avenues, alleys and other property of the city, and may provide for the removal of all obstructions from the sidewalks, curbstones, gutters and crosswalks, at the expense of the owners or occupiers of the grounds fronting thereon, or at the expense of the person placing the same there; the council may also regulate the planting and protection of shade trees in streets, the building of bulk heads, cellar and basement ways, stairways, railways, windows and doorways, awnings, hitching posts and rails, lamp posts, awning posts, and all other structures projecting upon or over and adjoining, and all other excavations through and under the sidewalks, or along any streets of the city."

Section 60 reads as follows:

"*Lighting Streets, Numbering Houses, etc.* The council may provide for and regulate the lighting of the streets, and the erection of lamp posts, and the numbering of the buildings in the city, and the construction of sewers; and the council shall have power to make contracts with any person, company or association for such purposes; and give such person, company or association the privilege of furnishing light for the streets, lanes or alleys of said city for any length of time not exceeding twenty-one years. It may also by ordinance adopt a method of numbering the buildings, and make contracts to secure the same to be done."

Under the general power thus granted was included the right to control the putting up and maintaining poles, wires, etc., in the streets of the city. Such right to erect and maintain poles, wires, etc., could be obtained only from the municipality, or from the Legislature itself. See Dillon on Municipal Corporations (5th Ed.) §§ 1296–1302; New Orleans Gas Co. v. Louisiana Light Co., 115 U. S. 650, 6 Sup. Ct. 252, 29 L. Ed. 516; Pikes Peak Power Co. v. City of Colorado Springs, 105 Fed. 1, 44 C. C. A. 333; Board of Mayor, etc., of Morristown v. East Tenn. Tel. Co., 115 Fed. 304, 53 C. C. A. 132; State v. Murphy, 134

Mo. 548, 552, 31 S. W. 784, 34 S. W. 51, 35 S. W. 1132, 34 L. R. A. 369, 56 Am. St. Rep. 515.

In Atchison Ry. Co. v. Mo. Pac. Ry. Co., 31 Kan. 660, 3 Pac. 284, the court had before it a somewhat similar question. A bill was brought by plaintiff to enjoin defendant from cutting and crossing plaintiff's street railway track. The defendant claimed that the plaintiff had no rights in the street. Plaintiff was occupying the street under an ordinance of the city (of the second class), and the question arose whether the city of Atchison had any power to grant the plaintiff the right to occupy the street. The court in its opinion said:

"Had the Legislature given to the city of Atchison this power? It is conceded that no special grant of power in this direction had ever been made; but the contention is that the general control of the streets vested in the corporation was sufficient to validate its action in granting permission to plaintiff to occupy the streets with its railway. This proposition we think must be sustained."

The court then cites sections 31, 55, and 56 of chapter 19, supra, which were then in force as sections 31, 54, and 55, and says:

"Now under this we think the council had power to permit a street railway company to construct and operate a railway upon the streets."

Further on the court said:

"All we decide is that the city had the power and did give the plaintiff permission to occupy the streets with its railway track; that such railway track was therefore not an obstruction, and could not be disturbed wantonly by a stranger."

It will thus be seen that the court held that, under the same sections of the statutes relating to cities of the second class which were in force at the time when the Dexter ordinance was passed, such city did have power over its streets, and by virtue of such power could permit the occupancy of the streets by a street railway company.

The case of La Harpe v. Gas Co., 69 Kan. 97, 76 Pac. 448, was decided in 1904. The city of La Harpe was a city of the third class. An ordinance had been passed in 1901 granting to one Evans the right to use the streets and alleys of the city for laying and maintaining pipes to convey oil, gas, and water. The Gas Company had acquired the property in 1902, and undertook to lay certain pipes under one of the alleys of the city. Previous to this time the Evans ordinance had been repealed by a later ordinance, and the city claimed that the Gas Company had no rights in the streets. The Gas Company brought suit to enjoin the city from interfering with its operations. The lower court granted an injunction, and this was affirmed by the Supreme Court; the latter court holding that the Gas Company had the right to use the streets of the city without the city's consent.

It is to be noted, however, that at the time when the La Harpe Case was decided the following statutory enactments were in force, and were involved in the case. Article 12, c. 23, Gen. St. 1868, relating to gas and water corporations; section 88, c. 23, Gen. St. 1868, as amended by chapter 64, Sess. Laws 1871, as further amended by chapter 58, Sess. Laws 1876, as further amended by chapter 85, Laws 1891, and as further amended by chapter 128, Laws of Kansas, 1901. It was upon

these statutory provisions relating to gas companies and certain other corporations that the decision in the La Harpe Case was based, and especially in view of the express provision in said statutes that the pipes, etc., of such corporation might be laid "through any street or alley, or public ground of any city of the second or third class." The court held that this was a direct authority from the Legislature to the gas company to occupy the streets, and that no consent was necessary. In its opinion the court said:

"A city is a creation of the Legislature—a subordinate agency of the state, which exercises only such power as the Legislature confers, and for such period of time as the Legislature in its discretion determines. The state gives, and the state can take away; and the Legislature is at liberty to resume so much of the control of the streets and alleys and public grounds formerly exercised by the city as it deems best, and this without obtaining the consent of either the officers or the inhabitants of the city."

In the instant case neither Williamson nor his predecessor, the Light Company, come within the terms of the statutory enactments which were controlling in the La Harpe Case. Doubtless the Legislature might have included electric light companies in said statutes, but it did not do so. The La Harpe Case did not decide that, in the absence of statutory enactment giving direct permission from the Legislature, either an individual or a corporation could occupy the streets of cities of the second class. But it did hold that the statutory permission claimed in the La Harpe Case, direct from the Legislature, was sufficient and controlling.

The case of McCann v. Telephone Co., 69 Kan. 210, 76 Pac. 870, 66 L. R. A. 171, 2 Ann. Cas. 156, involved simply the question whether telephone poles upon a rural highway constituted an additional servitude. It was answered in the negative. This was the only question in the case.

The cases of City of Wichita v. Telephone Co., 70 Kan. 441, 78 Pac. 886, and Telephone Co. v. City of Concordia, 81 Kan. 514, 106 Pac. 35, involved questions similar to those in the La Harpe Case, and were decided upon the ground that the Legislature itself had supreme control over the streets, and had directly granted permission to the companies in question.

The case of State v. Weber, 88 Kan. 175, 127 Pac. 536, 43 L. R. A. (N. S.) 1033, involved the question of the right of individuals to erect poles for the transmission of electricity along a rural highway. The question of the rights of an individual to erect and maintain poles and wires in the streets of a city of the second class was not involved in the case, and could not have been, in view of chapter 121, Laws of Kansas, 1905, passed after the decision in the La Harpe Case, and before the decision in the Weber Case. The court in its decision distinctly recognized the difference between city streets and rural highways and said:

"It is true that cities grant rights and prescribe the conditions upon which individuals and corporations may use the streets for certain purposes, but that does not militate against the view that an individual may use the rural highways for the same purposes without special authority. The power to control the streets has been delegated by the state to the cities under which they may make grants of public rights for public purposes; but where the

power has not been delegated, and the state has prescribed no conditions limiting or regulating the use of the highway, the people are at liberty to use it for travel, transportation, and communication, subject to the condition that such use does not interfere with other lawful uses of the street nor invade the rights of the owners of abutting lands."

A careful consideration of the statutes of Kansas, in the light of the decisions of the Supreme Court of the state, has convinced us that neither corporations nor individuals have had at any time the right to erect or maintain electric light or power wires or poles in the streets of a city of the second class in that state, without the permission of the municipality, and that the Supreme Court will so decide whenever the question is presented to it.

Our conclusion is that in 1910, when the poles and wires were partially destroyed, Williamson had no right to maintain the same in the streets of the city. Their presence there, after request by the city to remove them, constituted a nuisance, and they might be removed by the city authorities. The right of removal, however, would not give the right to wantonly injure or destroy. The rule of damages adopted by the trial court, under the circumstances of the case, was correct, and we see no reason to criticize the amount arrived at.

The judgment and decree of the court below is affirmed.

ROSPIGLIOSI et al. v. NEW ORLEANS, M. & C. R. CO. et al.

(Circuit Court of Appeals, Fifth Circuit. October 31, 1916.)

No. 2936.

1. RAILROADS ⟸169—MORTGAGES—BONDS—TRUSTEES.
Bondholders secured by deed of trust are assumed to be fairly represented by the trustee, and the court can deal with them only through their trustee.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536-548; Dec. Dig. ⟸169.]

2. RAILROADS ⟸169—MORTGAGES—DEEDS OF TRUST—TRUSTEES.
Trustee under deed of trust securing bonds may exercise his discretion within the scope of his powers, and in the absence of fraud his acts are binding on the bondholders.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 536-548; Dec. Dig. ⟸169.]

3. JUDICIAL SALES ⟸39, 40—VACATION—INADEQUACY OF PRICE.
A judicial sale of land will not be set aside for inadequacy of price, unless the inadequacy be so gross as to shock the conscience, or there be additional circumstances against its fairness, though, where there is great inadequacy of price, only slight circumstances of unfairness are necessary to raise a presumption of fraud.

[Ed. Note.—For other cases, see Judicial Sales, Cent. Dig. §§ 77, 78; Dec. Dig. ⟸39, 40.]

4. RAILROADS ⟸192—MORTGAGES—FORECLOSURE—SALE.
Where a decree foreclosing a deed of trust on the property of a railroad company securing bonds provided that the bidders should deposit a certain sum of money in cash or by certified check with the special master making the sale, or in lieu thereof a certain amount of bonds of

the company, the decree did not prevent competitive bidding, so as to avoid the sale; any bondholder or person financially able to buy property of that character being allowed to bid on making the required deposit.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

5. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—VACATION—CONSENT PROCEEDINGS.

Where, in proceedings to foreclose a mortgage on railroad property the railroad company appeared, but did not object to the proceedings, making no defense, and such course was less expensive and more expeditious, the procedure cannot be deemed collusive and fraudulent, warranting vacation of a sale of the property on the ground that the rights of the stockholders were injured.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

6. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—SALES.

Where the petition of another stockholder, attacking foreclosure sale of property of the railroad company, had been withdrawn, abandoned, or dismissed, it could not be relied upon, its allegations not having been adopted, by petitioners, who as stockholders, etc., sought to set aside the sale and order of confirmation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

7. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—SALES—VACATION.

Where the court ordering the sale of railroad property for mortgage foreclosure reserved the unconditional right to reject all bids, the sale, having been confirmed, cannot be attacked on the ground that the price was so inadequate as to shock the conscience.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

8. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE — SALES — INADEQUACY OF PRICE.

Evidence that a railroad cost about 2½ times as much as the price it brought on sale under mortgage foreclosure will not, no advance bid being shown, warrant vacation of the foreclosure sale on the ground that the price was so inadequate as to shock the conscience, particularly as the court reserved the right to reject all bids.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

9. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—INTERVENTION.

General allegations, in a bill by stockholders seeking to intervene and attack a sale of corporate property under mortgage foreclosure, that the trustee occupied a hostile position, and that the foreclosure suit was fraudulent and collusive, are insufficient, but the facts constituting the fraud must be stated.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

10. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—OBJECTIONS.

A small minority of the bondholders or stockholders of a railroad company, who refused to join with other bondholders seeking a foreclosure, cannot, the others having bought in the property, attack the foreclosure sale on the ground that the proposed plan of reorganization was inequitable, for they could either have participated in the purchase or bought in the property themselves, and the reorganization plan, relating to matters out of court, did not affect the right of foreclosure.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

11. CORPORATIONS ⊂⊃206(5)—STOCKHOLDERS—RIGHT TO SUE.
Stockholders of a corporation cannot intervene in a proceeding to foreclose a mortgage on corporate property, setting up defenses which were available to the corporation, where there was no averment of any demand upon or refusal by the corporation to assert such defense.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 794, 796; Dec. Dig. ⊂⊃206(5).]

12. RAILROADS ⊂⊃192—MORTGAGES—FORECLOSURE—JUDICIAL SALE.
Where foreclosure sale of the property of a railroad company was attacked on the ground of the grossly inadequate price, the amounts of securities outstanding on the property and those proposed to be issued are not relevant.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 391, 634–642; Dec. Dig. ⊂⊃192.]

Appeal from the District Court of the United States for the Southern District of Alabama; Harry T. Toulmin, Judge.

Bill by the Metropolitan Trust Company of the City of New York against the New Orleans, Mobile & Chicago Railroad Company to foreclose a mortgage, under which the property of defendant was sold, whereupon Laura McDonald Stallo Rospigliosi and others petition to intervene, attacking the sale and the decree confirming the sale. From a decree dismissing the petition, petitioners appeal. Affirmed.

The following is the opinion of Toulmin, District Judge:

In the matter of the petition of intervention of Laura McDonald Stallo Rospigliosi, Helena McDonald Stallo Murat, and James E. Harrington. Said interveners in their said petition except to the master's report and return of sale filed in this cause, and object to the confirmation of said sale, and pray that said sale be not confirmed, and that the same be vacated and held for naught, upon the following grounds, namely:

Because of fraudulent and illegal practices, and the fraudulently conceived scheme designed for the purpose of preventing competition at the sale and of destroying the rights and equities of stockholders of said New Orleans, Mobile & Chicago Railroad Company, particularly the interveners; that the price obtained for the properties of the said railroad company, as reported by the special master, was and is grossly inadequate, unfair, fraudulent, and clearly the result of collusion. The interveners aver: That the purchase price, to wit, $2,763,220, was entirely inadequate, and not more than one-eighth or one-ninth of the value of the property sold, and said sale was so conducted that a greater amount could not be realized therefrom. That the sale was unfair, irregular, collusive, and fraudulent, in that by the terms of sale competitive bidding was prevented. That said terms of sale destroyed all equity between the bondholders and all other persons, and were illegal, unfair, improper, and contrary to the justice of the court, and resulted in but one bid for the property. That said sale is a part of the collusive, fraudulent scheme to deprive the stockholders of said New Orleans, Mobile & Chicago Railroad Company of their large and valuable equity in said property.

[1, 2] It is "a rule that courts can deal with bondholders only through their trustees." It is "a rule of convenience proceeding upon the assumption that the cestuis que trust are fully and fairly represented by such trustees." Farmers' Loan & Trust Co. v. Northern Pacific R. R. Co. (C. C.) 66 Fed. 169–174; Jones Corp. § 338. "The action of the trustee within the scope of his duties is, in the absence of fraud, binding upon bondholders, and in exercising his trust he may exercise his discretion within the scope of his powers." Credit Co. v. A. C. R. Co. (C. C.) 15 Fed. 46; Toler v. E. Tenn. G. R. Co. (C. C.) 67 Fed. 168.

[3, 4] The first and second ground on which the interveners seek to set aside the sale in this case is that the price at which the property was sold was grossly inadequate, and because of fraudulent and illegal practices, and the fraudulently conceived scheme designed for the purpose of preventing competition at the sale, and of the rights and equities of stockholders, and that the price obtained for the property was grossly inadequate, unfair, fraudulent, and clearly the result of collusive design, and that said sale was so conducted that a greater amount could not be realized therefrom, and further that the sale was unfair, irregular, collusive, and fraudulent, in that by the terms of sale competitive bidding was prevented. "A judicial sale of real estate will not be set aside for inadequacy of price, unless the inadequacy be so great as to shock the conscience, or unless there be additional circumstances against its fairness. Great inadequacy of price at a judicial sale of real estate requires only slight circumstances of unfairness in the conduct of the party benefited by the sale to raise a presumption of fraud." Graffam v. Burgess, 117 U. S. 180, 192, 6 Sup. Ct. 686, 692, 29 L. Ed. 839. "The purpose of the law is that the sale shall be final; and to insure reliance upon such sales, and induce biddings, it is essential that no sale be set aside for trifling reasons, or on account of matters which ought to have been attended to by the complaining party prior thereto." Pewabic Mining Co. v. Mason, 145 U. S. 349, 12 Sup. Ct. 887, 36 L. Ed. 732; Ballentyne v. Smith, 205 U. S. 289, 27 Sup. Ct. 527, 51 L. Ed. 803.

It is charged that by the terms of sale competitive bidding was prevented, that said terms destroyed equality between the bondholders and all other persons, and that they resulted in but one bid for the property. The only fact alleged to sustain this charge is the decree itself, and the court puts no such construction on the decree. It provides, as is usual in such cases, for a certain amount of money to be deposited in cash or certified check with the special master, or, in lieu of a certain amount of cash, bonds of the railroad company. If any bondholder desired to bid, or other person, corporation, or syndicate desired to do so, and owned no bonds, but was financially able to buy a railroad of the size and character of the one in question, he could have raised the amount of money to make the necessary deposit; or if the objectors herein desired to do so, and were in fact bondholders, they had the right and opportunity to co-operate with their cobondholders in the matter. There was, in the opinion of the court, nothing in the decree to prevent their doing so. The decree did not, in the terms of sale provided therein, prevent competitive bidding or limit or restrict the bid.

[5] It is charged by the objectors that the proceedings, from the time of the filing of the original bill to the final sale of the property, were "consent proceedings." Such proceedings are not necessarily fraudulent, collusive, or void. The bondholders had the right under the provisions of the mortgage to request the trustee to file a bill for a foreclosure of the mortgage in default of payment of interest on the bonds of the New Orleans, Mobile & Chicago Railroad Company. This request was made by a majority of the bondholders. The trustee, the complainant in the cause, on the part of said bondholders, and as the representative of all the bondholders, filed a bill against said railroad company, the defendant. It was represented by counsel. No objection was made to the proceedings, and no defense as they progressed. This suit is characterized as one "by consent," it was nevertheless a legal and proper proceeding and between the proper parties—the trustee as the representative of all the bondholders and the defendant railroad company. The so-called "consent proceedings" were more expeditious and less expensive than if a decree pro confesso had been taken.

If the objectors herein were, in fact, stockholders or bondholders, they must surely have had knowledge of the proceedings taken and of their progress. If they were objectors to what was being done and the purpose of the proceeding, and considered their interest jeopardized, why did they not by intervention or otherwise make known their grievance or complaint, if any, to the trustee or to their cobondholders for redress or protection during the pendency of the proceeding? Pewabic Mining Co. v. Mason supra. There are no facts alleged to sustain the charge of a collusive and fraudulent scheme to deprive the stockholders of said railroad of their alleged large and valuable equity in said property. None of said stockholders are named, and none are here mak-

ing any such claim. If it be a fact that the interveners were or are stockholders, that fact is not affirmatively alleged in their petition of intervention. That fact, if shown to exist, is by implication only.

[6] The petition of L. S. Berg, as set forth in the sixth ground of the petition, has, in my opinion, no place in this proceeding. He is not a party to this proceeding, and the allegations made by him in his petition are not made or adopted by interveners as their allegations in their petition. Moreover, Berg's petition was not insisted on by him, but in fact it was withdrawn, or abandoned, and dismissed.

[7, 8] One of the counsel for the objectors stated in his brief that "the rule of inadequacy of price must be so gross as to shock the conscience of the court is not applicable to this cause." The court concurs with the learned counsel in this opinion, for the reason, as stated by him, that the decree of the court reserves the unconditional right to reject all bids, and for the further reason that, in the opinion of the court, the inadequacy of price has not been shown by sufficient or satisfactory legal evidence in the case to be so gross as to shock the conscience or excite the suspicion of the court.

The evidence offered to prove the value of the property to sustain the charge of inadequacy of the price for which it sold is the estimated value at which the reorganization committee proposes reorganization. There can be no reorganization until the purchasers have acquired the title and possession of the property. What they now propose or plan may be entirely changed before or when the reorganization is to be made effective. It is certainly not competent or sufficient evidence to satisfy the court that the inadequacy of price is such as to justify it in refusing to confirm the sale, on the alleged estimate of said committee. The only other evidence on the subject that I find submitted by the objectors, likewise insufficient, is the testimony of T. F. Whittlesey. He shows that he had considerable experience as a railroad man, and might properly be considered generally as an expert. He testifies that from 1905 to 1907 he was general manager of the Mobile, Jackson & Kansas City Railroad Company, now the New Orleans, Mobile & Chicago Railroad Company. He states that he has just made an examination of the line of the said New Orleans, Mobile & Chicago Railroad, and has visited and observed many improvements since he was an officer of the Mobile, Jackson & Kansas City Railroad. He gives no opinion as an expert as to the value of said Mobile, Jackson & Kansas City Railroad at the time he was the general manager, and of the present value of the New Orleans, Mobile & Chicago Railroad. He does not state that he has an opinion on the subject, but he does say it was his understanding that the cost of the Mobile, Jackson & Kansas City Railroad and the Gulf & Chicago, combined, was $8,000,000, and that, taking into consideration the improvement of the property since he left it, he is of the opinion that the price of approximately $2,750,000 for the property is wholly inadequate.

[9] There is no advance bid on the price at which the property sold by any one, and none offered or suggested. "To warrant a court in disregarding the rule which precludes the intervention of an individual bondholder in foreclosure by the mortgage trustee as representative of all bondholders, the petition for intervention must allege traversable facts which, if true, show that the trustee occupies a hostile position, or other reason why he cannot fairly represent petitioner, and general allegations that the suit is fraudulent and collusive, and that the trustee is co-operating with bondholders in a reorganization scheme, are insufficient." "The petition must disclose facts bringing it within the principles governing the right to intervene; and in determining whether such facts are disclosed, the allegations of the petition must be subjected to, and must meet, the same tests as are applied to ordinary proceedings to determine whether a cause of action or defense is stated."

General allegations that the trustee acted in bad faith and in opposition to petitioner's rights and interests, and characterizing his action and the situation resulting therefrom as "fraudulent, collusive, and the like, are insufficient, in the absence of allegations of facts themselves giving rise to an inference of such partiality, fraud, or collusion." There must be an allegation of traversable facts sufficient for the court to determine whether a cause for intervention or a defense is stated. A wholesale charge of fraud and collu-

sion does not satisfy the degree of particularity and definiteness required by the rules of pleading. Continental & Commercial Trust & Savings Bank v. Allis-Chalmers Co., et al. (D. C.) 200 Fed. 600. "A bill in a suit founded on fraud must aver particularly the facts constituting the fraud." Rice v. Wilson (D. C.) 225 Fed. 159.

The objectors charge the Metropolitan Trust Company, trustee, committed wrongs which showed it was not a proper person to represent the objectors, upon the question under consideration, and charge said trustee with bad faith, fraud, and collusion in co-operating with bondholders in a reorganization scheme. Wholesale charges of wrongdoing, general allegations of fraud and collusion, without disclosing the facts on which they are based, are insufficient. But counsel in his brief states that, "if the facts alleged by the objectors, supported by the affidavit of Mr. Stallo, be proved, then the sale of certain stocks to the St. Louis & Francisco Railroad was a fraud upon the rights of the objectors." The converse of this proposition must also be true, to wit: If the facts alleged by the objectors, supported by the affidavit of Mr. Stallo, be not proved, then the sale of the stocks referred to was not a fraud upon the rights of the objectors. Fraud justifying relief in equity must be strictly proved. Rice v. Wilson, supra. There are at least three witnesses who, in their affidavits, contradict Stallo's statements, and declare them to be untrue. The evidence of these witnesses destroy the probative force of said Stallo's evidence.

[10] The reorganization committee represents only the depositing bondholders, and is not the same party as the complainant trustee, representing all the bondholders. In the case of Investment Registry v. Chicago & M E. R. Co., the court in the course of its opinion said that, "when a nondepositing bondholder objects to confirmation solely on the ground that the reorganization committee's bid * * * was substantially short of the fair value, the answer is that his co-owners of the common mortgage and the common decree offered him the opportunity to deposit his bonds and to share equally with them the benefits of the purchase." In the concurring opinion of Judge Seaman in the same case, he said: "I believe it to be well recognized that reorganizations on the part of bondholders are needful and legitimate means for the purpose of purchasing the mortgaged property at foreclosure sales; that no bondholder can be brought into such reorganization without his consent; that bonds may be purchased of a nonassenting bondholder for the purpose of foreclosing his objections or attempts to interfere with the reorganization plans; that equality in prices so paid is not, generally speaking, an essential requirement in such transaction; and that suppression of competition, either for reorganization or for the purposes of the sale, which may arise in such purchases or arrangements, neither disqualifies the purchasers to become bidders at the sale, nor per se invalidates the sale. Accordingly, in judicial sales of railroad properties these several elements are frequently involved, resulting in a single bid much below the estimated actual value of the properties, and the sale thereupon may rightly be confirmed by the court." 212 Fed. 594, 613, 129 C. C. A. 130, 149.

A great part of the petition of intervention and by counsel for the objectors is taken up with complaints against the proposed plan of reorganization. In addition to what I have already said in reference to the same, I will quote the language of Judge Hough of the United States District Court of the Southern District of New York, who said: "I do not think that courts sit to redraw, or move, or make suggestions, concerning such voluntary business arrangements as organization plans. * * * It is certainly a curious conception of practice which leads a small body of shareholders to seek to answer a foreclosure bill merely because they are dissatisfied with what the foreclosing complainant says it intends to do after the final decree is procured." Conley v. International Pump Co. (September 14, 1915), 237 Fed. 286.

The case before this court is where a few alleged stockholders or bondholders seek to set aside a sale under a decree of foreclosure at which 95 per cent. of the bondholders were the purchasers, and said objecting stockholders are dissatisfied because the purchasers have agreed on a plan in which they declare what they intend to do after they acquire the title and possession of the property sold and bought by them.

[11, 12] This court is of opinion that the following exceptions to the exceptors' and objectors' petition of intervention in this cause should be, and they are hereby, sustained:

Ninth. That the aforesaid exceptions and objections are not sufficient in law or in fact to justify this court in refusing to confirm the sale of the property herein, pursuant to its decree of June 24, 1915.

Tenth. That the said exceptions and objections do not state facts sufficient to entitle the exceptors and objectors to intervene in this cause.

Twelfth. That the exceptors and objectors do not allege any demand upon the defendant railroad company, or request of said company to take any action in behalf of the exceptors and objectors, nor do said exceptions and objections show that, if said demand or request were made, the same had been or would be refused by the defendant railroad company.

Thirteenth. The exceptions and objections do not allege, with the particularity or definiteness required by law, any fraud, collusion, conspiracy, or misrepresentation on the part of any of the parties to this cause in the conduct thereof, or otherwise, or any facts or circumstances upon which the general and indefinite charges of fraud, collusion, conspiracy, or misrepresentation or illegal acts can be predicated or sustained.

Fifteenth. The amount of the present securities outstanding on the property of the defendant railroad company and the amount proposed to be issued are not pertinent or relevant to the exceptions and objections, which allege that the price bid for the property is inadequate.

Eighteenth. Further answering the exceptions and objections, the complainant alleges that the allegations of the exceptors and objectors in respect to the legality of the proposed plan of reorganization are not material or relevant to the motion before the court to confirm the sale.

The petition of intervention is denied, and the petition dismissed; and it is so ordered.

Gregory L. Smith, of Mobile, Ala., and Nash Rockwood, of Saratoga Springs, N. Y., for appellants.

Chas. K. Beekman, of New York City, D. P. Bestor, Jr., of Mobile, Ala., and Jas. N. Flowers, of Jackson, Miss., for appellee.

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

PER CURIAM. This is an appeal from a decree dismissing an intervention attacking the sale of a railroad under foreclosure proceedings, and also from a decree of confirmation of the sale. Judge Toulmin, in dismissing the intervention and confirming the sale, gave elaborate and satisfactory reasons, in which we concur.

The decrees appealed from are affirmed.

NATIONAL REFINING CO. v. ST. LOUIS, I. M. & S. RY. CO.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1916.)

No. 2834.

1. CARRIERS ⟸100(1)—CARRIAGE OF GOODS—DEMURRAGE—"PRIVATELY OWNED TRACK."

A demurrage rule of a railroad company declared that it should apply to cars held for or by consignors or consignees, except private cars on the tracks of the owner, when used for transportation of commodities which the owners of cars produce, etc. Defendant granted the company a right of way for a spur track over and across its property, the deed re-

citing that the ownership of the track should be in the railroad company. *Held*, that such track was not, despite any advancing of money therefor, a "privately owned track," and defendant is liable for demurrage on cars held thereon.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–430, 432, 433; Dec. Dig. ⟸100(1).

For other definitions, see Words and Phrases, Second Series, Private Railroad Track.]

2. CARRIERS ⟸100(1)—CARRIAGE OF GOODS—DEMURRAGE—"RAILROAD SERVICE."

A railroad company's demurrage rule declared that it should apply to cars held for or by consignors or consignees for loading or unloading, forwarding directions, or for any other purpose, and that private cars, while in railroad service, whether on the carriers' or private tracks, should be subject thereto. Defendant, the owner of private cars used to transport its products, was entitled to receive from the company under applicable classification compensation "on loaded and empty movement" for use of the cars. *Held*, that such cars were in "railroad service," and defendant, having agreed to promptly load and unload the cars, could not, in view of the purpose of the rule, which is to facilitate shipping, escape demurrage on cars held on tracks for storage purposes beyond the free time allowed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–430, 432, 433; Dec. Dig. ⟸100(1).]

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

Action by the St. Louis, Iron Mountain & Southern Railway Company against the National Refining Company. There was a judgment for plaintiff (226 Fed. 357), and defendant brings error. Affirmed.

C. D. Chamberlin and Tolles, Hogsett, Ginn & Morley, all of Cleveland, Ohio, for plaintiff in error.

Edward J. White, Henry G. Herbel, and Fred G. Wright, all of St. Louis, Mo., for defendant in error.

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

PER CURIAM. The railway company brought an action, comprising two counts, against the refining company in the court below to recover demurrage charges alleged to have accrued on certain interstate shipments made by defendant in its own cars over plaintiff's railroad to defendant's distributing plant at Little Rock, Ark. The cause was submitted and determined below upon the pleadings and an agreed statement of facts. The charges were assessed because of alleged undue detention of the cars by defendant on a certain spur track. This track had been constructed from plaintiff's railroad right of way and into defendant's premises under a deed of grant from defendant to plaintiff and in pursuance of a written agreement between them. The right of the railway company to recover these demurrage charges must, in view of its demurrage rules, depend upon whether the spur track was the property of the railroad and the cars

were "in railroad service." [1] The court below determined these questions in favor of the railway company, and entered judgment accordingly. The writ of error is prosecuted to reverse this judgment.

[1] Upon careful consideration of the pleadings and agreed statement of facts, which set out the deed and the written agreement before referred to, we are satisfied that the conclusions, both of fact and law, reached by the learned trial judge and expressed in his opinion (226 Fed. 357, 358) are correct. According to both the deed and agreement, the ownership of the spur track is in express terms vested in the railway company. We need not attempt to add to what is said in the opinion below touching the rights of the company in the spur track, unless it be to point out that the written agreement of the parties distinctly provided that the refining company should convey to the railroad company "by easement all the land necessary for the construction of the track * * *, the said land to be furnished free of cost to the railway company and to be of such width and quantity as may be required by the engineer of the railway company, title to same to be free and unincumbered"; and the deed, entitled "Grant of Easement," appears to have been made in pursuance of the foregoing provision of the agreement. The deed distinctly grants to the railway company "the right and permission to construct, maintain and operate their spur track over and across the property" of the refining company (such property being described), "together with the right to enter upon said property at all times for the purpose of constructing, operating, maintaining, repairing, changing or removing said track, it being expressly understood and agreed that the ownership of the said track, including rails, fastenings and switch fixtures, now or hereafter therein, shall at all times be and remain in" the railway company. The right of way was laid out and graded, and the spur track was constructed and put into use and operation for shipment purposes in connection with the main track of the railroad; and while certain details of construction, advancing of money therefor, and the like, are made use of in argument, we do not think these details were intended to change, or had the effect of changing,

[1] The following demurrage rule is relied on by the railroad in support of the first count of the petition:

"Cars held for or by consignors or consignees for loading, unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules, except as follows:

"(C) Private cars on tracks of the owner, or on privately owned tracks of the consignor or consignee, when used for the transportation of commodities which the owners of the cars produce or in which they deal. (See Note.)

"Note.—This exception will include also such cars owned and leased to shippers by private corporations."

The following is the form of demurrage rule relied on under the second count:

"Cars held for or by consignors or consignees for loading or unloading, forwarding directions, or for any other purpose, are subject to these demurrage rules."

"Note.—Private cars, while in railroad service, whether on carrier's or private tracks, are subject to these demurrage rules to the same extent as cars of railroad ownership."

the obvious purpose as originally expressed to vest the spur track in the railway company as its property. It results that the shipments in question in the first count fall within the demurrage rule first quoted (note 1, supra), and not within the exception thereto; for while the cars containing the shipments were private cars of the defendant and used for the transportation of a commodity produced by it, within the meaning of the exception, they were on a track owned by plaintiff, not by defendant, at the time for which the demurrage charges were assessed.

[2] Furthermore, the portion of the opinion below which treats of the question whether the cars involved in the second count were "in railroad service" may be more readily applied when it is read in connection with the demurrage rule and the note thereto secondly quoted herein (note 1, supra). The expression "in railroad service" is broad and comprehensive, and must be construed with reference to the object to be attained. The object would seem to extend to all cars to which the carrier may resort for the purpose of discharging its duty to supply cars necessary to accommodate the traffic passing over its road. The language of the demurrage rule, considered as an entirety, distinctly includes private cars; and unless the carrier has some means of regulating the loading and unloading of available cars, regardless of their ownership, the clear purpose of the demurrage rule is defeated. Hence, when a shipper chooses to supply cars for the carriage of freight, even though of a commodity produced by the shipper, this must be done with reasonable reference to the spirit and intent of the demurrage rule. It would seem to be clear enough that if the cars, while standing on this spur track, had been loaded or unloaded through some agency of the railroad, the cars might fairly be said then to have been "in railroad service." This results in principle from decisions like the following: Chicago, etc., Railroad Co. v. Pontius, 157 U. S. 209, 211, 212, 15 Sup. Ct. 585, 39 L. Ed. 675; State v. Minnesota & International Ry. Co., 106 Minn. 176, 181, 118 N. W. 697, 1007, 16 Ann. Cas. 426; Pennsylvania R. R. Co. v. Jersey City, 49 N. J. Law, 540, 542, 9 Atl. 782, 60 Am. Rep. 648; Orendorff v. Railroad Ass'n, 116 Mo. App. 348, 353, 92 S. W. 148. And it ought to follow that these cars were, in respect of the time for which the demurrage charges were assessed, "in railroad service," within the meaning of the demurrage rule. Loading or unloading of cars is of course a necessary incident to their use in ordinary transportation service. Moreover, the written agreement between the parties applies to these cars, as well as all cars similarly situated. The agreement provides, "The said second party (defendant) shall promptly load and unload all cars that may be set for its use upon the said track;" i. e., this spur track. True, these were tank cars which could not except at considerable expense be used for carrying any kind of freight other than defendant's products; but it is agreed that under the applicable railroad classification rule the plaintiff was obligated to pay and was paying the defendant "mileage at the rate of three-fourths of a cent per mile * * * on loaded and empty movement" for the use of the cars. Plainly the defendant could

not both let the cars to plaintiff for the purpose of transporting defendant's commodity, and hold them for purposes of storage; such a course would destroy any workable arrangement made for the supply of equipment. R. R. Com. of Ohio v. H. V. Ry. Co., 12 Interst. Com. R. 398, 410, 411; Interstate Com. Comm. v. Ill. Cent. R. R., 215 U. S. 452, 30 Sup. Ct. 155, 54 L. Ed. 280. It would also be inconsistent with the spirit and intent of defendant's obligation "promptly" to "load and unload" the cars. Further, it is agreed by the parties that under the demurrage rules defendant was allowed 48 hours "free time in which cars delivered to it and placed for unloading may be unloaded." This limitation, quite as certainly as the mileage charge, is included in defendant's consent to the plaintiff's use of the cars for transportation purposes; and it is not perceived why the advantage of the mileage charge can be received except subject to the "free time" limitation. The defendant, therefore, as the owner of these cars, is not in a position rightfully to claim an advantage as a shipper which would not accrue if the cars were owned by another person. Indeed, the charges involved in the second count, as well as those in the first count, are in principle sanctioned by the decision in Procter & Gamble Co. v. C., H. & D. Ry. Co., 19 Interst. Com. R. 556, which was affirmed on its merits by the recent Commerce Court, 188 Fed. 221. True, it was held that the action of the Interstate Commerce Commission there in issue was not within the jurisdiction of the Commerce Court (225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091); but nothing is said in the decision of the Supreme Court which affects the reasoning of the Commerce Court upon the merits of the demurrage charges involved. See, also, Norfolk & W. Ry. Co. v. Swift & Co., 56 Pa. Super. Ct. 471, 477, 478; State ex rel. v. C., N. O. & T. P. Ry. Co., 47 Ohio St. 130, 140, 23 N. E. 928, 7 L. R. A. 319. Indeed, it is not suggested nor perceived why this spur track does not possess attributes of a public character in the sense that the railroad company would be bound to deliver or receive cars thereon, regardless of their ownership, which contain freight consigned either to or by the refining company. Chicago & N. W. R. Co. v. Morehouse, 112 Wis. 1, 11, 87 N. W. 849, 56 L. R. A. 240, 88 Am. St. Rep. 918 et seq.; Hairston v. Danville & Western Railway, 208 U. S. 598, 608, 28 Sup. Ct. 331, 52 L. Ed. 637, 13 Ann. Cas. 1008; Chicago Dock Co. v. Garrity, 115 Ill. 155, 167, 3 N. E. 448. See Los Angeles Switching Case, 234 U. S. 294, 306, 311, 34 Sup. Ct. 814, 58 L. Ed. 1319. And it hardly would be denied that as to such cars the demurrage rules and charges in question would be applicable.

The judgment is affirmed, with costs.

DICKSON v. CHATTANOOGA RY. & LIGHT CO.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1916.)

No. 2824.

1. RAILROADS ⟸338—STREET RAILROADS ⟸103(2)—INJURIES TO PERSONS ON TRACK—CONTRIBUTORY NEGLIGENCE—LAST CLEAR CHANCE.

One who is injured by a railroad train at a highway crossing, or by a street car in a street, may recover, notwithstanding his preceding contributory negligence, if he is using the street or highway for a proper and legitimate purpose, and his negligence has terminated, and the operators of the engine or street car, by the exercise of reasonable care and diligence, could have discovered his peril in time to avoid and prevent the accident.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1096–1099; Dec. Dig. ⟸338; Street Railroads, Cent. Dig. § 219; Dec. Dig. ⟸103(2).]

2. STREET RAILROADS ⟸83—INJURIES TO TRESPASSERS—DEGREE OF CARE REQUIRED.

One who makes an improper use of a street or railroad track, so as to become a trespasser, cannot recover for injuries received, unless the operators of the train or street car, by the exercise of reasonable care and diligence after the discovery of his peril, might have avoided the accident.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 179, 180; Dec. Dig. ⟸83.]

3. STREET RAILROADS ⟸83—INJURIES TO PERSON ON TRACK—TRESPASSER—INTOXICATION.

One who had voluntarily become so intoxicated as to be unconscious, and had then lain down on a street car track, is a trespasser, since voluntary intoxication is no excuse for wrongdoing, and cannot recover unless the operators of the car could have avoided the accident after discovering his peril.

[Ed. Note.—For other cases, see Street Railroads, Cent. Dig. §§ 179, 180; Dec. Dig. ⟸83.]

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

Action by Robert L. Dickson against the Chattanooga Railway & Light Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. W. Thompson, of Chattanooga, Tenn., for plaintiff in error.

J. E. Brown, of Chattanooga, Tenn., for defendant in error.

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

SESSIONS, District Judge. On May 27, 1913, plaintiff went from his home in Arkansas to Chattanooga, Tenn., to attend a Confederate reunion. During the day he became intoxicated to such an extent that after 9 or 10 o'clock in the evening he was unconscious of his surroundings and actions. About 1 o'clock the next morning, while in a drunken stupor, he was lying across the railway track in a public street of Chattanooga when he was struck by one of defendant's street cars and seriously injured. The street where the accident occurred was in a thickly populated part of the city, and was used by many people and

vehicles in the daytime, but upon that occasion, as was usually the case at that early hour in the morning, was practically deserted. No one saw plaintiff go upon the railway track, and there was no testimony tending to show when he lay down in the street. No eyewitness to the collision was found or called, except the motorman.

After denying defendant's request for a directed verdict in its favor, the trial judge submitted the case to the jury upon the theory that the defendant could be held liable only in case its motorman was guilty of actionable negligence after he actually discovered plaintiff in a position of peril. The issue presented in the lower court and here is sharply defined by one of plaintiff's requests to charge, which was refused, and by the general instructions given to the jury. The request which was refused is as follows:

"Plaintiff is entitled to recover if defendant, through its motorman, failed to exercise ordinary care and caution to discover plaintiff and his perilous position on the track, *provided* the weight of the evidence shows that by the exercise of ordinary care and caution such motorman might have discovered plaintiff and his perilous position and thereby have avoided the accident."

The following excerpt from the charge fairly represents and typifies the instructions which were given:

"The general public has a right in the streets of the city; it has a right to use the streets of the city as a public highway, but that does not carry with it the right to use the tracks as the plaintiff was using them. He was not using the track as a highway, but he was using it to lie down upon—which is an unauthorized use—and not using it as a highway. I charge you that under the undisputed facts, the plaintiff using that track in this way, there is no liability in this case unless the greater weight of the evidence, the greater weight of all the evidence, shows that the motorman of the defendant's car failed to take due care to prevent the accident and injury to this plaintiff after he actually discovered the plaintiff on the track ahead of the car and could tell or had reason to suspect that it was a human being on the track in a position of danger. A street railway company is required by law to keep a lookout for people liable to use the highway for lawful purposes. It is not required by law to keep a lookout for people that are using the track as a bed, as this plaintiff practically was doing, and even if you should be of the opinion that the motorman could have seen the man further than he did, that would not carry any liability on the part of the defendant, as it owed him no duty to keep a lookout when he was using the track in this manner."

[1] If plaintiff had been making a proper and rightful use of the street at the time of the accident, and his own contributory negligence had not continued until he was injured, he would have been entitled to the instruction which he requested, and which was refused. It is well settled that one who is injured by a railroad train at a highway crossing, or by a street car in a street, may recover for such injury, notwithstanding his own initial or preceding contributory negligence in exposing himself to danger, provided he is using the street or highway at the time for a proper and legitimate purpose and his negligence has terminated, and provided, further, that the driver of the engine or street car, by the exercise of reasonable care and diligence, could have discovered his peril in time to avoid and prevent the accident. Robinson v. Louisville Ry. Co. (C. C. A. 6) 112 Fed. 484, 50 C. C. A. 357; Gilbert v. Erie R. Co. (C. C. A. 6) 97 Fed. 747, 38 C. C. A. 408; Toledo Traction Co. v. Cameron (C. C. A. 6) 137 Fed. 48–68, 69 C. C. A. 28; Tutt v. Illinois Cent. R. Co. (C. C. A. 6) 104 Fed. 741, 44

C. C. A. 320; Baltimore & Ohio R. Co. v. Anderson (C. C. A. 6) 85 Fed. 413, 29 C. C. A. 235; Illinois Central R. Co. v. O'Neill (C. C. A. 5) 177 Fed. 328, 100 C. C. A. 658.

[2] On the other hand, it is equally well settled that one who makes such an improper, wrongful, or unlawful use of a street, or railroad track, as to become a trespasser thereon, and, in so doing, places himself in a position where he is likely to come into collision with a passing train or car, cannot recover for injuries so received, unless those in charge of the train or street car, by the exercise of reasonable care and diligence after the discovery of his peril, might have avoided the accident. Newport News & M. V. Co. v. Howe (C. C. A. 6) 52 Fed. 362, 3 C. C. A. 121; Baltimore & Ohio R. Co. v. Hellenthal (C. C. A. 6) 88 Fed. 116, 31 C. C. A. 414; Kansas City, Ft. S. & M. R. Co. v. Cook (C. C. A. 6) 66 Fed. 115, 13 C. C. A. 364, 28 L. R. A. 181; New York, N. H. & H. R. Co. v. Kelly (C. C. A. 2) 93 Fed. 745, 35 C. C. A. 571; Denver City Tramway Co. v. Cobb (C. C. A. 8) 164 Fed. 41–43, 90 C. C. A. 459; Little Rock Ry. & Electric Co. v. Billings (C. C. A. 8) 173 Fed. 903, 98 C. C. A. 467, 31 L. R. A. (N. S.) 1031, 19 Ann. Cas. 1173, and 187 Fed. 960, 110 C. C. A. 80; Chunn v. City & Suburban Railway of Washington, 207 U. S. 302–309, 28 Sup. Ct. 63, 52 L. Ed. 219; St. Louis & S. F. R. Co. v. Summers (C. C. A. 8) 173 Fed. 358, 97 C. C. A. 328; Iowa Cent. Ry. Co. v. Walker (C. C. A. 8) 203 Fed. 685, 121 C. C. A. 579; Dunworth v. Grand Trunk Western Ry. Co. (C. C. A. 7) 127 Fed. 307, 62 C. C. A. 225.

[3] City streets are reserved and dedicated to the public for the primary purpose of travel thereon, either on foot or in vehicles, and, in the exercise and enjoyment of the rights so conferred, every person is entitled to the fullest measure of protection which the law affords. But, in this instance, plaintiff was not using the street for that or any other legitimate purpose. It goes without saying that to lie down upon the street in front of an approaching car or upon a track where cars are expected to and must run is an act of gross negligence. Upon reason and authority, it is undeniable that, if plaintiff, while sober and in the possession of all his faculties, had voluntarily lain down upon the street railroad track and had consciously remained in that position until he was struck by the car, or had gone to sleep after knowingly putting himself in the place of danger, his contributory negligence would have continued, and would have precluded recovery for the injuries which he sustained. Does his intoxication change the rule, and relieve him from the consequences of his own wrongful conduct? "The condition produced by intoxication, being voluntary, does not relieve the person injured from the necessity of exercising ordinary care to avoid injury required under like circumstances of a sober man." 29 Cyc. 534, and cases there cited. In a case similar to the present one in many particulars (Little Rock Railway & Electric Co. v. Billings, 173 Fed. 903, 98 C. C. A. 467, 31 L. R. A. [N. S.] 1031, 19 Ann. Cas. 1173, and 187 Fed. 960, 110 C. C. A. 80) the Circuit Court of Appeals of the Eighth Circuit thus clearly and tersely stated the general rule upon this subject:

"The undisputed evidence shows plaintiff was intoxicated when the injury occurred to him. From the fact that he was an electrical worker employed

by the Rock Island Railway Company as lineman, and from all the other facts and circumstances in the case, it is undisputed this state of intoxication was brought by plaintiff on himself by his voluntary act. He was therefore chargeable with the result of his acts, deemed by the law to constitute contributory negligence, in the same degree and to the same extent as though he had been and remained duly sober. McKillop v. Duluth St. Ry. Co., 53 Minn. 532, 55 N. W. 739; Rollestone v. T. Cassirer & Co., 3 Ga. App. 161, 59 S. E. 442; Keeshan v. Elgin Traction Co., 229 Ill. 533, 82 N. E. 360; Railway v. Wilkerson, 46 Ark. 513. While one who, from the excessive use of intoxicating liquors, brings on himself such a condition of permanent imbecility or idiocy as to thereafter render his acts done wholly involuntary, may be regarded in law with the same favor as he who by the operation of natural laws is born or becomes an idiot or a lunatic, yet men who voluntarily 'put an enemy in their mouths to steal away their brains' must and will in law be held to the same high degree of care for their personal safety as though they had not voluntarily made themselves drunk. In other words, a man will not be permitted to plead and prove his own voluntary self-intoxication to his profit. Therefore, in so far as plaintiff alone is concerned, his conduct in coming and remaining on the track of defendant at the time, in the manner, and at the place he did must be viewed in the same light as though he had not intoxicated himself but had remained duly sober; and his pleading and proof of voluntary intoxication in this case will not avail to excuse him in the doing of any act which would have constituted negligence on his part, had he remained sober."

In Winfrey v. Missouri, K. & T. Ry. Co. (C. C. A. 8) 194 Fed. 808–815, 114 C. C. A. 218, the same court, speaking of a drunken man who had alighted from a train and instead of leaving the tracks with other passengers had remained thereon until, 20 minutes later, he was struck by another train, said:

"A drunken man must be held to the consequences of that condition. Otherwise a premium is put upon misbehavior. If he by voluntarily rendering himself unable to care for himself, can invite injury and recover from another ignorant of his condition therefor, notwithstanding his own direct contribution to the cause of it, the sober and careful man is put to a disadvantage in such cases. This seems and is unreasonable."

In the same case the court quotes with approval the following language found in Beach on Contributory Negligence:

"Drunkenness will never excuse one for a failure to exercise the measure of care and prudence which is due from a sober man under the same circumstances. Men must be content, especially when they are trespassers, to enjoy the pleasures of intoxication cum periculis."

It does not appear that in either of the cases above cited the injured person was so drunk as to be completely unconscious and insensible. Some courts have adopted what is termed the "humanitarian" doctrine that the negligence of an intoxicated person culminates and terminates with insensibility and unconsciousness, and, in consequence, have held that one so intoxicated is not guilty of continuing his contributory negligence, so as to preclude recovery for an injury attributable to the subsequent negligence of another. This doctrine necessarily recognizes degrees in intoxication, and hence in culpability, as measuring responsibility for one's own misconduct. Other courts, adhering to the long-established rule that voluntary intoxication, whatever its degree, does not excuse and does not relieve from the consequences of negligence, or even crime not involving conscious criminal intent, have repudiated this doctrine, and have refused to recognize any different standard

or measure of conduct for a drunken man, though unconscious, than for a sober man. Whatever may be the rule here or elsewhere when the question involved is merely one of negligence, and not wrongdoing in the nature of a trespass, this court, as pointed out by the trial judge in denying defendant's motion for a directed verdict, and as appears from its decisions, above cited, is committed to the doctrine that the employés of a railroad company, operating its trains and cars, owe no duty to a trespasser upon the railway tracks to keep a lookout for him, and that their only duty toward him is to exercise due care not to injure him after the discovery of his peril.

Was plaintiff a trespasser upon defendant's railway tracks, or was his position upon the tracks at the time of his injury so analogous to that of a trespasser that the rules governing liability to the latter should be applied to him? No one will question that an intoxicated man, who wanders from the sidewalk of a public street upon adjoining private premises and lies down, is a trespasser, and continues to be a trespasser as long as he remains there, regardless of the degree of his intoxication. If a drunken man leaves the highway at a crossing, and while upon the railroad track lies down and goes to sleep, he is a trespasser, and his right to recover for injuries sustained while in that position is solely that of a trespasser. New York, N. H. & H. R. Co. v. Kelly (C. C. A. 2) 93 Fed. 745, 35 C. C. A. 571. A pedestrian upon a highway at a railroad crossing under some circumstances may be a trespasser. Kelly v. Michigan Central R. R. Co., 65 Mich. 186–191, 31 N. W. 904, 8 Am. St. Rep. 876. There is direct authority for holding that a drunken man who lies down in the street upon a street railway track is a trespasser. Scates v. Rapid Transit Co. (Tex. Civ. App.) 171 S. W. 503–506. The right to be upon a public street does not carry with it a license or privilege to use the street for purposes other than those fairly incidental to travel. The boundaries of the right are the limits of the privilege. One who exceeds the limits of, or abuses or misuses, his rightful privilege, and, in so doing, infringes or encroaches upon the property and property rights of another, is, to the extent of such infringement or encroachment, as much a trespasser as he would be if he were doing the same thing without license of any kind or character. A street railway company owns its tracks, though located in a street, and is entitled to operate its cars thereon without unlawful or wrongful obstruction, and without interference, except such as necessarily results and follows from the rightful and legitimate use of that portion of the street by the public. Upon plainest principles, the placing of an obstruction of any kind, whether a rock, a log of wood, or a human being, on a street railway track, violates the property rights of the owner thereof and is an act of trespass.

Upon the facts disclosed by this record, we find no error in the instructions to the jury, and the judgment of the lower court is affirmed.

In re LANCE LUMBER CO.

WEBBER v. GEORGE F. LANCE CO.

(Circuit Court of Appeals, Third Circuit. December 6, 1916.)

No. 2134.

CORPORATIONS ⊂=448(2)—CONTRACTS—LIABILITY.

A sale was negotiated to C., acting in behalf of a corporation to be formed, G. dealing with him in that character; and while C.'s individual notes were taken by G., both understood that the corporation's notes would take their place as soon as this could be done, and on formation of bankrupt the property passed to it, and it for three or four years made payments on and renewals of the notes. *Held*, that there was in effect a sale by G. to bankrupt, so that G.'s claim on the balance of notes given in substitution and renewal of the purchase-money notes was properly allowed.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1790, 1792; Dec. Dig. ⊂=448(2).]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

In the matter of the Lance Lumber Company, bankrupt. From an order upholding the claim of the George F. Lance Company (224 Fed. 598), W. W. Webber, trustee, appeals. Affirmed.

J. R. Dickinson, of Reading, Pa., and Charles B. Ermentrout, of Philadelphia, Pa., for appellant.

J. A. Keppelman, of Reading, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The Lance Lumber Company was adjudged bankrupt in January, 1913, and the pending appeal is from the allowance of a claim presented by the George F. Lance Company against the estate. The basis of the claim is two unpaid notes, aggregating $5,591, bearing date in November and December, 1912, respectively, each made by the bankrupt to the claimant's order. The referee rejected the claim, but the District Court allowed it. 224 Fed. 598. The notes are the last of a series that began in February, 1909, and the controversy about them will be sufficiently explained by an outline of what occurred between the bankrupt, the claimant, and a third party, Cameron Lance.

The claimant, a Pennsylvania corporation organized in 1907, was a lumber dealer in the city of Reading. In August, 1908, it decided to go out of business, and with that end in view the board of directors resolved that the corporate property should be sold as soon as this could be done without a sacrifice. How much was disposed of during the next few months we do not know; but a considerable stock was still on hand in January, 1909. On the 23d of that month, Cameron Lance, who owned none of the claimant's shares, and was not connected with its business, offered to buy the unsold lumber and equipment, and to

pay for it with notes at 3, 6, 9, and 12 months. These were to be notes of "himself or his assigns," and we think the evidence establishes that both parties knew Cameron's intention to organize at once a new corporation, that should go into business with the property thus purchased and should undertake to pay for it. On this understanding the claimant agreed to sell, and accepted the further offer of Cameron to lease a portion of its yard. A price of $12,500 was agreed upon, Cameron gave four notes, dated February 1, the lease was made, and on February 20 the claimant's board of directors ratified and confirmed the transaction. (Later in the year—on November 13—the claimant's stockholders ratified and confirmed the board's "sale of its lumber and equipment to Mr. J. Cameron Lance and his assigns.")

On February 20, Cameron had not yet organized his company—the bankrupt's certificate of incorporation is from the state of Delaware, and bears the date of February 19—but on March 6 (the organization having meanwhile been effected) he made a formal offer to sell, and the bankrupt agreed to buy, the lumber he had bought from the claimant in January and February, with any accretions since made thereto, and with the good will of the claimant, "so far as the same is connected with the lumber business formerly carried on by that company." A valuation of $25,000 was agreed upon, and in payment thereof the whole capital stock of the bankrupt ($25,000) was to be issued to Cameron, "his nominees or assigns." He was elected secretary and treasurer, and in effect managed all the company's affairs. So far as appears, the details of the transaction between Cameron and the bankrupt were not known to the claimant.

On April 10, the claimant's treasurer reported to his board that the bankrupt had been organized, and "that hereafter the notes given by J. Cameron Lance personally to this company for the lumber and equipment purchased by him for himself and his assigns would be renewed and paid in part from time to time by the Lance Lumber Company." Thereupon the board resolved:

> "That this company accept from the Lance Lumber Company its notes and checks in renewal and part payment respectively of the notes of Mr. J. Cameron Lance now held by this company, the first of which said notes will be due May 1, 1909."

As already stated, this was the existing arrangement between Cameron and the claimant, and it was faithfully carried out for nearly four years. During this period the notes originally signed by Cameron were renewed by the bankrupt (except on one or two occasions, when Cameron signed the notes), and all the payments, either of principal or of interest, were made by the bankrupt out of its own funds. And this was done, although Cameron ceased to be the bankrupt's treasurer in October, 1910, and was succeeded in that office by another person.

Much of the trustee's argument relies on certain transactions between Cameron and the bankrupt in reference to the $25,000 of capital stock that was issued to pay Cameron for the lumber, and for present purposes we may concede that these transactions were loose and irregular. But we do not regard them as decisive in the present

inquiry; the claimant does not appear to have known anything about them, and is not chargeable with knowledge. Its chief interest was to see that the original arrangement was carried out, and apparently this was consummated by the incorporation of the bankrupt, by its subsequent taking over of the lumber that Cameron had formally bought in February, and by the bankrupt's assumption of the notes that he had signed at that time. Indeed, the trustee's position has no adequate support, unless Cameron's purchase in February was an independent transaction on his individual account, and unless his subsequent transfer to the bankrupt was in like manner independent and without relation to the original purchase. In our opinion, the facts are different. Cameron was acting in behalf of the company thereafter to be organized, and the claimant was dealing with him in that character; and, while the original notes were in form Cameron's individual obligations, both parties understood that the bankrupt's notes would take their place as soon as this could be done. After these understandings were carried out, the transaction became in form what in truth it had always been—a sale by the claimant to the bankrupt. The equities are with the claimant; its property passed to the bankrupt through Cameron's hands—he was little more than a conduit for the transmission of the title—and, although the bankrupt did not assume the notes by a formal resolution of its board, its renewals and payments during the next 3 or 4 years show distinctly that it had in fact accepted the arrangement made in its behalf. Certainly it paid more than half the debt out of its own funds, and this is a fact that can hardly be explained on any other theory. If Cameron was delinquent in his dealings with the bankrupt—a matter that does not now concern us—the claimant is not chargeable on that account.

The order allowing the claim is affirmed.

AKERS STEERING GEAR CO. v. GREAT LAKES ENGINEERING WORKS.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2801.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—AUXILIARY STEERING GEAR.

The Akers patent, No. 772,309, for an auxiliary steering mechanism for vessels, discloses invention and is valid, but, in view of the prior art, is not of broad scope. As so construed, *held* not infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Akers Steering Gear Company against the Great Lakes Engineering Works. Decree for defendant, and complainant appeals. Affirmed.

C. C. Bulkley, of Chicago, Ill., for appellant.

James Whittemore, of Detroit, Mich., for appellee.

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

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

KNAPPEN, Circuit Judge. This suit was brought for infringement of several claims of each of two patents to Akers. The District Court dismissed the bill. By this appeal we are asked to review so much only of the decree below as relates to the finding that claim 18 of patent No. 772,309 (October 11, 1904) is not infringed by defendant.

The objects of the invention, as disclosed in the patent, include the providing of auxiliary steering gear for ships, so constructed as to be normally out of operative connection with the rudder, but which may promptly be brought into connection therewith when the main steering mechanism is disconnected, including means for connecting the auxiliary steering mechanism with the rudder, operable at a distance therefrom. By an earlier patent (No. 649,790, May 15, 1900) the inventor had disclosed means for throwing the auxiliary gear into connection with the rudder on the disabling of the main gear, but not for disconnecting the main steering gear; and the remaining object of the second invention is to provide means for disconnecting the main gear from the rudder at the time the auxiliary gear is brought into service, thereby relieving the latter from the burden of moving the tiller chains and quadrant of the main steering gear, and putting upon the auxiliary gear only the duty of controlling the rudder itself. To accomplish these objects the inventor discloses this device:

The hub of the quadrant which forms part of the main steering gear (and to which the tiller chains are attached) is slidingly and rotatingly mounted on the rudder post; the upper face of the hub is formed for engaging a clutch ring rigidly attached to the rudder post, so as to rotate therewith; the hub and ring being held in engagement, when the main steering gear is operative, by rods whose lower ends are attached to the quadrant hub, their upper ends engaging the upper face of the quadrant clutch collar, which rotatingly engages the rudder post.

The emergency steering device consists of a gear rigidly secured to the rudder post above the quadrant clutch collar, and meshing with a pinion rotatively secured to a vertical shaft, which shaft is rotatively secured to the vessel and extends to the upper deck, where it is operated by the usual steering wheels. A clutch collar formed integrally with the hub of the pinion referred to, and projecting upwardly, is adapted for rigid engagement with the lower face of a nonrotating clutch collar which slidingly engages the vertical shaft mentioned.

The emergency steering gear is held out of engagement, and thus made inoperative (as when the main gear is operative), by means of a trip extending under the upper clutch collar of the emergency gear. It is designed to be made operative, and the main gear inoperative, by a pull communicated through a winch in the emergency wheel stand to a chain or other flexible connection attached to the trip referred to, as well as to an arm extending from the quadrant collar of the main gear, thus causing the upper collar of the emergency gear to fall *into*

engagement, and the quadrant hub of the main gear to fall *out of* engagement.

The claim in issue reads as follows:

"18. The combination with the main steering mechanism of a boat, of an auxiliary steering mechanism, and means located adjacent to the rudder and operable by a device situated at a point distant from the rudder for disconnecting the rudder from the main steering mechanism when the auxiliary steering mechanism is brought into service."

The steering gear built by defendant for the steamer St. Clair constitutes the alleged infringement. That steering system is this: Forward of the rudder post are two separate shafts (one on each side of the center line of the ship), each carrying a pinion designed to mesh with a gear segment permanently fastened to the rudder post and forming its only driving means. Each shaft is directly and rotatively operated by a separate and immediately adjacent steam engine (port and starboard respectively), and carries above the pinion a clutch adapted to engage a clutch member on the upper face of the pinion. The respective pinions are thrown in or out of engagement with the gear segment on the rudder post through the operation, by the engineer, of the respective clutches through separate levers (communicating each with one of the clutches), located side by side about 20 feet forward, in the main engine room (but one lever being operable at a time), in connection with the simultaneous working of the steering wheel by the wheelsman in the wheelhouse, to facilitate the meshing of the clutches. The two engines are alike, and the steering gear can thus be operated indiscriminately by either engine, although, in practice, one is designated as main, and the other as auxiliary. Whether defendant's device infringes the claim in suit depends on what are the essential features of the invention of the patent, the advance made thereby, and the construction to be given certain language of the claim.

When Akers entered the field there was nothing new in providing ships with auxiliary steering mechanism, to take the place of a disabled main mechanism. It was not unusual to employ, on ocean steamers, duplicate steering engines, each provided to operate directly a separate pinion for driving a single gear segment attached to the rudder post—but one engine to be actually in place at a time. The substituting of engines, however, required several men and about half an hour's time. But numerous devices for quickly substituting an auxiliary or emergency gear for a main gear had been patented; for instance, Williamson alone had taken out at least four patents (one as early as 1887) on means for facilitating changing from steam to hand power. Nor was it novel to provide means for quickly disconnecting the one mechanism and connecting the other, operable at points distant from the rudder; indeed, all four of Williamson's shifting devices were intended for operation by the wheelsman in or near the wheelhouse. The same is true of other devices in the prior art.

The prior art also disclosed means for connecting and disconnecting the auxiliary and main steering gears, respectively, located at different places between the two sources of power and the rudder. Thus,

according to Williamson (No. 472,324, 1892), as well as several other devices, the disconnection of the steam power is shown at the steering drum, which is thereupon operable directly by the hand power. In Whitehead (No. 379,840, 1888) the means for connecting and disconnecting both the main and auxiliary mechanisms are located upon an upright shaft between the upper and lower decks, likewise operable within the wheelhouse; and we think there was no invention in locating the means for connecting and disconnecting the respective steering devices at one point or at one distance, rather than at another point or at another distance, away from the rudder post. It is obvious that the presence of a single steering gear between the rudder and the two sources of power has a pronounced disadvantage, because the failure of such common steering gear would leave the vessel helpless.

Turning again to the prior art: Whitehead, for example, used the same tiller chains whichever power was used, and, should the chains break or jam, the auxiliary gear would be as inoperative as the main gear. The same is true of the Williamson devices, which employed in both steering systems the same steering drum and the mechanism between the drum and the tiller. Moreover, practical experience had shown that there is an additional advantage in the complete separation from the rudder of the tiller chains or other appliances of the main steering mechanism, when the auxiliary mechanism is operative—in preventing the overhauling of such appliances, and thus leaving the auxiliary mechanism unburdened thereby and free to operate the rudder only, thus not only reducing wear and tear upon the auxiliary mechanism, but preventing interference therewith by jamming or otherwise.

Plaintiff's contention as to the scope and nature of Akers' invention, as stated in the brief of its counsel, is that:

> "He was the first to connect two steering gears directly to the rudder, so that such steering gears—the one the main and the other the emergency gear—are entirely and completely independent of each other between the rudder and the source of power to operate the rudder, and then to provide connecting and disconnecting means respectively for the emergency and the main gear, so that when the emergency gear is in operation the main gear is entirely and completely disconnected."

We think this broad proposition is sustained by the record. Akers was not, however, the first to disclose a mechanism by which the auxiliary steering gear was directly connected to the rudder, or even to the segment operating it. Kirby (No. 582,931, 1897) had disclosed means for making the hand steering gear operative or inoperative, located directly upon the rudder, and operable from the forward part of the upper deck—the patent, however, showing no means of disconnecting the steam engine from the rudder, but stating that means for so doing were shown in a former application (not in evidence)—the specification stating that no part of the hand gear "should be connected with and move with the steam gear, whereby it would suffer wear and tear when steering by steam gear." Atkins (No. 439,716, 1890) had disclosed a hydraulic main steering gear whose engine piston was connected directly with a segmented tiller upon the rudder post, and

having a tubular capstan and pinion which, by means operated in the wheelhouse, is dropped into gear with teeth upon the segmental tiller referred to, and the rudder thereupon controlled by hand power applied directly to the capstan, apparently in the wheelhouse—the hydraulic engine being thereby entirely disengaged from the tiller. Atkins' device employed no tiller chains.

We are disposed to think, however, that Akers' device, as disclosed by the patent, did mark an advance in the art, and to concede the presence of invention in the claim in suit, notwithstanding the means shown in the patent for disconnecting the main and connecting the auxiliary mechanisms are effective to a limited extent only, and only in certain positions of the rudder; for it is to be presumed that effective means for the purpose are devisable, and the claim in suit is not limited to the specific means so shown. But we think that in view of the then existing art the invention was not a broad one, that the permissible range of equivalents is narrow, and that the invention must be limited to a construction in which, in the operation of the auxiliary steering device, the mechanism directly operating the rudder is entirely disconnected from and independent of the main steering mechanism.

Defendant's steering mechanism obviously differs from the device of the patent in suit in these respects: It employs no tiller chains (the power being applied directly to the segmental tiller, as was the case in Atkins and the duplicate steam engine equipment mentioned), and to that pinion-driven member (which for convenience or economy only is in form a segment, rather than a complete circle) the rudder is always operatively connected, and is moreover always in engagement (operative or inoperative) with both driving pinions; the connecting of one gear and the disconnecting of the other are not accomplished by a single means or by a single movement, but by separate means and separate movements. The gear segment is a prominent member of the main steering gear mechanism. The segment gear and its driving pinion perform the functions of plaintiff's tillerchains to the extent of communicating the power to the rudder, and are, we think, the equivalent of those chains for that purpose. From this segment the rudder is never disconnected. The claim thus does not read literally upon defendant's device. Nor is the latter within the spirit of the patent, for the connection of this gear segment with the rudder post and its engagement (although inoperative) with the pinion upon the shaft operated by the main steering engine precludes complete independence between the rudder and main steering mechanism. Not only does the connection with the pinion of the main steering mechanism, even when running idle, afford some friction, but there is always present the possibility of interference with the free movement of the rudder and auxiliary gear by the jamming of the segment gears with those of the pinion of the main mechanism, as is said to have actually happened in one instance, when the segment was carried past an operative connection with that pinion. The auxiliary mechanism is thus not left entirely unburdened and free to operate the rudder only, as is the case in the device of plaintiff's patent; or to use the language of the specification, "so that the work which devolves upon the auxiliary gear is

only that of controlling the rudder." We are therefore of opinion that the structure complained of does not infringe the claim in suit.

This conclusion makes it unnecessary to consider whether, in view of the differing language of the various claims, including the language employed by the specification in stating one of the objects of the invention, viz., "to provide means for disconnecting the main gear from the rudder *at the time* the auxiliary gear is brought into service"—the language in the claim in suit—"*means* * * * for disconnecting the rudder from the main steering mechanism *when* the auxiliary steering mechanism is brought into service," should be construed as calling for a unitary means or device as distinguished from two separate devices for effecting the connection and disconnection of the auxiliary and main gears respectively, or as calling for simultaneous action of the connecting and disconnecting means, as distinguished from a device permitting operation of but one lever at a time.

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

TOLEDO PLATE & WINDOW GLASS CO. v. KAWNEER MFG. CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2915.

1. PATENTS ⟸66—LIMITATION—PRIOR ACT.
   A patent is not a part of the prior art as relates to another patent to the same patentee, issued later, but on an application filed before the first patent issued.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 79, 81; Dec. Dig. ⟸66.]

2. PATENTS ⟸26(1)—INVENTION—COMBINATION OF OLD ELEMENTS.
   Although each separate element of a combination is old, there may be invention in the combination, if it produces a better result and by new means.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26(1).]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—STORE FRONT—CONSTRUCTION.
   The Plym patent, No. 852,450, for store front construction, was not anticipated, and discloses invention; also *held* infringed.

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Kawneer Manufacturing Company against the Toledo Plate & Window Glass Company. Decree for complainant, and defendant appeals. Affirmed.

For opinion below, see 232 Fed. 362.

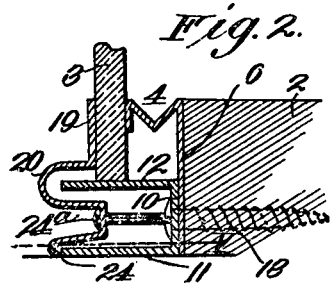
Wilber Owen, of Toledo, Ohio, for appellant.

Wallace R. Lane and Clarence J. Loftus, both of Chicago, Ill., for appellee.

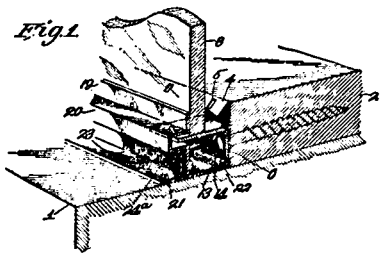
Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

KNAPPEN, Circuit Judge. Suit on patent No. 852,450 (May 7, 1907) to Plym for improvements in store front construction. The defenses are invalidity of the patent and noninfringement. The District Court held the patent valid and infringed (232 Fed. 362), and made the usual decree for injunction and accounting.

The invention relates to sash rails or settings for heavy glass, especially in show windows; its object being to provide a structure for effectively supporting the plate glass, and which is capable of quick, easy, and economical installation, with provision for the ready removal of accumulated dust and dirt without disturbing the glass plate. The device consists (aside from the glass plate) of three elements: A base for the plate to rest upon, a gutter in the rear of the plate, and an outer retaining member. Fig. 2 of the patent drawings (here reproduced) shows in vertical section the inventor's preferred type of construction.



The arm *6* of a gutter of resilient material, M-shaped in section, is fitted against the outer edge of the show window floor *2*. The glass is supported on short channel irons, whose base portions *10* fit against the arm *6* of the gutter member, their lower arms *11* resting on the windowsill, their upper arms *12* directly supporting the glass plate. The channel irons are secured to the show window floor by fastening devices *13*. The glass is retained securely upon its supports by a channeled strip *19*, whose upper portion bears directly against the outer face of the glass plate at or near its lower margin, the channeled portion fitting around the outer edge of the shelf, terminating at its lower end in a gutter recessed, as at *24*, to receive the lower arms of the channel iron. (In other forms illustrated by the inventor the glass plate rests upon angle brackets, instead of channel irons, as shown in Fig. 1 of the drawings, also here produced.)



The M-shaped gutter has a series of drain and ventilating holes *5*, the retaining strip having openings *23* for the same purpose. In the practice of installation the gutter and the support for the glass are first secured in position, the plate being then placed on the support and against the gutter, after which the retaining strip is secured in position against the plate by the screws *24a*, which extend into the show window floor *2*. The patent discloses another form, having a gutter of nonresilient material, but this form is not involved

here. The setting, minus the support for the glass, may extend along the side and top edges of the plate; and such is plaintiff's practice.

The claims in suit are Nos. 5, 6, and 7. Claim 6 reads as follows:

"6. In a construction of the character described, the combination of a shelf or support, a glass plate resting edgewise thereon, a resilient gutter exerting an outward pressure on the glass plate, and a retaining strip adjustable toward or from said support or shelf and disposed at the outer side to engage said glass plate."

Claim 7 differs from claim 6 only in including holes in the gutter and outer retaining members. Claim 5 differs from the other two claims in substituting the words "means for pressing said plate yieldingly outward" for the words "a resilient gutter exerting an outward pressure on the glass plate," and in including the gutter underlying the shelf on which the glass plate rests.

In practical construction (although not so prescribed by the patent) the gutter member, the outer retaining strip, and the base on which the glass rests are made of thin sheet copper. The advantages claimed for the device of the patent are that it furnishes a sufficient degree of resiliency in the setting to protect against breakage of the glass due to atmospheric changes, as well as to wind or other pressure against the plate from the outside; ventilation adequate to prevent the accumulation of moisture upon the inner surface of the window, liable to form hoar frost in cold weather; drainage for the protection both of the glass and the woodwork; facility in removing dirt and sediment without disturbing the glass (the outer member being readily removed); and economy and ease of setting, with reduced danger of breaking the glass in the process. The utility of the device is abundantly proved.

[3] The validity of the patent is challenged as not involving invention, in view of the prior art, including an earlier issued patent to Plym. In the art previous to Plym, setting devices involving a base for the glass plate, an inner gutter member, and an outer retaining member had been disclosed by patent; but none of these prior devices, in our opinion, anticipated Plym, or preclude invention in the patent in suit. The patents chiefly relied upon as denying such invention are Phelps (No. 736,774, 1903), Von Oven (No. 795,004, 1905), and Strayer (No. 416,080, 1889). Neither of these patents discloses Plym's inner resilient gutter member, which is an important feature of the combination of the claims in suit. Phelps' device has practically no elasticity. Von Oven has nothing which we think can properly be regarded as a resilient rear gutter strip. The resiliency afforded by Strayer's gutter member apart from its ends (and thus away from the corners of the glass) is nullified by its rigidity at the corners. Neither of the three discloses the useful combination of ventilation, drainage, elasticity, and ease of setting found in the Plym patent.

That the patent, as respects the claims in suit, discloses a device affording substantial elasticity in the gutter member, and thus in the setting, is clear. It is also satisfactorily established that plaintiff's gutter member, as manufactured and marketed, in substantial accordance in this respect with the patent in suit, affords a resilient gutter and furnishes a setting resilient to a substantial extent. The extent of the required resiliency is not easy to define; the setting must be suffi-

ciently rigid to measurably resist strains, and resilient enough to yield before the breaking point in the glass is reached. We think Plym's device meets these requirements, and that its conception involves invention as distinguished from mere mechanical skill.

Plym had, however, by patent No. 846,343, applied for before, but issued after, the application for the patent in suit, disclosed the resilient gutter shown by that patent; the "substantially V-shaped gutter" being the subject of one of the claims of that patent. Defendant insists: (1) That the first Plym patent is a part of the prior art, and that the second patent involves no invention over the first; and (2) that a double patenting of the invention of the first Plym patent has resulted.

Plym's first patent differed radically from his second patent in this respect: The shelf for supporting the plate glass was a part of the outer retaining member (as shown in the illustration below), instead of being, as in the second patent, wholly independent of that member.

The second patent was not only an improvement over the first, in that it relieved the outer retaining member of the burden of carrying the heavy glass (with its tendency to weaken the retaining force of that member), with its attendant difficulty and danger of breaking the glass in the original setting, as well as in the removal of the retaining strip for cleaning and other purposes; but its retaining strip necessarily lacked the element found in each of the claims of the patent in suit, of adjustability toward or from the support for the glass. This lack of adjustability was inherent in the device of Plym's first patent. Treating the feature of adjustability of the retaining strip as intended to relate to the gutter, the result is the same.

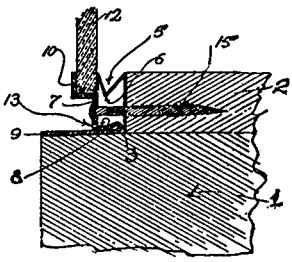


FIG-4

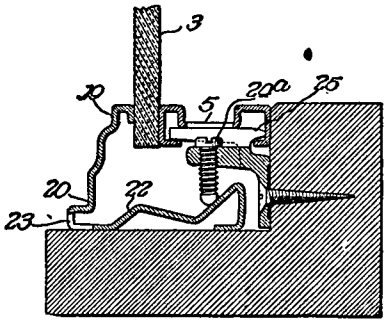
[1] Nor was Plym's first patent a part of the prior art as related to the second patent; the later patent having been applied for by the same inventor before the first patent issued. Century Elec. Co. v. Westinghouse Elec. Co. (C. C. A. 8) 191 Fed. 350, 352, 353, 112 C. C. A. 8. The question is not one of priority between two inventors, as in the cases in this court of Drewson v. Hartje Paper Mfg. Co., 131 Fed. 734, 739, 65 C. C. A. 548, and Elec. Controller Co. v. Westinghouse Co., 171 Fed. 83, 87, 96 C. C. A. 187, where the date of the first application is held to be prima facie the date of the first invention.

[2] But, even if part of the prior art, we think the second patent involved invention over the first. Invention in the combination is not precluded by the fact that there was nothing novel in providing an independent setting block for the glass, and an independent retaining strip drawn and held against the face of the glass. There was no double patenting of the invention, for the first did not disclose, nor did any of its claims cover, the combination of the claims here in suit. The invention of the claims of the second patent (in suit) was neither previously patented nor abandoned. The mere fact that the gutter member was made the subject of a separate claim of the first patent does not render void combination claims of the later issued patent,

including such member as one element. Notwithstanding each separate element of the combination was old, invention might, and we think did in fact, exist in the combination of the claims in suit; it effected a better result than known in the previous art, and by a new combination of means. Loom Co. v. Higgins, 105 U. S. 580, 591, 26 L. Ed. 1177; Ferro Concrete Co. v. Concrete Steel Co. (C. C. A. 6) 206 Fed. 666, 669, 124 C. C. A. 466; Loose Leaf Co. v. Kalamazoo Loose Leaf Binder Co. (C. C. A. 6) 230 Fed. 120, 127, 144 C. C. A. 418.

We have no difficulty in holding the patent valid as against the defenses made.

The question of infringement is not free from difficulty. The alleged infringing structure is manufactured by the Zouri Drawn Metals Company (which is defending this suit), under patents to Murnane, issued subsequently to all the Plym patents, and is marketed or installed by defendant in connection with its glass business. The structure in question here responds to the claims in suit unless in this respect: Its gutter is supported on cast metal brackets (*25*), distributed on 10-inch centers throughout the entire length of the gutter, as shown by the following drawing, Plaintiff's Exhibit 21; the base on which the glass rests not being shown:



In the devices involved in this suit the brackets do not extend quite to the web of the gutter which contacts with the glass plate, falling short of so doing by 1/32 of an inch, more or less. Defendant contends that the use of such scant brackets was unintentional, and contrary to its instructions, the scantness being due to a natural lack of uniformity in the castings. The outer retaining member is not drawn and held in position, as in plaintiff's device, by a screw extending therethrough into the show window floor, but by the screw *20a*, which bears upon an inclined face of the lower arm of the retaining member. This manufacture is advertised as a rigid construction. The contention is that the device has not the "resilient gutter exerting an outward pressure on the glass plate" called for by claims 6 and 7, nor the "means for pressing said plate yieldingly outward" within claim 5. The bracket naturally diminishes resiliency, but whether or not defendant's gutter is nevertheless "resilient" depends upon whether the claims call for "extreme resiliency" or only for "a degree of resilience sufficient to perform a useful purpose under the conditions of practical use." [1]

We think the latter is the correct rule of construction; and we are satisfied from the evidence, including uncontroverted testimony of practical tests, that defendant's scant bracket structures, so far as made the subject of testimony here, do furnish a useful and substantial de-

[1] Language of Judge Day in Kawneer Mfg. Co. v. Ventwell Store Front Co. (D. C.) 210 Fed. 459, 461.

gree of resilience under conditions to which they would naturally be subjected in actual use.

The further contention is, however, made that defendant's gutter does not exert an "outward pressure on the glass plate," nor press it "yieldingly outward," because, as alleged, it is not put under compression in the setting operation, and thus gives no outward pressure, except by way of reaction. The patent does not in terms declare that the gutter is put under compression in the act of setting. In the description of the drawings the gutter is spoken of as "of resilient material and pressing outwardly against said plate"; the wall is described as "clamped in position by screws *24a* which extend into the floor *2*", etc.; and the retaining strip as secured in position after the gutter and shelf with glass thereon are so secured "by slipping it up against the plate and inserting and driving home the screws *24a*." It does not affirmatively appear that in defendant's setting process the gutter is subjected to such an amount of compression as to call into action an appreciable degree of resiliency before the exertion of the special strains which the gutter is designed to meet. But the gutter is evidently subjected in the setting to such a degree of compressing strain as to clamp the glass firmly between the resilient retaining strip and the gutter (thereby providing, theoretically, at least, slight pressure outward on the glass), and such that further pressure in actual use will ipso facto and immediately induce a substantial outward pressure; and this degree of pressure is, we think, all the claims in suit necessarily call for. We therefore are of opinion that defendant's scant bracket construction of the type condemned by the decree of the District Court infringes all three of these claims, and equally so whether their use was intentional or unintentional. Thompson v. Bushnell (C. C. A. 2) 96 Fed. 238, 243, 37 C. C. A. 456.

Since this suit was begun defendant seems to have used only brackets of such length as to come into actual or substantial contact with the outer web of the gutter. The District Court regarded such full bracket construction as not within the issues presented (as it was not), and so declined to determine whether or not it constitutes infringement. Plaintiff has not gone into that subject below or here, and objects to its present determination. We are not at liberty to now consider it.

A motion presented by defendant-appellant remains to be considered. The decree below was entered August 4, 1915; the transcript on appeal was filed in this court April 1, 1916; on April 19th following appellant asked permission to apply to the District Court for leave to open the decree for the admission of evidence discovered since the entry of decree. The application was passed over to the hearing on the merits. The situation on which the motion is based is briefly this: Plaintiff company was organized about January 1, 1907, succeeding another company of the same name organized in Missouri in February, 1906. Plaintiff had successfully prosecuted several infringement suits based on the patent here in suit, the decrees in none of which have been reviewed by an appellate court. Plaintiff had also a copending suit in the District Court for the Southern District of New York against the Zouri Company, based on the scant bracket structure in-

volved here. Since the decree in the instant case the Zouri Case has been decided in plaintiff's favor, and the accounting thereunder is said to be in progress. After the decree in the instant case, the defendant took, in the Zouri Case, the deposition of the inventor Plym, the head of the plaintiff company, as well as of its predecessor; he not having been a witness in the instant case. From this deposition it is said to appear that Plym admitted, first, that the structure of the first patent (No. 846,343) was manufactured exclusively by plaintiff and its predecessors up to January 1, 1907, and for a period of several months thereafter (the patent in suit having been applied for August 22, 1906); second, that in the spring of 1907 plaintiff company advertised the structure of Fig. 1 of the patent in suit in "Sweet's Indexed Catalogue for the years 1907–08" (the fact having been discovered by defendant since the decree below), prepared to manufacture it, and made an experimental installation thereof at Kenosha, Wis.; third, that plaintiff's present device, in fact made according to the descriptions and drawings of the third Plym patent (No. 879,898, applied for June 8, 1907, issued February 25, 1908), was not adopted by plaintiff until the summer of 1907; fourth, that the manufacture and sale of the structure of the first Plym patent was continued during the experimental work under the patent in suit and until plaintiff's present device was adopted. It is also shown that an examination, made since Plym's deposition, of the store front construction in Kenosha, corroborates his testimony relating thereto. Defendant asks, in the alternative, for the introduction of the entire record in the Zouri Case or for certain parts showing the facts just stated.

We think defendant's petition should be denied. It is clear that due diligence was not exercised in presenting the proposed testimony below. The Zouri Company was a regular advertiser in the catalogue referred to, and presumably familiar with the Kawneer advertisements. The edition referred to had been in the public library at Chicago and accessible to the public ever since June, 1907. Defendant's counsel introduced below a copy of the catalogue for a later year, to show the Zouri Company's advertisement. No sufficient reason is shown for not taking Plym's deposition in the instant case. He was accessible to defendant's counsel, who had been told that his production by plaintiff would depend upon the nature of defendant's testimony. His examination was not asked for except in open court, after the testimony had been considered closed, following rebuttal testimony by both plaintiff and defendant. It was not surrebuttal, and its admission was within the court's discretion, which we think was not abused. Defendant, in fact, showed in the present case the manufacture and sale by plaintiff's predecessor of the structure of the first Plym patent. The fact that it was unable to prove that plaintiff itself did the same for a short time after its organization is not highly important. While the fact that plaintiff's commercial structure is the device of the third Plym patent lessens the force of commercial success and public favor, as applied to the question of invention in the patent in suit, we have no difficulty in finding such invention independently of those considerations. Indeed, the device of the second patent is in plaintiff's commercial structure; the third patent being merely an improvement upon

the second, and so declared on the face of the patent.[2] While it is possible that some of the adjudications in plaintiff's favor may have been made under a misapprehension of the true history of manufacture and sale of the various Plym devices, such fact, even if it exists, is not enough to justify reopening the decree. In the Zouri Case, which, as already said, involves the specific structure in issue here, the testimony in question was before the court. Some, at least, of the proposed testimony will naturally be important upon the question of profits and damages under the accounting, but its use for those purposes does not depend upon its present admission.

The petition for that purpose is accordingly denied.

The judgment of the District Court is affirmed, with costs.

ADAMS v. BOSTON STORE.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1916.)

No. 2268.

PATENTS ⟸328—INVENTION—JOINT FOR METAL BEDSTEAD.

The Adams patent, No. 923,235, for a joint for metal bedsteads, *held* void for lack of patentable novelty and invention.

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

Suit in equity by George Adams against the Boston Store. Decree (216 Fed. 626) for defendant, and complainant appeals. Affirmed.

The appeal is from a decree of the District Court finding the issues for appellee and dismissing appellant's bill for want of equity. There is involved claims 1 and 2 of United States patent No. 923,235, to George Adams, June 1, 1909.

Claim 2 is as follows: "A joint for a metal bedstead, or the like, comprising a hollow member provided with a hole or opening, a mold plate, means for securing said mold plate within said hollow member, said mold plate being shaped to form a recess or cavity within said hollow member into which the opening in said hollow member opens, the means for so securing said mold plate in position comprising a screw in screw-threaded engagement with a hole or opening in said mold plate, an end of which is adapted to bear against the inner surface of said hollow member and to draw said mold plate into close engagement with the side thereof around the hole or opening therein, said screw being of such length that it will project into the recess or cavity defined by said mold plate, a part of or projection on the other connected member which extends through the hole or opening in said hollow member into the recess or cavity defined by said mold plate, and an abutment cast within said recess or cavity, with or upon said part of or projection on said second connected member which projects into the cavity or recess defined by said mold plate and also upon the end of the screw for securing the mold plate in position which projects into said recess or cavity, substantially as described."

Claim 1 is the same as claim 2, omitting therefrom, after the words "opening therein," the clause "said screw being of such length that it will project into the recess or cavity defined by said mold plate," and omitting also, just

[2] The gutter of Plym's third patent has an arm underlying the support for the glass; otherwise, it is substantially Z-shaped, instead of M-shaped, in section.

preceding the word "substantially," the clause "and also upon the end of the screw for securing the mold plate in position which projects into said recess or cavity."

The controversy concerns the joining together of the various members of the head and foot ends of metal beds, particularly attaching to the tubular corner post the member to receive and hold the side rails of the bed. Earlier construction showed a "chill" or casting upon the post completely surrounding it. This required considerable metal, adding undesirable weight and expense, and marring the symmetry of the bed. In 1877, Bryett secured a British patent for casting, or "frenching," as it is called the corner member upon the post making an orifice or hole in the post placing next thereto the mold for making the corner piece, and pouring into the mold the molten metal, which, filling the mold, and passing through the orifice into the post, on hardening made a solid casting firmly held to the post by the metal abutment thus cast therein. To avoid filling the entire cavity of the hollow post with liquid metal, plugs were inserted within the post a short distance above and below the orifice, so only that part of the cavity of the post between these plugs was filled with metal. This plugging process was considerably used, and is shown in some of the exhibits in evidence. But filling the entire post cavity between the plugs involved waste of metal and extra expense and weight, and it was deemed advantageous to restrict the cavity to a capacity affording just enough metal to give the necessary holding strength to that part of the completed casting constituting the abutment within the post.

There appears a patent to J. M. Adams, No. 808,501, December 26, 1905, in which is described a corner piece attached to the post by the "frenching" process, and illustrating an abutment within the post, not occupying the entire diameter as in the British patent, but only a comparatively small part thereof, immediately within the orifice. In order to restrict the bulk of the casting within the post, there must be formed a cavity, by means of a mold or receptacle within the post, to receive and hold the metal while it is being poured, and until it becomes hardened. This means is not described in that patent, but in the testimony it appears that in practice a mandrel, with a mold or cup at one end corresponding with the desired shape of the internal abutment, was inserted from the end of the post, and held in position next the orifice or hole in the post, so that this mold or cup, together with the mold for making the external corner piece, constituted one mold or form for making the entire casting. The metal then poured into the mold, within as well as without the post, becoming hard, the mandrel was removed, leaving the abutment within the post as a part of the casting.

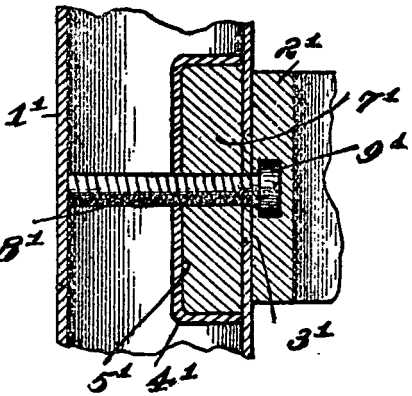
A large maker of metal beds, the Art Bedstead Company of Chicago, owned by F. W. Adams, who is a brother and employer of J. M. and George Adams, made use of the process described in J. M. Adams patent, employing the means stated for casting the inner abutment. The Simmons Manufacturing Company of Kenosha, another large manufacturer of metal beds, and who, as makers of the particular beds of which infringement is here claimed, have assumed and conducted the defense of this action, appears also to have employed various means for frenching the corner piece to the post, and for making joints for uniting the tubular members of the bed.

October 20, 1908, patent No. 901,482, was granted to O. Rudd, assignor to Simmons Manufacturing Company, for a joint for metal beds, the mold or cup for casting the inner abutment of which was constituted by a depression in a section of inner metallic lining frictionally held in place within the post or tube, and which remained permanently in its place after the casting was made.

January 8, 1909, application was filed whereon was issued Patent No. 933,355, to J. M. Adams, for a joint for metal bed. He describes a mold plate for the purpose of making the internal casting to constitute the abutment within the post, and specifies "means for rigidly securing said mold plate in position," preferably that in casting the abutment the mold plate becomes a constituent part of the joint, and the specific means he shows for holding the mold plate are clips secured into the mold plate, with the ends bent over the edges of the hole. His first three claims are very similar to those here in issue, but instead of describing the screw as a means for holding the plate in place, he

claims generally means for securing the mold plate in position within the hollow member—other claims describing the holding clips.

January 27, 1909, application was filed for the patent in issue. The internal abutment of the post shown by this patent, after it is cast, is not substantially different from those in the joints shown by the J. M. Adams patents or the Rudd patent. But the distinct feature claimed is that George Adams' mold plate or cup for forming the inner part of the casting, or the abutment on the inside of the post, is held in its place, by a screw, 8', which passes through a threaded hole in the bottom of the mold plate, so that by turning this screw until it impinges on the opposite wall of the post the mold plate is pressed against the side of the post next to the casting, as shown by following Fig. 5 of the patent drawing:



Exclusive rights under the patent were granted to Seng & Co., large makers of and dealers in manufacturers' specialties, who pay a royalty to the patentee on all the mold plates sold, excepting those sold to the Art Bedstead Company. Seng made and sold a great number of them and paid a considerable amount in royalties. Simmons declined to recognize the patent, but made many beds embodying the particular feature claimed for it; i. e. with the mold plate or cup held in position by threaded wire or screw passing through it until its end impinges against the opposite wall of the post or other hollow member.

George C. Waldo, of Chicago, Ill., for appellant.
Albert H. Graves, of Chicago, Ill., for appellee.

Before KOHLSAAT, MACK, and ALSCHULER, Circuit Judges.

ALSCHULER, Circuit Judge (after stating the facts as above). If the claims in issue are valid, there has unquestionably been infringement, as charged, in appellee's sale of the beds. In thus permanently attaching the mold plate, it does not actually form part of the joint, but when the casting imbeds the attaching means the mold plate remains as a matter of necessity rather than of choice. Its contribution to the strength of the joint is negligible. George Adams testified:

"The only purpose of the threaded screw or wire of my patented construction is to hold the mold plate in place until the casting is made" (page 37).

And J. M. Adams testified that, where a large post is used, he thinks it preferable to dispense with any mold plate, as the large post gives greater opportunity to use a mandrel, which is a removable mold, and that when using his first patent the cost of the mold plate is saved.

Appellant's counsel say:

"We call attention to the fact that the device of the patent in suit is a joint for metal beds, and not means for securing a mold plate in position in the abstract."

But the cause has been tried and decided upon the theory that the question involved is whether or not George Adams was the first and lawful inventor of the means shown in his patent for holding in place the mold plate for forming the internal abutment for such a frenching

or joint, by means of a screw extending through it and impinging on the opposite wall of the post or tubular member; and we will consider and determine the cause on the same theory.

The defense is anticipation and prior use by the Simmons Company. Evidence was adduced to show that in March, 1906, the Simmons Company made for the Michael Reese Hospital of Chicago several metal beds, part of one of which was brought into court, which showed an inner cast iron mold plate or cup, having two cavities, each opposite a corresponding hole in the post, and a headed screw through the post passing into the mold plate between its two cavities, drawing and holding it in engagement with the post, and a frenching cast upon the post, the liquid metal passing through the two holes and filling the cavities of this mold plate, forming two internal abutments within the post integral with the outer casting. Other Simmons beds were shown, claimed to have been made in 1907, showing single cavity mold plates held by a screw through the post on the casting side into the mold plate. They showed still other beds, which it is claimed they made in the spring of 1908, having joints formed with single cavity cups, with threaded wire extending through them, impinging on the opposite wall of the post, thus holding the mold cups in position for casting in same manner as in the patent in suit. Witness Bayer, long superintendent of the Simmons brass bed department, testified that in the spring of 1908 he devised the mold plate fastening so used in the last-mentioned beds, and that his company has since then used them quite extensively.

Thereupon George and J. M. Adams again testified, carrying back George's invention to January, 1908, which is earlier than the last stated Simmons use. The making and sale in March, 1906, of the Michael Reese beds having the double cavity cast mold cups held by a screw as stated, is well established by the evidence. The use by Simmons in 1907 of the single cavity cup held by a screw through the same side of the post is fairly well shown. But the Simmons use of the cup secured in the manner of the patent, in the spring of 1908, is involved in considerable doubt. The evidence which carries the Adams invention back to January, 1908, appears to be at least as convincing as that which shows this last stated use by Simmons in the spring of 1908.

Much appears in evidence and in argument on the subject of the superiority and advantage of the single over the double cavity mold; but the comparison is made between the unnecessarily heavy, large, and crude cast iron structure of the early Simmons double cavity cup with Seng's later single cup, neatly formed from thin sheet steel. But the superiority of the latter represents only that natural growth, development, and perfection which involves mechanical skill rather than invention.

If, instead of the large heavy casting of the mold plate for the 1906 bed, there had been employed a double cavity plate pressed from sheet steel, and not larger than necessary for casting a sufficient abutment, we would have the Simmons 1906 mold plate; and the employment thereafter of a plate having a single cavity would not patentably distinguish from the other. Indeed, the alleged novelty of the patent is not to be found in the employment of a single cavity mold cup, as distinguished

from a plurality of cavities, nor in fact in employing a mold plate at all. In order to cast within the post an abutment which shall occupy less than the entire diameter of the post, some form of restricting or limiting mold within the post is necessary to prevent the liquid metal from filling the post. The single abutment of the first J. M. Adams patent required and contemplated a single cavity mold in which to cast it. The George Adams application refers to the structure of the J. M. Adams earlier 1909 application, in which there is shown a single cavity mold cup as an essential part of that structure.

And so with respect to the novelty of the patent claimed for the screw passing through the mold plate and impinging against the opposite side of the post, thus holding the plate. George Adams cannot claim generally a mold plate attached to the post and becoming in such sense a part of the abutment through the holding means being imbedded in the frenching or joint when it is cast. The prior J. M. Adams 1909 application claims generally the disclosure of a mold cup attached to the post, and his first three claims allowed are for means generally for securing the mold plate in position within the post. Other claims show this fastening to be metal clips so bent as to hold the plate in position, so that when the casting is made the clips will be imbedded therein. But Simmons showed in 1906 the use of a screw passing through the post and into a screw hole in the plate between the cavities, for drawing and holding the plate in place, and in 1907 showed a similar screw passing through a single cavity mold and likewise drawing and holding it in place. The lengthening of the screw and passing it through the mold plate until it impinges against the opposite side of the post, thus pushing and holding the mold plate, instead of drawing it by a screw whose head engages the post on the side on which the frenching or joint is to be made, is in our judgment accomplishing the same result in substantially the same way. Some slight advantage is pointed out in the employment of the former over the latter method, but this would not alter the conclusion of substantial identity in function and means. We fail to discover the quality of invention in the later as compared with the earlier use of the screw for holding the mold plate to the post.

Neither do we find novelty in the idea of extending the screw forward from the metal plate, so that, when the casting is made, the screw, being imbedded therein, may afford an element of additional strength. The imbedding within a casting of a piece of metal, such as a screw or wire, is not novel in the art, but is found in structures of various kinds. Besides, in the same J. M. Adams prior 1909 application there is shown a similar strengthening screw to be likewise imbedded in the casting, and for a similar purpose as claimed in the patent in issue.

We are of opinion that the District Court did not err in dismissing the bill for want of equity, and its decree is accordingly affirmed.

LEADER PLOW CO. v. BRIDGEWATER PLOW CO. et al.

(Circuit Court of Appeals, Fourth Circuit. October 6, 1916.)

No. 1447.

1. PATENTS ⇐129—SUIT FOR INFRINGEMENT—ESTOPPEL OF ASSIGNOR.
The assignor of a patent is estopped to deny its validity when sued for its infringement, or that it is entitled to a sufficiently broad and liberal construction to give full protection to the invention; but he is not estopped from showing its limitation by evidence of the prior art, or any other relevant fact.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. ⇐129.]

2. PATENTS ⇐129—SUIT FOR INFRINGEMENT—ESTOPPEL.
A corporation which commenced business under a license from the owner of certain patents, who was made its general manager, *held* affected by his estoppel with respect to prior patents which he had assigned to complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 182½–186; Dec. Dig. ⇐129.]

3. PATENTS ⇐328—INFRINGEMENT—HAND PLOW.
The Hanger patent, No. 764,051, and the Hanger and Thomas patent, No. 792,703, both for improvements in garden hand plows, construed, and *held* not infringed by the structures of the Click patent, No. 853,961, and the Coffman patent, No. 878,774.

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

Suit in equity by the Leader Plow Company against the Bridgewater Plow Company and Daniel S. Thomas. Decree for defendants, and complainant appeals. Affirmed.

Parker Cook, of Washington, D. C. (Armistead Gordon, of Staunton, Va., on the brief), for appellant.

Melville Church, of Washington, D. C. (D. O. Dechert, of Harrisonburg, Va., on the brief), for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The Leader Plow Company, as assignee of patents No. 764,051, issued to G. M. Hanger July 5, 1905, and No. 792,703, issued to G. M. Hanger and Daniel S. Thomas June 20, 1905, for improvements in garden hand plows, brought this action for infringement against the Bridgewater Plow Company and Daniel S. Thomas. The plaintiff rests its case on claim No. 1 of the first patent and claim No. 3 of the second patent, which read as follows:

1. "In a hand plow, the combination, with a down-turned standard having spaced side arms, of a wheel journaled to and between the side arms, spaced handle members pivoted at their lower ends to the side arms of the standard, a brace connecting the handle bars, pivots connecting the upper ends of the bars to the handle bars, said pivots also constituting means for fastening the cross-brace to said handle members, and means for adjustably fastening the lower ends of the supporting bars to the standard to permit the adjustment of the handle members toward and from the same."

3. "In a plow, the combination, with a beam member, of a handle member, one of said members comprising spaced elements, a connection between the members adjustably passing between said elements, and means located at one side of the connection, and separate therefrom, for clamping the elements upon said connection."

The defendant the Bridgewater Plow Company manufactures and sells plows under patents No. 853,961, issued to Joseph S. Click May 21, 1907, and No. 878,774, issued to Charles R. Coffman February 11, 1908, for improvements in hand plows.

One of the defendants, Daniel S. Thomas, was formerly the owner of the two patents now owned by the plaintiff, and was engaged in the manufacture and sale of garden plows thereunder. On January 6, 1906, Thomas sold his plant, his stock, and the two patents to Walter A. Payne and McChesney Goodall for $7,500, and Payne and Goodall sold to the plaintiff, Leader Plow Company. Afterwards Thomas acquired the later Coffman patent and a half interest in the later Click patent. The defendant Bridgewater Plow Company is doing business under a license from Thomas as assignee of these patents, which embraces an option to purchase them for $2,500. Thomas is manager of the defendant corporation.

[1] The garden plow is a comparatively simple implement, long in use, and apparently admitting of little important improvement of construction. The patents set up by the plaintiff being nothing more than improvements on the prior art, the general rule on the subject would require that they be given a narrow construction. Singer Mfg. Co. v. Cramer, 192 U. S. 265, 24 Sup. Ct. 291, 48 L. Ed. 437. But this general rule is elastic enough to allow the application of the dominant equitable rule that as between the assignor and assignee the construction of the patent must be broad and liberal enough to give full value to the patent assigned, and shut out the assignor from every structure within the fair meaning of the claim. When Thomas assigned the Hanger and Thomas and Hanger patents, he asserted them to be valid, and he is estopped to deny their validity. He was not estopped, however, from showing the limits of the assigned patents by evidence of the prior art, or any other relevant fact. Martin, etc., Co. v. Martin, 67 Fed. 786, 14 C. C. A. 642; Automatic S. Co. v. Monitor S. Co. (C. C.) 180 Fed. 983; Noonan v. Chester Park Co., 99 Fed. 90, 39 C. C. A. 426; Smith v. Ridgely, 103 Fed. 875, 43 C. C. A. 365; Rollman v. Universal H. Works (D. C.) 207 Fed. 97; Plunger E. Co. v. Stokes, 212 Fed. 941, 129 C. C. A. 461. But on an issue of infringement between assignor and assignee the courts will give a liberal rather than a narrow construction to the patent assigned, if necessary to preserve its value.

"While a patentee assignor may, when made a defendant, litigate the scope of his patent and have it judicially construed according to its true extent (Noonan v. Chester, 99 Fed. 91, 39 C. C. A. 426; Smith v. Ridgely, 103 Fed. 875, 43 C. C. A. 365), the courts surely will not, unnecessarily, construe it so narrowly as to make it worthless. See Alvin Co. v. Scharling (C. C.) 100 Fed. 87, by Judge Gray. They will be inclined, so far as the record permits, to make its exclusive right a real and valuable thing. Ordinarily equitable considerations must require this point of view, and the resulting liberality of construction." United States Frumentum Co. v. Lauhoff, 216 Fed. 610, 132 C.

C. A. 614. Schiebel v. Clark, 217 Fed. 760, 133 C. C. A. 490; Alvin Mfg. Co. v. Scharling (C. C.) 100 Fed. 87.

The estoppel extends to every structure within the fair meaning of the claim. United P. M. Co. v. Cross P. F. Co., 227 Fed. 600, 142 C. C. A. 232.

[2] Does this estoppel extend to the Bridgewater Plow Company? If, as an independent corporation, it were confined in its defense to the rights acquired under the license from Thomas, it would be subject to the same estoppel; "for the assignee of a patent takes it subject to the legal consequences of the previous acts of the patentee." McClurg v. Kingsland, 1 How. 202, 11 L. Ed. 102; Worley v. Tobacco Co., 104 U. S. 340, 26 L. Ed. 821. But if the Bridgewater Plow Company was making and selling plows as a corporation independent of Thomas and not in association with him, it would be entitled to the entire prior art without respect to the license under the junior patents. The invalidity of the junior patents would not affect its right in common with the public to the prior art.

We do not think, however, that the defendant company can be said to be disassociated from Thomas. The facts that it entered upon its business under a license from Thomas and that he is its manager tend strongly to support the conclusion that the corporation is doing business in such association and privity with Thomas that it is subject to the same estoppel in favor of the plaintiff. Thus the corporation acting under authority from Thomas and under his general direction as manager may justly be said to aid and abet him in the infringement of the patents assigned by him, if there be infringement. These facts bring the case within the principle laid down in Woodward v. Boston L. M. Co., 60 Fed. 283, 8 C. C. A. 622; Marvel v. Pearl (C. C.) 114 Fed. 946; Continental W. F. Co. v. Pendergast (C. C.) 126 Fed. 381; Mellor v. Carroll (C. C.) 141 Fed. 992; Siemens-Halske E. Co. v. Duncan E. Co., 142 Fed. 157, 73 C. C. A. 375; Mergenthaler v. International T. M. Co. (D. C.) 229 Fed. 168. At least, the facts were sufficient to put upon the defendant corporation the burden of showing that other innocent third parties were interested in the corporation and controlled it.

[3] With these principles in view the first inquiry is as to the differences between the patents acquired by the plaintiff and the prior art. The defendants rely on the Finson patent of 1876 as the nearest approximation to the Hanger patent found in the prior art. Comparison of claim No. 1 of the Hanger patent with the Finson structure shows that the only real differences are: (1) The Hanger patent has a single brace connecting the handle bars; the Finson patent has two braces, but on structures under patents prior to the Finson patent the single brace was used. (2) In the Hanger patent the bolts connecting the upper ends of the supporting bars to the handles are true pivots, and act as such in the lowering or raising of the handle bars; the corresponding bolts in the Finson structure do not pivot but are taken out and replaced in adjusting the handle bars. (3) In the Hanger patent these bolts not only connect the supporting bars, but also fasten the cross bar to the handle bars; in the Finson structure the cross bar

are fastened separately. (4) The Hanger patent has the bolts and holes for adjustably fastening the lower ends of the supporting bars to the standards to permit the adjustment of the handles; in the Finson structure the holes and bolts for adjusting the handles are at the upper ends of the supporting bars.

Claim No. 3 of the Hanger and Thomas patent is not very definite, but the application for the patent was filed after that of Hanger; and construed in the light of the file wrapper it was intended to supplement the Hanger application by doing away with the holes at the lower ends of the standards used for adjusting the handle bars, and substituting clip bolts at the same place. The Finson patent has holes and bolts at the upper ends of the standards.

The language of the plaintiff's claim indicates that these distinctive features which differentiate the plaintiff's patents from the prior art were regarded as substantial and important. The presumption is that the assignor and assignee had in view these substantial differences and that there was no intention to embrace in the sale rights which belonged to the public or to prior patentees. Even as against the assignor the patents must, therefore, be referred to these distinctive features and will not be held to include the prior art. If the defendants' structure contains any of the distinctive features pointed out as peculiar to the Hanger patent or the Hanger and Thomas patent, it infringes; otherwise, it does not.

The plaintiff is not helped by the rule that change in the relative position of the different parts of the machine does not avert infringement where the parts transposed perform the same relative functions after the change as before. True, as between the plaintiff and the defendants the patent must be sustained against the prior art; but this must be done, if it fairly can be, on the features which distinguish it from the prior art, and which both the plaintiff and defendants are presumed to have had in view as substantial improvements. This being so, there is no ground to say that the defendants' return to the prior art is an infringement of plaintiff's patents as a mere change in the relative positions of different parts performing the same functions, or that the plaintiff is entitled to the distinct features of the prior art, used by the defendants, as equivalents of its design.

None of the distinctive features above set out of the Hanger structure, upon which its patentability depended, are found in the defendants' structure. If the plaintiff's structure be an improvement in the art in the particulars set out in the claim, then that of the defendants is a step backward to the prior art in those particulars. Indeed, we are unable to see any material difference in the defendants' structure and that of Finson, except that in the defendants' structure the plows are secured to the forward-curved ends of the perpendicular standards, whereas in both the Finson structure and the Hanger structure the plows are secured to the down-turned ends of the horizontal standards. As this feature of the defendants' structure does not appear in the plaintiff's structure, its use is not an infringement. We are not concerned with the validity of the Coffman or Click patents, except that the fact that they were granted aids the defendants, in that it consti-

tuted a presumption that they did not infringe. Campbell Printing P. Co. v. Duplex Printing P. Co. (C. C.) 86 Fed. 315; Boyd v. Janesville Hay Tool Co., 158 U. S. 260, 15 Sup. Ct. 837, 39 L. Ed. 973.

Giving a liberal construction to the plaintiff's patents as against the prior art, and also against the defendants' structure, and giving full effect to the doctrine of estoppel against the defendants, we do not think that any feature of the defendants' structure is an infringement.

Affirmed.

CORRUGATED PAPER PATENTS CO. v. PAPER WORKING MACH. CO. OF NEW YORK.

(District Court, S. D. New York. December 30, 1913, June 5, 1914, December 29, 1914, September 16, 1916.)

1. PATENTS ⟸288—SUIT FOR INFRINGEMENT—JURISDICTION—WAIVER OF OBJECTION.

In a suit for infringement of a patent, the objection that the court is without jurisdiction, which goes only to the venue, is waived by the defendant by entering a general appearance and pleading to the merits.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 460–466; Dec. Dig. ⟸288.]

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MANUFACTURE OF CELLULAR BOARDS.

The Langston patent, No. 878,403, for manufacture of cellular boards, was not anticipated, discloses patentable invention, and is valid. Claims 1, 3, and 4 also *held* infringed, and claims 2, 5, and 6 not infringed.

3. PATENTS ⟸286—SUIT FOR INFRINGEMENT—DEFENSES.

Conceding that an agreement by the assignor of a patent not to engage in business which will compete with the manufacture and sale of the patented article during the life of the patent is invalid, it does not affect the right of the assignee to maintain a suit in equity for infringement of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 453–456; Dec. Dig. ⟸286.]

4. PATENTS ⟸62—ANTICIPATION—EVIDENCE TO CARRY BACK DATE TO INVENTION.

Evidence *held* sufficient to carry the date of conception and disclosure of the invention of a patent back to a time prior to the issuance of an alleged anticipating patent, under the rule which requires such proof beyond a reasonable doubt.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. ⟸62.]

5. PATENTS ⟸322—SUIT FOR INFRINGEMENT—ACCOUNTING.

Complainant in an infringement suit, having proved one infringement at the hearing, is entitled on an accounting to a sworn statement from the defendant as to what other infringements he has committed and the profits of each, and if dissatisfied with the statement may, under Equity Rule 63 (198 Fed. xxxvii; 115 C. C. A. xxxvii), examine the defendant viva voce upon interrogatories before the master.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. ⟸322.]

6. PATENTS ⟸321—SUIT FOR INFRINGEMENT—HEARING.

An infringement case will not be reopened a year after an interlocutory decree for complainant has been entered to permit defendant to introduce

other alleged anticipating patents, no reason being shown why they were not produced on the hearing.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⟸321.]

7. PATENTS ⟸328—ANTICIPATION.

The Langston patent, No. 878,403. for manufacture of cellular boards, *held* not anticipated by the Lacaux French patent.

8. PATENTS ⟸26(1)—INVENTION—COMBINATION.

Whether a combination of several elements requires invention is the commonest issue in patent cases, and depends upon the degree of originality which the court chooses to set up to protect the public against monopolization of what ordinary artisans, with ordinary incentives, would have accomplished anyway.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26(1).]

9. PATENTS ⟸26(1)—COMBINATION—INVENTION.

A person who, by persistence in a series of experiments, eliminates one after another of all possible combinations, may be an inventor, though each combination is obvious enough as a possible permutation.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 27–30; Dec. Dig. ⟸26(1).]

In Equity. Suit by the Corrugated Paper Patents Company against the Paper Working Machine Company of New York. Decree for complainant.

Lawrence E. Sexton, of New York City, for complainant.
Albert H. Walker, of New York City, for defendant.

December 30, 1913.

LEARNED HAND, District Judge. Four points are raised in this case: (1) Jurisdiction; (2) validity; (3) infringement; (4) plaintiff's inequitable conduct.

[1] I do not believe that Judge Lacombe, in Streat v. American Rubber Co. (C. C.) 115 Fed. 634, meant to hold that, although the point of jurisdiction is taken after general appearance, nevertheless it is good. Judge Beatty, in U. S., etc., Co. v. Phœnix, etc., Co. (C. C.) 124 Fed. 234, suggests with much justice that in that case the only suggested infringement anyway was in the Southern district of New York, and that therefore, when Judge Lacombe found that the defendant was not responsible for that supposed infringement, he could do nothing but dismiss the bill. I attach no significance to the circumstance that it is said to have been dismissed for lack of jurisdiction. If there had been an acknowledged sale, outside of the Southern District of New York, and if, after general appearance, Judge Lacombe had held that that sale was insufficient jurisdictionally, that would have raised the point. While I can find no exact authority under the section in question except that of Judge Beatty, yet it seems to me that the question must be controlled by the general principle with which we are all so familiar when the jurisdiction depends upon diverse citizenship. There it is so well established as to need no citation that, when the controversy is one over which the Constitution gives us jurisdiction as to subject-matter, the provisions regulating the district in which the

suit may be brought are for the protection only of the defendant, and that he must assert his right to dismiss the bill for lack of jurisdiction by motion to quash, if it appears on the bill, or by special plea, if it does not. Nobody can think it reasonable that the defendant should let the cause proceed to trial, reserving his right to assert that he ought never to have been haled into this particular court, because it imposed upon him the hardship of fighting his case away from home. Of course, if the court has no power to hear the case at all, no consent will serve; but concededly this court has that power.

[2] The only real question as to the validity of this patent arises under Smith, 457,676, granted in 1891. Ferres, 746,807, granted 1903, is not suggested as an anticipation of more than the tension devices, which I think it is. As to Smith, I think: First, that even if only a new use, the patent in suit is a good invention for the reasons I shall show; but that, second, it is not a new use, because the disclosure was not adapted to the work of making corrugated paper without changes involving a very radical difference in purpose, if not in structure. As to the first point, we are all familiar, I believe, at least since Potts v. Creager, 155 U. S. 597, 15 Sup. Ct. 194, 39 L. Ed. 275, with the idea that the rule regarding new use depends upon what kind of new use may be in question. This, indeed, the Supreme Court has recognized even when holding that a patent was without invention. Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856. While there must, of course, be physically a new combination of elements to support a patent, as in all combinations, each element is simply put to a new use, and that may require the highest originality. Now, the facts here are very strong. This art was at least eight years old when Langston filed his application, because already Ferres in 1899 had devised a highly complicated machine to do just this work. I think it within the reasonable range of inference that such a completely differentiated machine does not appear till an art is somewhat mature. Therefore for those eight years and longer the need had existed, and Ferres represented its supply. Then came Langston, and Langston has had a very substantial success, whether or not his results are better than Ferres'. Is there no reason to suppose that, if it were an obvious thing to use Smith for the purpose, some one during those eight years would have done so? Especially, if we are permitted to assume the art was older, the argument is stronger. It is true that we must by a fiction suppose that Langston had Smith before him, though not suggested for the purpose, and only in the sense that the whole of kindred arts were before him. Whether the process is one of ironing or not, certainly the purpose is different from ironing, and, as I believe, there is no easy road of suggestion between the two, for Langston did not have to smooth out a fabric; he had only to keep it under yielding pressure while the paste set. That one should have looked to the ironing art to solve that problem does not seem obvious; and, if it did, I should hesitate so to hold in the face of proof that it did not seem obvious to any one else for eight years.

But I believe that, even if it be thought an obvious step to go to such a machine, much readjustment was necessary, and that, too, with an

underlying purpose which Smith did not supply. It will be noticed in that patent that the pressing and drying are alternate, not simultaneous. While the web is under the rollers, FF', etc., it is not exposed to heat, except in so far, of course, as the plate may be heated by conduction. The steam pipes are withdrawn from that part of the plate. It is only when over the parts, $a°$, between the rollers, that the web is dried. Moreover, there is no reason at all to suppose that the apron has any pressure of itself, for it is kept taut by the feed-roller, I, and, if taut, its weight does not freely fall upon the plate over the spaces, $a°$, $a°$, $a°$. In this machine, therefore, we have only an alternate presser or roller and a drier, the web being kept moving and held from flying upwards by the taut apron, but not by the weight of the apron while the drier is at work. I can see in this no suggestion of Langston. Furthermore, I think it quite clear that to suppose the rollers are in the least analogous to the rollers added commercially to Langston is to misconceive their function, even if they have a vertical play, which is nowhere indicated. No one would think of this machine as capable of doing the work, who had not already conceived of a depending belt whose mere weight would hold the web in yielding pressure. Then he would only think of it to see that it might be reformed under the guidance of the constructive insight of an inventor into what the inventor had already discovered.

As to infringement, I shall certainly not decide now whether the Raffel patent infringes. The plaintiff had the opportunity of allowing the proof in at the trial of the defendant's other structures, and refused. Having limited the case strictly, it is certainly bound to stand on its proof. On the other hand, I shall not hear the defendant suggest that the Baltimore machine may originally have been constructed under the Raffel patent and then changed. It could have told us all about the machine when sold, and it refused; therefore, I shall take the plaintiff's proof as true. I attach no importance to the word "resilient," which, though perhaps not the best possible word, is perfectly clear. Nor can I see that the defendant's belt is not in the same sense resilient. Certainly it does not hold the web at a rigid and inflexible distance from the plate, like Ferres' plates. It may be that the accommodation to variation in the height of the corrugations is less close then the plaintiff's—I should think so—but certainly even as between two adjacent plates some change in angle is permissible and so some accommodation to variations in the corrugations. When one compares the defendant's machine with Ferres', the prior art, one at once sees that it has borrowed frankly from the plaintiff.

I shall not allow infringement of claim 6, however, as I think the last words refer to the lower belt. As to claim 4, I have considerable doubt whether the proof shows that the lower web is under tension in the defendant's machine. Peterson does not indicate on his drawing, and apparently paid little attention to it; but he does say it came from a drum whose inertia at least and journal friction created some tension. Here, too, moreover, the defendant, having a complete disclosure within its own power, cannot too nicely scrutinize the plaintiff's proofs. Claims 1, 2, 3, 4, and 5 are infringed and valid.

[3] The last question is of the collateral agreement of Langston not to engage in the business of making or selling corrugated paper machines or their product, while the patent lasts. I shall not decide whether such a covenant accompanying the sale of a patent is or is not too broad to be valid. Gamewell Fire Alarm Tel. Co. v. Crane, 160 Mass. 50, 35 N. E. 98, 22 L. R. A. 673, 39 Am. St. Rep. 458. Rather I shall assume that these covenants are illegal, in that they go farther than is reasonably necessary to protect the grant—a matter I have much doubt about. Even so, it must be conceded that the plaintiff could sue at law for infringement. Such an action does not involve the illegal agreement at all. The present theory is that any one so tainted as to take such an agreement from the patentee should be refused all equitable relief. Now, I do not understand that the so-called doctrine of unclean hands means that you may not have recourse to equitable remedies because in the past you have even committed a crime, or shown yourself otherwise immoral. A court of equity will refuse to enforce any part of an illegal contract, but it will not refuse to give the usual remedies to property which has been in the past acquired by means which involved the violation of law. Sharp v. Taylor, 2 Phil. Ch. 801; Harvey v. Varney, 98 Mass. 118; Heath v. Van Colt, 9 Wis. 516; Trice v. Comstock, 121 Fed. 620, 57 C. C. A. 646, 61 L. R. A. 176; Ownes v. Ownes, 23 N. J. Eq. 60; American Association, Ltd., v. Innis, 109 Ky. 595, 60 S. W. 388; Pitzele v. Cohn, 217 Ill. 30, 75 N. E. 392. The nearest cases to the case at bar are those in which it was alleged that the plaintiff had formed a combination of patents which was a monopoly, but in most of these the usual equitable relief was given. Strait v. National Harrow Co. (C. C.) 51 Fed. 819; American Soda-Fountain Co. v. Green (C. C.) 69 Fed. 333; Columbia Wire Co. v. Freeman Wire Co. (C. C.) 71 Fed. 302; General Electric Co. v. Wise (C. C.) 119 Fed. 922. Judge Baker appears to have thought otherwise in National Harrow Co. v. Quick (C. C.) 67 Fed. 130, but that is the only case I have found. However that may be, the Circuit Court of Appeals authoritatively settled for this circuit, in Edison Electric Light Co. v. Sawyer-Man Electric Co., 53 Fed. 592, 598, 3 C. C. A. 605, that in a suit for infringement the plaintiff combination would not be investigated to ascertain whether or not it violated the law in this respect.

Moreover, it should be remembered that the supposed illegality of this contract is much more remote than if the plaintiff were engaged in a trust or combination. In those cases it was always urged that the suit was in aid of the very trust itself; that an injunction secured the very restraint of trade which the whole combination was designed to procure. There was force in that contention. Here, however, the injunction has not the remotest relation to the plaintiff's contract with Langston. If that contract is void, part of the plaintiff's consideration for its payment of $40,000 has failed and it has only got its patent. I cannot see upon what theory so much of the consideration as remains should be denied protection, except it be that any one who has once made such a contract has become such an outlaw as not to be entitled to come into any court of equity for any relief of any kind. If such a

rule is to obtain, then the assignee of a mortgage could not foreclose if he took an illegal collateral covenant, nor the grantee of an interest in land have partition, nor could the grantee of a reversion stop waste.

Let the usual decree pass; no costs.

June 5, 1914.

[4] The only question I shall consider is whether the Lacaux patent, assuming that it is an anticipation, antedates the date of actual invention of Langston's patent; but I do not mean that I have decided the Lacaux patent a good anticipation. That question I pass over. The effective date of the Lacaux patent is July 10, 1906, nearly a year before the date of Langston's application, June 27, 1907. No one disputes that if Langston, before July 10, 1906, disclosed his invention to any other person, Lacaux is not an anticipation, provided that the disclosure was made with enough particularity to enable the person in question to understand it and to describe it. Moreover, it is settled that this fact must be established by a high degree of proof (Clark Thread Co. v. Willimantic Lumber Co., 140 U. S. 481, 11 Sup. Ct. 846, 35 L. Ed. 521), "with equal certainty" to the degree of conviction necessary for the proof of prior use. Brooks v. Sacks, 81 Fed. 403, 26 C. C. A. 456, says that the rule requires proof "beyond a reasonable doubt," and I shall accept that canon.

In most of those cases in which the patentees have failed it has been because of the absence of some contemporaneous document inevitably fixing the date of the invention; courts have been very unwilling to trust in such matters merely to oral testimony, especially to that of the inventor. I do not regard the case of Westinghouse Electric & Mfg. Co. v. Catskill Ill. & P. Co., 121 Fed. 831, 58 C. C. A. 167, as an authority against Langston, because the court especially emphasized the absence of the inventor Tesla's testimony, and of any document by which to fix Page's dates. Subsequently, upon fuller proofs, the Circuit Court of Appeals for the First Circuit, in Westinghouse El. & Mfg. Co. v. Stanley Instrument Co., 133 Fed. 167, 68 C. C. A. 523, found the prior publication was successfully antedated, as had District Judges in Westinghouse Electric & Mfg. Co. v. Mutual Life Ins. Co. (C. C.) 129 Fed. 213, Same v. Roberts (C. C.) 125 Fed. 6, and Same v. Jefferson Electric Light, Heat & Power Co. (C. C.) 128 Fed. 751.

In the case at bar we start with two dates of unquestionable authenticity, the contract with Howell on June 19, 1906, and the offer of a similar contract made to MacMullen on May 7, 1906. Nobody can reasonably question that Langston at this time had already completely conceived and elaborated what he supposed to be a practical automatic machine for double-facing single-faced corrugated paper, because he could not otherwise have undertaken its manufacture or guaranteed its performance. Nor can any one question that on May 10, 1906, he had asked quotations of J. H. Jolley & Co., upon six hard-rolled yellow metal plates which were of the same size as the heating plates eventually put into the two machines and which were unquestionably ordered for them. We know that the stationary heater afterwards furnished was therefore definitely decided on and its exact size already known. MacMullen did not close the offer of May 7th till the 25th day of July, 15

days after the critical date here in question; but when closed it followed the offer made on May 7th. Two days after MacMullen closed, Langston ordered the yellow metal plates, about which he had inquired on May 10th. As the dimensions are the same, we know that there was no change in plan as to the stationary heater meanwhile. Of these plates, four were billed to him on October 6th, and two later, while the machines were being made. The belting he ordered also on July 27th, and we have the bills. This I shall consider later. Furthermore, the correspondence during the autumn of 1906 shows that the machines were actually being built at the time, and that the buyers were constantly pushing Langston for delivery, which was made in one case at the end of the year and in the other during the early part of 1907.

There remains, therefore, only this question: To what extent did Langston at the time he made the offer to MacMullen, or the contract with Howell, disclose the machines which he delivered some eight months after, and were they the same as the patent in suit? I quite agree that the undisclosed conception of the invention alone would not be enough. The case must depend upon some talk, or diagram, or sketch, or the like. That Langston had a talk with MacMullen on May 7, 1906, appears beyond contradiction from the letter written by him that day when he got back to his office. That he also had a talk with Howell is also proved by the contract of June 19th; but I disregard the latter, since he does not rely on it. If in the talk with MacMullen he in fact described those elements of the machine which are the essentials of the patent in suit, he made an adequate disclosure.

As to the details of what Langston described, they are in agreement. Langston's version was that he drew a sketch at the time showing that they would use a flat heating surface with belts to carry the web over it and a carrier at the end of it to pull it through. He did not go into the cutting mechanism, as that had already been built for a single-faced paper machine, but he described definitely how his machine worked, and what he described to him was identical with the machines which he is building now; that he had never departed from that first conception, except in the matter of changing the brass plates to iron steam chests. As to the talk with Howell, he was dead, and his clerk, who was present when the contract was signed, Langston had not been able to find. He went over the matter with Howell, but his recollection was not as clear about what he told him, as it was about what he told MacMullen, who was a trained mechanic, or the extent to which he described the machine.

MacMullen testified that he remembered the conversation of May 7th in which Langston quoted the price on the machine. He could not place it independently of the letter, but the letter confirmed his impression that it was in the early spring of that year. He was under the impression that Langston drew some sketches of the machine in the course of the discussion, which sketches, however, he did not keep. Langston told him that he had a machine which was different from any one's else, in that it ironed the paper; explained the use of the belts, and why they were put in front of what was then intended to be a brass bed-plate; showed him how the belts operated, by means of which the paper was carried over the brass plates at a certain speed

and then cut off in various lengths; and said that he would use the old gluing apparatus on the hand machine. When the machine was delivered, it corresponded with what Langston had told him on that day and with Fig. 1 of the Langston patent, except as to the heating arrangements. On cross-examination he described what the sketch showed, as follows: A top belt traveling endlessly over two pulleys, the heater directly underneath, and directly in front of the heater two pulleys with an endless belt running around them.

I count for little the discrepancy between these witnesses as to where this talk took place. It was certainly about the time when MacMullen moved his shop, but they might well differ as to just when. It is inherently most improbable, assuming that any such talk ever took place, that it should be at any other time than when Langston made his offer, which we know to be May 7th. Then was the time to explain what he proposed to deliver. This strongly corroborates the evidence of the two men, though it does not, of course, make it like a proposition in Euclid, an unreasonable degree of proof to ask.

We know from photographs that Howell's machine was in fact precisely like the patent in suit, except for the matter of the steam chests, and that it was well under way in the autumn. Rowand corroborates Langston in saying that there was no change in design after they began.

What, then, have we by unquestioned proof, and how much does it corroborate the oral story? We know that as early as January MacMullen was dissatisfied and wanted a different machine from the hand gluer. We know that by May 7th Langston had in a talk described to MacMullen an automatic machine, and had worked it out enough to make a guaranteed offer. We know that he had fixed the details of the stationary heater by May 10th, as they eventually were made, and that he made a second guaranteed contract on June 19th. We know that, two days after MacMullen closed with him, he ordered the heater plates and the belting, and that from then on he was at work building the machine.

While we have it only by word of mouth, we may, I think, from antecedent probability, accept without reservation Langston's statement that he had before him Ferres, which he meant to avoid in whatever he did, and of course we know by the result what differentiation he in fact made from Ferres. With this assumption we may infer, I think, what elements of his machine were necessarily in his mind before he offered to make a contract. What were the possible variations from Ferres at once consistent with the eventual result which we know, and also with patentable differentiation? That he retained Ferres' joint belts in the front of the machine is too obvious for comment. That he kept Ferres' lower stationary heater and omitted his upper heater appears from his inquiry for quotations on May 10th and from the necessity of that omission to escape infringement. What was there left for patentability but the very element upon which I have found patentability to rest, the holding of the web upon the lower stationary heater by making the upper belt run back to the end of the machine? If it be suggested that he might simply

have taken off Ferres' upper stationary heater and let the two belts in front pull the web across the lower heater, the answer is that to let the web run over the heater without any pressure whatever was so obviously a futile method that we may assume Langston did not entertain it. Moreover, we have an interesting documentary confirmation of this at least as early as July 27th, in the belting which he ordered. That consisted of 160 feet of 7-inch belting and 160 feet of 16-inch, 80 feet for each machine. The upper belts were three in number, two strands of 16-inch and one of 7-inch. The plates were 15 feet long, and the lower belts, one-third the length, "approximately 6 feet," making 20 feet or 21 feet in all. It therefore took for the upper belts of one machine 80 feet or 84 feet of 16-inch belting and 40 or 42 feet of 7-inch, or, for two machines, 160 feet or 168 feet, and 80 feet or 84 feet respectively. If we assume for the lower belts, of which we do not know the structure, three strands of 7-inch belting,[1] we have 30 feet or 36 feet for each machine, or 60 feet or 72 feet for both. Thus we find that the proper belting was 140 feet or 156 feet of 7-inch belting and 160 feet or 168 feet of 16-inch, approximately the amount ordered of each. If, on the other hand, we assume that the upper belts originally did not extend back over the plates, the amount of belting was more than four times that needed. Indeed, it is incredible that Langston should have ordered anything like what he did, if at that time he had not thoroughly understood that the upper belt did cover the stationary heater. Of course, theoretically it remains possible that he should have thought out this structure between May 7th and July 27th, but I think I have shown that it is very hard, knowing what we do of the way Langston was working; to suppose that, when once he had in mind any completed machine which was on the path from Ferres towards the completed machine he made, it should have been any other than the final product.

The chief attack of the defendant is against the disclosure on the theory that a brass-plate heater is not a stationary heater. Surely this is a most meticulous objection at this stage of the case. I am now in no position to say that it was impossible theoretically for brass plates with steam pipes under them to work as a heater; not the slightest suggestion of the sort was made at the hearing and Langston stated that they worked perfectly well, except that the paper adhered to them. To allow such an issue now to be raised would be extremely unjust and purely fanciful. Obviously such plates would constitute some kind of stationary heater, and if the defendant meant to insist that it was unpractical or ineffective some indication of that position must appear in the evidence. There is not the slightest such; all the proof on the subject is quite to the contrary. Both Langston and Rowand say that the MacMullen machine ran successfully for a time before Howell's machine was delivered.

Finally, the defendant attacks Langston's honesty. I am sorry for it, because my own impression was so strongly the opposite that

[1] It is reasonable to suppose that all the 16-inch belting was used above where weight was of the essence; while three strands of 7-inch would have been enough below to help pass along the finished web.

I cannot help thinking the attack to be unwarranted. He in no sense attempted to suppress the change from brass plates to a steam chest, which nobody at the trial thought of any consequence. It was perfectly apparent all along, and he himself brought it out at once, that the original structure was of brass plates, and, as for the subsequent steam chest, it was there in the patent to speak for itself. As to his seeing the brass plates at Vincennes in 1912, he may be right and Rowand wrong (I should incline to accept his statement); but, right or wrong, there is not the slightest ground to attribute the difference to dishonesty, because, as I have said, nobody at the trial suggested that the change was significant or that the original machines were inoperative. His difference with MacMullen as to the place where the talk took place operated to his own disadvantage. On the other hand, so far as one is justified in judging of a witness' honesty from his bearing, Langston appeared to me an exceptionally straight and honorable man. I agree that he had an interest, which ought to be kept in mind—though a somewhat remote one—but his answers were fair, he made no effort to state a clear recollection when he did not have it, and he did not evade cross-examination. My personal judgment was strong in favor of his honesty; so far as I could see, there was every reason not to impugn it.

I therefore conclude that Langston did on May 7th disclose to MacMullen all the essentials of the machine afterwards patented, and that he at once proceeded, after July 25th, to make both machines with as much diligence as could reasonably be expected of him. There is, of course, always room for some doubt in these cases. Absolute certainty is out of the question, but I do not think it extravagant to say that many men have gone to prison, and indeed have been executed, upon no stronger proof than has been made in this case. I will therefore not change the ruling I made before this patent was introduced, and the same decree may be entered as was entered upon the original hearing.

December 29, 1914.

This cause comes up upon notice of motion to compel the defendant to make and file with the master a statement showing the number of so-called double-facing machines, including and substantially like the machine sold by the Baltimore Paper Box Company, made and sold by it, and also the number of such machines substantially like the machine shown in the Raffel patent and in a certain cut or advertisement on pages 4 and 5 of the American Box Maker of August, 1914.

An interlocutory decree had been entered herein adjudicating the patent valid and infringed by a machine known as the Baltimore machine and directing the usual reference for an accounting. The master, on October 14, 1914, passed an order directing the defendant to file a statement in writing to show the extent of its infringements and what profits it had made, and, in particular, to set forth the number of so-called "cellular board double-facing or double-backing machines made or sold by the defendant" and the profits made by them, and also to attend with its books and papers and by its president to be examined. The defendant, on the advice of its counsel, filed a paper on the return

day, the 16th day of October, 1914, setting forth: First, that it had never infringed the patent; second, that it had never made any "so-called cellular board double-facing or double-backing machines" and had never made any profits thereon; third, that it had no books or papers bearing upon such a sale, or any evidence that it ever had so infringed; fourth, that it produced a letter from its attorney stating his advice not to answer otherwise, and a copy of the details of the Baltimore Paper Box Company's machine in question. The plaintiff did not ask the master to certify defendant for contempt, but at once applied by this motion.

[5] Having proved one infringement, the plaintiff is entitled to a sworn statement from the defendant as to what other infringements he has committed and the profits on each. The defendant files a statement under rule 63 that he has committed no other infringements, particularly that he has made no "so-called cellular board machines." It is not credible that the defendant should not have known what the phrase really meant, and I cannot accept his explanation as ingenuous; but I do not think the question is here material. I think it will serve no useful purpose at this stage to require any further statement from the defendant until the facts be ascertained regarding the structure of the machines which it makes and their number. Obviously better progress can be made by an examination viva voce than by further statements. Rule 63 provides for a statement, and the defendant has made a statement denying all infringement. The rule next provides that any party, if dissatisfied, may proceed to examine the other viva voce. It is this examination which must proceed, and it is the scope of this which is the real controversy. Is the plaintiff to be confined to the single Baltimore machine, or may the examination include all machines made by the defendant according to the Baltimore machine, the Raffel patent, or the cut in the American Box Maker?

Both parties insist that the defendant makes and has made but one kind of machine. The defendant says that the Baltimore machine was misdescribed in the suit, and, conceding that the decree is an estoppel as to that single machine, that the plaintiff cannot prove an infringement as to any other. The case is therefore not one where the defendant has changed his infringement after bill filed; it is not even one where there were two forms at the outset. Yet in this circuit it is well settled that the reference is the place to determine the extent of the infringement even in such cases. Welling v. La Bau (C. C.) 32 Fed. 293; Westinghouse Air Brake Co. v. Christensen Engineering Co. (C. C.) 126 Fed. 764; Brown Bag-Filling Mach. Co. v. Drohen (C. C.) 171 Fed. 438. A fortiori it is the place to determine the extent of the infringement where there is but one type. It was certainly not the duty of the plaintiff to present on the hearing all the machines as infringements, when the defendant tendered that issue; one infringement was enough for a decree and all that the plaintiff may have perhaps been prepared to prove.

Since, however, there is a genuine dispute here about the extent of the infringement, I will have the master report first upon the number of machines which the defendant has manufactured and which are in-

fringements. If there be found such, I will then direct an account for profits to be filed, and that account to be stated by the master. The proceeding before the master must now continue to accomplish this preliminary purpose, its scope will include all machines made by the defendant like the Baltimore machine, the Raffel patent, or the cut in the American Box Maker. The defendant, if called as a witness, must answer all questions relating to such machines, and the plaintiff may put in such proof as it wishes. The master will then report.

As Judge Geiger, in Beckwith v. Malleable Iron Range Co. (D. C.) 207 Fed. 848, 854, suggests that the plaintiff in such a case should indicate his dissatisfaction under rule 63 by an exception, it may be as well for the plaintiff to except to the statement filed, for it is obvious that this case is to be fought with the extreme of technicality.

If it is thought necessary, an order may be entered, which in view of the general prayer for relief is not limited to the relief specifically asked. Settle on notice.

September 16, 1916.

[6] The questions presented upon the exceptions to the master's report are two: First, whether the defendant's machines, as now finally found to be originally constructed, infringe the patent; and, second, whether the Lacaux machine, assuming its délivré date is what counts, and not its publié date, is a valid anticipation. A preliminary question also arises which should be first disposed of; that is, whether there should be a further rehearing to allow in evidence other patents not discovered before. This question I can dispose of in the plaintiff's favor, without the least compunction. The case has, for one reason or other, already dragged out over much too long time. After the proofs were once all closed, I allowed the cause to be reopened to put in the Lacaux patent, but only upon the ground that, owing to the indexing of foreign patents in the Patent Office, it was not fair to hold any one responsible for upturning even with reasonable efforts all relevant foreign references. Now, after the cause has proceeded for another year, the defendant proposes to introduce a number of added United States patents and one added British patent, concededly an equivalent of one of the United States patents. The defendant offers no ground for this unusual relief under such circumstances, except that the relevancy of these patents must some day be decided. I should disregard every rule applicable to rehearings, were I to allow the application. The references are not foreign (omitting the Lake British patent), and there is no suggestion of a reason why they should not have been originally discovered. The plaintiff refuses to allow the cause to go on without the right to offer rebutting evidence at least by the explanation of experts, and it is within its rights in so objecting. If trials are to conclude anything, the counsel must be held responsible for their preparation at the outset. I shall therefore decline to consider the new references.

I therefore proceed to the question of infringement. The defendant's machine is so made that at least at the outset the belt, which holds the paper by a resilient pressure upon the heater, moves forward at a slower rate than the upper and lower rollers advance it through the ma-

chine. This is accomplished by a difference of gearing which insures a slight backward drag upon the top surface of the paper against the forward pull of the two wheels. The belt does not, therefore, advance, but, on the contrary, retards the paper in its passage, because the differential between the speed of the belt and the pull of the rollers necessarily results in a backward wipe of the belt along the upper face of the paper, a function which is claimed to have advantages in smoothing out air bubbles in the cement. The patentee no doubt supposed he effected this same result by the "ironing effect," which he speaks of on page 1, lines 92–94. He assumed, and it necessarily follows from his disclosure, that the paper and the belt, *12*, travel at the same rate, but any results which he secured by the "ironing effect" on the lower surface the defendant has retained. Even if the backward wipe improves this result, it is only by an added function; the whole effect of the original disclosure remains.

The defendant's position is that the claims in suit—the first six—do not admit of a construction which will include such a machine. Claim 1 has the phrase, "means spaced therefrom and movable in relation thereto for advancing the paper and holding it in resilient engagement with said heater." The question is: First, whether it must be a single "means" which at once advances the paper and holds it in engagement; and, second, whether, if the means may be double, the rollers of the defendant are "spaced" from the heater and "movable" in relation to it. I do not think that the "means" need be single. If the belt, *12*, were cut in half and the left-hand half ran on idlers, while the right-hand half advanced the paper, I should not think infringement would be avoided. Second, are the defendant's means for advancing the paper and for holding it in engagement spaced from the heater and movable in relation thereto? The defendant's belt which holds the paper in engagement fulfills both these conditions in exactly the same way as Langstons'. What of the advancing means? The upper belt of Langston does not alone advance the paper; it is the grip between the right-hand part of that belt and the lower belt, *13*. Only a part, therefore, of the advancing means is vertically spaced from the heater, and these two belts are in precisely an analogous position to the heater as the two rollers of the defendant. Moreover, two such rollers are exactly the equivalent of two such belts; they operate in the same way, and they do the same thing. If the defendant had divided the upper belt as suggested above, I cannot suppose that any one would have thought the claim avoided. The further change of the upper and lower gripping belts into rollers would certainly have been an equivalent. I therefore find that the advancing and holding means are spaced from and movable in respect of the heater in exactly the same sense as Langston's, and that claim 1 is infringed.

I also find claim 3 infringed. The paper is advanced in Langston, as I have said, by the grip between the right-hand part of the upper belt and the lower belt. The paper is advanced in Raffel by that part of the rubber rollers slightly flattened by pressure which is parallel with the paper. As the rollers rotate, this part, even though it were a mere tangential point, necessarily moves parallel with the surface of the heater. As the rollers are a precise equivalent, as I have said, for

the belts, the language of the claim serves to cover the defendant's device.

However, claim 2 seems to me not to be infringed because the "pressure-applying mechanism" does not advance the paper. It is an undue extension of the words when the several claims are read together, to hold that the rollers of the defendant are part of the "pressure-applying mechanism," as they must be to infringe.

Verbally taken, claim 4 is clearly infringed, except for a doubt arising from the phrase "traveling with the corrugated strip." The defendant's belt does not travel at exactly the same speed as the paper, but nothing in the patent or in the art requires such a limited interpretation. If, as above suggested the defendant's belt traveled upon idlers, obviously the claim would be literally included. Instead, being positively actuated, it travels at a slightly lower speed. Yet the words had best be held to exclude only a fixed folding means, below which the paper is drawn frictionally. Taken literally, the more natural meaning of the language would, it is quite true, cover only a belt traveling at exactly the same speed; but all the results of the plaintiff's mechanism are accomplished by the defendant's and in the same way, because, as I have said, although the belt has a differential of speed as against the rollers, the "ironing effect" of wiping the paper under pressure forward across the face of the heater still remains, even if it is improved upon. It may be said that the effect would be as good if the belt were stationary, but the means would be different, and no one can know whether the result would be the same or not. The point here is that the defendant's upper belt retains the forward wipe relative to the face of the heater, and does so by traveling in the same direction, and with substantially equal speed, as the paper itself.

Claim 5 I am disposed to hold not infringed because the belt does not advance the paper. If that had been the only claim, I should not have hesitated to think the doctrine of equivalents applicable, because the rollers are an equivalent for the right-hand part of the belt; but where there are, as in this patent, multiplied claims, some differences must be attributed to each, and such a term as "endless belt" must be more literally applied than if it stood alone.

At the hearing I held claim 6 not infringed, but I must say that without that opinion before me I cannot now recall why I should have done so. The fact of claim 6 is not of any practical moment, and I shall not disturb the finding. Costs must be divided in any case owing to my decision upon claims 2 and 5, though my present disposition would be to hold claim 6 infringed.

I therefore hold infringed claims 1, 3, and 4, and not infringed claims 2, 5, and 6. I have throughout disregarded the question whether in actual operation the differential of speed between Raffel's belt and his rollers disappears. In the view I take of the claims, this is a matter of no consequence. It is at best a very vexed matter depending upon how far the differential in speed in fact disappears and how far I must impute to the defendant, as a contributory infringer, a knowledge of this inevitable practice which users will make of the machine. A much firmer basis for decision appears to me to exist in the character of the

machine as it is put out. In no event can I see that the result would be changed as regards claims 2 and 5.

[7] I next take up what amounts to a reargument of my decision regarding Lacaux's French patent, upon the theory that it is the délivré date and not the publié date which counts. I have, it is true, not heard the plaintiff upon this question; but the defendant has stated its position fully, and as I deem the patent irrelevant, even if the délivré date does determine the question, there is no occasion for waiting to hear the other side. Claims 1, 3, and 4 call for a stationary heater, and claim 4 that the facing strip shall pass in engagement with it. In Lacaux there is no stationary heater and if the felted table, *j*, were made into such, the facing strip would not come into engagement with it and there would be no "ironing effect" as referred to on page 1, *94*, above mentioned. The defendant, of course, recognizes this and only asserts that the changes necessary to conform Lacaux into Langston are all suggested in Ferres, and that the necessary changes in Ferres are suggested in Lacaux. At the outset it must be noted that some of the defendant's assertions about Lacaux are inaccurate. Thus, it is far from true that:

"If the lower endless belt of the French patent were stationary, we would have the precise and exact structure of the Langston patent."

The belt (conducteur, *i*) is the means of conveying heat from the revolving heater (cylindre, *h*), and, if this belt were stationary, there would be no drying means at all, except so far as the mere tangential point of the cylinder at the very entrance of the paper might most ineffectively dry the paste. The whole theory of Lacaux was of a belt which should be heated, and give up its heat during its passage synchronously with the paper, to be reheated upon the revolving, steam-filled cylinder after it had left the paper. Nor is it true to say that:

"The French patent shows every single element of every one of the Langston's claims except the stationariness of the lower heater."

The means for advancing the paper comprise the lower flexible strip (conducteur, *i*), which is in no sense spaced from the heater, if the felted table were turned into a heater. Moreover, as already said, the facing strip would not come into engagement with the heater in any possible readjustment of the machine.

[8, 9] It is quite true that one could take Lacaux's belt and, by combining it with Ferres, make a machine which would anticipate the Langston, if Raffel infringes. The floating upper heaters of Ferres (for the defendant is quite right in saying that these heaters float upon the paper) would be taken off, and there would be substituted a heavy belt such as Lacaux shows. The question of patentability, therefore, may fairly be said to rest upon whether such a combination of several elements requires invention, and the patent has no presumption in its favor, since Lacaux was not discovered by the examiner. Whether a combination of several elements requires invention is the commonest issue in patent causes, and depends upon the degree of originality which the court chooses to set up to protect the public against the monopolization of what ordinary artisans with ordinary incentives would have

accomplished anyway. We must not suppose that only he is an inventor who has the insight of genius. A person who by a persistent series of experiments eliminates one after another of all possible combinations may be an inventor, though each combination is obvious enough as a possible permutation. Indeed, it is such patient work by trial and error that the inducement of a patent would be most likely to call out, for genius often works without any incentive but its own expression. Therefore we are so familiar with the dictum that a good invention may seem obvious once it has proved successful.

If we are to suppose a person with Ferres and Lacaux before him, setting out to experiment with the possible combinations of their elements, it would take no talent out of the common to select as one combination Lacaux's belt with Ferres' heater; it would be one of a number of possible machines. But the final selection of the successful combination would involve just the experimentation which may constitute invention, and, when the experimenter has by trial finally ascertained which combination is in fact fruitful, he has made an advance, though he is no son of Archimedes. It is only when the result of the combination is familiar in analogous situations, so that its appropriateness at once jumps to the eyes of an ordinarily competent artisan, that we should deny to an inventor the fruits of his work.

The suggested combination of Ferres and Lacaux, might, or might not, have proved such a fruitful experiment. It is impossible to speculate upon it, now that it has shown its value. Even if it took an original insight merely as a possible hypothesis, its trial and demonstration among all the alternatives are enough to constitute it an invention, so long as past experience did not at once show that it must inevitably work successfully. There was no such experience, and no ordinary artisan would have known that it would necessarily result in a successful answer to what the art required. I therefore find that the addition of Lacaux to the art does not invalidate the patent.

A decree will be entered adjudging the 42 defendant's machines manufactured to be infringements of claims 1, 3, and 4, and directing the master to take an account of the profits and damages upon the same, which will in turn come on for confirmation.

An order may also go denying the defendant's application for a second rehearing to introduce the United States patents mentioned in the brief and the Lake British patent.

SHIPMAN v. FRANK et al.

(District Court, D. Maryland. September 11, 1916. Rehearing Denied January 3, 1917.)

1. PATENTS ⊂=124—VALIDITY—FRAUD IN PROCURING.

Where, though a prior patent was cited against some of plaintiff's claims, plaintiff proceeded and secured a patent including other claims, the fact that he subsequently applied for a reissued patent, on the theory that in view of the disclosures of the prior patent another of his original claims

was too broad, does not establish fraud in securing the patent, though plaintiff doubtless read the prior patent; for actual fraud must be proven, and it cannot be assumed that plaintiff saw the interference which was not discovered by the Patent Office examiner.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 176; Dec. Dig. ⟸124.]

2. PATENTS ⟸138(1)—REISSUED PATENTS—LACHES IN SEEKING.

Though plaintiff's original patent was issued in 1905 on an application filed in 1904 and he did not until 1915 apply for a reissued patent, on the ground that one of his claims was too broad, the reissued patent will not be held invalid on the ground of laches in seeking a reissue, notwithstanding about nine months before application therefor defendant's attorney advised plaintiff that his broad claim was anticipated; for, while a patentee must use reasonable diligence in seeking a reissue, yet knowledge that a claim is too broad is necessary before action is required, and plaintiff was not bound to accept the statement of defendant's attorney made in negotiations for the disposal of his patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 201, 201½, 203; Dec. Dig. ⟸138(1).]

3. PATENTS ⟸62—VALIDITY—ANTICIPATION.

A patent will not be held invalid on the ground of anticipation, where the evidence was sufficient only to raise a doubt as to whether the patentee's invention was anticipated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 78; Dec. Dig. ⟸62.]

4. PATENTS ⟸157(1)—CLAIMS—CONSTRUCTION.

Where a patent by reason of slight use, notwithstanding appreciable advertisement, appears to have been of little practical value, it is not entitled to a broad construction.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⟸157(1).]

5. PATENTS ⟸328—VALIDITY—INFRINGEMENT.

The Shipman patent, No. 783,902, of February 28, 1905, and reissued patent No. 13,903, of April 20, 1915, for a carbureter, *held* limited to a device where the closing movement of the valve was retarded by a dash pot, and, as limited, not infringed by defendant.

In Equity. Bill by Ralph Shipman against Joseph Frank and Sidney Frank, trading as Frank Bros. Bill dismissed.

John Watson, Jr., of Baltimore, Md., and Robert Watson, of Washington, D. C., for plaintiff.

John E. Cross, of Baltimore, Md., Charles W. Hills and Charles W. Hills, Jr., both of Chicago, Ill., and Edwin F. Samuels, of Baltimore, Md., for defendants.

ROSE, District Judge. Plaintiff says defendants have sold a carbureter which infringes the fifteenth claim of his reissued patent 13,903, granted April 20, 1915. The defendants are Baltimore dealers in automobile supplies. The carbureter was made by Findeisen & Kropf Manufacturing Company, an Illinois corporation. It has a great interest in the controversy, the nominal defendants scarcely any. It has come into the case and taken charge of the defense. For convenience it will be called the "defendant."

The original patent was numbered 783,902. It was issued February 28, 1905, in pursuance of an application filed January 8, 1904.

The Defenses.

The defenses are invalidity and noninfringement. To sustain the former, four grounds are assigned: (1) Fraud in procuring the original issue. (2) Laches in asking for the reissue. (3) Prior use by one Menns. (4) Anticipation by various British and American patents. Of these in their order.

Fraud in Procuring the Grant of Original Claim 15.

[1] In asking for the reissue, plaintiff said that in the light of the disclosures of the Butler patent, 423,214, the original claim 15 was too broad. In the course of the prosecution of the original application, this Butler patent was cited against other of plaintiff's claims. It was not mentioned in connection with claim 15. Defendant points out that nevertheless at that time plaintiff's attention was called to it. He must have read it. If he did, it is argued he must have perceived that claim 15 covered much to which he had no right. To persist in his application for it was, it is contended, knowingly to seek a patent for more than he had invented. Actual fraud must ordinarily, perhaps must invariably, be shown before a patent can be held void on this ground. The examiner in the Patent Office had the Butler patent before him. He did not discover its pertinency to claim 15. Plaintiff may have been equally honest and equally dull.

Laches in Seeking a Reissue.

[2] The reissued patent differs from its original in the wording of the claim in suit. In all other respects they are identical. The change in the phraseology of that claim has no other effect than to narrow its scope. Nevertheless, it is said that plaintiff waited too long to ask for it. He did not make his application for the reissue until March 15, 1915, more than ten years after the patent was granted. Mere lapse of time after the issue of a patent does not by and of itself bar the right to disclaim or to obtain a strictly narrowing reissue. A patentee, it is true, must act with reasonable promptness after he knows that his patent or some of its claims are too broad; but knowledge must precede action, and, until he knows that his claim covers something he has not invented, he is not bound to do anything. He is not required to believe everybody who tells him that his claim is invalid. Very possibly, as defendant contends, a patentee even before he knows his grant is too broad may so act as to shut off his right to disclaim or to seek a narrowing reissue. It would be unsafe to say that there are no circumstances in which such an estoppel would be raised. Into such questions there is no occasion here to go. In this case nothing is shown which even tends to make it inequitable for plaintiff to stand upon the reissue he has obtained. It is true that about 9½ months before the application for the reissue was filed defendant's lawyer told the plaintiff that claim 15 was anticipated by the Butler patent. This statement was true, but plaintiff was not bound to believe it.

Defendant was then in treaty with him for the purchase of his patent, or, at all events, had been in such treaty a few days before. He may have thought what was said as to the worthlessness of claim 15 was merely the proverbial, "It is naught," of the would-be buyer.

Prior Use by Menns.

[3] The defendant has produced a carbureter made by one Menns. It embodies the invention described in the claim in suit. The controversy is as to whether it was made before or after plaintiff applied for his patent. Much evidence has been taken concerning it, and a good deal of heat has been generated in the process. A minute analysis of the testimony relating to it would serve no purpose. The conclusion would be merely that it is doubtful whether Menns made his device before or after plaintiff asked for his patent. Under such a state of the proofs, this particular defense fails.

Anticipation by Prior British and American Patents.

[4] A number of patents have been offered in evidence. Highly competent experts have discussed them from many different points of view. The defendant has had constructed devices which its experts say embody the inventions shown in these patents. As is usual, the witnesses for the defendant assert that, when they have done anything not alluded to in the patent or not precisely therein described, they have used only the skill and discretion which the patentee had the right to expect from the mechanic who undertook to reduce his invention to practice. Equally according to established custom and usage, plaintiff's expert replies that what has been done is to reconstruct the various patented machines, not as the inventors intended them to be, but in the light of subsequent discoveries. No discussion of any of these patents or of what has been said about them will be attempted. I am not satisfied that the precise combination described in the claim at bar is to be found in any of them. I am not prepared to say that there may not have been invention in combining the old elements as plaintiff did. It is true that, individually considered, each of these elements was old, and that others had previously brought them, or some of them, together in ways which were not much unlike that of the plaintiff. For a number of years after plaintiff's patent was issued, little use was made of the combination covered by the claim in suit, although plaintiff gave it an appreciable advertisement. It is therefore possible that the forward step in the art taken by plaintiff was, after all, of but little practical value. Under such circumstances, the claim is not entitled to a broad construction.

Noninfringement.

[5] Has the defendant infringed? The answer turns on a narrow issue. Prof. Carpenter, of Cornell, who was defendant's principal expert, pointed out that there are ten elements in the combination described in the claim in suit. He finds all but one in defendant's device. The one which he thinks is missing is described in the claim itself as means for retarding the closing movement of a valve, which in both

defendant's and plaintiff's structures normally restricts the flow of air through the mixing chamber and is adapted to open by atmospheric pressure. The means actually used by the plaintiff to effect this retardation was a dash pot. The use of such an instrumentality to check too rapid movement was old in this and in other arts. Defendant has a dash pot. In defendant's, as in plaintiff's device, the dash pot affects the speed of the valve movement, which, were it not for the dash pot, would close more quickly than it does. Plaintiff's claim may therefore be read upon defendant's structure. It must be, provided the words used are to be understood as they would be by one who knew nothing of how they got into the claim. But they actually have a history, and one which for the purpose in hand is significant. The patent has always said that it is desirable to permit the valve to open rather freely and to retard the closing movement in order to avoid hammering against its stop. The mechanical construction of plaintiff's valve was such that some means to prevent hammering was necessary. It was called for entirely independently of any direct effect hammering would have upon the operation of the engine itself. Had it not been supplied, the parts would have been worn out so speedily that the device would have been of no practical value. Nothing else is said as to the purpose of the retardation, except that it prevents any sudden closure of the valve when there is no demand for air.

While the descriptive portions of the patent thus explained that the purpose of the retarding device was to prevent hammering resulting from too sudden closing and that this end was to be reached by retarding the closing of the valve, the original fifteenth claim was not so limited. In it the retarding element was described as "means for retarding the movement of the valve in question," comprising a "cylinder containing a liquid"; that is, as the context shows, a dash pot. The claim literally construed would have covered all carbureters containing the other elements of the described combination and in which a dash pot retarded the movement of the valve in either or in both directions. Plaintiff himself ultimately reached the conclusion that in view of the prior art a claim of such breadth could not be sustained. In his oath supporting his application for the reissue he said, among other things, that in the Butler patent there is shown a pump plunger in a cylinder in a fuel reservoir for pumping fuel into a mixing chamber, and that such cylinder, liquid, and piston necessarily cause some retardation of the movement of the valve, although such retardation is incidental and without functional purpose. In connection with the limitation introduced into the reissued claim that the retardation must be to the closing movement of the valve, this disclaimer necessarily requires that the claim shall be so construed as to exclude from it any structure in which there is a retardation even to closing, provided such retardation is not intended to serve any purpose of its own, and is merely incidental to the attainment of some other end.

Plaintiff says, even so, defendant infringes, because in his view the retardation to the closing of defendant's valve is intended to prevent its fluttering and actually achieves that purpose. Defendant

replies that it does not seek to make the closing of the valve a slow process or slower than it otherwise would be. Its aim as defined by itself and its experts is to insure that the valve shall open rather slowly, or that it shall secure a certain pumping action in its machine, which pumping action requires the introduction of a resistance to the opening of the valve. If there is any resulting retardation to the closing, it is a mere purposeless incident. In defendant's structure there is little or no occasion to guard against the valve hammering upon its stop, if the word "hammering" is to be understood in its most literal sense. Plaintiff nevertheless argues that the retardation of the closing movement of the valve helps to prevent fluttering, any tendency to which makes a carbureter undesirable. A properly constructed and adjusted dash pot will do much to prevent fluttering precisely as it has long been used to keep doors from slamming. A dash pot which retards the movement of a valve in one direction may, and ordinarily perhaps will, make slower the corresponding movement in the other. In this case the dispute is all the more attenuated and difficult to follow because in modern high-speed multiple-cylinder engines there is little fluttering, so long as they are running at a constant speed. Everything is being done so rapidly that the valve has not time to change its position. It remains permanently open, in what is, for practical purposes, a fixed position. Fluttering takes place only when a sudden change of speed is made or attempted. As appears from the admissions of the plaintiff and his expert under cross-examination, a carbureter in which the closing of the valve is retarded under such circumstances has certain disadvantages which occasionally might conceivably prove serious.

The issue between the parties as to infringement vel non is both narrow and close. I am not convinced, however, that defendant's carbureter contains any element which is intended to retard the closing of the air valve or in which any function is accomplished by any retardation to closing which may, incidentally to the operation of the machine in other respects, take place.

It follows that, although the claim in suit is valid, defendants have not infringed it. The bill will be dismissed.

INDIVIDUAL DRINKING CUP CO. et al. v. PUBLIC SERVICE CUP CO.

(District Court, E. D. New York. November 29, 1916.)

PATENTS ⇐109—CLAIMS INSERTED BY AMENDMENT.

On reargument additional patents bearing on the prior state of the art would not change the decision on claims which, though inserted in a patent by amendment long subsequent to filing of application, have been held valid because the drawings and specifications were sufficiently made a part of and embodied in the claims to limit them to a patentable invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 152; Dec. Dig. ⇐109.]

On rehearing. Decree directed.
For prior opinion, see 234 Fed. 653.

Clifford E. Dunn, of New York City, for plaintiffs.
Briesen & Schrenk, of New York City, for defendant.

CHATFIELD, District Judge. The defendant has applied for a rehearing of the case upon a number of patents, which he seeks to have added to the record for use in considering the prior art, in order to limit the plaintiffs' claims and thus avoid a finding of infringement, if possible. The court has granted the motion to the extent of allowing these various patents to be added to the record, but has denied the balance of the application for rehearing, and will direct a decree to be entered in accordance with the opinion previously filed.

This case was tried upon the theory that the various claims were invalid, through their insertion in the patent by amendment long subsequent to the filing of the application. The court found against this contention, and consideration of the patents now urged would not change the decision of the court upon that point. The various claims were classified by the attorney for the defense at the trial, and the decision of the court was to the effect that the disclosure of the drawings and specifications was sufficiently made a part of, and embodied in, the claims to limit them to such interpretation that they should be held valid. From this standpoint, the addition of the patents now presented would not change the decision. This court has not passed upon the language of each separate claim, nor upheld it as a broad, basic, pioneer claim for a device usable in other arts, and the decision of the court upon the record, with the patents in evidence, will not be changed from that previously rendered.

Decree will be entered accordingly.

MINERALS SEPARATION, Limited, v. BUTTE & SUPERIOR COPPER CO.

(District Court, D. Montana. November 28, 1916.)

No. 8.

1. COURTS ⟸91(2)—FEDERAL COURTS—PRECEDENTS.
A decision of the Circuit Court of Appeals is binding on the District Courts within the circuit, notwithstanding the Supreme Court had issued certiorari to review the same; the issuance of certiorari not weakening its effect.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 313, 326; Dec. Dig. ⟸91(2).]

2. PATENTS ⟸306—INJUNCTION PENDENTE LITE—RIGHT TO.
After a decision in another case upholding the validity of complainant's patent, complainant sued defendant alleging infringement. The original suit was appealed to the Circuit Court of Appeals, and complainant's application for injunction pendente lite was denied on condition that defendant file a bond and agree not to expand its operations with the patent process and to file a monthly statement, etc. The Circuit Court of Appeals found that the patent was void for want of novelty and certiorari

was granted by the Supreme Court. *Held*, that in such case, as the effect of the decision of the Circuit Court of Appeals was not weakened by the granting of certiorari, the order relating to defendant's use of the patent process should be reversed, and the bond given in lieu of an injunction pendente lite discharged.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 500, 501; Dec. Dig. ⟸306.]

In Equity. Suit by the Minerals Separation, Limited, against the Butte & Superior Copper Company for infringement of a patent. On motion by plaintiff for an increase of a bond given in lieu of an injunction pendente lite, together with motion by defendant for discharge from further performance of the order requiring the bond. Motion of plaintiff denied, and that of defendant granted.

Henry D. Williams, of New York City, and O. W. McConnell, of Helena, Mont., for plaintiff.

Kremer, Sanders & Kremer, of Butte, Mont., and Sheridan, Wilkinson & Scott, of Chicago, Ill., for defendant.

BOURQUIN, District Judge. After decision in Minerals Separation, Ltd., v. Hyde (D. C.) 207 Fed. 956, plaintiff brought this suit, alleging infringement of the patent upheld by said decision. On hearing for injunction pendente lite, the evidence was the record of the Hyde suit, save sufficient other to charge this defendant. The Hyde suit was then on appeal and soon to be argued, and this court denied the injunction sought on condition that defendant file a bond in the sum of $75,000, to secure plaintiff in damages and profits, if successful finally herein, and that defendant also file and perform an agreement to not expand its operations with the patent process, and to file monthly statements of such operations, pending suit. The order also recited that the parties might solicit modification if future conditions warranted. Defendant accepted the condition.

The appeal in the Hyde suit resulted in the reversal of this court's decree. See 214 Fed. 100, 130 C. C. A. 576. The Supreme Court granted certiorari (235 U. S. 701, 35 Sup. Ct. 202, 59 L. Ed. 432), and therein the cause was recently argued.[1] In the meantime occurs the war, defendant's product (zinc) advances in price, defendant increases its output, and therefrom pays over $13,000,000 in dividends. Thereupon plaintiff moves herein for an increase of the bond aforesaid, or that defendant be enjoined from further dividends, from further "increase in its plant," and from sale or incumbrance of its property, pending suit. It suffices to say defendant files answer to the motion, and in addition moves that it be discharged from further performance of the order aforesaid.

[1, 2] Plaintiff's motion is denied, and the motion of defendant is granted. The Circuit Court of Appeals, having determined that plaintiff's patent is void for want of novelty, thereby established its said judgment as the law of the land, so far as this and all other courts of this circuit are concerned, in any and all cases wherein the evidence is substantially like that of, and so not fairly distinguishable from, the

[1] Reversed by Supreme Court, 242 U. S. 261, 37 Sup. Ct. 83, 61 L. Ed. —.

Hyde Case, until by the Supreme Court that judgment is reversed. That the Supreme Court has said judgment under review in no wise weakens it as controlling authority in this circuit, nor relieves this court of the plain duty to accept and follow it until reversed. See Railway v. Bank, 60 Barb. (N. Y.) 234; Cement Co. v. Riser (Tex. Civ. App.) 137 S. W. 1188.

To do otherwise would violate the settled law of the relations that subsist between subordinate and appellate courts, would substitute disorder for order in litigation, and would bring doubt and confusion to the exercise of rights. No legal principle or case is cited to the contrary. It is true the judgment of the Circuit Court of Appeals by certiorari has been superseded, but only in so far as acts are required to execute said judgment. For in so far as its self-executing quality is concerned—that is, establishment of law for this circuit—that was accomplished, executed on its rendition and before certiorari, and remains law to this day undisturbed by the certiorari.

As this suit now appears, defendant's user of the process involved is rightful before the law and without condition, and plaintiff has no cause of action; and though the future may demonstrate the contrary, the court's authority to afford plaintiff security cannot be invoked and lawfully exercised in speculative anticipation, but only when that time arrives. The law as it is when orders are made dictates their nature, and not the law as it is hoped for, or later may be. It now appearing the aforesaid condition, imposed upon and accepted by defendant, was from mistake of law and without consideration, defendant is rightfully relieved from it. No other feature now requires comment.

THE GEORGE W. FIELDS.

(District Court, S. D. New York. April 12, 1915.)

1. SHIPPING ⟸209(1)—LIMITATION OF LIABILITY—RIGHT TO REMEDY.
   The rule that proceedings for limitation of liability cannot be maintained, where the claims are less than the value of the vessel, must be limited to cases where the aggregate of the claims appears beyond question from the petition or otherwise.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. § 652; Dec. Dig. ⟸209(1).]

2. SHIPPING ⟸207—LIMITATION OF LIABILITY—RIGHT TO REMEDY.
   An owner may limit his liability for any act of the master or crew.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 555, 643, 644; Dec. Dig. ⟸207.]

In Admiralty. In the matter of the petition of the Cornell Steamboat Company, owner of the steam tug George W. Fields, for limitation of liability. On motion to dismiss. Denied.

J. Parker Kirlin, of New York City, for petitioner.
Mark Ash, of New York City, for claimant.

LEARNED HAND, District Judge. [1] It is now settled that a single claim will support a limitation proceeding. White v. Island Transportation Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993. But it has been decided in the Ninth circuit that this single claim must be greater than the value of the vessel. Shipowners' & Merchants' Transportation Tugboat Co. v. Hammond Lumber Co., 218 Fed. 161, 134 C. C. A. 575. The last seems also to have been Judge Brown's opinion. The Garden City, 26 Fed. 766, 772. But in the same case Judge Brown held a petition valid, though the claims actually brought were a very small part of the value of the vessel, because he could not say that there might not be other claims which he would not ask the petitioner to wait for. He held it was not necessary to aver or prove that the aggregate of the claims was more than the value. Judge Chatfield made the same ruling in The Defender (D. C.) 201 Fed. 189. Perhaps it is true that, if there be a single claim, less than the value, the proceeding is unnecessary, and the reasoning applies equally well, if the aggregate of several claims, definitely known, be less than the value. The practical difficulty lies in knowing whether the claims actually filed are the only ones, and, if there are others, how many they are and how large. If the petition were to allege that the aggregate of all possible claims was less than the value, if the statute of limitations had run upon all claims, as suggested by Judge Chatfield in The Defender (D. C.) 201 Fed. 189, if the nature of the accident were such as could result by no chance in more than one claim (Shipowners', etc., Co. v. Hammond Lumber Co., 218 Fed. 161, 134 C. C. A. 575), then the petition might be open to exception, but here there is nothing of that sort.

The petitioner alleges that he has heard of other claims from the crew for personal injury and loss of effects, though none have been made. It does not appear how many men were on the boat, or whether they suffered any personal injury; the statute of limitations has not run, and it is not yet fanciful that they might sue. I think it clear that the petitioner should not be required at his peril to aver and prove that there are claims for more than the value of the vessel, for, if he fails, he loses his limitation, without any assurance that there may not be others which he may not know. If the rule has any application, it must be limited to cases where the aggregate of the claims appears beyond any question, either from the petition or elsewhere. If the affidavit may be considered on this application, it is far from making the necessary proof.

[2] The second point is that the injury was not caused by the tug, but by the default of the petitioner under its contract. In Richardson v. Harmon, 222 U. S. 96, 32 Sup. Ct. 27, 56 L. Ed. 110, it was held that the owner might limit for any act of the master and the crew. It appears from the petition that the Fields was the only tug in the vicinity, and the fault, if any, must necessarily have been either in leaving the Bourne No. 6 at the beginning, or in failing to go to her during the storm. Either was a fault of her master or crew, and is within the statute.

Laches seems to be no defense to the proceeding. The motion to dismiss is denied.

THE TUG NO. 16.

(District Court, S. D. of New York. November 14, 1916.)

SHIPPING ⊂=209(3)—LIMITATION OF LIABILITY—RIGHT OF REMEDY.

A shipowner is prima facie entitled to a limitation of liability, and the limitation will be denied him, if at all, only when respondent can show that it can have no possible value to him, which must be shown by allegation and proof, and cannot be done by affidavit.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 652; Dec. Dig. ⊂=209(3).]

In Admiralty. In the matter of the petition of the Standard Transportation Company, owner of steam tug No. 16, for limitation of liability. On motion to vacate injunction. Denied.

This arises on a petition to limit the liability of a shipowner for a collision at a pier near Fifty-Sixth street, Brooklyn, N. Y. The petition alleges that its tug was moving out one of its barges from a slip. It then proceeds to allege: "After getting the tow under way, the tug was stopped so that the barge might come out at slow speed under its own stern way. When the barge, still moving slowly, was half way out of the slip, she rubbed slightly alongside the pile driver. At this time the men on the pile driver were observing the movements of the tug and tow. No damage was sustained by either the barge or the pile driver, but it is contended that one Mikal Olson received some injuries to his left foot." It then alleges that Olson has brought an action for $25,000 damages in the state court, and that "other suits may be begun for damage or loss resulting from said contract" and that the value of the tug is $40,000.

Olson moves to vacate the usual injunction against other suits, and files an affidavit alleging that: "In taking the vessel from said slip, said tugboat caused and allowed said vessel to come with considerable force against a certain pile driver which was lying adjacent to the pier at which the plaintiff was working, and caused the said pile driver to crowd against the piling, catching the plaintiff's foot, and causing the damage complained of. The only persons working at or about the scene of the accident at the time were Adolph Larsen, Samuel Gunderson, August Johnson, and Ben Madison. That none of said persons received any injuries at the time aforesaid, or at any other time, by reason of said collision. No damage was done to the pile driver nor to the pier." No counter affidavit is filed.

William F. Purdy, of New York City, for the motion.

B. W. Wells, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). Judge Brown held in The Garden City (D. C.) 26 Fed. 766, 770, that it was not jurisdictional to allege and prove that there were other claims, when the value of the vessel was greater than the claim actually made, yet it is perfectly clear (page 772) that he did not consider the question irrelevant whether or not such claims were possible. His language in Briggs v. Day (D. C.) 21 Fed. 727, 731, shows the same opinion. Similarly Judge Adams, in The Hoffmans (D. C.) 171 Fed. 455, 462, assumed that, if there were not even "the merest possibility" of future claims, the petition might not lie. The same idea is shown in The George W. Fields (D. C.) 237 Fed. 403, filed April 12, 1915, and in The Defender (D. C.) 201 Fed. 189. If that "merest possibility" do not exist, the petition has been held bad. Shipowners', etc., Co. v.

Hammond Lumber Co., 218 Fed. 161, 134 C. C. A. 575. The theory in such case may be that the statute is only to protect shipowners from liability, not arbitrarily to give them a peculiar forum, especially since an admiralty court sits with a jury in certain jurisdictions.

It has now been finally decided that a single claim is enough to sustain the petition (White v. Island Trans. Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993), contrary to the early impression in this district (the Rosa [D. C.] 53 Fed. 134), and it may be urged that, since the limitation could be effectively enforced by a state court, where there was only a single claim, that case should be taken as holding that the petition lies, even when the single claim is less than the value of the vessel. Yet in White v. Island Transportation Co., supra, the claim was larger than the value, and all that the case necessarily decides is that the shipowner in that event has his option of forums; it need not be taken to decide that, where there is no need of any limitation at all, he may enjoin the usual common-law remedies, which are, indeed, preserved by the statute.

If so, the shipowner ought not to be allowed to avail himself of a merely colorable possibility, to say nothing of a manifest impossibility, such as existed in Shipowners', etc., Co. v. Hammond Lumber Co., supra. Although the allegation of this petition—i. e., that there "may be" other claims—be not necessary, yet an allegation in the answer might be a defense that there was no possibility of any such. I do not mean to decide that question here, because it is not necessary. I only mean to say that, if it be a good defense, at least the respondent must undertake the burden of establishing it, and that he may not do so by affidavit, but must do so by trial. White v. Island Trans. Co., supra, 233 U. S. 350, 34 Sup. Ct. 589, 58 L. Ed. 993. In short, a shipowner as such is prima facie entitled to the privilege, and the limitation will be denied him, if at all, only when the respondent can show that it can have no possible value to him. Consequently a mere affidavit like this does not require any answer; if it did, the shipowner must look about and learn the facts at his peril. The best that the respondent can do is by traverse to the petition or by defense in his answer to prove that there is no such possible danger.

This application is therefore denied, but the cause may have a preference, if the respondent wishes it.

THE SOPHIA JOHNSON.

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

No. 3259.

1. MARITIME LIENS ⇐42—SUPPLIES—APPLICATION OF PAYMENTS.

Intervener sold oil from time to time to the owner of a vessel for commercial purposes, and also for the use of the vessel. It was all charged in a general account, and all payments were credited to such account. *Held* that, after suit brought against the vessel by other lien claimants, intervener could not change the application of the payments made to the

items bought for commercial purposes, and assert a lien for the oil furnished to the vessel during the entire period.

[Ed. Note.—For other cases, see Maritime Liens, Cent. Dig. § 80; Dec. Dig. ⊂⊃42.]

2. PAYMENT ⊂⊃47(1)—APPLICATION OF PAYMENTS.

An application of payments, once made, cannot be changed, so as to affect the rights of third persons.

[Ed. Note.—For other cases, see Payment, Cent. Dig. § 127; Dec. Dig. ⊂⊃47(1).]

In Admiralty. Suit by H. W. Starrett, doing business as the Sunset Boat & Engine Company, against the schooner Sophia Johnson. On exceptions of libelant to allowance of claim of the Union Oil Company. Exceptions sustained.

Daniel Landon, of Seattle, Wash., for libelant.

Cassius E. Gates, of Seattle, Wash., for intervening libelant Union Oil Co.

NETERER, District Judge. This cause was referred upon stipulation of parties to the commissioner to take testimony and report findings and conclusions. Exceptions are now filed to the allowance of the claim of the Union Oil Company as reported by the commissioner. The testimony shows that in 1914 the Union Oil Company entered into an arrangement with the owners of the schooner Sophia Johnson, by which it furnished oil to the owners of this vessel, and for commercial purposes, and for fuel on the vessel. This oil so furnished was sold to various fishermen and patrons located at various points upon Puget Sound. These items were furnished upon an open account charged to "Schooner Sophia Johnson, Owner's Acct. Sallie & Thuesen." The first entry appears May 15, 1914, and oil was furnished from that time upon a current account until the 9th of March, 1916. During this time it appears that $10,665.32 worth of oil had been furnished. Upon this account was paid from time to time the sum of $9,694.18, leaving a balance due of $972.14. Intervening libel was filed to recover this full amount, but upon the hearing before the commissioner intervening libelants abandoned recovery for the full amount, and sought to apply all of the payments made upon the items in the account for oil furnished for commercial purposes, and produced "delivery slips" covering the period of time showing that $755.14 had been furnished to the vessel for consumption as fuel by the vessel, and elected to apply the moneys paid to the oil furnished for commercial purposes, and hold the lien on the vessel for the fuel furnished during the entire period.

[1] I think the exceptions of the libelant must be sustained. The intervening libelant would have the right to apply a general payment made to any account which it may have against the debtor when no application is made by the debtor himself, but this must be done at the time and before any controversy arises. The Mary K. Campbell, 40 Fed. 906. It is too late to make application of payments while preparing for suit, or after suit is instituted. Taylor v. Coleman, 20 Tex.

772; Norris v. Beaty, 6 W. Va. 477. In the instant case there was but one account. The payments, as disclosed by the testimony, were credited to the current account, in which were the items of oil furnished for the commercial purposes, as well as the oil for consumption upon the vessel. Nothing appears in the account to indicate any intention on the part of the intervening libelants other than to furnish the oil upon the general current account. A party cannot intermingle items for which he has a lien with items for which he has no lien, and then assert a lien for the entire amount. Such is construed into a fraudulent intent, and the entire claim is defeated.

[2] The payments made were applied to the general account, and that included some items for which a lien is now asserted, and after the application of the payment by the creditor, it cannot be altered by him, except by mutual consent. Pearce v. Walker, 103 Ala. 250, 15 South. 568. And where application is made at the time of payment, no change in appropriation can afterwards be made, so as to affect the equities of third parties. Terhune v. Colton, 12 N. J. Eq. 232. The only right that the intervening libelant in this case can hope to have will be to recover for such oils as were furnished to the schooner for fuel within 90 days prior to the filing of the libel herein, as remain unpaid after the application of all payments to the account current (The Edith [D. C.] 217 Fed. 300), and have allowed as a claim of the second class the unpaid items furnished prior to such time, after being credited as indicated, and an order may be presented accordingly.

In re ARCHBOLD & HAMILTON.

(District Court, N. D. California, First Division. November 16, 1916.)

No. 10025.

BANKRUPTCY ⊜132—TRUSTEE—SELECTION.

All of the creditors save one voted for a particular person as trustee, but the bankrupt objected to his selection on the ground that the firm of attorneys who represented him were also attorneys for a creditor who was claiming the return of merchandise delivered to the bankrupt upon an alleged assignment. It was represented that the one whose selection as trustee was opposed would engage additional attorneys, and that the attorneys already selected would not, in case of conflict of interest, represent the creditor. *Held* that, while the selection of trustees brought about by persons having an adverse interest to that of the general creditors should be denied, it was improper in such case for the referee to refuse to approve the selection of the trustee by the creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 190; Dec. Dig. ⊜132.]

In Bankruptcy. In the matter of the bankruptcy of Archbold & Hamilton. Proceedings to review an order of the referee refusing to approve the selection of Joseph Golden as trustee. Order reversed, with directions, and subsequent proceedings relative to the selection of a trustee set aside.

Driver & Driver, of Sacramento, Cal., for bankrupts.
Asher, Meyerstein & McNutt and Rothchild, Golden & Rothchild, all of San Francisco, Cal., for certain creditors and trustee.

DOOLING, District Judge. At the first meeting of creditors, which was held on May 5, 1916, all of the creditors that voted for trustee voted for one Joseph Golden for that office. The amount of claims thus voted was $3,582.14. An objection was made by the bankrupt to this selection on the ground that the firm of Rothchild, Golden & Rothchild, attorneys, who were the attorneys for said proposed trustee, were also attorneys for Strouse & Bros., a creditor of said bankrupt, who was claiming the return of certain goods and merchandise delivered to the bankrupt upon an alleged consignment. Joseph Golden is not a member of the firm above named, but would, if elected trustee, employ the said firm as his attorneys. The referee refused to approve the selection of Mr. Golden, basing such refusal upon the ground that:

"There was a reasonable cause to believe that a conflict of interest might have arisen by reason of the fact that Messrs. Rothchild, Golden & Rothchild were attorneys for Strouse & Bros., who were claiming the return of certain merchandise of the bankrupt estate."

It was stated to the referee that, if it should afterwards appear that there was any conflict between the interests of the creditor, Strouse & Bros., and the trustee, the firm of Rothchild, Golden & Rothchild would not represent the claim of said Strouse & Bros., and that said trustee would have as his counsel, not only the firm above named, but also the firm of Asher, Myerstein & McNutt, and Messrs. J. P. Keleher and Joseph Kirk.

This court has at different times clearly expressed itself upon the impropriety of the representation by the same attorney of conflicting interests. The court has also in several cases approved the action of referees in refusing to approve the selection of trustees brought about by persons having an interest adverse to that of the general creditors of the estate. The rules heretofore laid down by the court in these respects will not be relaxed; but, on the other hand, they will not be unduly extended, so as to deprive creditors acting in good faith from controlling the election of trustee. Under all the circumstances disclosed here, I cannot agree with the referee's conclusion that the selection of Joseph Golden as trustee was one which should not be approved.

The order rejecting and disapproving the selection of Joseph Golden as trustee is reversed, and the referee is directed to approve such selection. The subsequent proceedings relative to the selection of a trustee are set aside. So also is the order refusing to approve the offered compromise, so that this last matter may be left open for further action by the creditors and the referee.

UNITED STATES v. PRENDERGAST.

(District Court, D. Oregon. November 13, 1916.)

No. 7921.

POST OFFICE ⊂⊃33—OFFENSES—NATURE OF.

A postal card contained the following communication: "In re Unique Tailor Co. v. Fox, District Court. Your breach of stipulation has caused this case against you to be again placed in the hands of the proper officials for serving of summons and complaint—this was held up since Aug. 2d and was to be held until 18th inst.—you will find same directed to you at proper address this time and no nonsense will be tolerated as before." Other cards stated that suit would be entered at once unless the addressee acted promptly. *Held*, that the mailing of the cards was a violation of Criminal Code (Act March 4, 1909, c. 321) § 212, 35 Stat. 1129 (Comp. St. 1913, § 10382), denouncing the mailing of postal cards on which is written any language of a threatening character, or calculated and obviously intended to reflect on the character or conduct of another; all of the cards being threatening, and the first one in a measure intended to reflect on the character of the addressee.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. § 53; Dec. Dig. ⊂⊃33.]

At Law. W. J. Prendergast was charged with mailing postal cards containing language of a threatening character, or calculated to reflect upon the character and conduct of another, in violation of Criminal Code, § 212. On demurrer to the indictment. Demurrer overruled.

Clarence L. Reames, U. S. Atty., and Robert R. Rankin, Asst. U. S. Atty., both of Portland, Or.

W. H. Fowler and R. E. Moody, both of Portland, Or., for defendant.

WOLVERTON, District Judge. This is an indictment upon three counts, charging that Prendergast mailed certain postal cards, with certain matter written on the postal cards. The indictment is brought under section 212 of the Penal Code, which denounces the mailing of any postal card on which is written any language of a threatening character, or calculated by its terms and obviously intended to reflect upon the character or conduct of another. The matter written upon the card which is the subject of the first count is as follows:

"Removed to 605-06 Panama Bldg. In re Unique Tailor Co. v. Fox, District Court. Your breach of stipulation has caused this case against you to be again placed in hands of the proper officials for serving of summons and complaint—this was held up since Aug. 2d and was to be held until 18th inst.—you will find same directed to you at proper address this time and no nonsense will be tolerated as before."

The second card contained these words:

"Final Notice. Returning book is no defense; if rent is unpaid. Suit enters unless you act promptly. No other way open.

"Merchants' Mercantile Co., Inc."

And the third is as follows:

"Feb. 9, 1916. No replies to our letters or telegrams received. Suit enters unless you act promptly. Merchants' Mercantile Co., Inc."

The question presented is whether these cards are of a threatening character, or whether they contain terms that are calculated to reflect upon the conduct or character of another. I think unquestionably the first card is both of a threatening character and in some measure by its terms intended to and does reflect upon the conduct of the person addressed. The other two cards are each of a threatening character, I think, within the terms of the statute.

The case of United States v. Bayle (D. C.) 40 Fed. 664, 6 L. R. A. 742, the decision in which was rendered by Judge Thayer, seems to announce the true doctrine. The law was intended, I think, to inhibit people from writing to others on an open postal card threatening them with suit, and I believe that each of these counts comes within the inhibition of that statute.

The demurrer will be overruled.

In re WRIGHT & BARRON DRUG CO.

(District Court, N. D. Georgia. November 25, 1916.)

BANKRUPTCY ⊂=140(1)—PROPERTY VESTED IN TRUSTEE—OWNERSHIP IN PROPERTY—CONSIGNMENT OR CONDITIONAL SALE.

Where a stock of paints was consigned by the seller to a dealer, to be insured by him, title to remain in the seller, who was to inventory at regular intervals of 60 days the stock unsold, and charge to the dealer at a price agreed on such as had been sold, and if at a future time either party desired to terminate the arrangement, the dealer to pay for the stock on hand, the goods were held on consignment, not on conditional sale, and on bankruptcy of the dealer could be recovered by the seller.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 198, 199; Dec. Dig. ⊂=140(1).]

In Bankruptcy. In the matter of the Wright & Barron Drug Company, bankrupt. Petition to review order of referee refusing petition of the Lampton, Crane & Ramey Company to reclaim property. On certificate from referee. Petition granted.

E. P. Treadaway, of Rome, Ga., for intervener.
Graham Wright, of Rome, Ga., for trustee.

NEWMAN, District Judge. This case comes before the court now on a certificate from the referee, showing that he decided certain goods in the possession of the bankrupt at the time of the failure were held by contract of conditional sale and not on consignment. The contract is as follows:

"This contract, entered into this 3d day of January, by and between Lampton, Crane & Ramey Company, a corporation of Louisville, Ky., party of the first part, and Wright & Barron Drug Company, of Rome, Ga., party of the second part, witnesseth that the party of the first part agrees to consign to the party of the second part certain stock of ready mixed paints to be handled and cared for and sold by the party of the second part under the following conditions:

"First. Party of the second part agrees to keep said stock of paint insured against loss by fire and to pay premiums on said insurance.

"Second. Title and ownership of said paint stock to remain in party of the first part until sold and paid for.

"Third. The initial shipment of paint made under this contract will be of such colors and quantities as may be agreed upon between the representatives of the party of the first part and the party of the second part to make a complete stock, and such stock shall be increased and decreased as they may believe to be necessary.

"Fourth. At regular intervals of about 60 days the stock of paint which is unsold shall be inventoried by representatives of party of the first part, and such sales as shall be made from time to time out of the consigned stock shall be charged to the party of the second part at price agreed upon and upon terms of 60 days from each inventory with an allowance of 2 per cent. for payment within 10 days.

"Fifth. If at the end of the year the account should be unsatisfactory to either party, said party shall have the right to terminate contract, and the party of the second part agrees to purchase and pay for any stock which may be on hands."

It is expressly provided by the contract, as will be seen above, that the goods were consigned by Lampton, Crane & Ramey Company to the bankrupt company, and there is nothing whatever in the contract that, to my mind, changes its character from a consignment to a contract of conditional sale. At regular intervals of 60 days the stock unsold was to be inventoried by representatives of the consignor, and such as had been sold charged to the bankrupt at the price agreed upon. If at the end of 1916 either party desired to terminate the arrangement, they could do so, and the bankrupt company would buy and pay for the stock on hand.

Counsel cite the case of Furst Bros. v. Commercial Bank of Augusta, 117 Ga. 472, 43 S. E. 728, and this case is also cited by the referee as authority for the decision reached that this was not a consignment, but a conditional sale. I do not see, even under this case, that the referee is correct in his finding. In the case of Bondurant Hardware Co. (D. C.) 231 Fed. 247, I had a question something like the one now before the court, and in that case it was held that implements delivered by a manufacturer to a dealer, who was not to pay for them until sold, were held on consignment, and could be recovered by the manufacturer after the bankruptcy of the dealer. The facts in that case do not very clearly appear in the report of the case, but I think they were very similar to the facts appearing in this case. There is no pretense in the contract now under consideration that the goods not sold were ever to become the property of the bankrupt company until the end of the year 1916. That time has not yet arrived, and the bankruptcy occurred some months ago.

I am compelled to differ with the referee, and the direction of the court here is that the paints unsold at the time of the bankruptcy be delivered to Lampton, Crane & Ramey Company, the owners of the same.

STOTESBURY v. HUBER et al.

(District Court, E. D. New York. September 16, 1916.)

1. COURTS ⟸489(13)—JURISDICTION OF FEDERAL COURTS—SUITS RELATING TO ESTATES.

A federal court has jurisdiction to determine the right of one to a share in the estate of a decedent as an heir, the limitation or extent of his share, and rights under an assignment as betweeen the parties, but not to settle the estate or direct distribution.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1325; Dec. Dig. ⟸489(13).]

2. COURTS ⟸312(1)—JURISDICTION OF FEDERAL COURTS—SUITS BY ASSIGNEE.

A suit by the assignee of an interest in the distributive share of an heir in the estate of a decedent, to establish such interest and enforce his assignment, is not within Judicial Code, § 24 (Act March 3, 1911, c. 231, § 24 [1], 36 Stat. 1091; Rev. St. § 629 [Comp. St. 1913, § 991]), relating to jurisdiction of federal courts of suits by assignees of choses in action, since the interest of the heir is not a chose in action, but a beneficial interest not arising out of contract, and where the necessary diversity of citizenship exists between the parties to the suit the court has jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 873–875; Dec. Dig. ⟸312(1).]

3. COURTS ⟸312(1)—JURISDICTION OF FEDERAL COURTS—CITIZENSHIP OF PARTIES.

Defendant, in consideration of money advanced to him by a partnership, agreed to assign an interest in his share of an estate. He executed an assignment in the name of the firm which was designated therein as a corporation. At the request of the firm, he executed a second assignment in lieu of the first to one of the partners as an individual. The assignee afterward repaid the money advanced to the firm and brought suit to establish and enforce the assignment. *Held*, that defendant was in no position to question the assignee's right to maintain the suit in his own name, and that, he and defendant being citizens of different states, a federal court had jurisdiction regardless of the citizenship of the other members of the firm.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 873–875; Dec. Dig. ⟸312(1).]

4. WILLS ⟸743—RIGHTS OF DEVISEES AND LEGATEES—VALIDITY OF ASSIGNMENT OF INTEREST.

An assignment of a definite sum of money out of the assignor's share in an undivided estate, consisting of real and personal property, devised and bequeathed by a will containing a power of sale to the executors or trustees, if otherwise legal, is valid and enforceable.

[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1907–1910; Dec. Dig. ⟸743.]

5. USURY ⟸18—WILLS ⟸743—ASSIGNMENT OF INTEREST BY BENEFICIARY—LEGALITY—CONSTRUCTION OF CONTRACT.

Defendant, a resident of New York and married, as an heir of his deceased mother, was entitled to a share in the estate of his grandfather, subject to the life tenancy of his grandmother. The estate consisted of real and personal property located in New York and in the hands of executors and trustees who were accountable to the Surrogate's Court. Being in straitened circumstances and in need of money, he applied to various parties for a loan on the security of his interest in the estate. The loan was refused, but after negotiations through an agent to a firm in Philadelphia, of which complainant was a member, an agreement was

made for the sale by defendant of a definite amount of his share in the estate and he executed an instrument by which, in consideration of $23,500 paid to and disbursed for him, he assigned to complainant $50,000 of his share of the estate, with interest after the death of the life tenant. The life expectancy of the life tenant was at that time about nine years, and she in fact died within four years, whereupon complainant brought suit to establish his rights under the assignment. *Held* that, although the contract was made in Pennsylvania, the rights of the parties under the assignment were governed by the law of New York where the property was located and where alone it could be enforced; that by such law, while the assignment was in form and was intended by the parties to be one of sale, and while the facts do not justify a finding that it was merely a loan and an attempted evasion of the usury statutes, nevertheless, the amount assigned being largely in excess of the amount paid with legal interest during the life expectancy of the life tenant, it was unconscionable and inequitable under the law of New York, and would be denied enforcement by a court of equity on condition that defendant pay to complainant the amount advanced with legal interest and such sum for expenses and profits as should be fixed by the court.

[Ed. Note.—For other cases, see Usury, Cent. Dig. §§ 31–34, 36–38, 40; Dec. Dig. ⟸18; Wills, Cent. Dig. §§ 1907–1910; Dec. Dig. ⟸743.]

In Equity. Suit by Edward T. Stotesbury against Joseph Huber, Louis D'Esterre, and others. Decree for defendants on conditions.

Winthrop & Stimson, of New York City (Dickson, Beitler & McCouch, of Philadelphia, Pa., and Henry L. Stimson and George Roberts, both of New York City, of counsel), for plaintiff.

Steuart & Perry, of New York City (James L. Steuart and Frank S. Moore, both of New York City, of counsel), for defendants Louis D'Esterre and Anna W. D'Esterre.

Oscar A. Lewis, of Brooklyn, N. Y., for defendant William H. D'Esterre.

John F. Clarke, of Brooklyn, N. Y., for Huber Estate.

CHATFIELD, District Judge. The plaintiff holds a deed or assignment of a share amounting to $50,000 (and interest from the date of the death of the life tenant) of the vested remainder which the defendant Louis D'Esterre received upon the death of his mother, who was a daughter and one of the beneficiaries under the will of Otto Huber, deceased. This assignment, dated the 30th day of November, 1910, was executed in New York and transmitted, after record in the counties of New York and Kings, to Philadelphia, in the place of a previous assignment which had been executed by the defendant Louis D'Esterre, and by his wife, and which had been turned over in the city of Philadelphia to the firm of Drexel & Co. in return for checks totaling $23,500.

The earlier instrument under date of November 17, 1910, named by mistake, as party of the second part, Drexel & Co., a corporation. Drexel & Co. was in fact a partnership in which certain residents of Philadelphia and certain residents of New York City were partners. The second assignment was made in order to correct this mistake, and, while the moneys concerned were advanced by the partnership, the second assignment was caused to run to one of the partners (the plain-

tiff), in accordance with a custom by which individual partners took title to firm property and accounted for the same in the partnership books, for obvious reasons of convenience.

The plaintiff had as partner authorized the transaction in question, so, prior to the beginning of the action, he as an individual paid over to the firm of Drexel & Co. the amount involved, which thus became his individual asset, free from any duty to account or as trustee.

The assignment is upon its face an absolute conveyance of the amount mentioned, and was made by the defendant Louis D'Esterre as one of the heirs at law of his mother, who died November 5, 1906. Her father, Otto Huber, died August 31, 1889, leaving property real and personal to his seven children, with a life estate to his wife, who lived until August 28, 1914. A part of the estate of Otto Huber, deceased, had been paid to Mrs. D'Esterre or to her administrator prior to the making of the assignment in question; but a large amount of real and personal property is still in the hands of the executors of Otto Huber, deceased, and they have been made parties to this action.

[1] These executors have objected to the entry of any decree establishing the present claim of Louis D'Esterre or his assignees, in the estate of Otto Huber, deceased, prior to the accounting and recognition of those claims in the Surrogate's Court of this county. These executors have taken the position that this court has no jurisdiction to direct payment by them of any specified amount, or to determine the ultimate value of the share of Louis D'Esterre. Ingersoll v. Coram, 211 U. S. 335, 29 Sup. Ct. 92, 53 L. Ed. 208, disposes of the question involved and upholds the jurisdiction of this court to determine whether or not Louis D'Esterre or his assignees are possessed of a share in the estate of Otto Huber, deceased, and to determine the limitation or extent of such share. It is, however, not within the jurisdiction of this court to perform the functions of the Surrogate's Court, in passing upon the accounts of the executors, nor to direct the distribution of the estate of Otto Huber, deceased, independently of the decree of the Surrogate's Court in that regard. Waterman v. Canal-Louisiana Bank, 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80.

In Ingersoll v. Coram, supra, it was held that the United States court had jurisdiction, where diversity of citizenship existed, to determine the rights gained by an assignment of an interest under a will, as between the parties to the action. It was recognized in that case that the Circuit Court of the United States could not thereby supersede the probate court, or take away from the probate court jurisdiction to determine what property should come into the hands of those parties described as executors in the United States court action, or what interest should be subject, in their hands, to the rights which the United States court might decree. A decree of the probate court upon these matters would be res adjudicata. Comity would require the United States court to leave to the exclusive jurisdiction of the probate court the determination of the matters as to which it, solely, should render a decree. The rights of the executors, therefore, are fully protected, and the objections raised by them to the jurisdiction of the court have been overruled.

[2] Their position is made the basis, however, of a defense urged by Louis D'Esterre, under section 629 of the Revised Statutes, now embodied in section 24, par. 1, of the Judicial Code, which prohibits the United States court from taking cognizance of a suit upon a chose in action, in favor of any assignee, unless such suit might have been prosecuted to recover upon the chose in action if no assignment had been made.

It is contended that this prohibits the present action unless the defendant Louis D'Esterre could have sued in the United States court for this district to obtain payment of his share in the estate of Otto Huber, deceased. Louis D'Esterre is admittedly a resident of this district. The plaintiff is a resident of the Eastern district of Pennsylvania, but the other defendants are also residents of the state of New York. But as was held in Ingersoll v. Coram, supra, and in Brown v. Fletcher, 235 U. S. 589, 35 Sup. Ct. 154, 59 L. Ed. 374, an interest in a distributive share of an estate is not per se within the language of the section referred to.

The defendants claim that the case of Ingersoll v. Coram, just cited, had to do with the assignment of an aliquot or definite fractional share in the estate in question. They also urge that the case of Brown v. Fletcher, supra, expressly excepts determination as to the effect of assigning $35,000 out of a $50,000 share, "if it shall appear that the trust estate in the hands of the trustee consists of property and not of money." The Supreme Court, however, says that the words of section 24 of the Judicial Code can refer only to a cause of action based on contract. Kolze v. Hoadley, 200 U. S. 76, 26 Sup. Ct. 220, 50 L. Ed. 377; Shoecraft v. Bloxham, 124 U. S. 730, 8 Sup. Ct. 686, 31 L. Ed. 574. It is further stated, in Brown v. Fletcher, supra, 235 U. S. on p. 598, 35 Sup. Ct. 154, 59 L. Ed. 374, that the relation between trustee and cestui que trust is not contractual.

It is impossible to see how the assignment of $35,000 out of $50,000, or how the assignment of a share amounting to $50,000 out of a supposedly larger legacy, would be any less or any more the assignment of a chose in action than would the assignment of a one-fourth or one-fifth interest in that legacy. If the entire legacy establishes, not a contractual, but a beneficial claim (measured by legal rights between the executors and the beneficiaries), then the United States court would have jurisdiction over one as soon as over the other.

[3] It is urged by the defendants that the existence of citizens of New York as partners in the firm of Drexel & Co. is a bar to the maintenance of an action in the United States court, as the defendants contend that these partners are the real parties in interest, and that the plaintiff is not entitled to be recognized as a party litigant, resident in a state other than that of the defendants.

This brings us to the facts attending the making of the assignment, as they are presented by the testimony. On September 1, 1907, the defendant Louis D'Esterre married the defendant Anna Williams D'Esterre, who is still living. This defendant Louis D'Esterre was born and brought up in Brooklyn, attending the schools of that borough, and receiving no particular business education. Upon leaving high

school he went into business with his father and uncles at the Otto Huber Brewery for a few days, and then obtained employment in an electrical concern, where he earned $15 a week, which was the amount of his salary when he married. He thereafter engaged in the millinery business in Jersey City; but this business was unsuccessful, and the money which he put into it was lost. His living expenses for a time were contributed by his father, to such extent as he was able; but by the fall of 1910 he was in debt for household expenses and casual obligations which he had no immediate way of meeting. He had also, some six months previously, borrowed $5,000 upon a six months' note, to secure which he had made a mortgage of $5,000 on his share in the estate received by him from his mother as one of the heirs of Otto Huber, deceased. This estate was then subject to the life interest of Louis D'Esterre's grandmother, who was 70 years old and in good health. Louis D'Esterre had also made another assignment, to secure the sum of $1,000 and interest for borrowed money.

During the month of September, 1910, Louis D'Esterre consulted various commissioners or loan brokers, for the purpose of obtaining cash for his current needs and to meet the interest obligation upon the $5,000 note which was due October 29, 1910. This obligation was held by one Nahm, whose attorney at law, one Louis Wertheimer, died before the trial of this action. Wertheimer had demanded for his client payment of this interest, and in case of default threatened to foreclose the assignment to obtain the principal, which led Louis D'Esterre to seek a loan sufficient to pay these amounts, before the 29th day of October, 1910. In so doing he had some relations with an attorney named Mendel, who also died prior to the trial of the action, and to whom D'Esterre delivered an authorization to procure for him a loan in the sum of $14,500, to be secured by the interest of Louis D'Esterre in the Huber estate. From this Louis D'Esterre was to realize about $6,000. Mendel had, in some way not made clear by the testimony, invoked the good offices of one Herbert P. Queal, who had negotiated other transactions of this nature, and who took up with Drexel & Co. (a partnership composed of certain individuals in Philadelphia and certain other individuals who composed the New York firm of J. P. Morgan & Co.) the financing of the matter. This was done through an attorney, one Carrol R. Williams, and in consequence of his activities Mr. Queal, whose name had been in some way inserted in the authorization just mentioned (in the place of the name of Mendel), wrote Drexel & Co. upon October 28, 1910. This letter stated that Louis D'Esterre was entitled to upwards of $125,000, vested in him subject to the life estate of his grandmother, who was stated in this letter to have been 72 years of age on April 27, 1910. This letter offered to sell an interest amounting to $50,000, payable upon the death of the grandmother, for $28,000, and to furnish the papers and pay the fees of such counsel "as you shall select to pass on the legality of the transaction."

It appears that in the meantime some discussion had arisen with relation to the possibility of securing such a loan as D'Esterre had desired to seek through Mendel, and Wertheimer, the attorney for Nahm, had claimed the right to act for Louis D'Esterre, so as to protect the

interest of his client Nahm. The result of these negotiations was that upon November 1, 1910, Louis D'Esterre and Herbert P. Queal entered into an agreement by which Queal was authorized to sell a $50,000 interest in D'Esterre's portion of the estate of Otto Huber, deceased. Queal was to take care of all expenses and charges and to receive for his fees and for such charges any sum which might be obtained by such sale over and above the sum of $20,000. The matter was to be closed on or before November 15, 1910, in the city of Philadelphia, and notification was to be given to D'Esterre, through his attorney Wertheimer, not later than November 12, 1910, at which time the papers were to be submitted, and, if the matter was not closed under these terms, the authority of Queal was to cease.

It also appears that, in the meantime, through the assistance of Queal, D'Esterre had borrowed $150 from an attorney named Wells, who subsequently acted as attorney at law for Louis D'Esterre in matters which will be referred to later. This $150 was secured by a note indorsed by Queal, and was used to pay the interest upon the Nahm assignment. By this arrangement an extension of time for the payment of the principal to Nahm was obtained until the 15th of November, 1910, and, subsequently, to the 22d of November, 1910, in view of the agreement which had then been entered into to secure the money from Drexel & Co.

It also appears that on or about October 24, 1910, D'Esterre had agreed that Mendel should obtain for him a loan of $50,000, from which he should realize the sum of $18,250, and that Mendel subsequently sued D'Esterre upon the basis of this agreement; but the disposition of that litigation was entirely outside of the matters with which we are concerned in this action.

The communication of Queal to Drexel & Co. was followed by an interview between Queal and one Horatio G. Lloyd, a member of the firm of Drexel & Co., in Philadelphia. Mr. Lloyd did not at first think well of the proposition; but subsequently, after consultation with the plaintiff, Mr. Edward T. Stotesbury, a member of that firm, suggested that they might be willing to pay $22,000 for the assignment of the $50,000 interest in D'Esterre's portion of the Huber estate. Upon examination of the will of Otto Huber and a schedule of what was represented to be the assets of the Huber estate, an agreement was finally reached that Drexel & Co. would give the sum of $23,500; it having appeared in the meantime that Mrs. Huber (the grandmother) was 70 years old instead of 72. The matter was referred to Philadelphia counsel of Drexel & Co., H. Gordon McCouch, who was to pass upon the so-called "legalities" of the transaction. The assignments were to be submitted when drawn, and searches were to be made by the New York legal representatives of Drexel & Co., and Mr. Egerton L. Winthrop, Jr., of the firm of lawyers now representing the plaintiff in this action, was named as the attorney to do this work.

By November 18, 1910, the assignments had been prepared and the searches made showing the prior assignments to Nahm and to Reed, which the counsel for Drexel & Co. required should be taken up so as to leave the assignment for $50,000 as a first lien against D'Esterre's interest in his grandfather's estate.

The assignments to Drexel & Co. were executed in New York upon the 17th day of November, 1910, by Louis D'Esterre and wife, and acknowledged before notaries public in New York and Brooklyn. These assignments were submitted to McCouch by Queal, in Philadelphia, and a receipt given by which Drexel & Co. agreed to return the assignment if the transaction was not consummated. They were then given to Queal to record in Brooklyn, which was done on or about the 21st day of November, 1910, one each in the three offices where record was required. Upon notification of this recording, checks for the payment of the Reed and Nahm assignments were given to Queal, dated November 22, 1910, and, with these checks, assignments of the Reed and Nahm claims to Louis D'Esterre were obtained and recorded.

The testimony shows that these reassignments were made in order that Drexel & Co. might be subrogated for the amount of their advances, if the $50,000 assignment was not carried through. After these reassignments to Louis D'Esterre had been recorded, a letter from Winthrop, under date of November 22, 1910, was sent to McCouch informing him that the $50,000 assignment had been properly executed and recorded, so as to convey a valid title to the extent of $50,000 in the estates of Otto Huber and Lina D'Esterre, deceased; that reassignments of the Nahm and Reed claims had been properly recorded; and, also, that upon November 18, 1910, Winthrop had explained the matter to D'Esterre, who represented that he was not hard pressed, but intended to use the money to establish himself in the millinery business, and fully understood the effect of the assignment, which was satisfactory to himself and his wife.

On November 23, 1910, Louis D'Esterre, with Queal, went to the office of McCouch, in Philadelphia, where he signed the following paper, upon which was also written the following receipt:

"I, Louis D'Esterre of the borough of Brooklyn, city of New York, state of New York hereby direct Drexel & Company to disburse the sum of twenty-three thousand five hundred ($23,500) dollars, consideration for my sale to said Drexel & Company of fifty thousand ($50,000) dollars of all my right, title and interest in and to the estates of Otto Huber, Senior, my deceased grandfather and Lina D'Esterre my deceased mother to Drexel & Company, as follows:

Pay to the order of Arthur L. Reed	$ 1,020 00
Pay to the order of Julius Nahm	5,312 50
Pay to the order of Frank M. Wells	150 00
Pay to the order of Louis D'Esterre	13,517 50
Pay to the order of Herbert P. Queal for his commissions, counsel fees and disbursements	3,500 00
Total	23,500 00

"Dated New York, November 19, 1910. Louis D'Esterre.
"Witness: Herbert P. Queal.
"I acknowledge receipt of above checks aggregating $23,500.
"Philadelphia, Pa., Nov. 23, 1910. Herbert P. Queal."

At this time the three checks to the order of Wells, D'Esterre, and Queal were made out and delivered. A short time after the recorded assignments came into the hands of McCouch, who noticed that they had been executed to Drexel & Co., a corporation.

It was apparent that, upon proper showing, Drexel & Co. could compel reformation of these instruments, inasmuch as the description of the party paying the consideration was incorrect, in that Drexel & Co. was not a partnership and that no such corporation as Drexel & Co. existed. Negotiations were immediately started which resulted in the making of a new assignment, in triplicate, upon the 30th day of November, 1910, by Louis D'Esterre and his wife, in consideration of one dollar and other good and valuable consideration, but running to Edward T. Stotesbury, a member of the firm of Drexel & Co., and being for the purpose of ratifying and confirming the assignment previously made upon November 17, 1910. The instrument recited the incorrect description in the earlier assignment and the request of Drexel & Co. to make the new deed run to Edward T. Stotesbury, a member of said firm. This was done at the suggestion of McCouch, who testifies that it was customary, in order to avoid difficulty in the execution of papers where so many individuals were concerned, to have title placed in one member of the firm who would, in the course of the partnership business, account for the result of the transaction to his partners. This new confirmatory deed was recorded, and provided, as did the earlier instrument, for the payment of interest upon the sum of $50,000 after the death of the life tenant, and until the amount of the assigned interest should be paid over to the assignee.

Mrs. Huber, Sr., died, as has been stated, upon August 28, 1914; that is, within a little less than four years after the execution of the assignment. According to the testimony, the expectancy of the life tenant upon November 17, 1910, was 9.18 years, according to the Carlisle tables, and 8.5 years, according to the American mortuary tables. It also appears that the present value of $50,000, based upon the life of a woman 70 years old, computed according to the Carlisle tables, would be $32,241.40, and according to the American tables, $872 more.

After the death of Mrs. Huber, Sr., the defendant Louis D'Esterre, through Wells, who then acted as his attorney, communicated with Stotesbury, offering to pay the amount advanced with interest and asking for a reassignment upon such payment. This letter states that upon July 1, 1912, Louis D'Esterre executed an additional assignment in the sum of $70,000, as security for a loan from the Logan Trust Company of Philadelphia, and that he had guaranteed to his brother that his (Louis') remaining interest in the estate was at least $40,000. This letter also states that, according to the executors' accounting, Louis D'Esterre's share was $^{2}/_{63}$ parts of such estate, and that its value appeared to be about $80,000 instead of $160,000, as represented by said Louis D'Esterre in the assignment to Drexel & Co.

It appears from the testimony that, both in the assignment to the Logan Trust Company and in a further assignment to the Huguenot Trust Company, Louis D'Esterre stated that he had disposed of a $50,000 share in the Huber estate to Drexel & Co., and it also appears from the instruments of assignment to Drexel & Co. that the statement by Louis D'Esterre was to the effect that his share in the estate was $170,000, instead of $160,000, as recited in Mr. Wells' letter. It also appears that upon June 5, 1912, Louis D'Esterre had written Drexel &

Co. recalling to their attention that in November, 1910, he had disposed of a $50,000 portion of his interest in the estate of Otto Huber, of Brooklyn, N. Y., and that he desired to dispose of an additional $100,000 portion thereof. This letter D'Esterre testifies he had no idea would be favorably received. It was written upon the letter head of the H. H. Dean Co., bearing the words "Louis D'Esterre, Secretary and Treasurer." D'Esterre testifies that he offered to go into business with Dean, and that the letter heads were printed solely at the request of Dean, but that he never took office in such company, never put any money therein, and that it was done merely as a favor to Dean. Drexel & Co. promptly refused the offer of a further assignment, and also replied to the letter of Wells, in which Stotesbury, while admitting that his purchase had proved to be profitable through the death of the life tenant, had instructed McCouch, who wrote the answer, to advise Wells that he knew of "no reason why he should sell the same at any discount whatsoever."

The next step in the transaction was the bringing of the present action, in which Stotesbury filed a bill in equity alleging that he had no adequate remedy at law, and sought to avoid multiplicity of suits, relief to the effect that he should be declared entitled to immediate possession of $50,000 with interest from August 28, 1914, out of the interest of Louis D'Esterre in the estate of Otto Huber, deceased, and the estate of Lina D'Esterre, deceased; that Joseph Huber, as executor and trustee, should be required to pay to the plaintiff the sum of $50,000 with interest as aforesaid; that William H. D'Esterre, as administrator of the estate of Lina D'Esterre, should be directed to pay the sum of $50,000 with interest as aforesaid, in case it should be determined that the executor of Otto Huber should pay the share of Lina D'Esterre in her father's estate to her administrator; and that the parties should be enjoined from litigating in any other court the transfers above recited.

The defendant Joseph Huber, as executor, trustee, etc., takes no part in the controversy between the plaintiff and Louis D'Esterre, but has upon the trial insisted upon his objection to any exercise by this court of jurisdiction over the matters actually pending in the Surrogate's Court, viz., the administration of the estate under probate proceedings.

As has been stated, this court will confine its decree to a determination of the claims which may be enforced through Louis D'Esterre, when a final distribution or accounting may be had in the courts of the state of New York.

The defendant William H. D'Esterre, in the same way, while avoiding any participation in the controversy between the plaintiff and Louis D'Esterre, objects to the exercise of jurisdiction by this court in passing upon the rights of said D'Esterre, in and to the estate of Otto Huber, deceased, and merely presents to the court a statement, subject to said objection, of such distribution as has already been made in the estate of Lina D'Esterre, deceased.

The defendants Louis D'Esterre, and Anna Williams D'Esterre, his wife, answered charging fraud, duress, and usury, as well as failure

of jurisdiction through misjoinder of parties. The answer as amended avoids any charge of fraud, but repeats the defense of usury, unconscionable contract, and misjoinder of parties. On the trial the objection to jurisdiction, because of the alleged transfer of a chose in action, was presented, and the defendants also offered to repay the sum of $23,500 with interest, if the court so decreed.

Upon the trial Louis D'Esterre testified that his understanding had been that the amount of such loan was but $20,000, and disavowed knowledge of the $3,500 paid to Queal to cover his fees and expenses; but, on being confronted with the documents in question, D'Esterre admitted that the actual amount involved, and for which he would be liable in the event that the claim should be held valid as a loan, was the said sum of $23,500.

The issue which must be first considered is that of the jurisdiction of this court, based upon the citizenship of the parties. The plaintiff is a resident of the state of Pennsylvania, but it is claimed that the real parties plaintiff are the members of the firm of Drexel & Co., and that Mr. Stotesbury, even though he has paid back the money to the firm, has not thereby obtained title either for himself or as trustee for his partners.

The basis for this contention is that the making of the first assignment to Drexel & Co., a corporation, was not superseded by the making of the second assignment to Mr. Stotesbury as an individual. It is not questioned that by "Drexel & Co., a corporation," was intended the firm of Drexel & Co., a partnership; nor is it suggested that any corporation of that name has acquired an interest in the subject-matter of the assignment. But the defendants urge that, inasmuch as by the mistaken title it was intended to transfer to certain individuals a share in the estate of Otto Huber, deceased, and inasmuch as the identity of those individuals is admitted, the mistake of calling Drexel & Co. a "corporation" can be overlooked. They consider that the effect of both assignments was to transfer to Drexel & Co., as a copartnership, certain rights which have never been given up by the partners. The legal instrument entered into by Louis D'Esterre for the sake of correcting the mistake is said by the defendants to be a conveyance to Mr. Stotesbury as a "dummy," and that he cannot without a properly executed assignment get actual title. Of course, an actual assignment would be assailed by the objection under section 24 of the Judicial Code. This would, however, be of no effect if, as held in Brown v. Fletcher, supra, the interest of Louis D'Esterre was not a chose in action. But, further, the first assignment was a nullity except by subrogation, and Drexel & Co. could transfer any rights they had to Stotesbury or any other person who could take title to the property, and who would be accountable to them only by means of an outside agreement with which we are not concerned. If Louis D'Esterre did not contest the right of Drexel & Co. to create through him a voluntary and possibly unenforceable trusteeship, then he cannot now repudiate the effect of his own transfers by suggesting that Drexel & Co., as a firm, might have been defrauded by Mr. Stotesbury. The firm received back its money.

The difficult questions in this case are based upon the proposition left open for determination in Brown v. Fletcher, supra, when the court leaves the issue for the lower court as to the effect of an assignment of a certain amount in dollars from a vested remainder, in real estate or even in personalty. This brings under consideration certain decisions of the New York courts as to the assignment of a sum of money in payment of what was intended to be a loan, and also brings into consideration the acts and purposes of the defendant Louis D'Esterre in making the assignments in question.

From this two questions are presented:

[4] I. Is an assignment of a definite amount of money out of an undivided share in an estate, comprised of real and personal property, valid as an enforceable transfer? The right of sale or the existence of a so-called equitable conversion must be taken into account in determining this point. In the will of Otto Huber, a power of sale was granted. Whether there was an equitable conversion of his real estate into personalty, for the payment of the legacies in question, or whether the action of the executors in turning the estate into cash for the payment of the bequests makes an answer unnecessary, an assignment could certainly be valid if the interest of Louis D'Esterre exceeded the amount of $50,000 and interest. The transfer of a $50,000 interest in real estate conveys a title which could be made the basis of a partition suit if the executors do not reduce the estate to cash, or if the estate is partially reduced to cash and the balance is left undivided in real estate.

[5] II. Under the laws of New York, will any assignment of an interest measured by a liquidated amount of money be considered as payment for a loan, if the transfer be in consideration of the advancement of cash to meet the requirements of one who is in straightened circumstances?

Before discussing these New York cases, it must be determined whether the law of New York or of Pennsylvania governs the transaction in question.

It is apparent that the plaintiff seeks to establish the instrument in question as a deed or bill of sale of actual properties, title to which was vested in Louis D'Esterre subject to the life estate of his grandmother and the statutory rights of his father. In this sense the part of the estate then consisting of real estate (even if the executors had power of sale) could be conveyed only by a deed sufficient under the law of New York. The personal property was in the jurisdiction of the Surrogate's Court in Kings county and subject only to a transfer which was valid in that court.

In order to support the contention that the contract was made in Philadelphia, that delivery was had there, and that the validity of the same should be tested by Pennsylvania law, the plaintiff seeks to separate the assignment from the transfer of the land in completion of the transaction. But, if so, he could not bring himself within Brown v. Fletcher, supra. A contract to convey is not a conveyance, nor is it the transfer of a share in a specific res.

The elementary proposition that a contract is governed by the law

of the place where the contract is made is urged by the plaintiff in asking that the laws of Pennsylvania be held to cover the assignment by D'Esterre. The plaintiff cites in support of his contention such cases as Scudder v. Union National Bank, 91 U. S. 406, 23 L. Ed. 245, where the contract related to a chose in action, or Equitable Life Society v. Clements, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497, Manhattan Life Insurance Co. v. Johnson, 188 N. Y. 109, 80 N. E. 658, 9 L. R. A. (N. S.) 1142, 11 Ann. Cas. 223, and Staples v. Nott, 128 N. Y. 403, 28 N. E. 515, 26 Am. St. Rep. 480, in which the contract was valid in the place where made, but security was furnished which was located in a jurisdiction where the contract would be invalid. So, also, Miller v. Tiffany, 68 U. S. (1 Wall.) 298, 17 L. Ed. 540, which is based upon a citation from Andrews v. Pond, 38 U. S. (13 Pet.) 65, 10 L. Ed. 61, as follows:

"The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance, and, if the interest allowed by the laws of the place of performance is higher than that permitted at the place of the contract, the parties may stipulate for the higher interest, without incurring the penalties of usury."

The defendant cites Green v. Van Buskirk, 74 U. S. (7 Wall.) 139, 19 L. Ed. 109; Loftus v. Farmers' & Mech. National Bank, 133 Pa. 97, 19 Atl. 347, 7 L. R. A. 313; Pullman's Palace Car Company v. Pennsylvania, 141 U. S. 18, 11 Sup. Ct. 876, 35 L. Ed. 613; Schmidt v. Perkins, 74 N. J. Law, 785, 67 Atl. 77, 11 L. R. A. (N. S.) 1007, 122 Am. St. Rep. 417—to the effect that the place of domicile governs certain contracts having to do with the activities of an individual, but that this may be overruled by the laws controlling the property in its actual location. He also cites Genet v. Hudson Canal Co., 13 Misc. Rep. 409, 35 N. Y. Supp. 147, U. S. v. Fox, 94 U. S. 315, 24 L. Ed. 192, McGoon v. Scales, 76 U. S. (9 Wall.) 23, 19 L. Ed. 545, and Boyce v. City of St. Louis, 29 Barb. (N. Y.) 650, to the effect that contracts relating to land, or directly affecting property located within the direct control of courts in a certain jurisdiction, will be construed according to the laws of that jurisdiction. The defendant infers therefrom that contracts, relating to the undivided property of an estate, have in necessary contemplation the statutory limitations or obligations placed upon the property (real and personal) of the estate, as distinguished from the mere personal rights of the parties entering into the contract.

On this question the defendant points out that the executors of Otto Huber were given power of sale but were not directed to sell his estate, and that at the death of the life tenant some of the real estate had not in fact been sold, but that the interest of the various devisees has attached to the real estate itself. They urge that this was within the contemplation of any person contracting as to the estate, and that therefore the laws relating to the assignment of rights in real estate in Kings county would control any transfer of rights in that real estate. They also point out that the instruments in question were actually executed and turned over to an attorney for record in New York. They

contend that the delivery in Philadelphia was but a step in the making of the contract, which would not of itself cause the contract to be judged by Pennsylvania standards of law.

If some penal enactment or statutory regulation as to entering into this contract, or agreeing to the terms of this contract, were prohibited by the laws of Pennsylvania, it could not be contended that the contract with which we have to deal would not be subject thereto. On the other hand, such laws as recording acts or statutes as to the effect of the assignments in question would certainly be governed by the laws of New York, where the contracts were to be carried out and where title to the subject-matter of the contracts was within control of the New York courts and would have to be perfected.

A statute of limitations or a statute of frauds affecting the transfer under the laws of New York would be applicable to a transaction of this sort, even though a contract to transfer, valid under the laws of the state of Pennsylvania, might have been made by which, in that state, or in the United States courts, the parties could be compelled to carry out their contract so as to give good title in the state of New York.

In the present case, the contract itself was entered into in Pennsylvania. Under the laws of Pennsylvania, as shown by the decisions of the courts (In re Phillips, 205 Pa. 511, 55 Atl. 212), a complete transfer of tangible or intangible property is valid if the parties entering into the transfer actually intended to sell a property interest, as opposed to transferring property to pay back borrowed money with more than the legal rate for the loan. The usury statute of the state of Pennsylvania provides that the amount of the loan with legal interest shall limit recovery and does not make the entire transaction void from inception; but the Pennsylvania law also seems to recognize a distinction between a completed transfer, with the time of payment conditional (which is a valid sale), and a promise to pay back an amount more than sufficient to cover any possible accumulation of interest and principal (which is usurious in any jurisdiction).

We have therefore a transaction which could be validly undertaken in Pennsylvania only if the contract was not to secure a loan. But to find that the transfer of this property was merely an usurious loan is to go much further. It is to conclude that the rules of law known to the plaintiff and expressly called to the defendant's attention, the deliberate purpose of both parties in so entering into an agreement as to make it legal instead of illegal, and the careful action of those concerned so as to make it plain that they understood what would be illegal and were avoiding an illegal contract, were but subterfuges and evasions.

When we come to the law of the state of New York, we have, however, an additional suggestion from some recent cases in the Appellate Division of the Supreme Court of the State of New York, First Department, one of which, Hall v. Eagle Insurance Co., 151 App. Div. 815, 136 N. Y. Supp. 774, affirmed 211 N. Y. 507, 105 N. E. 1085, discusses the proposition at length.

As was said in Brown v. Fletcher, supra, an actual determination of the merits as to an assignment of a $35,000 interest from a $50,000 estate is not settled by a holding that the court had jurisdiction to pass upon the question, and the New York cases present a different issue than that based only upon In re Phillips, supra.

In Hall v. Eagle Ins. Co., 151 App. Div. 815, 136 N. Y. Supp. 774, the Appellate Division of the Supreme Court has in effect held that the usury statute of New York, which reads as follows:

"Sec. 370. The rate of interest * * * shall be six dollars upon one hundred dollars, for one year. * * *

"Sec. 371. No person * * * shall, directly or indirectly, take or receive in money, goods or things in action, or in any other way, any greater sum or greater value, for the loan or forbearance of any money, goods or things in action, than is above prescribed."

"Sec. 373. All * * * conveyances * * * whereupon or whereby there shall be reserved or taken * * * any greater sum * * * for the loan or forbearance of any money * * * than is above prescribed, shall be void." Consolidated Laws 1909, c. 20.

—is the equivalent of an enactment by the Legislature that any assignment of an interest in property exceeding in value the principal and interest for the estimated life of a life tenant, upon the amount given as consideration, shall be deemed usurious and to be no more than a contract of loan with security therefor, even though presented in the form of an actual sale for a fixed consideration.

The Hall Case holds that the transfer of a fractional share or an uncertain interest in a property or devise would be valid. This seems to be stated as correct, whether applied to personalty or realty. But when the uncertain element is merely the length of postponement of payment, and when the future establishes the time of payment as within the period in which legal interest would equal the amount assigned, then the laws of New York are to the effect that an assignment to reimburse the lender must necessarily be construed as an usurious loan. In the Hall Case the court, however, held that an offer to repay the loan might be recognized and the transaction treated as void in part only. But in Hartley v. Eagle Insurance Co., 167 App. Div. 230, 152 N. Y. Supp. 686, the court said that where the only issue was the validity of the transaction, and where no such tender had been made, the entire agreement must fall.

The present case is distinguished from the Hall Case, in that no mortgage was given to secure the assignment or to repay the loan. D'Esterre evidently was seeking a loan, but he was told plainly that such a loan could not be made. If he had applied to an institution in the business of discounting future properties for their present value according to the insurance tables, the commercial value of what he was obtaining would have as a minimum the price reached by computing interest for the probable life of the life tenant, according to some recognized table. This might have been the basis of a loan, but evidently no institution was willing to make a loan upon the estate of Otto Huber of such a nature. It was necessary to find an individual who would gamble, on the one side, as against D'Esterre, who was gambling upon

the other side, when the matter was viewed from the standpoint of the single transaction. It is evident that the person advancing the money would advance as little as possible in order to make his chance of loss upon the gamble as little as possible.

It may be policy to protect individuals by prohibiting all such transactions, but they do not all involve usury. It is not gambling in the criminal sense, and it is difficult to see how the New York courts would view a contract of this sort, or consider it usurious, if the date of fulfillment of the condition had run beyond the time when the principal and interest equaled the amount of the assignment. If the transaction is void from its nature, then it is difficult to see why it should be recognized as valid, even if the amount of principal and interest should far exceed the figures of the assignment.

But, as has been said, the transaction of the deed with which we have to deal is not in all respects like that in the Hall Case. The instruments in the record, as well as the subsequent instruments executed by Louis D'Esterre, show his intent to treat the transaction as a sale, but yet a sale which was in effect a mortgage with illegal interest. He needed protection as all improvident persons, who are not capable of earning as much as they spend, need control in their transactions. Therefore, while it does not seem possible to find that in this particular instance the parties were intentionally making an usurious loan (even though the brokers originally endeavored to obtain a loan before they found that this was impossible), yet the defendant Louis D'Esterre may be entitled to some equitable relief as actually granted by the New York court in the Hall Case.

This involves the question which has been reserved, as to the possibility of assigning a $50,000 share in an estate involving real estate or undistributed and unliquidated securities. The very provisions of the law relating to partitions and the protection of persons holding valid liens for liquidated amounts lead us to the conclusion that there is no inherent difficulty, legal or otherwise, in selling an interest in real property, even comprising a decedent's estate, which interest should be measured by the amount involved instead of by a fractional interest based upon arithmetic or survivorship between the members of the family.

But whether the transfer was a fair sale of such an interest depends upon the facts, and also upon the knowledge of the parties. It is urged that Queal was the agent for D'Esterre, even though Drexel & Co. intrusted the recording of certain papers and the performance of some steps in the transaction to him. The defendant seeks to throw responsibility for knowledge of D'Esterre's condition upon Drexel & Co. by charging that Queal was Drexel's agent, knew D'Esterre's real position, including his desire to secure a loan, and that Queal was Drexel & Co.'s agent in determining how to evade the usury statute.

While Queal was apparently not acting for Drexel & Co., and while his services as their agent in certain ministerial acts would not make them responsible for matters known only to him, it is nevertheless true, as claimed by the defendant, that Queal had information of D'Esterre's desire to obtain a loan and to give a $50,000 share in the estate as

security. It was Queal who informed D'Esterre that such a contract would not be considered. This was in the fall of 1910, and the case of Mercantile Trust Co. v. Gimbernat, 134 App. Div. 410, 119 N. Y. Supp. 103, had been decided in November, 1909, to the effect that an assignment of a share in a remainder over a limited estate was nothing but a cover for an usurious loan, when the time of payment of the remainder was definite and the amount of the assignment covered more than interest upon the sum advanced, with various items for expenses which were not proven to the satisfaction of the court. Further, the case of Wetzlar v. Wood (reversed in 143 App. Div. 311, 128 N. Y. Supp. 501) had been decided at Special Term to the extent of upholding a purchase of an interest in an estate. The basis of the decision at Special Term was certain evidence in the form of affidavits by which the assignor was held to have been estopped from showing that the transaction was not one of legitimate sale. These decisions were known to all of the parties, inasmuch as the attorneys for Drexel & Co. used them as the basis of their opinion in considering whether the laws of New York or of Pennsylvania would apply to the transaction, and whether even under the laws of New York the transaction would be invalid.

It is urged by the plaintiff in the present action that any one relying honestly upon the propositions of law upheld by the courts of the state at a given time could not be held to have acted in any fraudulent or inequitable manner if subsequently thereto the rules of law were changed by judicial decision. Gelpoke v. City of Dubuque, 68 U. S. (1 Wall.) 175, 17 L. Ed. 520; Muhlker v. N. Y. & Harlem R. R., 197 U. S. 544, 25 Sup. Ct. 522, 49 L. Ed. 872; Harris v. Jex, 55 N. Y. 421, 14 Am. Rep. 285; and others. While this proposition is true, it does not apply in the present case, for the subsequent decisions of the courts of New York have not constituted a reversal or change from what had been the law previously, but are merely determinations or definitions of what under the laws of New York constituted inequitable (that is, unconscionable) contracts. If such a contract should be held inequitable or unconscionable, it possessed the same qualities and the decision should have been the same prior to the announcement of the law, and an honest opinion that the courts would hold to the contrary, or even an honest opinion that the previous decisions of the court were to the contrary, would not mean that the law had been changed.

The principles of equity are the same, and no decision has been cited showing an actual finding that such a contract was not unconscionable or inequitable. In the Gimbernat Case, as in Hall v. Eagle Ins. Co., 151 App. Div. 815, 136 N. Y. Supp. 774, and Otten v. Freund, 150 App. Div. 434, 135 N. Y. Supp. 59, the court found the transaction to be in fact a loan, and hence that the assignment was an evasion of the usury statute, for the reason that security of some sort accompanied the assignment and because the amount of the payment exceeded the loan and legal interest.

In the cases of Leavitt v. Enos, 155 App. Div. 584, 140 N. Y. Supp. 862, and Hartley v. Eagle Ins. Co., supra, an assignment of a definite sum, of which the payment might be delayed, was held void for usury,

because the amount as advanced was much less than the face of the assignment. So, also, in Wetzlar v. Wood, supra, although security accompanied the assignment, this security was only to protect against a contingency which might render the assignment ineffectual prior to the date of payment. In effect, the decision in Wetzlar v. Wood, supra, was based upon the inherent nature of the transaction, and not upon the fact that security for a so-called loan was given as well as the assignment of an estate payable in the future.

The court in Hall v. Eagle Ins. Co., supra, discussed at length what constitutes evasion of the usury law, and states that it is the law in England, as well as the United States, that any agreement to return the principal in any event, and to agree to give a profit beyond the legal rate of interest because of the necessity or improvidence of the borrower, makes the contract usurious. The authority for this is Colton v. Dunham, 2 Paige (N. Y.) 267, and cases cited therein.

It is evident that the principle stated is the law in substantially all jurisdictions, and it is also evident that the cases decided by the Appellate Division of New York, with the exception of Leavitt v. Enos and Hartley v. Eagle Ins. Co., supra, fall within this rule because the facts showed, in each case, that a loan was intended and that the amount to be paid was beyond any possible expenditure with interest added. In Leavitt v. Enos, it would appear that the court was satisfied as a matter of fact that payment would be made before the interest should cause the advance to mount up to the face of the assignment, and no different principle is presented.

We have not, therefore, doubt as to what was or is the law of New York, but a flat issue as to what was the transaction between Drexel & Co. and Louis D'Esterre in the present case.

D'Esterre was perfectly willing to make an usurious and invalid loan and to cover his acts up so that the invalidity could not be urged by him in the future. In other words, he was in a position where the New York law would protect him even against his own intent and consent. He readily acquiesced when told that he could not borrow money but would have to sell a share in his expectations. He also readily acquiesced when he perceived the necessity of answering the inquiries by Mr. Winthrop so as to deceive Drexel & Co. and their representative and to make out that he was not in financial straits, and was therefore mentally capable of entering into a contract of straight bargain and sale.

There is nothing in the evidence to indicate that Drexel & Co., or that Winthrop, who acted for them, intended to effect an assignment which should really cover up an usurious loan. On the contrary, they were unwilling to enter into that transaction, and there is no reason to impugn their motives. If the transaction was void or voidable because of usury or lack of equity, nevertheless this is a result purely from a determination of law, and not from any deceit or lack of good faith on the part of Drexel & Co. But yet if the transaction of itself is one which shows the advance to have been a loan, and if the only legal contract which could be based thereon would be an assignment in the form of a mortgage to secure the repayment of the loan with legal

interest, then any assignment which should provide for the repayment of more than legal interest must fall in one of the two categories. It is either void as usurious, or inequitable (i. e., invalid) as an attempt to enter into a contract which a court of equity could not enforce.

In the present case the form of the contract was drawn in the course of transactions in which Louis Wertheimer acted as attorney for D'Esterre. This attorney also acted for the lender in the case of Otten v. Freund, supra, which was based upon what purported to be the purchase of a legacy and which had not been declared illegal at the time the Drexel transaction was completed.

It is evident that Mr. Stotesbury treated the matter like the purchase or sale of merchandise. Assuming that such a contract or purchase could be made legally, he was interested only in securing it at as cheap a price as possible, knowing that there was a physical possibility that payment would be deferred until he should lose money, if interest were added to the amount advanced. So in the purchase of merchandise, the value of the property might diminish and a loss result. Mr. Stotesbury did not approach this transaction from the standpoint from which an insurance company would figure the present value of the amount assigned; but taking that present value as the basis of what would make the maximum of the loan, and assuming that his attorneys' advice was correct and that the transaction was legal, he bid a smaller amount upon the chance of a profit and ran the risk of a chance of loss. There would be no usury nor usurious intent in that sort of a bargain; but, nevertheless, if Mr. Stotesbury had accepted, upon his attorney's advice, an assignment secured by mortgage of the property in the Huber estate, he would have entered into an agreement the legal effect of which would be to convict him under New York law of making an usurious contract.

So in the present instance, apparently with the best of intentions on the part of Mr. Stotesbury, with the most honorable and careful investigation and action on the part of his attorneys both in Philadelphia and in New York, and with the evident purpose on the part of D'Esterre and Queal to reach a bargain by which D'Esterre should transfer an interest in his grandfather's estate for that sum of money which he was willing to accept, and with evident appreciation on the part of D'Esterre that this could not be done legally in any form except that of a direct bargain and sale, the parties all joined in the making of an agreement which it was thought would avoid the objections made by the Appellate Division to other transactions, which had been held to be either usurious or inequitable, and yet which all the parties concerned ought to have understood involved one of the very difficulties or impossibilities which they thought they were avoiding.

The assignment provides for the payment of interest after the death of the life tenant. Although the transfer is supposed to be absolute, although no benefit and no use of the money would run to D'Esterre after title became absolute and the money was payable, nevertheless D'Esterre agreed to pay interest on the amount of the assignment in case any difficulties or delay in payment should result.

It may be assumed that this would insure D'Esterre's aid in a prompt delivery to Stotesbury; but nevertheless it shows that the price upon

which the bargain and sale was intended to be based was that outside price at which all of the parties thought loss to Stotesbury was impossible, and upon which Stotesbury and D'Esterre were willing to dicker from the standpoint of a commercial sale.

If therefore we go back to the original proposition, as held in Brown v. Fletcher, supra, that the assignment must be an absolute transfer of something that can be delivered or transferred, and if the value of this transfer is fixed by its commercial availability, then the present value of a certain share in or claim to the real estate and personal property, which could not be delivered for a certain length of time (during which according to the probabilities of life interest would run), was the maximum from which standpoint the speculation in value began.

As has been held by the Appellate Division, a contract starting out with the maximum amount which could be considered as security for a loan, and with a bargain as to the possibilities of increase or diminution in the value of the property transferred, when coupled with an agreement to pay interest if delay should result in the actual transfer when such transfer could be demanded and under circumstances where the parties are plainly seeking to avoid an agreement which upon its face would be usurious, must be held to be legally an evasion of the usury statute. Whether it is equivalent to an usurious transaction may or may not follow.

The alternative, applied by the Appellate Division in certain cases, of holding that equity need not necessarily find a transaction to be usurious and therefore void, solely because an intent to evade the usury statute was present (as in cases where the court rendered a decision that, upon readiness to repay the sum with interest, equity could direct such a result), would seem to be proper in a case like the present, where the intent of the parties was to obey the law but the effect of the bargain was to disobey the provisions of the statute, and where it would be unconscionable and inequitable to allow either side to profit beyond what would have been strictly legal if there had been no basis for the interposition of a court of equity. There certainly would be no basis for compelling the parties to accept a contract based upon an agreement to loan money for the expected term of the life tenant, that is to go into the insurance business and to make an individual contract upon the basis of the general course of business. The actual vesting of title under the assignment of this case happened, in so far as it could vest, within four years of the execution of the paper. The expected term of life on which the present value would be estimated was in the neighborhood of nine years. As a matter of fact, the transaction has already stood for nearly six years, and it may not be possible to obtain payment of any moneys at the hands of the executors for some time in the future. The result of such action may be to diminish the total amount which D'Esterre may ultimately receive, or possibly to affect only the balance payable to him and claimed by other assignees or creditors. But with that we have nothing to do. The action of a court of equity on the present facts should be to hold that the assignment was unconscionable in exceeding a fair sum to cover the amount paid, with interest and proper allowance for profit and expenses, now increased by the necessity of bringing suit.

When viewed from the evident good faith of the plaintiff in assuming that he was standing on equitable as well as legal rights, this situation requires the court to enter a decree dismissing the bill as based upon an unconscionable and inequitable contract, upon the condition and in case the defendant Louis D'Esterre pays to the plaintiff the amount advanced by him, with legal interest to the date of payment, and with such profit as may be directed by the court, and with such allowance in lieu of costs as may be fixed by the court.

GILCHRIST TRANSP. CO. v. GREAT LAKES TOWING CO. (four cases).
FRANKLIN TRANSP. CO. v. SAME.

(District Court, D. New Jersey. October 16, 1916.)

1. TOWAGE ⟸11(1)—RELATION AND DUTIES OF TUG TO TOW.
The general rule respecting the duty and liability of one undertaking towing service is that he is not an insurer, nor required to use the highest possible degree of skill and care, but is bound to exercise reasonable skill and care in everything relating to the work undertaken.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⟸11(1).]

2. TOWAGE ⟸15(2)—SUIT FOR INJURY TO TOW—BURDEN OF PROOF.
While the burden is on the one who asserts negligence to prove it, and ordinarily the mere fact that a tow has been injured does not raise a presumption of negligence on the part of the tug, still the mere occurrence of an injury may under some circumstances raise a presumption of negligence and cast the burden of proof on the tug.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⟸15(2).]

3. TOWAGE ⟸11(1)—RELATION AND DUTIES OF TUG TO TOW.
A tug in her home waters is chargeable with knowledge of the ordinary currents and tides, channels, depth of water, and well-known obstructions.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⟸11(1).]

4. TOWAGE ⟸11(1)—RELATION AND DUTIES OF TUG TO TOW.
A tug impliedly warrants that she has sufficient power and ability to perform the service which is to be undertaken under conditions which are to be reasonably anticipated.
[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⟸11(1).]

5. TOWAGE ⟸11(3)—RELATION AND DUTIES OF TUG TO TOW.
A tug is required to know under the conditions then prevailing or reasonably to be expected, whether it is safe to make the proposed venture, although a mere mistake in judgment in such respect is not sufficient to charge her with negligence; but the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made.
[Ed. Note.—For other cases, see Towage, Cent. Dig. § 13; Dec. Dig. ⟸11(3).]

6. TOWAGE ⟸11(7)—INJURY TO TOW—NEGLIGENCE OF TUGS—COLLISION WITH BRIDGE PIER.
Two of respondent's tugs belonging to the port of Chicago undertook to move a large ship of libelant, which was without motive power, from the South branch to the North branch of Chicago river. Owing to the

southerly current they were unable to take her through the draw of the Washington Street bridge and were obliged to obtain assistance. When they reached the Lake Street bridge, and attempted to pass through the westerly draw, her starboard bow was struck by the current from the main river to the eastward, and was forced against the west pier and injured. *Held*, that the tugs were in fault and liable for the injury, in that they were without sufficient power to safely handle the tow under the conditions, which were not shown to be unusual, and should have known such fact.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 19; Dec. Dig. ⟸11(7).]

7. TOWAGE ⟸15(2)—INJURY TO TOW—FAULT OF TUGS.

Injury to a large steamer while being moved by tugs from a slip in Chicago river, by striking her stern against a pier on the opposite side of the river, *held* on the evidence not due to the fault of the tugs, but to the failure of the master to make fast a checking line to the pier as directed.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⟸15(2).]

8. TOWAGE ⟸11(6)—INJURY TO TOW—FAULT OF TUGS.

Two tugs towing a large steamship, at the time without motive power, from Milwaukee to Chicago, *held* in fault and liable for allowing her to drift into collision with another anchored vessel off Chicago harbor, while they were changing from lake to harbor lines.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 18; Dec. Dig. ⟸11(6).]

9. TOWAGE ⟸15(2)—SUIT FOR INJURY TO TOW—DEFENSES—INEVITABLE ACCIDENT.

A tug, which relies on inevitable accident as a defense to a suit for injury to her tow, must show what the cause of the injury was, or all possible causes, and in either case that the result was inevitable, in the sense that it occurred in spite of everything that nautical skill, care, and precaution could do.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⟸15(2).]

10. TOWAGE ⟸11(5)—INJURY TO TOW—FAULT OF TUG.

The grounding of a barge while being towed from Erie harbor, and after she had reached a point outside the piers, *held* due to inevitable accident, for which the tug was not liable, in that the wind suddenly changed in direction and materially in velocity, and with the current thereby caused drove the barge against the side of the channel, although the tug under usual conditions was fully able to handle it.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 17; Dec. Dig. ⟸11(5).]

In Admiralty. Four suits by the Gilchrist Transportation Company and one by the Franklin Transportation Company against the Great Lakes Towing Company. On final hearing. Decree for libelant Gilchrist Transportation Company in actions Nos. 1 and 3; other libels dismissed.

Oscar D. Duncan, of New York City, for libelants.
H. D. Goulder, of Cleveland, Ohio, for respondent.

HAIGHT, District Judge. The Gilchrist Transportation Company instituted four separate suits against the Great Lakes Towing Company to recover damages for injuries claimed to have been suffered by cer-

tain of its vessels, due to negligent towage on the part of certain tugs of the respondent. The Franklin Transportation Company likewise instituted a suit against the same respondent to recover damages suffered by it through the same cause. As the general principles applicable to the five cases are the same, the decision of each can be more conveniently announced in a single opinion, although it will be necessary to discuss them separately.

[1] The general rule respecting the duty and liability of one undertaking towage service for another is that the former is bound to exercise reasonable skill and care—that which prudent navigators usually employ in similar services—in everything relating to the work which has been undertaken, until it is accomplished, and is responsible for any damages which may result to the tow as a result of the failure to perform that duty; he is not an insurer, nor required to use the highest possible degree of skill and care. The Webb, 14 Wall. 406, 20 L. Ed. 774; The Margaret, 94 U. S. 494, 24 L. Ed. 146; The J. P. Donaldson, 167 U. S. 599, 603, 17 Sup. Ct. 951, 42 L. Ed. 292.

[2] While the burden is on the one who asserts negligence to prove it, and, ordinarily, the mere fact that the tow has been injured does not raise the presumption that the tug has been negligent (The J. P. Donaldson, supra), still the mere happening of an accident may, under some circumstances, raise a presumption of negligence, and cast upon the tug the burden of demonstrating that it was not due to any failure of duty on her part, such as that the accident was one of those inevitable occurrences for which no one is to blame (The Webb, supra, 14 Wall. 414, 20 L. Ed. 774; Vessel Owners' Towing Co. v. Wilson, 63 Fed. 626, 11 C. C. A. 366 [C. C. A. 7th Cir.]; The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83 [C. C. A. 2d Cir.], and cases there cited; The Marie Palmer, 191 Fed. 79 [D. C. Ga.], and cases there cited). The courts have announced various rules which serve as guides for determining whether, in a given case, a tug has performed the duty thus cast upon her.

[3-5] Three of such rules are pertinent to two of the suits at bar, viz.: (1) A tug, in her home waters at any rate, is chargeable with knowledge of the ordinary currents and tides, the channels, depth of water, and well-known obstructions. The Margaret, supra; The T. J. Schuyler v. The Isaac H. Tillyer, 41 Fed. 477 (C. C. E. D. Pa.); Vessel Owners' Towing Co. v. Wilson, supra, and cases there cited; The George Hughes, 183 Fed. 211, 105 C. C. A. 643 (C. C. A. 2d Cir.); The Marie Palmer, supra. (2) She impliedly warrants that she has sufficient power and ability to perform the service which is to be undertaken, under conditions which are to be reasonably anticipated. Dunn v. The Young America, Fed. Cas. 4,178 (D. C. E. D. Pa.); The E. T. Williams, 126 Fed. 871 (D. C. S. D. N. Y.), affirmed 139 Fed. 231, 71 C. C. A. 357 (C. C. A. 2d Cir.); The J. S. T. Stranahan, 151 Fed. 364 (D. C. S. D. N. Y.), affirmed 165 Fed. 439, 91 C. C. A. 493 (C. C. A. 2d Cir.); The Startle, 115 Fed. 555, 560, 561 (D. C. Del.). (3) And she is also required to know whether, under the conditions then prevailing or reasonably to be expected, it is safe to make the proposed venture, whatever it may be. The Margaret, supra; The

T. J. Schuyler v. The Isaac H. Tillyer, supra; Vessel Owners' Towing Co. v. Wilson, supra; The J. S. T. Stranahan, supra; The George Hughes, supra; The Nannie Lamberton, 79 Fed. 121 (D. C. S. D. N. Y.); The Allie and Evie (D. C.) 24 Fed. 745, 748 (D. C. S. D. N. Y.). However, a mere mistake in judgment in this latter respect is not sufficient to charge her with negligence, but the error must be one which a careful and prudent navigator, surrounded by like circumstances, would not have made. The Startle, supra, 115 Fed. 564; The Allie and Evie, supra. The latter of these rules is, to a great extent, the necessary result of and intimately connected with the first two, but in connection with them requires in all cases, as they do not necessarily, the taking into account of the condition of winds and weather. It follows from these rules that if, in any given case, an accident can be attributed to a lack of knowledge on the part of a tug of any of the things which it is required to know, as above stated, or, with the limitation before mentioned, to the inadequacy of the tug to perform the service she has undertaken, then she has not fulfilled her full measure of duty to the tow. Each case at bar will now be separately considered in the light of these general principles and rules.

[6] 1. What has been termed by the parties as action No. 1 has to do with an injury claimed to have been sustained by the Gilchrist Transportation Company's ship Neptune on the 25th of April, 1912, while in tow of two of respondent's tugs. On the day preceding the accident the tugs, at the libelant's request, and pursuant to a season contract for towage, undertook to move her from the place where she was lying in the South branch of the Chicago river to a point in the North branch. She was without motive power, steering gear, or a crew, except six or seven men used for the purpose of working the hatches, handling the lines, loading, etc. At the time the towage service was undertaken, therefore, she was completely within the control of the tugs and dependent upon them for guidance and movement. The first day she was towed to the Washington Street bridge in the South branch, but the tugs were unable to pull her through that day. However, with the assistance of two other tugs, they succeeded in doing so on the following day. She also passed safely through another bridge, but in attempting to pull her through the Lake Street bridge her port bow collided with the westerly stone abutment of the bridge. As a result she was more or less damaged, the extent being a matter of considerable conflict in the evidence. The main (north and south) branches of the Chicago river meet at about where the last-mentioned bridge is located. Owing to a drainage canal, the water of the Chicago river does not flow, as would be natural, towards the lake and in the same direction in which the vessel was being towed, but in the opposite direction. Consequently, when the boat and the tugs reached the Lake Street bridge, they were confronted with an opposing current, which caught the vessel on her starboard side.

The libelant's version of the accident, which is supported by two witnesses (the captain in charge of the libelant's boats and the shipkeeper of this particular vessel), is that the vessel first struck on her starboard bow against the center abutment of the bridge (the bridge

being of the swinging draw type); that this abutment was protected by loose spiling, and consequently no damage was done by such collision, but that the effect thereof was to cause the vessel to sheer off and her port bow to collide with the westerly stone abutment, which was not protected with spiling. Respondent, on the other hand, contends, and in this it is supported by the testimony of three witnesses (the captains of the respective tugs and the respondent's general superintendent), that the vessel did not at any time collide with the center abutment of the bridge, and, consequently, did not strike the stone abutment by reason thereof, but that she hit the latter in the first instance, and that the accident was due to the fact that, as she reached the bridge, the full force of the current flowing from the main branch of the river into the South branch caught her on her starboard bow, the effect of which, owing to her size and the narrowness of the draw, was inevitably to force her in the opposite direction to such an extent that, although both tugs did all that they could, they were unable to prevent her from colliding on her port side with the westerly abutment.

If the libelant's version is the correct one, it would seem to follow, from the mere happening of the accident, without further proof as to any particular negligent act, that there was a failure to exercise reasonable skill and care on the part of the tugs, because, considering that the effect of the current was to push the vessel away from the center abutment, such a collision was inexcusable. But I cannot find from the evidence (not having had the benefit of seeing the witnesses personally and hearing them testify) that the vessel ever did strike the center abutment. The burden of so establishing was on the libelant. Three witnesses, who were in quite as advantageous position to see what happened as the libelant's witnesses, if not more so, testified that the vessel never touched the center abutment. It may very well be that in the confusion of the moment libelant's witnesses might have mistaken some other jar for a collision with the center abutment. Nor have I any difficulty in finding that the use of the westerly, rather than the easterly, draw was, under the circumstances, entirely proper. Hence no negligence can be predicated on that act. But, in ascertaining whether the respondent performed its full duty, we are not confined solely to what was done at the time of the accident; but it is proper to inquire whether, in view of the fact that the accident happened in the home port of the tugs, and that the respondent was therefore charged with knowledge in respect to the current, depth of water, size of the draw, and that there was no spiling to protect the stone abutment, it was reasonably safe for only two tugs to attempt to take the libelant's vessel through with the current as it then was, especially in view of what happened at the Washington street bridge. Admittedly this draw had not been used for a vessel of the size of the Neptune, proceeding in the same direction, for a long time, if ever. At any rate, respondent had never attempted to so use it. For all that appears, the current was that which was ordinarily to be expected. Can one under such circumstances, charged with the knowledge before mentioned, be heard to say that the proper degree of care was exercised when the

accident, according to its own version, was the result of the inability of the tugs to resist the force of the ordinary current?

To answer the question in the affirmative would be to nullify the rule that a tug impliedly warrants that it has sufficient power to perform the service which it undertakes under conditions reasonably to be expected, and that it is chargeable with knowledge of the usual currents, and to permit it to take a chance. Of course, some chances must be taken, and the law allows for them; but they do not include the ability of a tug to resist the force of a known current. The fact that the accident happened as respondent claims it did, which I find to be the fact, and that later it was found necessary to use three tugs to pull the vessel through, proves the inability of the two tugs to perform the service which they undertook. I am therefore constrained to find that it was not the exercise of reasonable care for the two tugs to have attempted to make the maneuver alone, and hence that in this case the respondent is responsible, if any damage was done to the vessel. I do not find it necessary at this point of the case to determine the extent of the damage, it being sufficient, for present purposes, to find that some damage was done. This I unhesitatingly do. That the vessel was damaged was not only testified to by both of libelant's witnesses, but admittedly it was brought to respondent's attention very shortly after the accident, and at that time the only controversy was as to the extent. The fact that no survey was made until December, 1912, and that the libel was not filed until March, 1914, was commented upon by respondent's counsel during the course of the argument as indicating that libelants recognized at the time that either no damage was done, or that, if any was done, the respondent was not responsible therefor. While these facts, unexplained, might be a circumstance to be taken into account in weighing the conflict in the evidence regarding the manner in which the accident happened, they have no significance, when it is understood that these suits are being prosecuted for the benefit of those who insured the vessel. If libelant collected insurance for the damage, no unfavorable inference can be drawn from its failure to institute proceedings against a towing company with whom it was continually doing business, and whose good will it undoubtedly coveted. The above criticisms and observations apply, not only to the case now under consideration, but to all of the others. I do not, at this stage of any of the cases, attempt to consider what effect shall be given to the surveys or the extent of the damage.

The libelant is entitled to a decree in this case, with costs. The ascertainment of the damages, as in the other cases in which I find for the respondent, will be referred to a commissioner in the usual way.

[7] 2. Action No. 2 was brought to recover damages for another injury alleged to have been sustained by the Neptune on August 23, 1911, in the Chicago river. Immediately prior to the accident complained of she was lying in a slip alongside of the Union Elevator dock, bow in; her stern protruding, approximately 100 feet beyond the dock, out into the river. The river at that point is between 200 and 225 feet wide. She was without steam or steering gear, and had a crew of about six men to handle the hatches, load, and take care of

the ship at the dock. The respondent's tugs Charnley and Evans undertook to tow her from the slip to another dock a short distance up the river. While engaged in doing so, her stern came in collision with a dock on the other side of the river, at a point almost directly opposite the elevator dock, and it is claimed that by reason thereof she was damaged. The libelant contends that the collision was due to the negligence of the tugs, while it is the respondent's insistment that it was due to the failure of the captain of the vessel to obey the instructions of the tug captains as to keeping a line out on the elevator dock for the purpose of checking the vessel and preventing an accident, such as happened.

Admittedly, the captain of the vessel was instructed, in the first instance, to keep such a line out; he already had one or more attached to spilings on that dock. The captain of the vessel testified, however, that at his suggestion this order was rescinded, and it was understood that the line was to be fastened to a freight dock on the opposite side of the slip; that he accordingly dispatched a man around the slip to the freight shed for the purpose of fastening such a line, but before he could do so the tugs began to pull the vessel out of the slip, and consequently he was unable to get the line fastened before the accident happened. Both of the tugboat captains, on the other hand, testify that the original directions were in no respect altered or countermanded, but that they declined to acquiesce in the suggestion of the captain of the vessel—that the line be run to the freight dock. The length of the vessel, and the narrowness of the river and the slip, required that the stern of the vessel be permitted to go very close indeed to the opposite bank of the river before she could be permitted to swing in the current, and thus assume a position in the river which would make it possible to tow her to her destination. As the vessel had no power herself, it was thus necessary, or at any rate considered so by all concerned, that a line should be run from the vessel to a dock to check her when her stern reached a point a short distance from the opposite bank.

The question of liability, therefore, depends primarily upon whether the original direction, given by the tugboat captains, as to the keeping of a line on the elevator dock was rescinded. If it was not, the accident was undoubtedly due to the failure of the captain of the vessel to obey instructions, unless the fact that he had failed to do so was brought to the attention of the tug captains in sufficient time before the accident to have enabled them, in the exercise of reasonable care and skill, to have avoided the accident. There is no evidence which would justify the finding of the latter. If, on the other hand, the original direction regarding the placing of the lines was rescinded, and it was understood that the line was to be made fast to the freight dock, the tugs were in fault in starting when they did, and in not affording the vessel a reasonable opportunity to run a line. Bearing in mind the burden of proof, I am unable to conclude that the instructions originally given were rescinded. It is, I think, quite improbable that the captains of the tugs, knowing as they did the necessity of a line from the vessel to a dock, would have attempted to move the vessel before an op-

portunity had been afforded the latter to run such a line. I am inclined to believe, upon the whole, that there was a misunderstanding between the tug captains and the captain of the vessel as to where the line was to be placed. But this fact, of course, would not permit the finding of any negligence on the part of the tugs, providing that the captains of the latter had given the necessary instructions, and reasonably believed, as I find they did, that they would be carried out. They did not learn that their instructions were being disobeyed until it was too late.

My conclusion, therefore, is that the tugs were not responsible for this accident, and hence the libel in this case must be dismissed, with costs.

[8] 3. In action No. 3 it is sought to recover the damages claimed to have been sustained by the same steamer, the Neptune, on August 20, 1911, while she was on her way to Chicago harbor, in tow of respondent's tugs Indiana and Morford. She was under the command of the same captain as at the time of the collision of August 23d, and apparently had the same crew. At the time of the occurrence which gave rise to this action she was being towed from Milwaukee to Chicago; her engines were out of commission, and she was completely under the control of the tugs. She reached the Chicago Breakwater between 10 and 11 o'clock in the evening of August 20th, and at a point between the outer crib and the breakwall the tugs proceeded to change from the lake lines (which they had used in towing her from Milwaukee) to harbor lines. This necessitated the drawing in of the lake lines, first from one tug and then the other, and the casting out of the harbor lines. From 1½ to 2 hours were consumed in the former operation. The line which the starboard tug (the Morford) had was first drawn in, and then the line to the port tug (the Indiana). Just about the time that the drawing in of the latter line had been finished, and before the harbor lines had reached either of the tugs, the Neptune collided with another steamer, the Uganda, which was lying at anchor inside the breakwall, and it is claimed sustained damage thereby. Admittedly, the Uganda was seen by the captains of the tugs when the Neptune was at least three-fourths of a mile to the windward of her. The latter, during the time that the lake lines were being taken in, drifted with the wind and the current this intervening three-fourths of a mile. It appears from the testimony of the captain of the Morford that at the time the taking of the line from his tug was finished the Neptune was about one-half mile distant from the Uganda; he then went to the stern of the Neptune and "hollered" for a harbor line, it having been arranged that he was to have the stern line while proceeding up the Chicago river, where the Neptune was to be taken; that he received no response, and, after he had waited "quite a while" he saw that the Neptune was "going down on" the Uganda; that he then went around the vessel to take a position on her port side for the purpose of shoving her off. During practically all of the time that the Neptune was drifting this half mile, the Indiana still had the starboard lake line. No alarm signals, or other effort to warn the captain of the Neptune of the impending danger, were given by either of the

tugs until the captain of the Morford saw that there was likely to be a collision. It was then clearly too late for those on board the Neptune to do anything to avoid the collision.

It seems to me that the evidence of the captain of the Morford clearly charges him with negligence. He says that after the lake line was taken in he waited "quite a while" for the harbor line to be thrown to him. During all of that time the Neptune was drifting in the direction of the Uganda and covered a distance of about a half a mile. This must have taken considerable time, because she drifted altogether about three-fourths of a mile in 1½ to 2 hours. Yet during all of this time the Morford made no effort to shove the Neptune out of the course in which she was drifting, or to get the harbor line, except to "holler"; nor was any effort made by the Indiana to pull her out of the course in which she was drifting. When it is remembered that the vessel was without steam or ability to maneuver herself, and was entirely in the control of the tugs, it is difficult to escape the conclusion that one or both of the latter failed in their duty to take steps in time to avoid the subsequent collision or to notice her danger until it was too late. In either aspect there was clearly, I think, a failure to exercise the reasonable care that was required of them. It may be that the failure of those on the Neptune to cast a harbor line to the Morford was in one aspect a contributing cause of the accident. But there is no evidence, and in fact all is to the contrary, that the requests of the Morford for the harbor line were heard by those on the vessel. But, even if they had been heard and not heeded, this circumstance would not excuse the failure of the tugs to either notice the danger or to take some effective means to have avoided the collision before they did. There were no other circumstances to excuse this apparent neglect on the part of the tugs. The evidence quite conclusively demonstrates, I think, that if an effort had been made in time, and there is no reason why it should not have been, except inattention on the part of the tugs, the collision could have been readily avoided.

I therefore find the respondent liable in this case, and the libelant is, accordingly, entitled to a decree, with costs; the ascertainment of damages to be referred to a commissioner.

4. Action No. 4 concerns an injury claimed to have been sustained by the Gilchrist Transportation Company's steamer Lake Shore on January 17, 1912, while in tow of respondent's tugs Dickinson and Field. As in the cases previously discussed, this vessel was without steam and completely under the control of the tugs. She was in charge of a captain, a shipkeeper, and a crew of seven or eight men. At the time towage service was begun she was lying at the dock of the National Elevator Company in the South Chicago river, and was to be towed against the current to the Rock Island elevator, in the same river. When the Pennsylvania or Ft. Wayne bridge was reached the tugs were unable (although two or three attempts were made) to get the vessel through. A further attempt was made on the following day, and was likewise unsuccessful. On January 23d, however, through the use of three tugs and the raising of the depth of the water, and probably the diminishing of the current, the vessel was hauled through and

brought to her point of destination. It is claimed that on the first attempt "she sheered and struck her port bow" against one of the abutments of the bridge, which caused a dent to be made in two of her plates. It is to recover for the damage thus sustained that this action was brought.

I am by no means reasonably convinced, if there was any collision at the time and place in question, that any damage whatever was done. The burden was on the libelant to so demonstrate. The weight of the evidence seems clearly to indicate that the part of the vessel, which the captain first claimed had been damaged, could not have come in contact with any portion of the bridge. In addition, the evidence tends to prove, circumstantially, that the dent was due to another cause, for which the respondent was in no way responsible. While the testimony of the captain of the vessel is positive to the effect that the vessel did strike the abutment of the bridge, he is evidently wrong as to the character of the abutment, and as to the time when he first called the attention of any one connected with the tugs to the alleged damage. If the injury had been done on the first day, it is difficult to understand why some one's attention was not called to it until the 23d. I think probably the correct explanation of the whole affair is that the captain of the vessel did notice a jar of some kind during the first attempt to get the vessel through (which probably was due to the grounding of the vessel, this, undoubtedly, being the cause of the inability of the tugs to pull her through the bridge), and that later, when he reached the dock, he saw the dent and assumed that it was the result of the jar which he had felt on the first day. He then called the attention of respondent's manager to it. This is borne out by the statement, which respondent's witnesses testify he made at that time, to the effect that he did not know whether the tugs caused the dent or not. Upon the whole, the evidence does not justify a finding that any damage, for which the tugs were responsible, was done to the vessel at the time alleged.

It follows, therefore, that the libel in this case must be dismissed, with costs.

5. Action No. 5 was brought by the Franklin Transportation Company to recover the damages claimed to have been sustained as the result of the grounding of its barge Alexander Maitland just outside of the harbor at Erie, Pa., on November 12, 1912, while she was in tow of respondent's tug Buffalo. The barge was 366 feet long, with a beam of 44 feet, and at the time in question drew about 18 feet 6 inches of water, approximately 8 feet of her side being exposed. When the towage service began she was lying at the Susquehanna coal dock within the Erie harbor, without any power of her own. She was to be taken from the harbor to her consort, which was lying outside in the lake. The start was made between 6 and 6:30 p. m. (seventy-fifth meridian time). She was towed out through the channel, which was of amply sufficient depth and width to accommodate a vessel of her dimensions, without incident until she reached a point outside of the piers, which parallel the greater part of the lake end of the channel, when she went aground upon the east bank of the channel.

It is to recover the moneys expended for salvage services in getting her off that this action was brought. It may be noted at the outset that all of such services were rendered by the respondent, and the bills therefor were paid by the libelant shortly thereafter without protest or question. It may well be that under those circumstances such moneys cannot now be recovered; but as the respondent has not raised that question, and as I have reached the conclusion that the libel must be dismissed on another ground, I have not attempted to consider it carefully.

The circumstances of the happening of the accident, as detailed above, would probably, under the rules before mentioned, be sufficient to charge the tug with negligence, without proof of the respect in which she was at fault, and cast upon her the burden of explaining and demonstrating her lack of culpability. But the respondent has undertaken to discharge this burden, and to show that the grounding was one of those inevitable accidents for which no one is responsible. It is claimed on its behalf that, shortly before the tug and tow reached the end of the westerly pier, the wind, which had theretofore been blowing moderately from the southwest, suddenly shifted to the northwest and attained a very high velocity; that it, together with the current produced thereby, drove the barge out of the channel in which she was being towed, and forced her on the easterly bank where she grounded, notwithstanding that every possible effort was made on the part of the tug to prevent it. It is further insisted that the gale, especially in respect to the suddenness with which it arose, was one which could not ordinarily and reasonably have been anticipated. The libelant's proofs suggest primarily that the accident was due to the fault of the tug, either in coming out of the channel at too slow a speed, or because she took a position on the starboard bow of the vessel, or both. But, irrespective of these circumstances, the libelant contends that the gale which arose and the accompanying tide were such as might reasonably have been expected in that place at that time of the year, and consequently, under the rules before mentioned, if the tug was unable to hold the barge in the channel against the wind and the current, it is responsible for its failure to do so.

The weight of the evidence leaves no reasonable doubt, I think, but that the tug was proceeding through the channel at the customary and usual rate of speed. The captain of the tug was experienced, capable, and skillful, and, in the absence of circumstances which, in the exercise of reasonable care, would seem to call for a greater speed, no negligence can be predicated on the fact that he saw fit to travel at the usual rate. Nor, if it be assumed that the tug was towing on the starboard bow, rather than straight ahead, or on the port bow, can that circumstance, under the evidence, be held to constitute negligence. I have no difficulty in finding that the accident was in no respect due to the latter fact alone, or in connection with the rate of speed at which the tug proceeded. Undoubtedly, if it had been foreseen that a wind of the velocity and from the direction as that which subsequently arose was likely to be encountered, the tug would have been better able to prevent the barge grounding, if she

had been going at a greater rate of speed and had been pulling on the port bow. This, I think, is demonstrated by what she did when the wind arose. But, unless the wind could have been reasonably anticipated, I fail to see how either the rate of the speed or the position of the tug, which in themselves were entirely proper for ordinary conditions, can be held to be the proximate cause of the accident.

[9] The respondent having relied upon an inevitable accident, it was incumbent upon it to show what the cause of the grounding was, and that the result of the cause was inevitable, in the sense that it occurred in spite of everything that nautical skill, care, and precaution could do (Mabey v. Atkins, 14 Wall. 204, 20 L. Ed. 881; The Morning Light, 2 Wall. 550; Union Steamship Co. v. N. Y. & Va. Steamship Co., 24 How. 307, 16 L. Ed. 699), or to show all possible causes and as to all such that the result was inevitable in the sense before mentioned (The Merchant Prince, L. R. Probate Division 179; The Olympia, 61 Fed. 120, 9 C. C. A. 393 [C. C. A. 6th Cir.]; The Bayonne, 213 Fed. 216, 129 C. C. A. 560 [C. C. A. 2d Cir.]).

[10] The respondent, as before stated, has attempted to show the exact cause, and that the result thereof was inevitable. The decision of the case, therefore, resolves itself into the determination of whether the grounding was caused by the sudden change and violence of the wind and the current, and, if so, whether they were such as could not have reasonably been expected, and against the force of which the tug, in the exercise of due care and skill, could not prevail. The evidence leaves no doubt in my mind but that the tug was, under ordinary conditions, sufficiently powerful and in every way adequate to perform the service which she undertook, and that, although she was properly and skillfully handled, it was impossible for her to prevent the accident, because of the violence of the wind and current which then prevailed. It is not disputed that, shortly before or at about the time the tug and the barge arrived outside of the pier, the wind, which had been blowing from the southwest, shifted to the northwest. Although there is some conflict in the evidence, I am forced to the conclusion that the change in the wind was not only very sudden, but that its velocity was increased very materially, and as a result thereof a decided current set in. The combination undoubtedly drove or caused the barge to veer towards and ground upon the easterly bank of the channel. I have no hesitancy in finding, therefore, that the cause of the accident was the sudden changing of the wind and the current, and the velocity which they attained, and hence that the accident was inevitable, unless the cause could reasonably have been anticipated.

It remains, therefore, to consider whether it could have been. If it could, the accident cannot be said to have been inevitable or unavoidable; for in that case it would have been negligent either to set out upon a voyage which the tug was incapable of successfully completing, or in proceeding at the slow speed which it did and taking a position to the starboard of the vessel's bow. The determination of this question necessitates the ascertainment of what the weather conditions were at the time the vessels left the dock and during the

time which elapsed before the squall arose. The accident happened at about 7:30, so that there was an intervening period of time of from 1 to 1½ hours. On this latter point there is also an unfortunate conflict in the evidence, but I think I must find that there was nothing in the weather conditions prior to the time the tug reached the lighthouse, near the end of the pier, which would in any way indicate the likelihood of a change of wind or a squall of the suddenness and velocity of that which subsequently arose. In addition to the testimony of at least two disinterested witnesses, who were in a position to take note of weather conditions and by experience were quite capable of doing so, the government weather charts, offered by the libelant, show that the wind was not only blowing from the southwest during all of the time intervening between the beginning of the voyage and the happening of the accident, at a comparatively low velocity, but that, at about the time the boats reached the end of the pier, it shifted suddenly and without previous warning to the west and northwest and increased very materially in velocity. When it is considered that the respondent's witnesses were estimating, I think it quite remarkable that their estimates so nearly correspond with the accurate figures of the government. According to the latter, at 7:42 p. m. the wind blew from the northwest at the rate of 34 miles an hour, at 7:40 p. m. at the rate of 30 miles an hour, and from 7:25 to 7:35 at the rate of 27 miles an hour, while at 7:20 it was blowing in a southwesterly direction at the rate of 17 miles an hour.

It is true that nearly all of the witnesses testify that windy weather and squalls, of greater or less degree, occur around Erie during the fall of the year, and the government records for a number of years back show maximum wind velocities, at that point, during the month of November, equal to or in excess of that which prevailed at the time of this accident. But the mere fact that during a certain month of the year winds of high velocity occur and are to be expected from time to time falls far short of proving that a shift of wind of the suddenness of that in question and a squall of its magnitude could reasonably have been anticipated as likely to occur when this tug set out on its short voyage, or, for that matter, during the progress thereof, if the previous and then condition of the weather gave no indication thereof. To hold that a tug, under such circumstances, must anticipate such sudden and violent changes, would be tantamount to casting upon it the obligation of an insurer. The decisive inquiry is not alone whether violent winds were likely to arise at that time of year, but whether, in view of the then or previous state of the weather, taken in connection, of course, with the time of the year, they could be reasonably expected. When the case is considered in this light, there is no evidence to justify the finding that the wind and current could reasonably have been anticipated at any time before it was too late to guard against them. As, therefore, the gale and the attendant current were the proximate cause of the accident, and could not reasonably have been anticipated by those in charge of the tug at any time after the beginning of the voyage and before it was too late to avoid their effect, and hence that there was no negligence

in embarking upon the voyage, it follows that the grounding of the vessel was the result of an inevitable accident, for which the respondent is not liable.

It follows, therefore, that the libel in this case must be dismissed, with costs.

Ex parte GRIFFIN.

(District Court, N. D. New York. December 2, 1916.)

(Syllabus by the Court.)

1. CITIZENS ⟸13—EXPATRIATION.

A citizen of the United States, who with his family goes to Canada, and there later enlists in the army of that country for oversea service, making the necessary declarations, and takes an oath of allegiance that he will be faithful and bear true allegiance to His Majesty King George the Fifth, his heirs and successors, and that he will as in duty bound honestly and faithfully defend His Majesty, his heirs and successors, in person, crown, and dignity, against all enemies, and will observe and obey all orders of His Majesty, his heirs and successors, and of all the generals and officers set over him, so help him God, and actually enters the service, thereby effectually expatriates himself under the provisions of 2 U. S. Comp. Stat. 1913, § 3959, p. 1591, Act March 2, 1907, c. 2534, § 2, 34 Stat. 1228, which declares that "any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws or when he has taken an oath of allegiance to any foreign state," etc. Expatriation is complete, even if, after a few days' service, he deserts and surreptitiously returns to the United States.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⟸13.]

2. ALIENS ⟸46—DEPORTATION—EXPATRIATED CITIZEN.

Such person, by such acts, if voluntary, not only abandons and renounces his citizenship in the United States, but becomes an alien, and by such removal, enlistment, and oath of allegiance to a foreign power initiates naturalization in such foreign country and comes under its protection. Therefore, when he thereafter deserts such service and surreptitiously returns to the United States, not coming through any port of entry, he comes in violation of law, and may be deported under the provisions of section 36 of Immigration Act Feb. 20, 1907, c. 1134, 34 Stat. 908 (Comp. St. 1913, § 4285), which provides that "all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act: Provided, that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the Commissioner General of Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. ⟸46.]

3. CITIZENS ⟸13—EXPATRIATION—CONSENT—"FOREIGN STATE"—OATH OF ALLEGIANCE.

Such oath of allegiance to the king of Great Britain is an oath of allegiance to a "foreign state" within the meaning of the statute, and even if the consent of the United States and of such person is necessary to complete expatriation, the necessary consent is found in the statute and the

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

voluntary acts of such person. Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⊂⊃13.

For other definitions, see Words and Phrases, Second Series, Foreign State.]

4. ALIENS ⊂⊃46—DEPORTATION—EXPATRIATED CITIZEN.

The petitioner, born in the United States and residing in New York, went with his family to Gananoque, Canada, June 30, 1916, enlisted in the Canadian army for oversea service July 15, 1916, and took the oath of allegiance, deserted August 5, 1916, and surreptitiously returned to the United States August 6, 1916. *Held*, that he had voluntarily expatriated himself and was an alien, and was subject to deportation as such.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 105; Dec. Dig. ⊂⊃46.]

5. CITIZENS ⊂⊃13—EXPATRIATION—OATH OF ALLEGIANCE.

The fact that the enlistment was for "one year or during the war" between England and Germany and six months thereafter did not change the effect of taking the oath of allegiance, which contained no limitation.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⊂⊃13.]

(Additional Syllabus by Editorial Staff.)

6. CITIZENS ⊂⊃13—"EXPATRIATION."

"Expatriation" is the voluntary renunciation of citizenship; the renouncing allegiance to one's own government, usually accompanied by forsaking one's own country.

[Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 20–22; Dec. Dig. ⊂⊃13.

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

Petition by Edward Dempster Griffin for a writ of habeas corpus. Dismissed.

This is an application by Edward Dempster Griffin, who claims to be a citizen of the United States, for his release from the custody of the immigration officers of the United States, who seek his deportation to Canada on the ground that he (Griffin) is not a citizen of the United States, or entitled to be in the United States, but is a deserter from the British army, he having voluntarily expatriated himself, by voluntarily removing to the Dominion of Canada with his family and then and there voluntarily enlisting in the 156th Overseas Battalion, Canadian Expeditionary Force, and by complying with the laws of Canada, and by taking the oath of allegiance to His Majesty King George the Fifth, king, etc., after which, and after a few weeks' or days' service, he deserted such service and surreptitiously came into the United States, where he was apprehended.

John O'Leary, of Clayton, N. Y., for petitioner.

D. B. Lucey, U. S. Atty., of Ogdensburg, N. Y., for the United States.

RAY, District Judge. The questions involved are important, especially for the reason, if a citizen of the United States by voluntarily

going to Canada and there enlisting in its army and taking the oath of allegiance to the king of England and serving in such army does not lose his citizenship in the United States, he may serve in the English army for months and perhaps years, sustain injuries in such service which forever totally disable him from earning a support for himself or family, and then return to the United States and here become a public charge. There is before this court an original paper, the authenticity of which is not questioned, as follows:

Attestation Paper. No. 640184

156th Overseas Battalion, C. E. F.

Canadian Overseas Expeditionary Force.

Questions to be Put before Attestation.

(Answers.)

1. What is your surname? Griffin.
1a. What are your Christian names? Edward Dempster.
1b. What is your present address? Gananoque.
2. In what town, township, or parish, and in what country, were you born? Adams, Jefferson Co., U. S.
3. What is the name of your next of kin? Abia Griffin.
4. What is the address of your next of kin? Gananoque.
4a. What is the relationship of your next of kin? Wife.
5. What is the date or your birth? Nov. 3rd, 1873.
6. What is your trade or calling? Farmer.
7. Are you married? Yes.
8. Are you willing to be vaccinated or revaccinated and inoculated? Yes.
9. Do you now belong to the active militia? Yes.
10. Have you ever served in any military force? Yes. (If so, state particulars of former service.)
11. Do you understand the nature and terms of your engagement? Yes.
12. Are you willing to be attested to serve in the Canadian Overseas Expeditionary Force? Yes, for artillery.

Declaration to be Made by Man on Attestation.

I, Edward Dempster Griffin, do solemnly declare that the above are answers made by me to the above questions, and that they are true, and that I am willing to fulfill the engagements by me now made, and I hereby engage and agree to serve in the Canadian Overseas Expeditionary Force, and to be attached to any arm of the service therein, for the term of one year, or during the war now existing between Great Britain and Germany, should that war last longer than one year, and for six months after the termination of that war, provided His Majesty should so long require my services, or until legally discharged.

E. D. Griffin. [Signature of Recruit.]
R. W. Wood. [Signature of Witness.]

Date, July 14th, 1916.

Oath to be Taken by Man on Attestation.

I, Edward Dempster Griffin, do make oath, that I will be faithful and bear true allegiance to His Majesty King George the Fifth, his heirs and successors, and that I will as in duty bound honestly and faithfully defend His Majesty, his heirs and successors, in person, crown, and dignity, against all enemies, and will observe and obey all orders of His Majesty, his heirs and successors, and of all the generals and officers set over me. So help me God.

E. D. Griffin. [Signature of Recruit.]
R. W. Wood. [Signature of Witness.]

Date, July 14th, 1916.

Certificate of Magistrate.

The recruit above named was cautioned by me that if he made any false answer to any of the above questions he would be liable to be punished as provided in the Army Act.

The above questions were then read to the recruit in my presence.

I have taken care that he understands each question, and that his answer to each question has been duly entered as replied to, and the said recruit has made and signed the declaration and taken the oath before me at Bannfield, this 14th day of July, 1916.

T. C. D. Bedell, Lt. Col. [Signature of Justice.]

On the back thereof is Griffin's descriptive list, certificate of medical examination, and certificate of the officer commanding unit, which last certificate reads as follows:

Edward Dempster Griffin, having been finally approved and inspected by me this day, and his name, age, date of attestation, and every prescribed particular having been recorded, I certify that I am satisfied with the correctness of this attestation. T. C. D. Bedell. [Signature of Officer.]

Date, July 17th, 1916.

The petitioner does not deny that he gave the information contained in this paper, or that he signed the declaration and oath July 14, 1916, but contends, first, that if he did do so intelligently and voluntarily he did not thereby expatriate himself and lose his citizenship in the United States; and, second, that he was so intoxicated when he enlisted in such Canadian service and executed such papers that he did not know and understand what he was doing, or the nature and character of his acts, and is not bound thereby; that when he became sober and possessed of his faculties he left the service and Canada at the first opportunity and returned to the United States.

At this time we will consider the effect of the acts above set forth on the assumption they were voluntary and knowingly and intelligently done. If, when so done, such acts did not amount to expatriation and loss or deprivation of his citizenship in the United States, he is illegally held by the immigration officers and cannot be deported as an alien. If such acts, assuming they were knowingly, intelligently, and voluntarily done, did amount to expatriation and loss of citizenship in the United States, then evidence will be taken on the question of Griffin's mental and physical condition at the time of his enlistment and at the time he took the oath above quoted.

[1, 4] There can be no serious question that the acts of Griffin, assuming such acts were knowingly and voluntarily done, amounted to expatriation and loss of citizenship in the United States. The Congress of the United States has expressly affirmed and declared the natural and inherent right of a citizen to expatriate himself. R. S. U. S. § 1999, 2 U. S. Comp. St. 1913, § 3955, p. 1589; Act July 27, 1868, c. 249, § 1, 15 Stat. 223. That act declares as follows:

"Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the main-

tenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the republic."

The common-law rule of England is that once a citizen always a citizen, and that no citizen can expatriate himself, except with the consent of his sovereign or government. 1 Bl. Com. 369. At one time this was recognized as the law in the United States. Talbot v. Jansen, 3 Dall. 133, 1 L. Ed. 540; U. S. v. Gillies, Fed. Cas. No. 15,206, 1 Pet. C. C. 159; 2 Kent, 49; The Fifteenth Amendment, Brannon, 20, 21; opinion of Chief Justice Fuller in U. S. v. Wong Kim Ark, 169 U. S. at page 711, 18 Sup. Ct. 456, 42 L. Ed. 890; 7 Cyc. 144, and cases cited note 37. But at an early day the courts of the United States, both state and federal, began to question and repudiate this doctrine. 7 Cyc. 144, and cases cited. "The consent of the United States is not necessary to enable a citizen thereof to expatriate himself and become a citizen of another country." Jennes v. Landes (C. C.) 84 Fed. 73.

Not only has Congress recognized and declared this "natural and inherent right of expatriation" without the express consent of the government, but it has also enacted that *"any American citizen shall be deemed to have expatriated himself* when he has been naturalized in any foreign state in conformity with its laws, *or when he has taken an oath of allegiance to any foreign state:* * * * Provided also, that no American citizen shall be allowed to expatriate himself when this country is at war." 2 U. S. Comp. St. 1913, § 3959, p. 1591; Act March 2, 1907, c. 2534, § 2, 34 St. 1228. The king of England is "the state," and England is a "foreign state." It is perfectly clear that Griffin went into a foreign country, represented himself as residing at Gananoque with his wife, and regularly enlisted in the Canadian army, and subscribed and took the oath of allegiance to the king of Great Britain, a foreign state and government. This was complete expatriation, and so declared by the act of Congress above quoted. Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297.

In "The Fourteenth Amendment," by Brannon, page 20, citing Santissima Trinidad, Fed. Cas. No. 2,568, 1 Brock. (U. S.) 478, it is said:

"Federal citizenship is lost by expatriation; the citizen by it becomes an alien, and loses all rights adhering to him as a citizen, and is released from his obligations as such."

In Comitis v. Parkerson (C. C.) 56 Fed. 556, 559, it was held that:

"Expatriation can be effected only in accordance with law [and that] under our government Congress must be the source of that law."

This cannot be sound law if expatriation be a natural and inherent right, as Congress says it is; but, assuming it to be true, this petitioner went to Canada with his family, enlisted in a foreign army, and took an oath of allegiance to a foreign government, or state, and thereby expatriated himself by a course of conduct and the doing of acts which an act of Congress says is all-sufficient and effectual to constitute expatriation.

The United States has always insisted that a citizen of a foreign country has the natural and inherent right to leave that country, emigrate to the United States, and become a resident and a *citizen* here on compliance with our naturalization laws, regardless of the wishes or consent of the government from which he came. If such be the natural and inherent right of an Englishman, it is difficult to understand why it is not the natural and inherent right of a citizen of the United States.

[3] The right of expatriation has constantly been recognized by the federal Department of State, and those citizens of the United States who have taken upon themselves a foreign allegiance are denied the protection due American citizens. Steinkauler's Case, 15 Op. Attys. Gen. 15; Right of Expatriation, 9 Op. Attys. Gen. 356, 362; Id., 8 Op. Attys. Gen. 139.

[6] Expatriation is the voluntary loss or abandonment, or, more properly speaking, renunciation, of citizenship. This may be a completed act, and complete in its effect as to the status of a person, even if he has not become naturalized in some other country according to its laws. Persons born in the United States, subject to its jurisdiction, are citizens of the United States. If one of these persons goes to England and is there naturalized, he becomes a citizen of England, regardless of the wishes or consent of the United States. He is exercising a natural and an inherent right, says the Congress of the United States. In such case he loses his citizenship in the United States on becoming a naturalized citizen of England. This is distinguished from expatriation, which may consist solely in the abandonment and renunciation of citizenship in the United States, without being naturalized in some other country. Of course, a citizen of the United States expatriates himself when he voluntarily goes to England, and there applies for citizenship and becomes naturalized. He has not only abandoned, but renounced, his citizenship in the United States, and become a citizen of another country. Suppose a citizen of the United States abandons his residence here and goes to some foreign country, which has no naturalization laws or procedure, and there settles and conforms to its laws in all respects as a citizen thereof, and declares his purpose to remain, and the Congress of the United States by statute declares that such acts constitute expatriation; can it be said that such person remains a citizen of the United States because he has not been naturalized by such foreign government, and that he may claim and be entitled to the protection of the government of the United States as a citizen thereof? Expatriation is renouncing allegiance to one's own government, accompanied usually by forsaking his own country. In Stoughton v. Taylor, Fed. Cas. No. 7,558, 2 Paine, 562, it was held that an American citizen, by emigrating to a foreign country and entering its military service, completely renounced his American citizenship and was no longer held to its obligations. Can a person owe allegiance to two different absolute and independent governments at the same time? Clearly not. 1 Bl. Com. 370.

There may be a limited and qualified allegiance, of course. A citizen of the United States owes to his government full, complete, and true allegiance. He may renounce and abandon it at any time. This

is a natural and an inherent right. When he goes abroad on a visit or for travel, he must, while abroad, obey the laws of the foreign country, where he is temporarily. In this sense and to this extent only he owes a sort of allegiance to such government, but to no extent and in no sense does this impair or qualify his allegiance or obligations to his own country or to his own government. But if, when abroad, he enters the military service of the foreign government where he is, and there makes oath that he "will be faithful and bear true allegiance" to such foreign government, and "as in duty bound honestly and faithfully defend" such foreign government "against all enemies, and will observe and obey all orders of" such foreign government, etc., he has taken on himself duties and obligations absolutely inconsistent and at war with the duties he owes the home country and government he left, and he has also shown an unequivocal intent to remain abroad. By a change of mind, finding such service irksome and unpleasant, and by desertion from such foreign military service and surreptitious return to the United States, may be rehabilitate and reinstate himself as a citizen of the United States, in face of the statute quoted? In short, by unequivocal acts may he completely expatriate himself the one week and restore himself the next, with all the rights of a citizen? Aliens can only become citizens of the United States by compliance with our laws. Our naturalization statutes prescribe the mode, but the act of March 2, 1907, has a special provision applicable to a woman who marries an alien. There is no provision applicable to a male person who expatriates himself, except our naturalization laws. Is the United States to protect as citizens those who enter a foreign military service, and take an oath of allegiance to such foreign government, and then desert? Does not public policy forbid?

It seems to me very clear that the decision of the Supreme Court of the United States in Mackenzie v. Hare, supra, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297, settles the questions involved here against the contention of the petitioner. There this statute (Act March 2, 1907, c. 2534, 34 Stat. 1228) was under consideration, and its construction and application before the court. There the plaintiff, who sought by mandamus to enforce her right to vote in California, a right given to all female citizens of the proper age, was born and resided, and always had resided, in the state of California. In August, 1909, while a resident and a citizen of such state, she married in that state one Gordon Mackenzie, who then resided, and who for some considerable time had resided, in California, and who intended to make that state his permanent residence. Mackenzie was a native and subject of the kingdom of Great Britain, who had not been naturalized, and who had done no act to show an intent to become naturalized in the United States. From the date of their marriage in 1909, the plaintiff and her husband, Mackenzie, had lived together continuously as husband and wife in California. In January, 1913, the plaintiff applied to be registered as a voter. She had all the qualifications of a voter, unless by her said marriage she had taken the nationality of her husband and ceased to be a citizen of the United States. She was denied registration on the ground that by such marriage to Mackenzie, a subject of Great

Britain, she had taken the nationality of her said husband and ceased to be a citizen of the United States. This action was approved and held valid by the state courts (Mackenzie v. Hare, 165 Cal. 776, 134 Pac. 713, Ann. Cas. 1915B, 261, L. R. A. 1916D, 127), and the case went to the Supreme Court of the United States, where the decision was affirmed.

The act of March 2, 1907, after providing in section 1 for passports to aliens who have filed a declaration of intention to become citizens of the United States, provides in sections 2, 3 and 4 as follows:

"Sec. 2. That any American citizen shall be deemed to have expatriated himself when he has been naturalized in any foreign state in conformity with its laws, or when he has taken an oath of allegiance to any foreign state.

"When any naturalized citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years: Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer of the United States, under such rules and regulations as the Department of State may prescribe: And provided also, that no American citizen shall be allowed to expatriate himself when this country is at war.

"Sec. 3. That any American woman who marries a foreigner shall take the nationality of her husband. At the termination of the marital relation she may resume her American citizenship, if abroad, by registering as an American citizen within one year with a consul of the United States, or by returning to reside in the United States, or, if residing in the United States at the termination of the marital relation, by continuing to reside therein.

"Sec. 4. That any foreign woman who acquires American citizenship by marriage to an American shall be assumed to retain the same after the termination of the marital relation if she continue to reside in the United States, unless she makes formal renunciation thereof before a court having jurisdiction to naturalize aliens, or if she resides abroad she may retain her citizenship by registering as such before a United States consul within one year after the termination of such marital relation."

Section 3, above quoted, was involved and under consideration in the Mackenzie Case, supra. That section says:

"That any American woman who marries a foreigner shall take the nationality of her husband."

It then provides on what conditions she may resume her American citizenship on the termination of her marriage. The Supreme Court held that, although a citizen of the United States when she married Mackenzie, and although neither she nor her husband had departed from the United States or shown an intent to do so, the mere fact of marriage to such alien was an election and choice to abandon her citizenship in the United States, and so operated; Congress having declared that it should have that effect. The court said:

"It may be conceded that a change of citizenship cannot be arbitrarily imposed; that is, imposed without the concurrence of the citizen. The law in controversy does not have that feature. It deals with a condition voluntarily entered into, with notice of the consequences. We concur with counsel that citizenship is of tangible worth, and we sympathize with plaintiff in her desire to retain it, and in her earnest assertion of it. But there is involved more than personal considerations. As we have seen, the legislation was urged by conditions of national moment. And this is an answer to the apprehension of counsel that our construction of the legislation will make every act, though lawful, as marriage, of course, is, a renunciation of citizenship. The

marriage of an American woman with a foreigner has consequences of like kind, may involve national complications of like kind, as her physical expatriation may involve. Therefore, as long as the relation lasts it is made tantamount to expatriation. This is no arbitrary exercise of government. It is one which, regarding the international aspects, judicial opinion has taken for granted would not only be valid but demanded. It is the conception of the legislation under review that such an act may bring the government into embarrassments, and, it may be, into controversies. It is as voluntary and distinctive as expatriation, and its consequences must be considered as elected."

Section 2 of this same act of Congress has declared:

"That any American citizen *shall be deemed to have expatriated himself when* he has been naturalized in any foreign state, * * * *or when he has taken an oath of allegiance to any foreign state.*"

This language is definite, certain, and unequivocal. Concede that a sovereign cannot discharge a subject from his allegiance and arbitrarily deprive him of his citizenship *against his consent,* except as a punishment for crime, and that Congress cannot abridge or enlarge the rights of citizens, or restrict the effect of birth in the United States, subject to its jurisdiction; still the right of a citizen to expatriate himself exists, it is a natural and an inherent right, recognized and declared by Congress (and, since 1870, recognized by England), and the sovereign power, through Congress, may declare that the doing of certain acts, inconsistent with citizenship in the United States, shall constitute expatriation—loss of or renunciation of citizenship. Mackenzie v. Hare, supra. Congress having declared that naturalization in a foreign country, *or the taking of the oath of allegiance to a foreign government,* is expatriation, that the one doing the act "shall be deemed to have expatriated himself," it follows that such act, if voluntarily done, constitutes loss and abandonment and voluntary renunciation of citizenship in the United States. If not so, the statute is meaningless and worthless, and Congress is powerless to declare what acts constitute expatriation. Every citizen is presumed to know the law and to understand the effect of his voluntary acts. When he voluntarily does the acts which the law says operate as expatriation, we have the necessary assent. Mackenzie v. Hare, supra.

The provisions of the act of 1907, now under consideration, have justification in necessity and public policy. Mere enlistment and service in the army of a foreign government is not declared to work expatriation, but the taking of "an oath of allegiance to any foreign state" is. It is evident that it would lead to controversies and national entanglements for the United States to attempt to protect as citizens those who enlist in the English army, take an oath of allegiance, and then desert. If it be the natural and inherent right of a citizen to expatriate himself or herself, it would seem that the government should have the right to declare that the doing of acts by the citizen which are inconsistent with the discharge of his duties as such citizen to his government, accompanied by a departure from its jurisdiction, constitute expatriation—abandonment and renunciation of citizenship. There is no express grant of such power to Congress found in our Constitution. But there are powers implied necessary to the existence of a government or a nation—necessary to the exercise of sovereignty. This is one. Mackenzie v. Hare, supra.

"Alienage may arise in three ways—by birth, by election, and by operation of law." 2 Corpus Juris, 1044. "Alienage by election may take place under various conditions, such as when a country is divided into two independent sovereign countries, or when a dependent country proclaims and establishes its independence, or the like. *To this class of aliens belong also those persons who have availed themselves of the right to become aliens by expatriation,* or by being naturalized as citizens of another country." 2 Corpus Juris, 1044, 1045; Lynch v. Clarke, 1 Sandf. Ch. 583 (N. Y.) 668.

In Morse on Citizenship (1881) p. 160, § 129, it is said:

"Every individual must be a member of some political society; but he may not have more than a single citizenship or national character. It would seem to be the doctrine of modern public law that, though a person may *apparently* have a double citizenship or nationality, yet whenever circumstances arise which make two citizenships inconsistent, he must elect and determine which one he will prefer. The existing rule may be stated as follows: 'A person who has ceased to be a member of a nation, without having acquired another national character, is nevertheless deemed to be a member of the nation to which he last belonged, except so far as his rights and duties within its territory, or in relation to such nation, are concerned.'"

Field's Int. Code (2d Ed.) p. 130, note, is cited.

If this be correct, and Griffin, under our statute, ceased to be a member of the United States, but, not having been naturalized in England or Canada, so as to acquire another national character, was within the exception, so he had no rights and owed no duties as a citizen in the United States, it is difficult to understand what his status was and now is. He has definitely expatriated himself under our statute, but he has not been naturalized in England, although by his oath of allegiance he has made himself subject to that empire. He is not, however, a naturalized subject or citizen of that nation. Did he have two apparent citizenships at the time of his desertion and surreptitious return, the one inconsistent with the other, and could he and did he by such desertion and surreptitious return to the United States elect and determine which he preferred? Could he by such desertion and return nullify the effect of his oath of allegiance to the king of Great Britain and Ireland declared by statute and restore himself to full citizenship in the United States, with all the rights and privileges such status gives? I cannot assent to such contention. It may be said, however, that England must take and claim Griffin as a citizen of the empire, if she claims and takes him, or takes him, and, as he has not been naturalized in England, he had the legal right to elect citizenship by desertion and return to the United States.

In Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297, to which attention has been called, Mrs. Mackenzie assumed the marriage relation, which she could not throw off at will. The law of Congress declares that by her marriage to an alien she took on the citizenship of her husband, who was a citizen of Great Britain, and lost her citizenship in the United States. Here there was no naturalization of Mrs. Mackenzie in England, or under the laws of that country; no consent on the part of that empire; no residence or domicile in that country; no oath of allegiance. Still by her marriage with Mackenzie she lost her citizenship in the United States and her rights as such, and we are not informed as to what her

rights are under the laws of England. By the terms of the act of Congress she is restored on the termination of the marital relation by the death of her husband or by divorce, and not otherwise. But in the meantime she is *not* a citizen of the United States, and not a naturalized citizen of England. So far as the laws of the United States are concerned, she is declared to be a citizen of the kingdom of Great Britain and Ireland, but how is it under the laws of that country?

With Griffin the case is somewhat different, but still he is declared to have lost his citizenship in the United States. Congress could not make Mrs. Mackenzie a citizen of Great Britain, as only that government could do that. She gained no citizenship in any other country pursuant to its laws, and still she is not a citizen of the United States. So concede that Griffin did not gain citizenship in England, still by the act of Congress he lost his citizenship in the United States by expatriating himself, and by his oath of allegiance to the king of Great Britain he took on citizenship in that kingdom so far as the United States is concerned. In effect the act of Congress declares that Griffin took on citizenship in Great Britain and lost citizenship in the United States, and the United States must treat him as a citizen of England. This is certainly so if expatriation includes acquiring citizenship in another country.

It is contended by the petitioner's counsel that the oath of allegiance to the king of Great Britain, above quoted, taken by Griffin, is not such an oath of allegiance to a "foreign state" as is contemplated by the statute of 1907. The contention is, first, that Griffin did not swear allegiance to the kingdom of Great Britain and Ireland, or the British Empire, but only to the king; and, second, that in such oath he did not abjure allegiance to the United States of America. As already stated, the king of England is the foreign state, and the statute quoted does not require that the oath of allegiance to "any foreign state" shall abjure allegiance to the United States. In England nominally all power is centered in the king. To compass the king's death is high treason. It is the army of the king, and the king's navy, and the king's coin. The oath of allegiance to the kingdom of Great Britain and Ireland, or to the British Empire, runs to the king, in whom, nominally, all the executive power of government is centralized. An oath of allegiance to the king is an oath of allegiance to the kingdom and empire. The king declares war and makes peace. He is the head of the church. Allegiance is due to the king in his political and not his personal capacity. Isaacson v. Durant, L. R. 17, Q. B. D. 54, 65, quoted in U. S. v. Wong Kim Ark, 169 U. S. 663, 18 Sup. Ct. 456, 42 L. Ed. 890; Kilham v. Ward, 2 Mass. 236, 265; St. 4 George II, c. 21, and St. 13 George III, c. 21. Even if expatriation at common law, to be complete, required naturalization in a foreign country, Congress has declared that the act of taking an oath of allegiance to a foreign state constitutes "expatriation," whether such act amounts to naturalization or not. And this, as stated, is a necessary enactment to avoid national embarrassments and national complications.

The final question that presents itself is: Did the act of desertion from the service of the king of England, to whom Griffin had sworn allegiance, and his clandestine return to the United States, reinstate and rehabilitate him as a citizen of the United States, and give him the right to protection here as such? As already stated, I am of the opinion that Griffin became an alien by election, whether he became a citizen of the kingdom of Great Britain and Ireland or not. If the act of expatriation was complete, he lost his status as a citizen of the United States, and became an alien. I am not aware of any way for an alien (except in the cases prescribed by statute) to become a citizen of the United States other than by naturalization. The statute of 1907 makes no provision for the restoration to citizenship of one who has expatriated himself by taking the oath of allegiance to a foreign power. Reading the statute as a whole, and considering the provisions for restoration to citizenship of a woman who marries an alien, is it not fair and just to conclude that one who departs the United States and takes the oath of allegiance to a foreign power must regain his citizenship by naturalization, if at all? It seems to me this must have been in the mind and within the intent of Congress. Otherwise some other mode of restoration to citizenship in the United States would have been prescribed, as was done in the case of a woman who marries an alien and thereby takes on the citizenship and nationality of the husband.

Some of the definitions of "expatriation" state that to constitute "expatriation" there must be an actual change of *citizenship,* which would mean, in the case of removal to Canada or the British Empire, that to constitute expatriation there must be, not only a change of domicile, but naturalization according to the laws of that country. But England for a long time has had statutes declaring that foreigners enlisting into her sea or land armaments, and serving for a definite length of time, shall be ipso facto thereby naturalized. St. 13 Geo. II, c. 3; St. 2 Geo. III, c. 25; 1 Burge on Colonial and Foreign Law, 713; United States v. Wyngall, 5 Hill (N. Y.) 25.

In Ludlam v. Ludlam, 31 Barb. (N. Y.) 486, 489, it was said that to expatriate is to leave one's country and renounce allegiance to it with *the purpose* of making a home and becoming a citizen in another country; that it includes more than a change of domicile. This is of course true, and has never been seriously questioned. In that case a person left the United States in search of employment and a fortune. He not only found employment in South America, and there established himself in business, but there married and had children. However, he constantly looked forward to a return to his native country, the United States. Here, of course, there was no expatriation. There was no intent to abandon or renounce citizenship in the United States, or to become a citizen of any foreign country; he did no act inconsistent with citizenship in the United States; he took no oath of allegiance to any foreign power; and there was no statute declaring that such residence abroad constituted expatriation.

But in the instant case Griffin removed with his family to Canada, and there enlisted in the army of the king of England and took an oath of allegiance to that foreign power, which oath he, if a citizen of the United States, could not keep in case of trouble with the United States, without committing treason against the United States; and whether such acts made him a citizen of the kingdom of Great Britain and Ireland, with all the rights of a citizen of that country, or not, they were done with the consent and approval of that country, and Griffin became entitled to its protection.

"*Emigration, enlistment, and taking the soldier's oath, is effectually a change of allegiance.* Though it does not confer *all* the rights of citizenship, it is a naturalization quoad hoc; and if the expatriation be bona fide, there is nothing contrary either to law or morals in the soldier fighting against his original country, should a war break out between that and the one into whose service he has chosen to enter." United States v. Wyngall, 5 Hill (N. Y.) 16, 23.

Griffin was bound under his oath to serve England faithfully even as against the United States, and the United States in the exercise of its sovereign powers had the right to declare by statute, as it has done, that the acts done by him constitute expatriation; that is, renunciation of citizenship in the United States. Mackenzie v. Hare, supra.

This statute of the United States is a plain recognition of the doctrine of United States v. Wyngall, supra. The statute declares that, when Griffin did the acts which he did do, he effectually expatriated himself, and under the statutes of England referred to and the decisions he had taken steps in naturalization pursuant to the English laws. He emigrated, enlisted, and took the oath of allegiance required. It follows that Griffin, the petitioner, not only expatriated himself under the statute of the United States, but by his oath changed his allegiance to that of the kingdom of Great Britain and Ireland, and necessarily renounced his allegiance to the United States, and at least took the preliminary steps to become a naturalized citizen of England. Desertion and clandestine return to the United States could not restore his citizenship, or do away with the effect declared by law of his voluntary acts. Domicile, unless a law of the country forbids, may be gained at pleasure, but citizenship in an independent and sovereign nation, unless by birth, cannot be. Citizenship by birth is, of course, not a voluntary act, but determined by circumstances of birth. I cannot see that a citizen of the United States may voluntarily remove with his family to Canada, enlist in her army, take the oath of allegiance to the king of Great Britain, and still retain his citizenship in the United States. Neither can I see that, having renounced and lost his citizenship in the United States, and sworn allegiance to a foreign power, he may at will return to the United States in the manner and under the circumstances stated, and regain or restore himself to his rights and status as a citizen here.

[5] It is suggested that the oath of allegiance taken by Griffin was a "qualified" oath. But I find in it no qualification as to duty to the English government or as to time. It is true that in the declaration made on attestation he stated:

"I am willing to fulfill the engagements by me now made, and I hereby engage and agree to serve in the Canadian Overseas Expeditionary Force, and to be attached to any arm of the service therein, for the term of one year, or during the war now existing between Great Britain and Germany, should that war last longer than one year, and for six months," etc.

But this is no part of his oath of allegiance to the king, which oath is not for the time he serves as a soldier, or to expire with his period of enlistment. Even if so, the law of Congress quoted recognizes no distinction between an oath of allegiance to a foreign power indeterminate as to time and one for a specified and limited time. We cannot read into this act of Congress limitations and qualifications not found there or suggested by its terms. The law was evidently enacted to settle the question: Does taking an oath of allegiance to a foreign power constitute expatriation? It was not a new question. See Case of J. F. Bowler, which arose in 1895, and communication of Secretary of State Gresham in reference thereto, Foreign Relations, 1895, page 853, and Van Dyne, Citizenship of the United States, 280. Secretary Gresham said:

"The oath is inconsistent with his allegiance to the United States. By taking it he obligated himself to support the government of his adoption, even to the extent of fighting its battles in the event of war between it and the government of his origin. He could not bear true allegiance to both governments at the same time."

[2] It may be argued that Griffin, as a citizen of England, or as a man of no country, has the right to come into the United States, and that we are not concerned with returning deserters from the British army to that country. Concede this; still the United States has complete jurisdiction and control over the immigration of aliens into the United States. Aliens of any class or nationality, who enter the United States in defiance or violation of its immigration laws, may be deported. Aliens have no right to enter the United States from a foreign country clandestinely. If they so come, they are subject to deportation.

"It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Fong Yue Ting v. United States, 149 U. S. 698, 705, 13 Sup. Ct. 1016, 37 L. Ed. 905; Wong Wing v. United States, 163 U. S. 228, 231, 16 Sup. Ct. 977, 41 L. Ed. 140; Nishimura Ekiu v. United States, 142 U. S. 651, 654, 12 Sup. Ct. 336, 35 L. Ed. 1146; Chinese Exclusion Case, 130 U. S. 581, 606, 9 Sup. Ct. 623, 32 L. Ed. 1068; U. S. ex rel. Turner v. Williams, 194 U. S. 279, 24 Sup. Ct. 719, 48 L. Ed. 979; Passenger Cases, 7 How. 525, 12 L. Ed. 702, Woodbury, J., dissenting."

Section 36 of the Immigration Act (Act Feb. 20, 1907, c. 1134, 34 Stat. 898 [Comp. St. 1913, § 4285], as amended by Act March 26, 1910 [chapter 128, 36 Stat. 263] and Act March 4, 1913 [chapter 141, 37 Stat. 736]) provides as follows:

"That all aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this act: Provided, that nothing contained in this section shall affect the power conferred by section thirty-two of this act upon the Commissioner General of

Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico."

Ports of entry have been established, and alien immigrants must come through such ports of entry, whether entering the United States by land or sea. If they come otherwise, they are subject to deportation as aliens who have entered the country unlawfully. Being aliens, and having come into the United States clandestinely, and not through a port of entry, after an examination such as the laws of the United States and the rules and regulations of the United States Department of Labor prescribe, they are here illegally and in violation of law, and are subject to deportation for that reason. The courts do not stop to inquire whether they belong to the otherwise excluded classes of aliens, or whether or not they might have been admitted, if proper application had been made to the United States authorities at a port of entry. Having come into the United States clandestinely, and not through a port of entry and in compliance with the laws of the United States, they are within the express terms of section 36 of the Immigration Act, supra, and "shall be adjudged to have entered the country unlawfully and shall be deported," etc. United States v. Wong You, 223 U. S. 67, 69, 32 Sup. Ct. 195, 56 L. Ed. 354, affirming Wong You v. U. S. (D. C.) 176 Fed. 933, and reversing U. S. v. Wong You, 181 Fed. 313, 104 C. C. A. 535. In that case certain Chinese aliens entered the United States clandestinely, having come across the Canadian border, as did Griffin in this case. They were arrested, found to be aliens, and ordered deported. On habeas corpus this order of deportation was affirmed by this court under the provisions of section 36 of the Immigration Act of February 20, 1907, on the ground they were in the United States in violation of law, having illegally entered clandestinely. 176 Fed. 933. The Circuit Court of Appeals (181 Fed. 313, —— C. C. A. ——), reversed, holding that being Chinese persons they could not be deported under the Immigration Act, but must be dealt with under the Chinese Exclusion Laws. This action of the Circuit Court of Appeals was reversed by the Supreme Court (223 U. S. 67, 69, 32 Sup. Ct. 195, 56 L. Ed. 354, supra), and the order of this court was affirmed. The Supreme Court said:

"The parties are Chinamen, who entered the United States surreptitiously, in a manner prohibited by the Immigration Act of February 20, 1907, c. 1134, § 36, 34 Stat. 898, 908, and the rules made in pursuance of the same, if applicable to Chinese. They were arrested in transitu and ordered by the Secretary of Commerce and Labor to be deported."

They were held properly deported, not because they were Chinese persons, but because they were *aliens,* and came in surreptitiously, and were in the United States thereafter in violation of the immigration law. The petitioner, Griffin, in the instant case came in surreptitiously and in violation of the statute quoted, for the reason it appears he was and is an alien and did not come through a port of entry and submit to examination. If an alien, it must be adjudged that he entered the United States unlawfully and is in the United States in violation of law. The order for his deportation is valid on the showing made.

On the facts shown I conclude that Griffin, the petitioner, is an alien,

and subject to deportation. It has not been shown that he enlisted in the English army—Overseas Canadian Expeditionary Force—and took the oath of allegiance quoted when so under the influence of liquor that he did not understand and comprehend the nature of his acts.

The writ must be dismissed.

McLEAN LUMBER CO. et al. v. UNITED STATES.

(District Court, E. D. Tennessee, S. D. October 14, 1916.)

No. 13.

1. COMMERCE ⊜91—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS.

An order of the Interstate Commerce Commission, made on petition of shippers complaining of new rates about to be established by a railroad company, which, while not granting relief to the extent prayed for by retaining the old rates in force, establishes a schedule of new and higher rates, but lower than those proposed by the company, is not a mere negative order, and is reviewable by the courts.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. ⊜91.]

2. COMMERCE ⊜92—INTERSTATE COMMERCE COMMISSION—REVIEW OF ORDERS —VENUE.

Act Oct. 22, 1913, c. 32, 38 Stat. 219 (Comp. St. 1913, § 994), which provides that "the venue of any suit hereafter brought to enforce, suspend, or set aside * * * any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, * * * except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office." *Held*, that a suit by petitioners before the Commission, to review an order establishing railroad rates, whether such order was made on their petition or not, was within the jurisdiction of the court of the district wherein all the petitioners either reside or have their principal operating office, and that whether or not the railroad company has its principal operating office within the district is immaterial.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 142; Dec. Dig. ⊜92.]

3. COURTS ⊜325—JURISDICTION OF FEDERAL COURTS—WAIVER OF OBJECTION.

A motion by defendants to dismiss on grounds going to the merits is a waiver of any objection to the venue or jurisdiction of the particular court, where it has general jurisdiction by reason of diversity of citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 884; Dec. Dig. ⊜325.]

4. COMMERCE ⊜93—INTERSTATE COMMERCE COMMISSION—SUIT TO REVIEW RATE ORDER—PERSONS ENTITLED TO MAINTAIN—"INTEREST."

Owners of lumber mills, whose operation is dependent to a large extent upon logs shipped by them over a particular railroad, have such a pecuniary "interest" in the rates charged for the transportation of logs over such road as to entitle them to maintain a suit to enjoin en-

forcement of an order of the Interstate Commerce Commission fixing such rates, made in a proceeding to which they were parties.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 144; Dec. Dig. ⊂⊃93.

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

5. COMMERCE ⊂⊃96—INTERSTATE COMMERCE COMMISSION—SUIT TO ENJOIN ENFORCEMENT OF RATE ORDER.

A suit by shippers to enjoin enforcement of an order of the Interstate Commerce Commission requiring the establishment and maintenance of rates is not open to the objection that it seeks to have the court itself establish rates.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 146; Dec. Dig. ⊂⊃96.]

6. COMMERCE ⊂⊃92—INTERSTATE COMMERCE COMMISSION—SUIT TO ENJOIN ENFORCEMENT OF RATE ORDER.

Jurisdiction of such a suit is not affected by the fact that the order of the Commission has already been complied with by the railroad company by putting the rates into effect.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 142; Dec. Dig. ⊂⊃92.]

7. COMMERCE ⊂⊃91—INTERSTATE COMMERCE COMMISSION—ORDERS REVIEWABLE.

A conclusion by the Interstate Commerce Commission on a question of fact, such as the reasonableness of a rate, the correctness of which depends wholly upon a consideration of the weight to be given the evidence before it, will not be reviewed by the court; but a conclusion which plainly involves, under the undisputed facts, an error of law, or which is supported by no substantial evidence, will be so reviewed.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. ⊂⊃91.]

8. COMMERCE ⊂⊃91—INTERSTATE COMMERCE COMMISSION—LEGALITY OF RATE ORDER.

An order of the Interstate Commerce Commission directing the establishment by a railroad company of an increased rate on logs between certain points as a reasonable rate *held* supported by substantial evidence, and not to involve any error of law which would authorize a court to enjoin its enforcement at the suit of shippers.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 143; Dec. Dig. ⊂⊃91.]

9. COMMERCE ⊂⊃85—INTERSTATE COMMERCE COMMISSION—ORDER INCREASING RATES—GROUNDS.

It is the duty of the Interstate Commerce Commission, in passing on the reasonableness of a rate, to consider the conditions affecting the welfare of both shippers and carrier; but the carrier is not to be denied the right to change from an unreasonably low rate, which has formerly prevailed, to a just and reasonable charge for the future, merely because of the injurious consequences which would result to shippers from a change in the rate.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 138; Dec. Dig. ⊂⊃85.]

In Equity. Suit by the McLean Lumber Company, the Berry Lumber & Stave Company, the J. M. Card Lumber Company, and the Williams & Voris Lumber Company against the United States, in which the Interstate Commerce Commission intervened. On motions by complainants for preliminary injunction and by defendant and intervener to dismiss. Motion for injunction denied, and motions to dismiss for want of equity granted.

Sizer, Chambliss & Chambliss, of Chattanooga, Tenn., for plaintiffs.
Blackburn Esterline, of Washington, D. C., and Lewis M. Coleman, of Chattanooga, Tenn., for the United States.
Joseph W. Folk and Charles W. Needham, both of Washington, D. C., for Interstate Commerce Commission.

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

PER CURIAM. The McLean Lumber Company and three other corporations engaged in business in Chattanooga, Tenn., having filed a petition against the United States to set aside certain orders made by the Interstate Commerce Commission in the matter of the rates on logs in carload shipments from stations in Alabama and Mississippi on the line of the Alabama Great Southern Railroad Company to Chattanooga, Tenn., subsequently entered a motion for an interlocutory injunction restraining the enforcement of these orders pendente lite. This motion has been heard by three judges, as provided by Act Oct. 22, 1913, c. 32, 38 Stat. 220 (Comp. St. 1913, § 998), upon the petition and a transcript of the proceedings before the Commission exhibited therewith. There were also heard at the same time motions to dismiss the petition entered by the United States and by the Commission, which had, of its own motion, appeared as a defendant.

In 1900 the railroad company voluntarily published a schedule of rates on the interstate shipment of logs from stations on its lines into Chattanooga, varying according to distances, which remained in effect, with practically no change, until 1913, when it filed a new schedule for the purpose of canceling the former rates and putting higher ones into effect. The petitioners filed with the Commission a petition protesting against the proposed rates as unreasonably high, and the proposed schedule was thereupon suspended pending a hearing by the Commission as to the reasonableness of the rates. At the hearing the railroad company offered in lieu to establish another schedule, lower than the new rates at first proposed, but higher than those which had been in effect since 1900. After due hearing the Commission filed its report, finding the rates last offered to be reasonable (Chattanooga Log Rates, 30 I. C. C. 36, 39), and entered an order requiring the railroad company to cancel its former rates, and to establish these new rates by due publication, by June 1, 1914, and to maintain them for two years thereafter. In compliance with this order, the railroad company established and put these new rates into effect May 22, 1914.

Subsequently, the petitioners having petitioned for a rehearing and for a restoration of the former rates, the Commission granted a rehearing and reopened the case, but continued the new rates into effect pending a decision upon the rehearing. On July 23, 1915, the Commission filed its report on the rehearing, finding the new rates theretofore established to be unreasonably high as to certain distances, and making certain modifications therein (Chattanooga Log Rates, 35 I. C. C. 163, 171), and entered an order requiring the railroad company to cease, on or before September 15, 1915, from charging the new rates.

which had gone into effect under the original order as to these distances, and to establish, on or before said date, by proper publication, and maintain for two years thereafter, new rates which should not exceed those set forth in the order—being the rates which had been last offered by the railroad company and which had already gone into effect, as partially lowered by the Commission on the rehearing. All of the new rates thus ordered to be put into effect were, however, materially higher than those which had been established in 1900 and maintained until May 22, 1914. These new rates were duly published by the railroad company and went into effect September 15, 1915, as ordered. Thereupon, on January 10, 1916, almost four months after the new rates had gone into effect, the shippers filed their petition in this court, alleging that the new rates were unreasonable, and praying that the Commission's orders of March 3, 1914, and July 23, 1915, be annulled and their operation enjoined.

Our conclusions as to the several motions are:

[1] 1. There is no want of jurisdiction in the court to hear and determine the petition, upon the alleged ground that the orders sought to be annulled and enjoined are negative, and not affirmative. These orders are not in fact negative, as mere dismissals of the petitioners' complaint against the proposed rates, but affirmatively require the railroad company to establish and maintain the new and higher rates in controversy. Clearly, therefore, the instant case is not within the rule of Procter & Gamble v. United States, 225 U. S. 282, 32 Sup. Ct. 761, 56 L. Ed. 1091, and Hooker v. Knapp, 225 U. S. 302, 32 Sup. Ct. 769, 56 L. Ed. 1099, that a court is without jurisdiction to annul and enjoin orders of the Commission which merely refuse to give petitioners the relief sought by them, but is, on the contrary, ruled by analogy, at least, by the Tap Line Cases, 234 U. S. 1, 22, 34 Sup. Ct. 741, 58 L. Ed. 1185, in which it was held that an order requiring railroad carriers to cease and abstain from certain practices is affirmative in character and reviewable by the court. And see the Intermountain Rate Cases, 234 U. S. 476, 490, 34 Sup. Ct. 986, 58 L. Ed. 1408, in which it was held that there was jurisdiction to review an order of the Commission refusing to grant the request of carriers to be permitted to charge lower rates for long than for short hauls; the court saying that, while such order might be in one sense negative, it was in another and broader sense affirmative, since it refused that which the statute in affirmative terms declared should be granted if the prescribed conditions existed.

[2] 2. There is no want of jurisdiction in the court to hear and determine the petition on the ground that it does not appear that the railroad company has its principal operating office in this district. Act Oct. 22, 1913, c. 32, 38 Stat. 219, 221 (Comp. St. 1913, § 994), abolishing the Commerce Court and vesting its jurisdiction in the several District Courts of the United States, superseded the former provision as to venue contained in section 16 of the Interstate Commerce Act (Act Feb. 4, 1887, c. 104, 24 Stat. 379) as amended by section 5 of Act June 29, 1906, c. 3591, 34 Stat. 584, 592 (Comp. St. 1913, § 8584), and provided that:

"The venue of any suit hereafter brought to enforce, suspend, or set aside * * * any order of the * * * Commission shall be in the juridical district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition, before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office."

Three of the petitioners, upon whose complaint the hearing was had before the Commission resulting in the orders in question, are residents of this district, and the fourth has its principal office herein. Obviously, therefore, whether the orders in question be regarded as made upon their petition, or as not relating to transportation, or as not made on the petition of any party, there is, in either alternative, venue in this district, under the express terms of the act.

[3] Furthermore, both the United States and the Commission, a voluntary defendant, have, by their written motions, moved to dismiss the petition upon grounds based in part upon want of equity on its face and going to the merits, without objection to the venue; this latter objection having been subsequently made orally at the hearing in behalf of the United States alone. And since this objection does not go to a general want of jurisdiction in District Courts of the United States to hear and determine the controversy, but merely to the local jurisdiction of this court, it is clear, by analogy to the rule in cases where there is general federal jurisdiction by reason of diversity of citizenship, but want of local jurisdiction by reason of the residence of the parties (Western Loan Co. v. Mining Co., 210 U. S. 368, 28 Sup. Ct. 720, 52 L. Ed. 1101), that the making of such defense upon the merits is a waiver of the defect, if any there be, in the venue or local jurisdiction.

[4] 3. The petitioners have such interest in the rates ordered by the Commission to be put into effect as to entitle them to maintain this proceeding. They are manufacturers of lumber, having mills at Chattanooga, constructed and equipped at large expense, to whose operation, as they allege, logs purchased along the line of the railroad company in Alabama and Mississippi is the chief and indispensable source of supply; and, as they allege, the increased rates on these logs fixed by the orders of the Commission has caused the plant of one of the petitioners to be wholly abandoned, that of another to be shut down, and those of the two others to be greatly limited in their operations. Under the allegations of the petition they are directly affected in the conduct of their business by the orders of the Commission; and, if the rates fixed by these orders are unreasonably high, have suffered and will suffer great pecuniary damage.

We cannot sustain the contention made by the Commission, in which the United States does not join, that merely because the orders made by the Commission do not directly affect the petitioners' own property or its use, and because they have no vested interest in any rates filed by a carrier with the Commission, they have no such pecuniary interest

or property right involved under the orders in question as to give them a standing in court for the purpose of obtaining injunctive relief.

In Merchants' Association v. United States (D. C.) 231 Fed. 292, 294 (three judges), it was held, in an opinion by Morrow, Circuit Judge, that traffic associations, formed for the purpose of representing merchants in traffic matters, were entitled to bring a petition in equity to enjoin the enforcement of orders of the Commission, made upon its own initiative, suspending the long and short haul clause of the Interstate Commerce Act in reference to certain rates. A fortiori, shippers themselves, having been parties to the proceedings before the Commission in which such orders were made, would have been entitled to maintain such suit in equity. And it is to be noted that in this Merchants' Association Case the motion made by the United States to dismiss the petition was based upon the specific ground that the traffic association did not bring the suit either "as a common carrier or as shippers," and had no such interest in the orders made by the Commission as to enable them to maintain the suit; the government itself thus inferentially recognizing that the shippers themselves would have had such interest, just as in the instant case the right of the petitioners to bring this proceeding is not denied by the government. So in Galveston Chamber of Commerce v. Railroad Co. (Tex. Civ. App.) 137 S. W. 737, the right of a Chamber of Commerce and of individual shippers to bring a bill in equity to restrain the state Railroad Commission from enforcing a rate-making order on the ground of discrimination was not questioned either by the Commission, counsel, or the court.

While recognizing fully the general doctrine of Railroad Co. v. Ellerman, 105 U. S. 166, 26 Sup. Ct. 1015, In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092, and other cases upon which the Commission relies in argument, that a plaintiff in equity having no pecuniary or property interest in the subject-matter of the litigation is not entitled to injunctive relief, we find nothing in these decisions constraining us to conclude that the interest of a shipper in the rate which he is required to pay for the transportation of his property in the necessary conduct of his business is not such a direct pecuniary interest and property right as to give him the necessary standing in a court of equity for its protection. In United States v. Mich. Cent. Railroad (C. C.) 122 Fed. 544, 545, in which it was held that a suit in equity could be maintained at the instance of the government to restrain interstate carriers from discrimination in rates, after a preliminary investigation and finding by the Commission on the question of the unlawful discrimination, the court said:

"The Interstate Commerce Act confers upon each citizen engaged in productive industry * * * the substantive right of having his product transported by the common carriers of the country at rates equal to the rates obtained by his competitor. This right of equal treatment at the hands of the common carriers is as much a right of property, and affects as directly his interest in property, as any other right of property that he may have under the law, statutory or common. To enforce such right, there must be, somewhere in our system of jurisprudence, the remedy found essential. If an action at law for damages is inadequate, a remedy in equity must exist. The jurisprudence of the country does not leave him remediless."

And so we are of opinion that the right of a shipper to have his property carried at a reasonable rate in the transaction of his business is a right of property, that to enforce such right our system of jurisprudence does not leave him remediless, and that where an action at law is inadequate a remedy in equity must and does exist.

The common-law right of a shipper to have his goods carried at a reasonable rate of compensation is recognized in the provision of section 1 of the Interstate Commerce Act, as amended by section 1 of the Hepburn Act (34 Stat. 584), that all charges made by common carriers for services rendered in interstate transportation "shall be just and reasonable." A shipper, unless inhibited by statute, may "always invoke the aid of the courts" to protect himself against an unreasonable exaction of charges. Chicago Railway v. Osborne (8th Cir.) 52 Fed. 912, 914, 3 C. C. A. 347 (Brewer, Cir. Justice). Thus he is entitled at common law to his action in damages for the exaction of an unreasonable rate. Texas Railway v. Abilene Oil Co., 204 U. S. 426, 436, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075. This common-law remedy is, however, so abrogated by the Interstate Commerce Act that a shipper cannot now, consistently with its provisions, maintain his common-law action for excessive rates exacted on interstate shipments, where such rates have been duly published by the carrier and not found by the company to be unreasonable; and in such case a shipper must "primarily invoke redress through the * * * Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable." Texas Ry. v. Abilene Oil Co., 204 U. S. at page 448, 27 Sup. Ct. 358, 51 L. Ed. 553, 9 Ann. Cas. 1075 (1907).

It results that where an interstate rate published by a carrier has been determined by order of the Commission, in the exercise of its original jurisdiction, to be reasonable, the shipper who is compelled to pay these rates in carrying on his business is utterly remediless, whatever error may have been committed, unless he may in such case seek in the courts injunctive relief against the order of the Commission. Admittedly, however, an interstate carrier, aggrieved by an order of the Commission requiring the establishment of rates that are unreasonably low, may seek injunctive relief in the courts; and a careful consideration of the statutes in reference to interstate commerce convinces us that Congress not only did not intend to deny a corresponding remedy to shippers when the rates fixed by an order of the Commission are unreasonably high, but, on the contrary, affirmatively intended to extend such remedy to them.

By section 13 of the Interstate Commerce Act, 24 Stat. supra, at page 383, it was originally provided, in general terms:

"That any person * * * complaining of anything done or omitted to be done by a common carrier subject, to the provisions of this Act, in contravention of the provisions thereof, may apply to said Commission by petition."

And that:

"No complaint shall be at any time dismissed because of the absence of direct damage to the complainant."

By section 12 of the Commerce Court Act (Act June 18, 1910, c. 309, 36 Stat. 539, 552 [Comp. St. 1913, § 8583]), section 15 of the Interstate Commerce Act was amended so as to provide that, whenever there should be filed with the Commission any new schedule of rates, the Commission should be authorized, "either upon complaint or upon its own initiative," to enter upon a hearing concerning the propriety of such rate, and to make such order in reference thereto as would be proper in a proceeding initiated after the rate had become effective. We think it clear that this provision, enacted after the decision in the Abilene Oil Company Case, was intended to so broaden the right of shippers therein declared as not to limit their remedy against any unreasonable rate to claims for reparation after the rate had gone into effect, but to permit shippers who would in the conduct of their business be directly affected by a proposed new rate to appear as complainants before the Commission for the purpose of obtaining an order preventing such rate from being put into effect. And we necessarily conclude that the present petitioners by filing their petition before the Commission complaining of the new rate which the railroad company proposed to establish, acquired a legal status before the Commission as parties in interest to the proceedings had upon such complaint.

By section 1 of the Commerce Court Act (36 Stat. p. 539) there was vested in the Commerce Court the former jurisdiction of the Circuit Courts of the United States in cases brought to enjoin or annul any order of the Commission (Jud. Code [Act March 3, 1911, c. 231] § 207, 36 Stat. 1148 [Comp. St. 1913, § 993]). By section 4 it was provided that in all cases in the Commerce Court the Commission "and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, * * * in any suit wherein is involved the validity of such order or requirement * * * and the interest of such party"; that "committees, associations, corporations, firms, and individuals who are interested in the controversy or question before the * * * Commission, or in any suit which may be brought by any one" under the terms of the Interstate Commerce Act or its amendments, relating to action of the Commission, may "intervene in said suit or proceedings at any time after the institution thereof" (Jud. Code, § 212 [1]); and that "complainants before the * * * Commission interested in a case shall have the right to appear and be made parties to the case" (Jud. Code, § 213 [2]). And by Act Oct. 22, 1913, 38 Stat. p. 219, the Commerce Court was abolished and its jurisdiction transferred to the several District Courts of the United States.

Construing the foregoing provisions of the Commerce Court Act in their entirety, we are of opinion that it was intended that any person who had acquired a standing as a party in interest in proceedings before the Commission should have the right to appear as a party in any suit brought in the court involving the validity of an order therein made by the Commission, as distinguished from the mere right of intervention given to other persons who were not parties in interest

[1] Comp. St. 1913, § 1005. [2] Comp. St. 1913, § 1006.

before the Commission, but merely "interested in the controversy or question," and that the right thus given to a party in interest before the Commission is not limited to his appearance as an intervener in such proceedings as may be instituted by other parties in interest before the Commission, but includes the right to appear in the court as a party plaintiff in proceedings which he himself may bring to test the validity of the order of the Commission. And we hence conclude that, under the statutory provisions above quoted, the petitioners herein, having duly appeared before the Commission as complainants against the rates proposed to be established under the new schedule filed by the railroad company, not only became parties in interest before the Commission in the proceedings had upon such complaint, but that as such parties in interest in such proceedings they are now entitled, as of right, to appear as parties plaintiff under their petition in this court in proceedings to set aside the order of the Commission.

[5] 4. The petition is not open to the objection that it seeks to have the court take the place of the Commission as a rate-making body, and require the Commission to order the railroad company to establish in lieu of the new rates now in effect such other and lower rates as may be found to be reasonable by the court. This objection misconstrues the scope of the petition, which merely prays that the orders of the Commission, affirmatively requiring the carrier to establish the new rates and maintain the same for two years, be annulled and their enforcement enjoined, and contains no prayer that the court itself shall fix such other rates as it may determine to be reasonable and require them to be put into effect. What would be the exact status if the court should sustain the prayer of the petition and annul and enjoin the enforcement of these orders need not now be determined.

[6] 5. Nor can the petition be properly dismissed upon the ground that the rates in question have already been established and gone into effect. This objection does not go to the jurisdiction of the court, but merely to the extent of the relief obtainable by the petitioners. And even assuming that the court would be without authority to annul and enjoin the enforcement of such portion of the orders as has already been complied with, namely, that which directs the establishment of the new rates, this would clearly not prevent the court from granting part of the relief prayed, namely, the annulling and enjoining of so much of the orders as required the railroad company to maintain the established rates for two years from September 15, 1915.

[7] 6. On the merits of the application for an interlocutory injunction the petitioners earnestly insist that the conclusions of the Commission as to the reasonableness of the rates in question are (a) contrary to the evidence and without evidence to support them, and (b) based upon a mistake of law; and that the orders based on such conclusions should hence be annulled and enjoined. It is well settled that, on the one hand, a conclusion of the Commission upon a question of fact, such as the reasonableness of a rate, whose correctness depends wholly upon a consideration of the weight to be given the evidence before it, will not be reviewed by the court; while, on the other

hand, a conclusion which plainly involves, under the undisputed facts, an error of law, or which is supported by no substantial evidence, will be so reviewed. Pennsylvania Co. v. United States, 236 U. S. 351, 361, 35 Sup. Ct. 370, 59 L. Ed. 616; Louisville Railroad v. United States (D. C.) 216 Fed. 672, 679 (three judges), and cases therein cited. An order wholly unsustained by proof is reviewable, as being equivalent to an order in excess of the powers of the Commission. United States v. Louisville Railroad, 235 U. S. 314, 321, 35 Sup. Ct. 113, 59 L. Ed. 245; United States v. Louisville Railroad (D. C.) 225 Fed. 571, 579 (three judges).

[8] (a) On the question of the alleged want of evidence to support the conclusions of the Commission, the contention of the petitioners, based on their view of "the conditions established by the undisputed evidence," is, as summarized in their brief, substantially as follows: That the original schedule of rates, established by the railroad company itself, was presumably sufficiently remunerative at the time it was made; that having been continued for 13 years, without objection or complaint, until large investments have been made on the strength of them, this presumption of reasonableness is strengthened; that there was no effort to show any change of conditions which would justify any advance in the rates, or render them less reasonable than they were when first established; that it is a matter of common knowledge that the tendency is continually toward a reduction in freight rates, due to the increasing density of the traffic as the country develops, and the greater economy in moving it on account of the increase in size of engines and cars; that the steady increase in the earnings of the railroad company and its sound financial condition shows that these conditions have operated to its benefit and advantage; that the earnings from the log traffic have yielded their full proportionate share, or more, of all of the revenues of the railroad company; and that "in the face of this affirmative and uncontradicted evidence * * * the Commission exceeded its power when it required this raise of rates merely because it appears that on some other roads log rates are in force which are higher than the old rates on the line of this respondent."

The Commission, however, had before it a large amount of evidence, both oral and documentary, including exhibits showing the rates charged by other carriers for hauling logs to Chattanooga and for similar distances into Nashville and Memphis, Tenn., and Ohio river points, from which the Commission found that the new rates compared "favorably with the rates of other roads into Chattanooga and to the other points taken for comparisons where the traffic conditions appear to be similar"; evidence as to the due ratio between the rates on logs and those on lumber; evidence as to the comparatively slight participation of the railroad company in the outbound haul of lumber from Chattanooga, and the large proportion of the equipment used in hauling logs into Chattanooga which has to be returned empty; a comparison of the new rates on logs with those on other low-rated commodities; evidence as to certain inconsistencies in former rates as between different stations; and other evidence which at least tended to show that the earlier log rates had been originally established in order to encour-

age the industry. The Commission, after careful consideration of all of this evidence, as shown by its original and supplemental reports, reached the conclusion that the new rates which it directed should be put into effect were reasonable. And while the findings of the Commission are criticized by the petitioners in various respects, it being insisted, for example, that the log rates of other railroads used for comparison are in various respects misleading, we nevertheless conclude, after careful consideration, without setting forth the evidence in detail, that, as said in Interstate Commission v. Union Pacific Railroad, 222 U. S. 541, 550, 32 Sup. Ct. 108, 56 L. Ed. 308, there was in the mass of facts in evidence before the Commission "that out of which experts could have named a rate"; and that the conclusion of the Commission on this evidence that the new rate was reasonable, to which, as held in Illinois Central Railroad v. Interstate Commission, 206 U. S. 441, 454, 27 Sup. Ct. 700, 704 (51 L. Ed. 1128), is to be ascribed "the strength due to the judgments of a tribunal appointed by law and informed by experience," cannot be properly held to be supported by no substantial evidence and wholly unsustained by proof, or contrary to the indisputable character of the evidence, but is, on the contrary, supported by substantial evidence, and hence, as a finding on the facts, is now conclusive. Interstate Commission v. Union Pacific Railroad, 222 U. S. at page 550, 32 Sup. Ct. 108, 56 L. Ed. 308. And see Atchison Railway v. United States, 232 U. S. 199, 221, 34 Sup. Ct. 291, 58 L. Ed. 568; Loomis v. Lehigh Valley Railroad, 240 U. S. 43, 50, 36 Sup. Ct. 228, 60 L. Ed. 517.

[9] (b) The petitioners furthermore contend, in effect, that the conclusion of the Commission as to the reasonableness of the new rate is not now conclusive, because plainly involving an error of law, in that, it is insisted, the Commission "seem to have given no force or consideration whatever to the disastrous effect on the business of the protestants of the increase in rates which they have directed." It is the duty of the Commission, in passing on the reasonableness of a rate, to consider the conditions affecting the welfare both of the shippers and the carriers. Texas Railroad v. Interstate Commission, 162 U. S. 197, 219, 16 Sup. Ct. 666, 40 L. Ed. 940. However, the carrier is not to be denied the right to change from an unreasonably low rate, which has formerly prevailed, to a just and reasonable charge for the future, merely because of the injurious consequences which would arise to shippers from a change in the rate. Southern Pacific Co. v. Interstate Commission, 219 U. S. 433, 449, 31 Sup. Ct. 288, 55 L. Ed. 283; Atchison Railroad v. Interstate Commission (Com. Ct.) 190 Fed. 591, 594, and 203 Fed. 56, affirmed in per curiam opinion in Atchison Ry. v. United States, 231 U. S. 736, 34 Sup. Ct. 316, 58 L. Ed. 460; and Rates on Crushed Stone, 29 I. C. C. 136. The petitioners' contention in this matter is, we find, based on a misconception of the action of the Commission, which, as shown both by its original and supplemental reports, gave full and careful consideration to the contention of the petitioners in regard to the effect of the increased rates on their investments, but held, in effect, after such consideration and in accordance with the rules above stated, that the mere fact that the change in

rates would tend to impair or destroy the value of the investments made in expectation of their continuance did not constitute a ground for denying to the carriers the right to charge new rates which on all the evidence were found to be just and reasonable. 30 I. C. C. at page 39, and 35 I. C. C. at page 168.

We find no error of law in the action of the Commission in this regard. And we may add, in this connection, that there was substantial evidence supporting the statement made in the supplemental report of the Commission that, while it was shown that shipments of logs to Chattanooga had materially decreased since the new rates became effective, and that certain mills had closed and others were not running on full time, it also appeared that throughout the south the lumber industry had suffered severely as a result of the European War and from other causes, and that the depression at Chattanooga was perhaps no greater than at Memphis and other lumber manufacturing centers. 35 I. C. C. at page 168.

7. Since, therefore, for the reasons above stated, the conclusion of the Commission as to the reasonableness of the new rate must now be held conclusive, it results that the motion of the petitioners for an interlocutory injunction, restraining the enforcement of the orders based thereon, must now be denied. And as there is exhibited as a part of the petition all of the evidence taken before the Commission, we are, for like reasons, constrained to conclude that the petition shows on its face no equity or ground for permanently annulling and enjoining the enforcement of the orders of the Commission, which is the ultimate relief sought, and are hence of the opinion that the motions of the United States and of the Commission to dismiss the petition should, in so far as based upon the want of equity on the face of the petition, be granted. Louisville Railroad v. United States (D. C.) 227 Fed. at page 272.

A decree will accordingly be entered, denying the motion of the petitioners for an interlocutory injunction, sustaining the motions of the United States and of the Commission, and dismissing the petition for want of equity on its face, with costs.

UNITED STATES v. PENNSYLVANIA CO.

(District Court, N. D. Ohio, E. D. July 2, 1915.)

No. 8791.

1. RAILROADS ⇐229—OPERATION—FEDERAL SAFETY APPLIANCE ACT—CONSTRUCTION.

Federal Safety Appliance Act April 14, 1910, c. 160, § 3, 36 Stat. 298 (Comp. St. 1913, § 8619), provides that the Interstate Commerce Commission may upon full hearing and for good cause extend the period within which any common carrier shall comply with the provisions of the section with respect to the equipment of cars actually in service upon the date of the passage of the act. The Interstate Commerce Commission extended the time for the defendant railroad company to change and apply all appliances on freight cars so as to comply with the act for five years

from July 1, 1911, except that when a car should be shopped for work, amounting to practically rebuilding its body, it should be equipped according to the standards prescribed. A further provision of the act declared that when any car shall have been properly equipped as provided, and such equipment shall have become defective or insecure while such car was being used, it may be hauled from the place where such equipment was first discovered to be defective to the nearest available point where it might be repaired without liability for the penalty imposed. *Held* that, until expiration of the extension granted by the commission, the proviso extends to freight cars built and in service prior to July 1, 1911, which were not provided with all the required safety appliances, and which had not been shopped for work, amounting to practically rebuilding the body of the car before such cars became defective while in service.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.]

2. RAILROADS ⟸254(6)—OPERATION—SAFETY APPLIANCES.

Under federal Safety Appliance Act April 14, 1910, a railroad company cannot justify the operation of a train without the required percentage of air brakes being in use, due to the fact that the empty, bad-order, and chained-up cars composing the train were in such condition that the operation was not reasonably possible without establishing that it was not reasonably possible to have repaired the cars, either permanently or temporarily, so that the air brakes could have been connected up and used, for the proviso allows movement of cars only when necessary to make such repairs, and such repairs cannot be made except at repair point.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. ⟸254(6).]

3. RAILROADS ⟸254(6)—OPERATION—FEDERAL SAFETY APPLIANCE ACT.

A railroad company seeking to justify, under the proviso of federal Safety Appliance Act April 14, 1910, the movement of bad-order cars not equipped as required, has the burden of showing that it falls within the proviso; those setting up rights under exceptions in a statute being bound to prove them.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 772; Dec. Dig. ⟸254(6).]

4. RAILROADS ⟸229—OPERATION—FEDERAL SAFETY APPLIANCE ACT.

Under federal Safety Appliance Act April 14, 1910, providing that, when any car shall have been properly equipped and such equipment shall have become defective or insecure while such car was being used, it may be hauled from the place where the equipment was first discovered to be defective, to the nearest available point where the car might be repaired, a railroad company cannot justify the hauling of cars past the nearest repair points to a far-distant repair point on the ground that the repairs could not be reasonably made at the nearer points because of congestion and insufficient forces of men, for the statute, being for the protection of employés and passengers, should be given such a construction as would prevent carriers from practically suspending its operation.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⟸229.]

At Law. Action by the United States of America, against the Pennsylvania Company. Judgment for plaintiff.

This is a civil action brought by the United States to recover from the Pennsylvania Company penalties for claimed violations of the federal safety appliance acts (Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act April 1, 1896, c. 87, 29 Stat. 85; Act March 2, 1903, c. 976, 32 Stat. 943; Act April 14, 1910, c. 160, 36 Stat. 298 [Comp. St. 1913, § 8605 et seq.]).

The petition contains 34 counts. The first 25 counts are based upon the hauling of that number of empty bad-order cars in a train from Mosier, Ohio, to Dock Junction at Erie, Pa., when one or both ends of each of said cars (with the exception of the car mentioned in the twenty-fifth count which was hauled by its own drawbars) were not equipped with automatic couplers as required by statute, but were fastened to adjoining cars by means of chains.

At Haselton, a station between Mosier and Dock Junction, 8 additional empty bad-order cars were put into this train and hauled by means of chains instead of drawbars. The twenty-sixth count is based upon the operation of this train, consisting of 25 cars from Mosier and 33 cars from Haselton, together with engine, tender, and caboose, when less than 85 per cent. of the cars were controlled by air brakes; the air brakes being operated on engine and tender only.

The case is submitted to the court upon an agreed statement of facts, a jury being waived.

It is stipulated in the agreed statement of facts that the railroad over which the train of bad-order cars was moved was a part of a through highway of interstate commerce; that the cars were not equipped as required by the federal safety appliance acts; that the train on leaving Mosier on July 25, 1913, consisted of 25 cars and caboose, and a locomotive engine and tender; and that at Haselton 8 more bad-order cars were added to the train, making a total of 36 cars if the engine, tender, and caboose is each treated as a car. All of the cars were equipped with proper air brakes, but only those upon the engine and tender were used during the journey.

The agreed statement of facts further shows the place in the Youngstown district where each of the 33 bad-order cars was discovered and the date upon which it was marked "bad order." These dates run from May 15th to June 29th, and it is stipulated that they were all empty when moved; that the train in which they moved was not a revenue train and had no cars in it which were commercially used or which contained live stock or "perishable" freight; and that all of the cars had originally been equipped as required by the safety appliance acts, except the act of April 14, 1910, and the orders of the Interstate Commerce Commission made pursuant to this act.

The statement also shows that the defendant company had repair tracks at Mosier at what is known as the Market Street Yards in Youngstown and at Haselton, which is a suburb of Youngstown, but that bad-order cars had accumulated and were accumulating at each of these yards beyond the capacity of the yards to take care of them. It appears that the defendant had repair tracks at Ashtabula which were also congested beyond capacity.

It is further stipulated that on the cars in the train which had broken end and center sills the air hose could not be coupled up without danger of their being pulled apart on account of the slack in the chains. The fact that the train was not being operated by air was conveyed to the engine and train crew engaged in the movement of the train, and it was operated at a speed of about 10 miles per hour the entire journey. The distance from Youngstown to Dock Junction is 97 miles; the distance from Youngstown to Ashtabula is about 60 miles. All of the cars of the train were built and in service prior to July 1, 1911, and none of them had undergone regular repairs or had been shopped for work amounting to practically rebuilding of the bodies of them.

It is also stipulated that witnesses for the defendant, if called, would testify that at none of the three repair yards of the defendant referred to herein was there any place on the repair tracks to handle cars in excess of the number then awaiting repairs between May 15 and July 26, 1913, having regard to the reasonably necessary and practicable method of operating the railroad; that the defendant hauled the cars from Mosier and Haselton to Dock Junction for the purpose of repairing them, although it was not physically impossible to have made the necessary repairs on other than the repair tracks at any of the three repair yards between May 15 and July 26, 1913; and that in moving such a train as this one was it is considered safer practice to have the air brakes used only on the locomotive and tender than to attempt to use them throughout the train.

Cary R. Alburn, Asst. U. S. Atty., of Cleveland, Ohio, and Monroe C. List, Sp. Asst. U. S. Atty., of Washington, D. C.

Squire, Sanders & Dempsey, of Cleveland, Ohio, for defendant.

CLARKE, District Judge (after stating the facts as above). [1] That the defendant violated the federal safety appliance acts in moving the cars described in the various counts in the petition in this case as it did move them is clear, unless such movement is authorized by the proviso in the act of April 14, 1910. The parts of this proviso which are important to consider read as follows:

> Provided, that where any car shall have been properly equipped, as provided in this act and the other acts mentioned herein, and such equipment shall have become defective or insecure while such car was being used by such carrier upon its line of railroad, such car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired, without liability for the penalties imposed by section 4 of this act or section 6 of the act of March 2, 1893, as amended by the act of April 1, 1896, if such movement is necessary to make such repairs and such repairs cannot be made except at such repair point; * * * and nothing in this proviso shall be construed to permit the hauling of defective cars by means of chains instead of drawbars, in revenue trains or in association with other cars that are commercially used, unless such defective cars contain live stock or "perishable" freight. Section 4 (Comp. St. 1913, § 8621).

The act of April 14, 1910, after prescribing the equipments which all cars shall have, in section 3 contains this proviso, viz.:

> Provided, that the Interstate Commerce Commission may, upon full hearing and for good cause, extend the period within which any common carrier shall comply with the provisions of this section with respect to the equipment of cars actually in service upon the date of the passage of this act.

The agreed statement of facts shows that the cars in the train, movement of which is complained of, were all built and "in service prior to July 1, 1911," and Exhibit B is an order by the Interstate Commerce Commission providing in substance that carriers are granted an extension of five years from July 1, 1911, to change and apply all appliances on freight cars so as to comply with the standards prescribed by the commission in conformity to the act, except with respect to certain appliances designated which do not affect this case, and also except that when a car is shopped for work amounting to practically rebuilding the body of the car it must be equipped according to the standards prescribed by the commission. It is also provided that the extension of time thus granted must not be construed as relieving carriers from complying with the provisions of section 6 of the act of March 2, 1893, as amended April 1, 1896, and March 2, 1903.

First, the government contends that before the defendant can claim the privilege granted by the proviso of the act of April 14, 1910, a car must be equipped with all the appliances provided for and required by the safety appliances acts, including the act of April 14, 1910. As has been stated, the Interstate Commerce Commission was authorized by this act of April 14, 1910, to extend the time for compliance with its terms, and the commission on March 13, 1911, granted such

extension for cars such as were included in this train, as is shown by Exhibit B.

This order of the commission suspended the requirements of this act to a period long after the movement complained of in this case, and therefore the proviso under the stipulated state of facts should read as if written:

> Provided, that where any car shall have been properly equipped, as provided * * * in the other acts mentioned herein, and such equipment shall have become defective, * * * such car may be hauled, etc.

To say that the proviso extends only to cars equipped as provided by the act itself would be to read out of it the provision for an extension of the time for complying with it which was granted to the commission and which was exercised before the movement complained of.

If the contention of the government is denied, there still remains obvious and large application for the proviso, and this court is of opinion that the effect of the proviso is to put a congressional construction upon the act agreeing with that which was put upon it by several courts, but was denied by others.

Substantially this construction was placed upon the act by the Circuit Court of Appeals of the Fifth Circuit in Galveston, H. & S. A. Ry. Co. v. United States, 199 Fed. 891, 118 C. C. A. 339.

It seems very obvious to this court that the strained construction thus contended for by the government must be denied.

[2] As applicable to the twenty-sixth count, the government contends that the proviso does not permit the operation of any train with less than 85 per cent. of the air brakes on the cars in such train in use and operated by the engineer. Emphasis is laid upon the fact that the word "car" in the singular number is used throughout section 4 of the act, including the proviso, and for that reason it is claimed the proviso does not include a train of cars in bad order.

Without going the length of accepting this contention of the government based upon the use of the word "car" in the singular number, the fact remains that the proviso is applicable only where the "movement is necessary to make such repairs and such repairs cannot be made except at such repair point."

Before the defendant can claim exemption from the penalties of the act under this proviso, it seems plain enough that it must establish to the satisfaction of the court and jury that such movement of a train of cars in the extremely bad order in which these cars were when moved was necessary in order to reach a repair point, and that it was necessary to move them in a train when the cars were in condition such that the operation of air upon 85 per cent. of them was not reasonably possible.

The agreed statement of facts shows that upon the cars which had broken end and center sills the air hose could not be coupled up without danger of their being pulled apart or uncoupled on account of the slack in the chains, and that witnesses, if called, would testify that upon such a train it was considered safer practice to have the air brakes only upon the locomotive and tender.

The question thus presents itself to the court whether the agreed statement of facts shows that it was necessary, reasonably necessary, to move these cars without placing them in a condition such that the air upon 85 per cent. of them might have been connected up and used. Any person at all acquainted with the subject-matter under discussion of this case knows that it is often possible to equip a bad-order car with drawbars with coupling appliances for the purpose of hauling it when empty or in a train of empty cars when it would not be possible to so equip it for use when loaded or in a train of loaded cars. There is no evidence in this case that it was not reasonably possible to have equipped these cars with drawbars and couplers or to have repaired them with such drawbars and couplers as were upon them to the extent necessary to the making of the movement complained of.

Confessing the bad condition of the cars, the burden was upon the defendant to show that it was necessary to move them with chains and without drawbars and automatic couplers such that the air might be coupled up and used on 85 per cent. of the cars of the train, and since the agreed statement of facts does not show that it was not reasonably possible to make such repairs, temporary or permanent, as would have made it possible to use the air brakes, this court is clearly of opinion that the defendant offended against the airbrake provision of the safety appliance acts, and that under the twenty-sixth count of the petition it is liable for the statutory penalty. Even if it should be concluded that the defendant could not repair the cars completely at any of the three repair points near which their defective condition was discovered, it would by no means follow, without more evidence than is furnished by the agreed statement of facts, that it was not reasonably possible to make such repairs at the Mosier, Market Street, or Haselton repair plants as would have made it possible to use the air brakes when the cars were being moved, not loaded.

[3, 4] Finally, the government claims that the agreed statement of facts does not show that the movement of the cars in question was made for the purpose of repair within the meaning of the acts of Congress, and so that it does not bring the defendant within the protection of the proviso.

In order to avail itself of the benefits of the proviso, the burden is plainly upon the defendant to bring itself strictly within its letter and reason. "Those who set up rights under such an exception must establish it." Ryan et al. v. Carter et al., 93 U. S. 78, 23 L. Ed. 807. Quoted and approved in Schlemmer v. Buffalo, Rochester, etc., Ry., 205 U. S. 1, 27 Sup. Ct. 407, 51 L. Ed. 681; United States v. Dickson, 15 Pet. 141, 10 L. Ed. 689.

The defendant as if recognizing its duty to establish repair points, sufficient in number, with such provision for the repair of cars and in such locations as the traffic of its road might reasonably require, prior to this movement had established three repair points: One at Mosier; one at Market street in the city of Youngstown (distant from Mosier easterly three or four miles); and one at Haselton (distant from Market Street easterly about the same distance).

It must be accepted from the agreed statement of facts that the necessary repairs of the cars under discussion could have been made at any time at these three points, had not a congestion of bad-order cars caused delay in making such repairs. Twenty-five of the cars in this train were hauled from the repair point at Mosier, near which they were discovered to be in bad order through and past the Market Street repair point and through and past the Haselton repair point, and then more than 80 miles to Dock Junction, where they were repaired. The other eight cars were hauled from the repair point at Haselton, near which they were first discovered to be in bad order, to Dock Junction for repairs. Such a movement of bad-order cars was obviously unlawful unless it was "necessary" within the terms of the proviso of the act of April 14, 1910.

The defendant recognizes this situation and claims that the "necessity" which justified this movement was that the provisions made for repairing cars at the three established repair points named were not sufficient with the force of men which had been used and was then being used to repair these cars because of the number of bad-order cars which had accumulated and were continuing at the time to accumulate.

The agreed statement of fact, as we have said, shows that the defects in the cars were first discovered near to one or the other of these three repair points, and that they were discovered at various times between the 15th day of May and the 25th day of July, which was the day of the movement.

The proviso exempts from the penalties of the act only a movement of equipment which becomes defective when in use on a line of railway, and then only the movement of it from the place where it is first discovered to be defective to the nearest available place where it can be repaired, and this only if such movement is necessary in order to make such repairs, and if they cannot be made except at such repair point.

The alternative to this movement of bad-order cars complained of was the enlarging of the yards or the increasing of the force of operatives at the repair yards at the points where the exigencies of its business had led the defendant to establish them. There can be no doubt that with larger yards or a greater force of men employed these cars could have been repaired at any one of the three points near which they were discovered to be in bad order. A construction should not be put upon such wise and humane legislation as these safety appliance acts certainly are which will permit a carrier at its option to create as the defendant did the "necessity" which shall exempt it from compliance with the law. Failure to have repair yards of adequate capacity or the failure to provide a sufficient force of men to repair cars which may become out of repair in the vicinity of the established yards of the carrier cannot be permitted to create the "necessity" which the proviso declares shall exempt the company from liability for the moving of such defective cars.

Such a movement as is complained of in this case and for such a distance, and under the admitted conditions as to the establishment

of repair points, does not come within the limited privilege given by the proviso that a bad-order "car may be hauled from the place where such equipment was first discovered to be defective or insecure to the nearest available point where such car can be repaired" without liability for the penalties imposed by section 4 of the act of Congress.

That the movement under discussion cannot be justified as a movement of empty cars by themselves, and so not coming within the terms of the act for the reason that they were not at the time of the movement in use in interstate traffic, is settled by Southern Ry. Co. v. United States, 222 U. S. 20, 32 Sup. Ct. 2, 56 L. Ed. 72, which in effect overrules the decision in Southern Ry. Co. v. Snyder, 187 Fed. 492, 109 C. C. A. 344, which was rendered prior to Supreme Court decision.

The safety appliance laws are intended for the protection from injury of employés and passengers and for the facilitating of the conduct of interstate commerce, and, since experience has proved them to be of great value, a construction should not be placed upon them by the courts such as is contended for in this case, which would put it into the power of carriers to largely suspend their operations in a most important respect.

From the authorities cited and the foregoing discussion, it results that the finding must be in favor of the United States in each of the 34 causes of action pleaded in the petition.

GEORGIA R. & BANKING CO. v. WRIGHT, Comptroller General.

(District Court, N. D. Georgia. November 11, 1916.)

TAXATION ⟸278—SITUS OF PROPERTY—SHARES IN FOREIGN CORPORATION.

A Georgia railroad corporation leased all of its property for 99 years, and also by said lease assigned to the lessee "all the right of ownership, management, and use * * * which the party of the first part now has or is entitled to" in a railroad in Alabama of which it was a part owner. Such road was afterward incorporated in Alabama, and the lessor's interest was represented by stock issued in its name. The effect of the lease was to give the lessee the right to the use and income of such stock during the term of the lease, with reversion to the lessor. While in such condition it was held taxable in Georgia as property of the lessor domiciled in that state. *Held*, that a further agreement by which the lessor transferred the shares to the lessee, a corporation of another state, in trust to be held during the remainder of the term of the lease for the benefit of itself and a colessee, and after that to be reassigned to the lessor, did not change the situs of the property for the purpose of taxation; the lessor still being the owner of the stock subject to the lease.

[Ed. Note.—For other cases, see Taxation, Cent. Dig. §§ 454, 455; Dec. Dig. ⟸278.]

In Equity. Suit by the Georgia Railroad & Banking Company against William A. Wright, Comptroller General. Decree for defendant.

Cumming & Hull and Jos. B. Cumming, all of Augusta, Ga., and Alex C. King, of Atlanta, Ga., for plaintiff.

Clifford W. Walker, Atty. Gen., B. E. Pierce, of Augusta, Ga., and George Westmoreland, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. The question in this case is whether 15,000 shares of stock in the Western Railway of Alabama, which at the time of the lease to be hereinafter mentioned was the property of the plaintiff in this case, are, under the facts surrounding said stock, subject to taxation in Georgia; also whether $31,000 of bonds of the Monroe Railroad of Georgia, valued at $20,000, and $84,000 of bonds, valued at $25,000, and 200 shares of stock, said to be of no value, in the Union Point & White Plains Railroad Company, are subject to taxation against the plaintiff, the Georgia Railroad & Banking Company.

In 1881 the Georgia Railroad & Banking Company executed a lease for 99 years of its railroad and appurtenances to William M. Wadley, which lease, by successive transfers, subsequently came to the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, who now operate the Georgia Railroad as lessees. The power of the Georgia Railroad & Banking Company for making the lease to Wadley (who is succeeded in the lease, as stated, by the two railroad companies named) is shown by a provision of the original charter of that company, granted in 1833, as follows:

"That the said company may, when they see fit, rent or farm out all or any part of their exclusive right of transportation or conveyance of persons, on the railroad or railroads, with the privilege to any individual or individuals, or other company, and for such term as may be agreed upon."

In making the lease to Wadley the railroad company used the language of its charter as to the main body of the railroad and its appurtenances; that is, "hath rented and farmed out," etc. At the time of the making of the lease the Georgia Railroad & Banking Company and the Central Railroad of Georgia were the owners of the Western Railroad of Alabama, located in the state of Alabama, and that also went to Wadley under the lease. The language relating to that in the lease is:

"And the party of the first part [Georgia Railroad & Banking Company] also assigns by these presents to the party of the second part and his assigns all the right of ownership, management, control, and use of the Western Railroad of Alabama which the party of the first part now has or is entitled to: Provided, that when either branch of the Western Railroad of Alabama from Opelika into Georgia shall be sold, one-half of the proceeds of the sales shall be received by the party of the first part."

There is another provision in the lease to this effect:

"The party of the second part also covenants for himself and his assigns that he and they will pay the interest demandable of the party of the first part of the bonded debt of the Western Railroad of Alabama, so that said indebtedness shall never be increased, and at the termination for any cause of this agreement to return the property, which the party of the first part has in said railroad, without any greater incumbrance thereof than it now bears. But the party of the first part will consent to the organization of the owners of the Western Railroad of Alabama into a corporation, and to the issue by said corporation of bonds to renew bonds maturing from time to time, for which the said railroad of Alabama is liable, which said bonds the party of

the first part hereby agrees to indorse or guarantee to the same extent that it is now bound for the bonds of the Western Railroad of Alabama: Provided, that said incorporation shall not impair the beneficial ownership of said railroad by the party of the first part; and provided, further, that the aggregate amount of bonded indebtedness of said railroad and the rate of interest thereon shall not be increased to an amount and rate exceeding the present amount of bonds and present rate of interest."

Under the permission granted in this indenture, a corporation under the laws of the state of Alabama, styled the Western Railway of Alabama, was formed, to which the Western Railroad of Alabama was conveyed, and the interest of the Georgia Railroad & Banking Company was converted into a certificate for 15,000 shares of stock, out of a total of 30,000 shares; the other 15,000 shares going to the Central Railroad of Georgia. This certificate issued to the Georgia Railroad & Banking Company was sent to it at its office in Augusta, in this state, as I understand the record, and held by it until the making of a new agreement hereinafter referred to, in 1904. This stock, as it stood prior to 1904, has been held to be taxable in Georgia. Wright v. Louisville & N. R. Co., 195 U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167. And in Central of Georgia Railroad Co. v. Wright, Comptroller General (C. C.) 166 Fed. 153, the question of the effect of a statute of Alabama of 1907, then and now before the court, was referred to in the opinion in this way:

"A recent statute of the state of Alabama of March 7, 1907 (Laws 1907, p. 455), is set out in the bill, and it is claimed that the situs of this Western Railway of Alabama stock is fixed by it for the purpose of taxation in Alabama. The act provides for the assessment at its actual market value of all shares of stock in corporations of Alabama to the persons in whose names the shares appear on the books of the corporation. It requires the president or chief officer of the corporation to make out and return, under oath, to the assessor of the county in which the corporation is located, a list showing the total number of shares of the capital stock and the par value thereof, and the name and residence of each shareholder. It then allows a reduction from the aggregate value of these shares of any corporation of the amount at which the real and personal property of the corporation is returned to the tax assessor for taxation, and provides for taxing the residue, if any. It further provides that the amount paid by the corporation for any shareholder as taxes shall be a lien on any interest the shareholder may have in any property owned by the corporation. If this act of the Legislature of Alabama has any effect at all, it goes to the question whether this stock is taxable at all in Georgia, and, if so, to what extent, in view of the provisions of this Alabama statute. What the schemes of taxation may be of the state in which the physical property of a corporation is located has no effect apparently upon the right of another state in which shares in a corporation are held to tax such shares. Kidd v. Alabama, 188 U. S. 730, 23 Sup. Ct. 401, 47 L. Ed. 669; Wright v. Louisville & Nashville Railway Company, 195 U. S. 219, 25 Sup. Ct. 16, 49 L. Ed. 167."

The Supreme Court of Georgia, in Georgia Railroad & Banking Co., v. Wright, Comptroller General, 124 Ga. 596, 53 S. E. 251, and also in Georgia Railroad & Banking Co. v. Wright, Comptroller General, 125 Ga. 589, 54 S. E. 52, had the question of the taxability of this stock before it and held the same to be taxable; various questions being involved not material here. And in Central of Georgia Railway Company v. Wright, Comptroller General, 124 Ga. 630, 53 S. E. 207, the question of the taxability of its half of these shares of stock in

the Western Railway of Alabama was also before the court, with a like result. These cases went to the Supreme Court of the United States (207 U. S. 127, 28 Sup. Ct. 47, 52 L. Ed. 134, 12 Ann. Cas. 463) and the decisions of the Supreme Court of Georgia were reversed, but upon entirely different grounds; no holding whatever being made as to the taxability of these shares of stock, as I understand the cases. The extent to which this decision of the United States Supreme Court went is shown, I think, in the last paragraph of the opinion by Mr. Justice Day, as follows:

"Reluctant as we are to interfere with the enforcement of the tax laws of a state, we are constrained to the conclusion that this system does not afford that due process of law which adjudges upon notice and opportunity to be heard, which it was the intention of the Fourteenth Amendment to protect against impairment by state action."

I think it is thoroughly settled now that this stock was taxable in Georgia prior to 1904, and if its situs was then changed it was by reason of an agreement entered into in December, 1904, between the Georgia Railroad & Banking Company and the Louisville & Nashville Railroad Company, as follows:

"United States of America.

"This agreement entered into this ——— day of December, 1904, between the Georgia Railroad & Banking Company, a corporation created and existing under and by virtue of the laws of the state of Georgia, of the first part, hereinafter called the Banking Company, and Louisville & Nashville Railroad Company, a corporation created and existing under and by virtue of the laws of the state of Kentucky, hereinafter called the Railroad Company, witnesseth:

"That whereas, by an indenture dated the 7th day of May, 1881, between the Banking Company, as party of the first part, and William M. Wadley, of Monroe county, of the state of Georgia, of the second part, the said Banking Company among other things assigned, transferred, and conveyed to the said Wadley and his assigns for and during the term of ninety-nine years from the 1st day of April, 1881 "all the right of ownership, management, control, and use of the Western Railroad of Alabama which the party of the first part then had or was entitled to; and whereas, thereafter, the Western Railway of Alabama was incorporated and the interest of the party of the first part therein became represented by 15,000 shares of its capital stock of the par value of $100 per share, which said stock came under the terms of said lease; and whereas, by regular and legal assignment the Railroad Company and the Atlantic Coast Line Railroad Company have become the successors of the said William M. Wadley, and have acquired all of the rights and interests held by him under and by virtue of said lease, and said stock is now held by the Banking Company for the benefit of said lessees under the terms of said lease:

"Now therefore, in consideration of the premises and of the sum of ten ($10) dollars to the Banking Company by the Railroad Company well and truly paid at and before the execution of these presents, said Banking Company hereby transfers, assigns, and sets over to the Railroad Company said 15,000 shares of the capital stock of the Western Railway of Alabama to be held by said Louisville & Nashville Railroad Company in trust for itself and the Atlantic Coast Line Railroad Company, its colessee for and during the remainder of said lease, with the right in the Louisville & Nashville Railroad Company, as trustee as aforesaid, to the possession and custody thereof and to collect for itself and its colessee and use the dividends thereon, and at the expiration of said term the estate in said stock hereby conveyed, and all the rights, powers, interest, and possession of the said Railroad Company in said stock and its income are to terminate, and the said Railroad Company is to return said stock to the Banking Company or its assigns."

Then follows the execution clause.

It is claimed here by counsel for the plaintiff, the Georgia Railroad & Banking Company, that this instrument vested the legal title to the 15,000 shares of stock in the Western Railway of Alabama, which then belonged to the Georgia Railroad & Banking Company, in the Louisville & Nashville Railroad Company, as trustee for itself and the Atlantic Coast Line Railroad Company, leaving only a reversionary interest in this stock in the Georgia Railroad & Banking Company. Did this writing have this effect? That is the principal question here.

As the stock stood, it was held under the lease of May 7, 1881, by the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, as lessees, for the remainder of the term of 99 years for which the lease provided. The effect of this instrument of December, 1904, was not to change the right to have and enjoy the income of this stock, during the remainder of the lease, to the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company, and their assigns, but to change the right to hold it during that period from these companies themselves to the Louisville & Nashville Railroad Company, as trustee for itself and the Atlantic Coast Line Railroad Company, giving to the Louisville & Nashville Railroad Company, as trustee, the possession and custody thereof and the right to collect the dividends thereon.

I am unable to see how this changed in any way the legal status of this stock as to its situs for taxation, and that has been held, by all the decisions to which I have referred, at that time to have been in Georgia. It is understood that at the time this agreement of December, 1904 was made, the shares of stock in question here were held by the Georgia Railroad & Banking Company at its office in Augusta, Ga.

In speaking of this instrument of December, 1904, in their brief, counsel for the plaintiff says this:

"It is needless to inquire whether this instrument made any material change in the status of these shares. It did between the parties what the Wadley indenture called for as to these shares; or, if it did more, it did only what the parties had a right to do, and made the title to these shares exactly what the lease had done as to the ownership of the Western Railroad before the corporation was created. It turned these shares over to the parties, who were entitled to ownership and enjoyment of them for the term of the lease. It created an estate, or, if the estate already existed under the terms of the lease, it was the formal declaration of the estate—an estate for a long term of years with reversion to the grantor. It is immaterial, also, whether the trust was executed in the cestui que trust or not. Complainant contends that the trust is executory, for the reason that the trustee has a function to perform, viz. to retransfer the shares at the expiration of the estate for years. But this is immaterial. In either view complainant has no property or interest in these shares except the reversion. The owner of the estate for years does not reside in Georgia, and as the claim of the state to the arbitrary power to tax shares of stock of foreign corporations is based solely on the residence of their owner in the state, no law of the state authorizes the taxation of these shares."

If the certificate for these shares was transferred from Augusta, Ga., to Louisville, Ky., and was held by the Louisville & Nashville Railroad Company as trustee for itself and the Atlantic Coast Line Railroad Company, would that have any effect upon the fact that the

Georgia Railroad & Banking Company is still the owner of the shares? It seems to me it would have no effect whatever upon the legal situs of this stock for the purpose of taxation. This instrument of December, 1904, seems to carefully restrict the rights of the two railroad companies in this stock to what they had before the instrument was executed. Its only effect is to make the Louisville & Nashville Railroad Company the trustee for both the railroad companies.

The clause in the indenture of May 7, 1881, which authorizes the organization of the Western Railroad of Alabama into a corporation, had this proviso:

"Provided, that said incorporation shall not impair the beneficial ownership of said railroad by the party of the first part."

And so all through this original lease contract of 1881 it is everywhere shown that the purpose was simply to lease, or assign and transfer, if they are better terms, this interest in the Western Railroad of Alabama (which subsequently became represented by this stock in the Western Railway of Alabama) to the lessee for a term of years, with the ownership—that is, with the title—still in the lessor company, and with all rights that usually appertain to owners of leased premises reserved, and perhaps more than usual, and the right of visitation and examination of the property, and the right to have a forfeiture of the lease for noncompliance with its provisions.

The mere fiction of placing this stock in the hands of a trustee to hold for the purposes named in the original lease seems to me wholly ineffective, when considered in connection with the original lease and all of its terms, to change its ownership or title. Whether it created an executed or executory trust seems to me immaterial for present purposes. What it did was subordinate to, and must be considered in connection with, the original lease, and, so considered, it leaves the ownership of the stock in the Georgia Railroad & Banking Company, and the right to any profits or income from the stock, for the term of the lease, in the Louisville & Nashville Railroad Company and the Atlantic Coast Line Railroad Company.

This record fails to disclose anywhere, so far as I have been able to see, taxes paid on these shares of stock anywhere else than in the state of Georgia. There is nothing to show that there are any taxes paid in Alabama, and nothing to show that there are any taxes paid in Kentucky. Tax has been paid on the reversionary interest in the shares in the state of Georgia, and such tax has heretofore been accepted as satisfactory by the comptroller general. This last fact has been urged as an argument against the right to tax these shares on their entire value here now, but I do not see that the fact that the comptroller general was of the opinion during preceding years that it was right to accept the tax simply on the reversionary interest returned by the Georgia Railroad & Banking Company is any reason why, if the state has the right to tax the entire value, it should not do so. Certain it is that, so far as this record shows, the tax on the reversionary interest is all that has been heretofore collected on these shares anywhere.

It is a question of some difficulty, but in my judgment the court would not be justified in interfering with the comptroller general in the collection of these taxes.

What has been said above with reference to the shares of stock in the Western Railway of Alabama is equally true of the $31,000 of bonds of the Monroe Railroad Company and the $84,000 of bonds of the Union Point & White Plains Railroad Company. These two are Georgia corporations, and it is alleged, and not denied, as I understand it, that the bonds referred to were transferred to the Louisville & Nashville Railroad Company on the same trusts as were the shares of the Western Railway of Alabama.

As to the 200 shares of stock in the Union Point & White Plains Railroad Company, the comptroller general in his answer disclaims any right or purpose to tax said stock or that it is subject to taxation.

A decree will be entered, dismissing the bill, with costs.

SHERA v. MERCHANTS' LIFE INS. CO. et al.

(District Court, S. D. Iowa, E. D. April 1, 1916.)

1. COURTS ⊜347—SUBMISSION ON BILL AND ANSWER—EFFECT.

Equity rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii) abolishes the reply, save where a set-off or counterclaim is included in the answer, declaring that the cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed denied by the plaintiff; while rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii) abolishes exceptions for the insufficiency of an answer, providing that, if it set up an affirmative defense, the sufficiency may be tested by motion to strike. *Held* that, on submission upon bill and answer, new and affirmative matter pleaded in the answer must be taken as denied, the answer not being accepted as true, as it was under the old practice, and so the case is before the court upon the averments of the bill and admissions and denials of the answer not deemed controverted.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊜347.]

2. COURTS ⊜347—PRACTICE—ANSWER.

Under equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), providing that the answer shall avoid any general denial, and requiring the statements of the answer to specifically admit, deny, or explain the facts upon which the plaintiff relies, the court is not, upon submission on bill and answer, limited to general denials, but may consider explanatory facts in connection therewith.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊜347.]

3. FRAUD ⊜50—EVIDENCE—PRESUMPTIONS.

Fraud cannot be presumed; the presumption being that individuals are honest.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. §§ 46, 47; Dec. Dig. ⊜50.]

4. INSURANCE ⊜32—ASSESSMENT INSURANCE—ACTS OF INSURER.

Where acts of an assessment insurer were unlawful and ultra vires, the motive prompting the acts is of no importance.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 37; Dec. Dig. ⊜32.]

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5. EVIDENCE ⟸5(2)—JUDICIAL NOTICE—LEGISLATION.

The courts will take judicial notice of the increasing difficulty of assessment insurers to continue existence; it being a matter of common knowledge that, where the companies reach a certain age, it is difficult to obtain new members, because of the increasing age of the members and the enhanced death rate.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 4; Dec. Dig. ⟸5(2).]

6. INSURANCE ⟸53—ASSESSMENT INSURANCE—CHANGE IN ORGANIZATION OF COMPANIES.

Pursuant to Acts Iowa 32d Gen. Assem. c. 83, declaring that any existing domestic company or association may, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such a manner as to transform itself into a legal reserve or a level premium company, amendments to the articles of incorporation of an Iowa assessment association were adopted at a regular annual meeting, without previous notice, whereby the association was changed to a capital stock company, to be controlled by a board of directors selected by the holders of the capital stock, thus depriving members of the association of a vote in the selection of officers, or in the control and management of the assets. Plaintiff was the only member of the association who objected; other members acquiescing therein for nearly a year. *Held*, in view of the fact that the officers of the new company admitted that they had only legal title to the funds of the old association, and averred their intention of distributing the funds in accordance with the spirit of the by-laws of the old association, the change, though improper, will not be disturbed by a court of equity, and the old association restored, for the court would take judicial notice that, were it restored, it would probably become insolvent, and the rights of other members than plaintiff should be considered; this being particularly true, as plaintiff could obtain relief in an action at law.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 49; Dec. Dig. ⟸53.]

In Equity. Suit by Frank D. Shera against the Merchants' Life Insurance Company and others. Hearing on bill and answer. Decree for defendants.

James Bingham and Ellis E. Sluss, both of Indianapolis, Ind., and Hughes & McCoid, of Keokuk, Iowa, for plaintiff.

Seerley & Clark, of Burlington, Iowa, J. R. Lane, of Davenport, Iowa, and Locke & Locke, of Dallas, Tex., for defendants.

WADE, District Judge. This case is before the court upon bill and answer. Application for such submission was made by plaintiff, and concurred in by defendants. The effect of such submission is now in controversy.

[1] Under previous equity rules, upon submission upon bill and answer, the answer became evidence—"the only evidence the defendant needs, for it must be taken as true in all respects." Harris Reynolds v. First National Bank, 112 U. S. 405, 5 Sup. Ct. 213, 28 L. Ed. 733. The present equity rules do not seem to contemplate the submission of a case upon bill and answer; they seem rather to direct that the sufficiency of the answer as a defense, in view of the averments of the bill of complaint, shall be raised by motion to strike. Equity Rule 33 (198 Fed. xxvii, 115 C. C. A. xxvii). But, this case having been submitted

upon bill and answer, it is necessary to determine the effect thereof. Under equity rule 31, the reply is abolished, except where set-off or counterclaim is included in answer:

"The cause shall be deemed at issue upon the filing of the answer, and any new or affirmative matter therein shall be deemed to be denied by the plaintiff."

Under this rule, no reply is necessary to new and affirmative matter pleaded by way of confession and avoidance. All new matter is denied by virtue of the rule. This being the rule, I do not apprehend that the submission upon bill and answer can change or modify it; rather must it be assumed that the parties submitted the case upon bill and answer in view of this rule. Therefore the new and affirmative matter pleaded in confession and avoidance in this case must be held to be denied, and the case is before the court upon the averments of the bill, and the admissions and denials of the answer. The court, however, is not limited to the specific denials, but has a right to consider the statements in the answer explaining the denials.

[2] Equity rule 30 requires that the answer shall avoid "any general denial of the averments of the bill." It requires statements "specifically admitting or denying, or explaining, the facts upon which the plaintiff relies." So that the court is not limited to any general denial, but can consider in connection therewith the explanatory facts; but in my judgment it is thus limited.

[3] The answer in effect admits all the averments of the plaintiff's bill, which recites the organization of the mutual assessment company —the membership, insurance in force, method of making assessments and creating funds, and the existence of funds and assets, except that, as to assets, the amount thereof is disputed. That plaintiff is a member and certificate holder since November 23, 1909, is also admitted; and the proceedings of February 10, 1915, by which the Merchants' Life Association was transformed into a stock company, and its name changed to Merchants' Life Insurance Company, is also admitted.

The matters put in issue by the answer are largely the averments of the bill charging fraud and conspiracy, and confiscation of the assets of the Merchants' Life Association. So that the case is before the court upon an admission of the change from the Merchants' Life Association, a mutual assessment company, to the Merchants' Life Insurance Company, a capital stock level premium company, and an admission that all of the assets of the mutual association are now in the possession of the defendants, but with a denial that there were any improper motives, or any fraud or deception, with the assertion that the same was done in the best of faith, and in order to preserve the rights and interests of the certificate holders of the assessment association.

Fraud cannot be presumed. The law presumes that every person is honest until the contrary appears, and in this transaction, under the issues, the court must assume that the individual defendants were, in working the transformation, actuated by honesty of purpose.

[4] Even though it be held that the defendants' proceedings were in violation of law, it does not necessarily follow that they were fraudu-

lent, or with an improper motive. Men sometimes proceed contrary to law in the best of faith and with the best of motives, and in this transaction it must be borne in mind that the proceedings were in the open, and the court judicially knows that the change from the mutual assessment company to the stock company could not be effected without the approval of the insurance department of the state of Iowa, which is under the guidance of the Attorney General upon legal questions; but, strictly speaking, if the acts done were unlawful and ultra vires, as claimed by the plaintiff, the motive would not be of great importance.

[5, 6] Upon the issues presented, is the plaintiff entitled to the relief asked? Quoting from the language of Judge Trieber in Dill v. Supreme Lodge Knights of Honor (D. C.) 226 Fed. 807:

I may say that I "have given the matter the most careful consideration, realizing fully the importance of the case. Thousands of men, women, and children are interested in the result of this case. Perhaps in a large majority of the cases the insurance obtained in this lodge [association] is probably the only provision they have made for the protection of their wives and children after death. The able arguments made by counsel have aided us considerably in reaching our conclusions. We have carefully examined the numerous authorities, which the diligence of counsel has submitted to us, and given them such force and effect as we have thought they are entitled to. There were quite a number of questions argued to the court, all of which have received careful consideration."

The court cannot limit its vision to the little group consisting of the plaintiff and the defendants. It is conceded that there are at least 25,000 members of the assessment association, each of whom will be affected by the decree entered in this case. They are not in court, but nevertheless they are entitled to the consideration and the protection of the court. Quoting again from Dill v. Supreme Lodge Knights of Honor, and applying the language to the Merchants' Life Association, the assessment company:

"While it is true that this is a corporation, yet it is not a business corporation, nor a corporation for the purpose of doing business for a profit. It is simply an aggregation of individuals to create a fund in order to enable the parties to make provision for their wives, children, or their heirs in case of death. There is no profit in it; assessments are made for the purpose of paying death benefits; no one receives any profits; no investments are made; there is no capital. We might properly call it a charity in the nature of a trust fund to provide in the case of death for the survivors of the deceased members. That courts of equity have jurisdiction in all cases of trust is elementary. * * * It has been the public policy of every state in the Union—in fact, we might say, of every civilized government—to try and protect the members of such organizations by preventing the corporation, fraternal society of this nature, from carrying on its business whenever proof establishes beyond question, as it does in this case, that it would be impossible for the corporation to carry out the objects of its existence and induce its members to continue paying assessments, especially when they are increased periodically, which would be perpetrating a fraud on them."

While, under the present equity rules, much of the answer, pleading facts showing necessity for a change from the assessment to a level premium plan, is considered denied, yet the court must take judicial notice of what is a matter of common knowledge, that assessment companies, organized and operating upon the plan of the Merchants'

Life Association, are, and have been for a number of years, finding it very difficult to continue their existence. In recognition of these conditions, the Legislature of Iowa, in 1907, enacted a law (chapter 83, 32 G. A.) which, among other things, provided that:

"No life insurance company or association, other than fraternal beneficiary associations, which issues contracts, the performance of which is contingent upon the payment of assessments of call made upon its members, shall do business within this state, except such companies or associations as are now authorized to do business within this state and which shall value their assessment policies or certificates of membership as yearly renewable term policies according to the standard of valuation of life insurance policies prescribed by the laws of this state."

This legislation, prohibiting the organization of new assessment companies, naturally had the effect of creating public opinion against them. The court also must judicially know, because it is a matter of common knowledge, that these assessment companies at a certain age reach a point where, on account of the age of the members and the increased death rate, it is difficult to procure new members to take their place as they pass away. So that there is ample reason to feel that the individual defendants honestly felt that something must be done in the interest of all the members of the association, and I apprehend, if they had changed the association from an assessment to a level premium company, without issuance of capital stock, that their acts would be above criticism.

But at the regular annual meeting in 1915, without previous notice of their intention, amendments to the articles of incorporation were adopted, fixing the capital stock at $100,000, and changing the name of the corporation from the "Merchants' Life Association" to "Merchants' Life Insurance Company," and in every way providing for the control and management of said corporation by a board of directors selected by the holders of the capital stock. This change deprived the members of the association of a vote in the selection of officers, or in the control and management of the assets of the association, as provided by the original articles of incorporation, under which the plaintiff and his fellow members became members of the association. Under chapter 83 of the Acts of the 32d G. A., it was provided that:

"Any existing domestic assessment company or association may, with the written consent of the auditor of state, upon a majority vote of its trustees or directors, amend its articles of incorporation and by-laws in such manner as to transform itself into a legal reserve or level premium company."

Under this provision, and under the general power to amend the articles of incorporation reserved in the articles of incorporation of the association and in the statutes of the state of Iowa, defendants contend that the transformation effected by the amendments adopted at the February, 1915, meeting, were authorized. With this claim I cannot agree; but, in the view I take of the case, it is not necessary to enter into a discussion upon that point. We are dealing with conditions. The change has been made. It is now more than a year since the change to a capital stock company was effected. This case has been pending about seven months. I must assume that all the members of the association have long ago had full knowledge of what was done,

and I must also assume that many of the members have had knowledge of the pendency of this proceeding; but at no time up to the present has there been any suggestion brought to the notice of the court that any other member, except the plaintiff, is dissatisfied with what was done. It is true that the plaintiff alleges that the action is brought in behalf of himself and other members; but this averment is denied by the answer, and there is no proof that any other member is desirous of having the court grant the relief which the plaintiff prays herein.

This court of equity cannot shut its eyes to the interests of some 25,000 members, all of whom are free agents, and none of whom are seeking relief; nor can the court be oblivious to the fact that, by granting the relief asked by the plaintiff, it would be almost certain that the association would ultimately reach insolvency and dissolution. The association cannot live without procuring new members; without new members to take the place of those who die, the assessments would reach a point where they would not be paid, and I cannot believe that it would be possible to reinstate the old association with any hope of a continuance of its business. Therefore the relief asked by the plaintiff cannot be granted without irreparable injury to some 25,000 other persons. This court cannot consider the equities of the plaintiff alone; it must consider the equities of all persons interested in the result of this suit. Plaintiff is interested only to the extent of his insurance under his $2,000 policy, and to the extent of his equity in the existing funds of the association. Whatever damage he has sustained can be recovered by him in an action at law, and therefore, under all of the circumstances, I cannot consistently grant the relief prayed.

Much stress has been laid upon the fact that the company, as at present organized, has possession of the funds and assets of the old association. The defendants admit that they have such funds, but they contend that they only hold the legal title thereto, and admit that the equitable title thereto belongs to the members of the old association, and that their purpose is to administer the same according to the spirit of the articles of association under which said funds were accumulated. This assurance of intention may not be sufficient; it may be that the members of the old association should have the aid of the court in placing such restrictions upon the use of such funds as will assure their application to the purposes for which they were accumulated. But the plaintiff does not seek such relief, nor would a court grant such relief, except upon a consideration of the interests of all the members in a proceeding in which a fairly representative number of the members could be heard.

Therefore, without passing upon the other questions presented, the relief asked by the plaintiff is denied, and counsel for defendants will prepare decree, reserving proper exceptions, submitting the same to counsel for plaintiff, who may file objections to form, and the same will then be submitted for signature.

In re OHIO COPPER MINING CO.

Ex parte INTERNATIONAL INTER-CONTINENTAL MINING & REFINING CO. et al.

(District Court, S. D. New York. December 2, 1916.)

1. BANKRUPTCY ⟸269—SALE OF BANKRUPT'S PROPERTY—CONFIRMATION.

The property of a bankrupt corporation was sold on mortgage foreclosure, and under the law of the place of the sale the bankrupt had six months in which to redeem. Thereafter the equity of redemption was sold in the bankruptcy proceedings, but before confirmation of the sale the property greatly appreciated in value, so that the equity of redemption was worth a substantial sum above the debts. *Held*, that the referee in bankruptcy properly refused to confirm the sale of the equity of redemption, and allowed the stockholders time to form a committee to buy in the property upon resale; the order providing for payment of all debts of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⟸269.]

2. BANKRUPTCY ⟸262(1)—SALE OF BANKRUPT'S PROPERTY—STOCKHOLDERS' COMMITTEES—BIDDING.

In such case, the order allowing the stockholders an opportunity to form committees and buy in the equity of redemption on resale by paying all the debts of the corporation and expenses of administration should have provided for competitive bidding, so that those stockholders not parties to the reorganization plan would be protected, and the court would not be under the duty of determining which bidder proposed the more equitable reorganization; the stockholders being allowed to form more than one committee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 363; Dec. Dig. ⟸262(1).]

3. BANKRUPTCY ⟸262(1)—SALE OF BANKRUPT'S PROPERTY—BIDS BY STOCKHOLDERS.

Where a sale of a bankrupt corporation's equity of redemption was not confirmed, and stockholders' committees had several months' notice of resale and of the terms, but only one made a bid in accordance with the order of resale, accompanied by funds to pay the debts of the corporation, etc., such bid should be accepted, and the property need not be again exposed to sale for the benefit of other stockholders.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 363; Dec. Dig. ⟸262(1).]

4. BANKRUPTCY ⟸269—ORDER OF REFEREE—OBJECTIONS.

That an order of the referee for resale of a bankrupt corporation's equity of redemption in property sold under mortgage foreclosure contained directions to the purchaser in the foreclosure beyond the power of the court affords no ground for vacation, the purchaser not objecting.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 370; Dec. Dig. ⟸269.]

5. BANKRUPTCY ⟸260—ORDERS OF REFEREE—EFFECT.

Where an order of the referee for resale of the equity of redemption of a bankrupt corporation in property sold under mortgage foreclosure provided for payment of all debts in case of purchase of the property by stockholders' committees, the inclusion of the provision releasing the stockholders from liability is immaterial.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 360; Dec. Dig. ⟸260.]

In Bankruptcy. In the matter of the bankruptcy of the Ohio Copper Mining Company. On ex parte petitions by the International Inter-Continental Mining & Refining Company and others to review an order of the referee in bankruptcy denying confirmation of a sale of the bankrupt's property and authorizing a stockholders' committee to buy in the property. Order affirmed, and proceedings referred back to referee.

These are several petitions to review an order of a referee in bankruptcy dated November 6, 1916, the terms of which are summarized below. Five petitions were filed, seeking to review some or all parts of that order. The circumstances leading up to the order are as follows:

On September 11, 1914, the Ohio Copper Mining Company, a Maine corporation and the bankrupt herein, filed a voluntary petition in this court and was adjudicated a bankrupt in due course. The property of that company was incumbered by a mortgage previously executed to the Empire Trust Company as trustee to secure an issue of mortgage bonds of the face value of $1,242,000, upon which interest fell due on September 1, 1914. This default continuing for more than six months, on request of more than a majority of such bonds the trustee during the month of July, 1915, declared due the principal of the bonds in accordance with the mortgage and commenced with the leave of the bankruptcy court a suit of foreclosure in the District Court of Utah, the situs of the property in question. A decree of foreclosure followed on May 31, 1916, directing that the property be sold to satisfy the bonds, the total amount of which was found to be $1,397,746.80 with interest from March 1, 1916. Following this decree the property was duly advertised for sale in accordance with the appropriate statutes of Utah and struck down at auction on August 30, 1916, for the sum of $751,000 to a representative of a bondholders' committee, which had meanwhile been organized. The Utah court had appointed receivers, who were then and still are in possession of the property and at the present time in the receipt of large rentals due to the extraordinary rise in the value of metals.

Meanwhile, and on August 15, 1916, the bankruptcy court passed an order directing the sale of all the other assets of the Ohio Copper Mining Company on August 31, 1916, in Utah and at the same place as the sale in foreclosure the day before. These assets as described in said order and in the consequent advertisements consisted of the equity of redemption from the mortgage, all tools and mining supplies, all office furniture, certain specified choses in action, and the right of the trustees in bankruptcy upon stockholders' subscriptions. Under the laws of Utah, the owner, and certain other interested parties, of property subject to a mortgage have a period of six months within which to redeem from any sale in foreclosure, and the equity of redemption had therefore an actual, and indeed, as the event proved, a very large, value, beyond the purchase price and the bond issue. The bankruptcy sale was advertised according to law, and the auctioneer struck off the property as a whole for the sum of $40,000 to the same representative of the bondholders' committee who had bought under foreclosure on the day before. Becoming thus both purchasers under foreclosure and purchasers of the equity of redemption the bondholders were safe against any redemption under the Utah statutes, and the trustees in bankruptcy received for the assets of the company the sum total of $40,000.

Meanwhile objection had been made to the order of sale of August 15, 1916, and an effort made to secure its modification, which the referee denied by order of August 24, 1916. A proceeding, somewhat irregular in form, having been brought before the District Judge to review the referee's order of August 24, 1916, it was affirmed on September 1, 1916, by Judge Augustus N. Hand, who provided, however, that no application for confirmation should be made of any sale under the order of sale of August 15, 1916, until October 13, 1916. The purpose of this provision was to allow the stockholders by some joint action to redeem from the total indebtedness of the company and take it over either to the bankrupt or to a new company.

On October 17, 1916, the confirmation of the sale of August 31, 1916, was

brought on before the referee, and it then developed that two stockholders' committees were preparing to redeem from the foreclosure sale and give security for all the remaining indebtedness, consisting of the deficiency judgment in foreclosure and some $65,000 of unsecured indebtedness, together with the expenses of administration.

On November 6, 1916, after due deliberation, the referee upon the motion to confirm made the order now challenged which was in substance as follows: First he provided that any stockholders' committee might purchase the property by paying all the debts of the corporation and all expenses of administration to which purpose the funds already in hand should contribute. Second he fixed the 20th day of November, 1916, for a hearing at which should be computed the claims of all creditors and the administration expenses, the net amount necessary to redeem from the sale in foreclosure, the deficiency judgment for the bonds, and the settlement of the form of conveyance to the proposed new purchaser on redemption. Third, he provided that the trustees should redeem the property from foreclosure, as soon as the proper sum was paid into court, and that the purchaser on foreclosure should tender the certificate of purchase received from the Utah sheriff. Fourth, he provided that the trustees in bankruptcy should thereupon deliver a deed to the purchaser in redemption when he should pay the sum as fixed for redemption, and that the purchaser should release all stockholders from any liability. Fifth, he provided that any stockholders' committee might give five days' notice, compelling all other committees to contribute their shares of the redemption, and, if they failed, such committee might become the sole purchaser. Sixth, he provided a gross sum of $1,350,000 provisionally as purchase price in case the computation extended beyond November 20th. Seventh, he provided that any purchaser must offer to take all stockholders upon equal terms into the purchase. Eighth, he provided that, if any purchaser appeared and complied with the order of November 6, 1916, the motion to confirm should be denied, and if all committees failed it should be granted.

Here, strictly speaking, end the facts necessary for the consideration of the petitions of review; but the referee has likewise certified what took place on November 20th and 21st, when the hearing fixed in the order took place. The hearing was advertised twice in the newspaper, and both the North American Liquidation Company committee and the Central Trust Company committee had notice of it. On November 20, 1916, these two stockholders' committees offered to comply with the order of November 6, 1916, and on November 21, 1916, the North American Liquidation Company committee produced a check for $1,350,000, the amount fixed in the order. The referee took no action upon the bids, but certified the proceedings to the court.

Otto B. Schmidt, of New York City, for International Inter-Continental Mining & Refining Co.

Myers & Goldsmith, of New York City, for North American Liquidation Co.

Sullivan & Cromwell, of New York City, for Ohio Copper Co. bondholders' protective committee.

Emery H. Sykes, of New York City, in pro per.

Nash Rockwood and Alfred W. Kiddle, both of New York City, for trustees in bankruptcy of Ohio Copper Mining Co.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] It was of course within the power of the referee not to confirm the sale of August 31, 1916, and his refusal to do so in view of the larger possibilities of the situation was not only proper, but in justice necessary. The course he took, however, involved a situation which is at least anomalous in cases of this kind. He provided that any stockholders' committee might bid the amount of the indebtedness of the corporation and of the expenses of administration and

might receive a deed for the property from the trustees. Now under such an order two stockholders' committees might each bid the amount of the indebtedness and expenses, and the referee would find it impossible to award the property to either one without scrutinizing the terms of the reorganization upon which stockholders were to be admitted. The result of such a situation would inevitably force into the reorganization which the court thought best all those stockholders who had attempted to go into the others, and all others who had not entered any committees. As there was no provision by which any committee could bid a sum greater than the amount of the indebtedness and expenses, the stockholders who did not enter the successful reorganization would be excluded from any interest whatever in the property. Yet it might be that the property had a substantial value above the indebtedness and expenses which would appear in a competitive cash bidding. If so, each stockholder would be entitled upon dissolution of the corporation to his share of that surplus, which he might prefer to the rights he might get under the reorganization agreement. It must be remembered that as against a part only of the stockholders represented by a stockholders' committee the corporate entity may not be disregarded. It is only when all the stockholders are represented in the purchasing combination that their interests are identical with the corporation's, and that identity in the case at bar can be effected only by the short cut of saying that the opportunity of entering the successful reorganization is equivalent to a choice to do so. Stockholders have property rights which may not be dealt with in this way.

It was of course proper, since there had already been one sale, for the referee to provide that no stockholders' committee should be allowed to bid except upon the condition that all the indebtedness and administration expenses should be paid, and that if there were no such bid, the sale of August 31, 1916, should be confirmed, but it seems to me that the order was incomplete in failing to provide that the sale should be competitive, and that the property should go to that committee which bid the highest figure. It could have been provided, as in the case of purchase by bondholders, that such a percentage of the surplus as went to stockholders assenting to the successful reorganization might be paid by a mere credit upon their certificates of stock, but the sale should be permitted only in case there be a form of bidding which will insure to dissenting stockholders any value in cash which the property might bring. Then the court has nothing to say as to the terms of the reorganization agreement; it becomes a voluntary association among the stockholders, checked by the possible value which another set might pay in competition against them. But if the court is to compel all stockholders to enter a given reorganization which it may choose, it must charge itself with the duty of scrutinizing each agreement to see whether those terms are fairer than the possible cash value which might arise through their competition. This the court ought not to undertake.

[3] Now in fact there was only one bid accompanied by the necessary cash, and I think that the deficiencies in the order should be overlooked in view of that fact, since the referee has certified not only the

order, but what took place under the order on November 20 and 21, 1916. In short, if all parties had adequate notice, and only one appeared ready to conform to the necessary condition of any successful bid whatever, it would seem a barren thing to require the bidding to be made again. To do so, one must say either that there had not been fair opportunity for bids, or that the form of order, so far as erroneous, had discouraged bidding. There is no reason to suppose the latter.

As a practical matter the question therefore seems to me to turn upon the actual notice which the unsuccessful bidders had or might have had of those conditions which they were bound to meet. The only bidder on the 20th of November, 1916, besides the successful bid, was the Central Trust Company committee, who had begun to receive stock under a reorganization committee as early as September 25, 1911, and certainly knew the amount of the incumbrances upon the property. The attorney for this committee did not suggest, at the hearings on November 20th or 21st, that he had insufficient notice of the necessity of producing the cash to pay the indebtedness, but only asked for further time. Indeed, he said that he supposed when he came that no bid would be considered without cash. Nor did the attorney for the Madison Real Property & Security Company, Mr. Bien, make any such suggestion. The whole matter had been before this court on September 1, 1916, when Judge Augustus N. Hand gave further time to the stockholders to combine for the protection of the property. That was nearly three months before final action was taken, and meanwhile there had been much agitation of the possibilities of redemption. I cannot think that justice requires any further delay, or that a third offer should be made of this property for sale. The referee should therefore accept the bid of the North American Liquidation Company, as the only one which conformed with the necessary conditions for any sale.

[4] In spite, therefore, of the irregularity of the order of November 6, 1916, it will be affirmed. It is true that the order directing Sykes as purchaser in foreclosure to accept the redemption and assign the sheriff's certificate is beyond the powers of this court; but Sykes does not complain of it, and that provision will not, therefore, be disturbed.

[5] So far as concerns the release of the stockholders from liability, it is proper, though hardly necessary, since that liability can in no event be available when all the debts have been paid. Even if it included mortgage debts, it would be extinguished. Nor will that provision be modified which directs the payments to bondholders to be indirect.

The proceedings will be referred back to the referee to accept the bid of the North American Liquidation Company and to execute the order of November 6, 1916, in accordance with its terms.

RAKAUSKAS v. ERIE R. CO.

(District Court, E. D. New York. November 29, 1916.)

1. COURTS ⊜266—FEDERAL COURTS—JURISDICTION.
A federal court for one district has no jurisdiction to go beyond the territorial limits of its district in order to act in a suit against a party not a resident of the district, unless jurisdiction has been extended thereto by acts of Congress.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806–808; Dec. Dig. ⊜266.]

2. COURTS ⊜344—FEDERAL COURTS—PROCESS—SERVICE.
Service of process in an action at law in the federal District Court is not necessarily restricted to the United States Marshal and his deputies unless the process is directed to them.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊜344.]

3. COURTS ⊜344—FEDERAL COURTS—PROCESS—SERVICE.
Where a foreign corporation files a certificate within a state and designates an agent, the corporation does not thus become an actual resident of a federal district, within the state, wherein it has no place of business, and service of summons on the agent in another district does not confer jurisdiction upon the District Court of the former district.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊜344.]

4. COURTS ⊜274—FEDERAL COURTS—JURISDICTION OF FOREIGN CORPORATION —SERVICE OF PROCESS.
A domestic corporation may be sued in the federal courts by an alien in any district where it can be served and where it is doing business, if it does not properly raise the objection against being sued elsewhere than in the district of its residence; the case not being one depending on diversity of citizenship alone.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 814; Dec. Dig. ⊜274.]

5. COURTS ⊜276—FEDERAL COURTS—JURISDICTION OF FOREIGN CORPORATION —WAIVER.
Where a foreign corporation is sued in a federal court of a district of which it is not a resident, objection to the jurisdiction may be waived.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 815; Dec. Dig. ⊜276.]

6. CORPORATIONS ⊜665(2)—PROCESS—SERVICE—WAIVER OF DEFECTS.
To bring a foreign corporation within the jurisdiction of the courts of a state, strict compliance with the local statutes under which the courts gain jurisdiction over the cause is necessary.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2571, 2598; Dec. Dig. ⊜665(2).]

7. COURTS ⊜344—FEDERAL COURTS—JURISDICTION.
In an action in the federal District Court for the Eastern District of New York by an alien against a domestic corporation, not a resident of the district, service of process was made upon a ticket agent of the corporation in charge of the office within the district. Code Civ. Proc. N. Y. § 432, declares that in an action against a foreign corporation process may be served upon a cashier or managing agent or director. *Held*, that while strict compliance with the statute is necessary to give jurisdiction of an action in the state courts against a foreign corporation, and while the section governs "so far as may be," the corporation being foreign as to the court for the Eastern district, nevertheless the agent

must be deemed such an officer that service upon him was not void, but was sufficient to give jurisdiction where there was a waiver of objections to the jurisdiction of the court over the person of the corporation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 917; Dec. Dig. ⊂=344.]

At Law. Action by Konstant Rakauskas against the Erie Railroad Company. On motion to declare void an attempted service of summons. Motion denied.

Baltrus S. Yankaus, of New York City, for plaintiff.
Stetson, Jennings & Russell, of New York City, for defendant.

CHATFIELD, District Judge. [1] The motion to declare void an attempted service of summons in the Southern district of New York should be granted, on the ground that this court has no jurisdiction to go beyond the territorial limits of the district, to administer justice in an alleged cause of action against a party who is not a resident of the district, unless jurisdiction has been extended thereto by the authority of Congress. Sewchulis v. Lehigh Valley Coal Co., 233 Fed. 422, — C. C. A. —.

[2] As was held in the case of U. S. v. Mitchell (D. C.) 223 Fed. 805, service of process in an action at law is not necessarily restricted to the United States Marshal and his deputies, unless the process is directed to them. In admiralty and in equity, the contrary is true. To apply the provisions of the state law so as to bring an individual residing in another district (even though he be a citizen of the state of New York) into this district for the purpose of defending an action is certainly to extend the jurisdiction of this court over the hearing of issues.

[3] When the defendant is a corporation, however, with a designated agent and certificate filed, so that the authority of the agent and of the company under the certificate is coextensive with the boundaries of the state, the plaintiff in the present action contends that the foreign corporation is thus made an actual resident of the Eastern district, and that the process of the court should be allowed to extend throughout the state (unless the United States Marshal be compelled to step outside of his district in order to make the service) if the process is actually served in accordance with the laws of the state of New York.

But this contention was expressly overruled in the Sewchulis Case, supra, and, although no distinction was drawn between the individual as defendant and a corporation as defendant, the result would seem to be the same. Galveston, etc., Railway v. Gonzales, 151 U. S. 496, at page 506, 14 Sup. Ct. 401, 38 L. Ed. 248.

[4] Assuming therefore that the service in the Southern district of New York was ineffectual, we must consider the second part of the motion. The plaintiff has served within the Eastern district of New York, upon allegations charging that the corporation is a resident of the state, actually doing business within the Eastern district, the ticket agent in charge of the branch office for the sale of tickets, etc., in Brooklyn, and also a ticket agent at another office for the sale of tickets in a different part of Brooklyn.

Assuming that the defendant is a domestic corporation, it may be sued in the United States court by an alien, in any district where it can be served and where it is doing business in the sense of having an established office for the transaction of its regular business, if it does not raise properly the objection against being sued elsewhere than in the district of its residence. It is not a case dependent upon diversity of citizenship alone. Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264.

[5] If such foreign corporation is brought into a district where it is not a citizen—that is, other than the district where its main office is located and where the corporation was organized—objection to the bringing of the action in that other district may be waived, and the United States courts generally have jurisdiction over the action if the objection to jurisdiction over the person is waived. Male v. Atchison, etc., Ry., 240 U. S. at page 101, 36 Sup. Ct. 351, 60 L. Ed. 544.

[6, 7] The laws of New York are applicable so far as may be. In general, the provisions of section 432 of the Code of Civil Procedure, providing that in the case of a foreign corporation process may be served upon a cashier, or managing agent or director, control except in so far as the acts of Congress or the decisions of the United States courts establish the manner of service. While the defendant is a domestic corporation in New York, it is a foreign corporation to the United States court in this district.

To bring a foreign corporation within the jurisdiction of the courts of the state of New York, strict compliance with the statute is necessary, as the court has no jurisdiction other than that bestowed by the statute.

In the case of a suit against a foreign corporation in the United States court, by an alien, jurisdiction is present in the court over the cause of action if jurisdiction over the person is obtained. Strictness of compliance with the state statute should be exacted only to the point of properly securing the appearance of the person to defend the cause of action. Under such circumstances, a waiver of objection to being brought into that particular district for the trial of the suit is a very different matter from creating by consent jurisdiction in the court over a cause of action with which otherwise the court would have nothing to do. So in the present case, if jurisdiction over the cause of action as well as the person of the defendant were dependent upon the general or unlimited authority of the managing agent, there would be reason for holding that a ticket agent, in charge of an office for the casual transaction of railroad business, was not a director or managing agent in the usual sense of that term. But as was held in St. Louis S. W. Ry. v. Alexander, 227 U. S. 218, 33 Sup. Ct. 245, 57 L. Ed. 486, Ann. Cas. 1915B, 77, the conduct of business is such as to warrant "the inference that the corporation has subjected itself to the jurisdiction and laws of the district in which it is served and in which it is bound to appear when a proper agent has been served with process."

If the person in charge of the business office is a ticket agent, service of process upon him would seem to be sufficient to notify the corporation so that it could consider a possible waiver of objection to going into that district to defend the particular action.

As was said in Beck v. North Packing Co., 159 App. Div. 418, 144 N. Y. Supp. 602, the mere fact that the corporation received the paper does not show that the service was sufficient; but, where a waiver of appearance may be sufficient to support jurisdiction, proof of the receipt of the paper and action thereon, in a case in which the United States court has jurisdiction if the parties do not exercise their right to object, presents a question which was not under consideration in the Beck Case.

It is evident from the foregoing discussion that this service was valid, and the motion as to service upon the two agents must be denied.

In re IVERTSEN.

(District Court, N. D. California, Second Division. September 18, 1916.)

1. SEAMEN ⊜24—WAGES—RIGHT TO PARTIAL PAYMENTS—CONSTRUCTION OF STATUTE.

Under Rev. St. § 4530 (Comp. St. 1913, § 8322) as amended by Act March 4, 1915, c. 153, § 4, 38 Stat. 1165, which provides that a seaman shall be entitled to receive "on demand * * * one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has commenced, shall load or deliver cargo before the voyage is ended," the seaman is entitled at each such port to receive one-half the total sum then due him after deducting previous payments.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123–128; Dec. Dig. ⊜24.]

2. SEAMEN ⊜24—WAGES—RIGHT TO PARTIAL PAYMENT—CONSTRUCTION OF STATUTE.

Under the further provision of said section, that "any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned," a demand and refusal are necessary to put the master in default.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 123–128; Dec. Dig. ⊜24.]

3. SEAMEN ⊜21—DESERTION—MISTAKE IN PAYMENT OF WAGES.

A seaman demanded his pay and discharge at an intermediate port, and, being refused, left the ship. Before he went, without any demand therefor, he was paid what was thought to be the half wages due him under the statute, but through mistake the amount paid was too small. *Held*, that the mistake in payment did not relieve him from the charge of desertion, and that he thereby forfeited all wages due him.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 92–110; Dec. Dig. ⊜21.]

In the matter of the petition for payment of wages of Sigvard B. Ivertsen, a deserting seaman from the steamer Ventura. Petition denied.

VAN FLEET, District Judge. The petitioner on March 6, 1916, while the steamer Ventura, then on a voyage from San Francisco to

Sydney, New South Wales, and other Pacific ports and return, was touching at Honolulu on her outward voyage, shipped on her as an able seaman at $40 per month, signing articles for the remainder of the voyage out and back to San Francisco. At Sydney petitioner demanded and was paid $14.80, one-half of the wages then earned by him. On her return voyage the vessel against touched at Honolulu, and on April 11, 1916, at that port, petitioner, for what reason does not appear, applied to the captain for a final discharge and payment of the balance of his wages then earned. This request was refused, whereupon petitioner announced to the captain his refusal to continue the voyage, saying:

"Well, I am not going out on the ship anyhow; I am going to leave it; I can claim half of my money."

As will hereafter appear, however, petitioner did not at that or any other time make a demand upon the captain for the payment to him of one-half his wages, or anything less than all, and for his discharge. It does appear, however, that the captain directed the purser to pay him one-half the amount then earned, and the purser, computing what he believed to be the amount to which petitioner was entitled under the law, arrived at the sum of $8.75, which was paid him, and which he accepted without demur, took his dunnage, and left the ship. Thereafter on the same date he was duly entered in the vessel's log as a deserter, and subsequently, on the arrival of the vessel at San Francisco, the master turned over to the United States shipping commissioner at that port the sum of $24.67 as constituting the balance of wages earned by petitioner and remaining unpaid at the date of his desertion, which amount was by the commissioner paid into the registry of this court as required by the statute.

After the sailing of the steamer from Honolulu, the petitioner, claiming that he had not been paid all that he was entitled to receive on leaving the ship, made application through an agent of the Sailors' Union to the shipping commissioner at that port for relief, but was informed that that officer had no jurisdiction; that he should apply to the shipping commissioner at San Francisco. Thereafter, on July 10, 1916, when the officers of the ship were again in Honolulu, the evidence of the petitioner and that of the captain and purser as to the circumstances attending petitioner's quitting the vessel was taken before Hon. Charles F. Clemons, one of the United States District Judges for Hawaii, and this evidence, with petitioner's application, was thereupon transmitted to the shipping commissioner at San Francisco, by whom the matter has now been presented to this court.

[1] The theory upon which petitioner's application proceeds is that he was not paid at Honolulu the full amount of wages to which he was then entitled under the law, and that by reason of this fact he was at liberty to treat his contract as at an end and leave the ship; that such act did not, under the circumstances, constitute desertion; and that he is now entitled to demand and receive the full amount of wages earned by him on the voyage. This claim is based upon the provisions of section 4530, Revised Statutes (Comp. St. 1913, § 8322), which, so far as pertinent, reads:

"Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the wages which he shall have then earned at every port where such vessel, after the voyage has been commenced, shall load or deliver cargo before the voyage is ended and all stipulations in the contract to the contrary shall be void: Provided, such a demand shall not be made before the expiration of, nor oftener than once in five days. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. * * *"

The fact which it is claimed brings the case within this section is this: It seems that the purser, in figuring the half of the wages authorized by the master to be paid petitioner on April 11, 1916, construed the statute to mean that previous payments made are to be included in determining the wages earned at the time of any subsequent demand, which he accordingly did. He testified that he computed one-half of the wages earned by halving the total wages earned by petitioner up to that date and subtracting from such half the $14.80 advanced at Sydney, and thus reached his conclusion that but $8.75 was payable at that time. It would seem that this was an error. While somewhat awkwardly expressed, what the statute really means, I think, is that, deducting previous advances, the seaman shall be entitled to receive one-half of the balance of any wages earned and remaining unpaid at the date of demand. In this view the purser's computation would not result in ascertaining correctly the half of the wages then earned. The entire wages earned by petitioner up to that date was $47.99. He had been paid at Sydney $14.80. This left on the date in question the sum of $33.19 earned over and above the previous payment, one-half of which was $16.59. This latter sum constituted one-half of petitioner's wages earned and unpaid up to that date. That this is the correct construction is, I think, borne out by the section as it stood before amendment. It then provided:

"Every seaman shall be entitled to receive from the master of the vessel to which he belongs, one-third part of the wages which shall be *due* to him at every port where such vessel shall unlade and deliver her cargo before the voyage is ended, unless the contrary be expressly stipulated in the contract; and as soon as the voyage is ended, and the cargo or ballast is fully discharged at the last port of delivery, he shall be entitled to the wages which shall be then due."

Quite clearly under that language the wages due would be the sum to be paid the seaman if the shipping articles actually terminated at the intermediate port. Strictly speaking, the wages were not "due" at the intermediate port, as only one-third, as the statute then stood, was payable at that time. Evidently it was for this reason that, when the section was amended, the words "which he shall have then earned" were substituted for the word "due." But that Congress did not intend to change the relative amount made payable to the seaman is evident, when it is considered that under the method of computation adopted by the purser only comparatively insignificant sums would be payable at the second or any other intermediate port at which the vessel should subsequently touch. The purser began his halving process a step too soon.

[2, 3] But this mistake of the purser does not have the effect claimed by petitioner, assuming that a mere mistake, in the absence of protest,

could ever have such effect, since the facts, notwithstanding the error, fail in a material respect to bring petitioner's case within the section in question. The statute, it will be observed, expressly requires that there shall be a demand made upon the master for the partial payment provided for in order to put the latter or his vessel in default and release the seaman from his contract. This essential, as above indicated, was lacking. The evidence of the petitioner himself clearly establishes that no such demand was made. It is true that in his petition, sworn to before a notary public on June 14, 1916, petitioner states:

> That after the denial by the master of payment in full and his discharge he "then applied for a one-half part of the wages due him under and in accordance with R. S. § 4530," and that the purser, "acting for, and in the interest of, the master of the said S. S. Ventura, did pay the said Sigward B. Ivertsen the sum of eight ($8,00) dollars in payment of all claim of the said Sigward B. Ivertsen—such act on the part of the agent of the master of the said American steamer Ventura being in violation of and contrary to what was due deponent according to law."

But on his subsequent examination before Judge Clemons he testified in response to questions put by the agent of the Sailors' Union:

> "Q. Did you apply for your discharge? Did you ask the captain to pay you off? A. Yes, sir. Q. What did he say? A. He said he won't pay me off. Q. Well, then, what, if anything, did you do? A. I talked to you. I went up to see the agent of the Sailors' Union. Q. Well, what, if anything, were you told when you interviewed the agent of the Sailors' Union? A. I want to get my money. Q. What, if anything, were you told by the agent of the Sailors' Union? What did he tell you? A. The agent told me to go down and see the captain of the Ventura. Q. Did you do so? A. Yes, I went back again. Q. What did he tell you? A. He told me he wouldn't pay me off. * * * Q. I will ask you whether or not you applied to the captain for the half of the money due you upon finding that he refused to pay you off. A. I didn't apply for it. Q. How did you happen to receive it? A. I went down to the captain. Q. What, if anything, did he say again? A. He said he wouldn't pay me off. Q. I will ask you how you happened to secure any portion of that money. A. He was going to pay me off when he got to 'Frisco. Q. Was there anything said about the half of your money, either by the captain, yourself, or purser? A. No; I went down aboard. I got $8.75. I had some more coming—$13 I was figuring on. Q. You had drawn, I believe, £3? A. £3 sterling in Sydney. Q. That amounted to how much? A. $14.75—80 cents. Q. Then you got $8.75 and left the ship? A. $8.75 and left the ship."

It is thus made clear that what the petitioner sought and what he demanded was, not the half of his wages, but their payment in full, and to be discharged at an intermediate port—demands which the master was perfectly justified in refusing him. The master was clearly not required under the shipping articles, in the absence of some good reason, to grant petitioner's request unless he saw fit to do so. And there is nothing in the evidence tending to disclose the slightest reason why petitioner should have been accorded the privilege of release from his contract. Had petitioner made demand for the payment of one-half the wages earned, and this had been refused, he would have been within his rights under the statute in treating his contract of service at an end and leaving the ship; and he would then have been entitled to the relief now sought. But, not having made such demand, he was not within his rights in abandoning his contract and quitting the ship,

and the master was fully justified in treating him as a deserter and entering him on the log as such.

The petitioner asks, in effect, that if he cannot be allowed the full amount of his unpaid wages the court award him such amount as it may deem him "in justice entitled to according to law and human right." But unfortunately, in attempting to take the law into his own hands, petitioner has forfeited all rights in the premises which he might otherwise have had. Section 4596, R. S. (Comp. St. 1913, § 8380), provides:

"When any seaman who has been lawfully engaged * * * commits any of the following offenses he shall be punished as follows:

"First. For desertion, * * * by forfeiture of all or any part of the clothes or effects he leaves on board and of all or any part of the wages or emoluments which he has then earned. * * *"

Under this section the petitioner must be held, in the circumstances disclosed, to have forfeited all right to the fund paid into the registry, and the court is left without discretion to award him any portion thereof. While the courts should be jealous to carry out the laudable and humane purpose evident in the legislation of Congress, that seamen by reason of their hazardous calling and the condition of subordination and control to which they are necessarily subjected over that of other classes of labor, are to be fully protected against oppression and wrong, the limitations of their rights as prescribed by the law cannot be ignored; and the courts are not at liberty, in adjudicating controversies of this nature, any more than in those arising from contractual relations in other employments, to base their award on mere abstract considerations of moral right, which do not find sanction in the statute.

It results that the petition must be denied in its entirety; and it is so ordered.

WALDES et al. v. INTERNATIONAL MFRS.' AGENCY, Inc.

(District Court, S. D. New York. December 8, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⟸93(3)—SUFFICIENCY OF EVIDENCE—PRIOR USER OF TRADE-MARK.

In suit to restrain infringement of a trade-mark, evidence *held* sufficient to establish plaintiff's user of the trade-mark prior to defendant's use of a similar mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 106; Dec. Dig. ⟸93(3).]

2. TRADE-MARKS AND TRADE-NAMES ⟸21—RIGHT TO TRADE-MARK—USER.

A user of a trade-mark prior to defendant's user on about one-eleventh of the whole of plaintiff's output, which is uninterrupted and open, is not a casual or sporadic user, but is sufficient to establish right to the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. ⟸21.]

3. TRADE-MARKS AND TRADE-NAMES ⟸21—RIGHT TO TRADE-MARK—PRIORITY OF USER.

Ownership of a trade-mark depends solely on priority of user, though that use prior to defendant's use is small and for only a few months,

so that at the time defendant came into the market the mark had not become identified largely in the hands of the public with the goods of plaintiff.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. ⊂⊃21.]

4. TRADE-MARKS AND TRADE-NAMES ⊂⊃21—RIGHT TO TRADE-MARK—USER—PORTION OF MARK.

The use of the upper half of the Western hemisphere of the globe is a user of a trade-mark consisting of the entire Western hemisphere; it being immaterial how much of it is used, so long as enough appears to show that the globe was meant.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 24; Dec. Dig. ⊂⊃21.]

5. TRADE-MARKS AND TRADE-NAMES ⊂⊃45—OWNERSHIP OF TRADE-MARK—EFFECT OF REGISTRATION.

Registration confers no right to a trade-mark, and limits none, but is a mere procedural advantage, depending on common-law ownership.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 53, 59; Dec. Dig. ⊂⊃45.]

6. TRADE-MARKS AND TRADE-NAMES ⊂⊃32—USE OF TRADE-MARK—INCONSPICUOUS MARK.

The use of a trade-mark, which is so small and of such a color as to be difficult to discover, is evidence against the abandonment of the trade-mark, though not effective to establish the mark itself.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 36; Dec. Dig. ⊂⊃32.]

In Equity. Suit for injunction by Heinrich Waldes and others, co-partners doing business under the firm name and style of Waldes & Co., against the International Manufacturers' Agency, Incorporated. Decree rendered for plaintiffs.

This is the usual suit for an injunction and accounting under Trade-Mark Registration Act, Feb. 20, 1905, c. 592, 33 Stat. 724. The bill also asks for cancellation of the defendant's mark in so far as it conflicts with its own. The plaintiffs are aliens doing business in Austria, and the defendant is a corporation, a citizen of New York. On November 1, 1910, the plaintiffs obtained a registered trade-mark for snap buttons used as garment fasteners, which consisted of a plane representation of the Western hemisphere, with parallels and meridian. They asserted that this had been used in their Austrian business since July, 1905, and had been registered in Austria.

The defendant was incorporated early in September, 1912, but began to do business some time before—just when it is not certain. They adopted for their trade-mark a globe having a plane representation of the Atlantic Ocean, with the continents on either side, at the top of which was an airship, at the center a steamer, and at the bottom a train of cars. On October 19, 1915, they obtained a trade-mark for this to be used on dress shields, snap fasteners, corset laces, celluloid thimbles, finger shields, and collar supports. Above the globe was the word, "Eymay." The business of the defendant is the sale of the articles mentioned in the registration and of notions generally.

Snap fasteners are sold in two ways: By the dozen on cards; and fastened into a tape, which is reeled. The plaintiffs have used a great many different kinds of cards in this country, but by far the largest is a card going by the name of "Koh-i-noor" in dark blue. An insignificant detail of this card printed in gold is the globe, which is the registered trade-mark. It is so printed, however, that the ordinary observer would hardly be able to pick it out without much attention, for the color of the gold is very little distinguished from the dark blue, and there are many other confusing features. The tape fasteners sold by the plaintiff are on a reel, which does not contain the trade-

mark at all. Defendant sells its fasteners on a card, on which it does not use any representation of a globe; but it also sells tape fasteners, both on a reel and in a yellow box. On the front of the yellow box it uses its trade-mark of the globe without the word "Eymay," and it puts a paper band around the reel containing its full trade-mark. It is these two uses of which the plaintiff complains.

On the trial the evidence was excluded of the use of the plaintiff's trade-mark in Europe, it appearing that over the whole continent of Europe the globe had been widely used, and the court confined the plaintiff to its use in the United States. The plaintiffs then showed that the "Koh-i-noor" mark had been used in enormous quantities since the year 1909, over 20,000,000 in all having been sold, although the business had fallen off greatly since the beginning of the Great War. They also showed that a card called the "Rival" had been sold in large quantities, 1,800,000 in all, since the year 1909. This card had the upper half of the plaintiffs' trade-mark at the top of the card. It then showed some 13 other cards, which had been used in small quantities, being shipped over to this country in nothing like the amount of the "Koh-i-noor," or even the "Rival." The user of these cards is as follows:

Name of Card.	Number of Cards Sold.	When Sold.
Koh-i-noor	8,536	From March 13, 1914, to June 16, 1916.
" (No. 9)	3,600	" April 27, 1914, to March 26, 1915.
Best Quality	7,902	" August 8, 1912, to April 21, 1913.
Corso (white card)	7,560	" July 19, 1913, to July 17, 1914.
Corso (green card)	15,684	" May 3, 1915, to October 6, 1915.
Queen	19,656	" March 28, 1912, to June 6, 1913.
Zeppelin	3,572	" March 15, 1912, to May 15, 1913.
London	960	" April 15, 1915.
Conqueror	45,300	" April 7, 1915, to August 3, 1915.
Noblem	11,928	" April 12, 1915, to April 13, 1915.
Record	488	" August 27, 1914.
Mignon	45,856	" July 13, 1915, to October 6, 1915.
Atlas	40,555	" April 14, 1915, to October 6, 1915.

It also showed large and continuous advertising since 1909, in which the globe played a conspicuous part. In October, 1913, the plaintiffs objected to the use of the defendant's mark upon snap fasteners, but the defendant refused to accede to their claim.

Harry D. Nims, of New York City, for plaintiffs.
Louis S. Posner, of New York City, for defendant.

LEARNED HAND, District Judge (after stating the facts as above). [1] I think that there is enough proof in the case of a user antedating the defendant's user to support the plaintiffs' claim of a trade-mark, without considering the "Koh-i-noor" user, or the question of law raised by the foreign user with local registration. The earliest use, besides the "Rival" card and the "Koh-i-noor," is that of the "Zeppelin" card, which began on March 15, 1912, consisted of 7 separate invoices, and amounted in all to 2,136 cards before September 1, 1912. The next use was of the "Queen" card, beginning March 28, 1912, and amounting to 14,168 before September 1, 1912, in 32 separate invoices. Finally there is the "Best Quality" use, beginning on August 8, 1912, and consisting of 4 separate invoices, amounting to 720 cards before September 1, 1912. The defendant's use cannot with certainty be dated before September 1, 1912, but possibly it may have run back to June 1, 1912. In the latter event we should have 3 invoices of "Zeppelin," aggregating 1,048 cards, and 13 invoices of "Queen," aggregating 4,164 cards, antedating it. The use thus begun in March

15, 1912, continued without any break up to June of this year in the sales of "Koh-i-noor" (Exhibit A.) Various forms were used, aggregating the very substantial total of 211,597, and in every case the trade-mark was a substantial feature of the card, striking in its position and distinctiveness against the background. But the effective user does not stop there, because of the "Rival" card (Exhibit 3) 1,800,000 have been sold from 1909 to the present time. This card shows in the most conspicuous way the upper half of the hemisphere, and so far as that one-half can constitute a user it is such. That question I shall consider later, assuming for the present that it is to be included.

[2] Thus we have a total user of about one-eleventh of the whole output of the plaintiffs', antedating the defendant's user, uninterrupted and open. It is idle to speak of such a user as casual or sporadic, in the sense that it is used in such cases as Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, Brower v. Boulton, 58 Fed. 888, 7 C. C. A. 567, or Kohler Mfg. Co. v. Beeshore, 59 Fed. 575, 8 C. C. A. 215, where the name was used, off and on, for a single shipment, or for a short period, and then abandoned. This had been a foreign mark of the plaintiffs', and they had always intended to use it on all their goods. Indeed, the only possible ground on which the defendant can stand is that the plaintiffs failed unintentionally in the "Koh-i-noor" card, because the globe is too small and its gold color is not a sufficiently distinctive feature. The intention to use their mark on that card is apparent enough, and the only exception throughout the case is the instance of "Revol" (Exhibit 12) and the "Revol" tape (Exhibit B).

[3] If we were to disregard the "Rival" card, it is true that the use would be small, and would antedate the defendants by only a few months. In considering that question I shall not determine whether a mere claim of trade-mark by an alien, who has used it abroad, when the mark is fanciful and arbitrary, is enough to reserve the field for a while and keep others off. I shall, on the contrary, assume that the "ownership" of the mark depends solely upon user. Yet it is the priority of user alone that controls, even though, when the defendant comes into the field, it may not be fully established, or may not even be enough established to have become associated largely in the public mind with the plaintiff's make. Kathreiner's Malzkaffee Fab. v. Pastor Kneipp Medical Co., 82 Fed. 321, 27 C. C. A. 351; Thomas Carroll & Son Co. v. McIlvaine & Baldwin, 183 Fed. 22, 105 C. C. A. 314; Baker v. Delapenha (C. C.) 160 Fed. 746. Were it not so, it would be of extreme difficulty to show at just what point in time the mark became associated with the maker in enough of his customers' minds to justify the inference that the defendant's use might have become confusing. Therefore, once his use begins, the rest of the public must avoid his fanciful mark.

[4] Hence the user here would be enough, even though the "Rival" cards were disregarded, because we have an earlier use of the mark, continuous and substantial, to which no objection can possibly be taken. I do not, however, believe that the "Rival" cards should be thrown out of consideration. That question turns upon whether the use of half a hemisphere is enough like the use of the plane globe to identify the

goods as belonging to the same maker. I cannot see why not. In several of the other cards the base of the globe is more or less cut off, but no one would question that enough is left clearly to indicate that the globe is portrayed. I cannot see what difference it makes how much of the globe is shown, so long as there be enough to put it beyond doubt that a globe is meant. Sometimes people like to represent the globe as floating amid clouds, which conceal a substantial part of the hemisphere. It would, I think, be absurd to say that such a user was not the user of the globe itself. There is certainly no rule of rigidly undeviating similarity in the user of the mark. Such notions lose sight of the whole underlying theory of the matter, which, it cannot be too often repeated, is that the mark is only a representation, and will represent as far as it is recognized as identical with what has become familiar.

[5] People sometimes talk as though registration put some rigid limitation on user, but I know of none such. Registration confers no right, and limits none; it is a mere procedural advantage, depending upon common-law "ownership," which can exist quite as well without it. In a case like this, where the jurisdiction of the court does not depend upon it, it gives scarcely any advantage of any sort, except under section 16. It is not, like the issuance of a patent, the condition and the limitation of the owner's rights.

Now no one can doubt that the half hemisphere on the "Rival" card, being so distinctive as it is, indicates the globe, and only that, and no one can doubt that, to minds accustomed to an association of a half hemisphere with these fasteners, the full representation of a globe would carry out that association. If, indeed, the only use of the mark had been a half hemisphere, I should not hesitate to hold it infringement to use the whole. For the same reason I do not hesitate to include within the actual user of the mark such a user as the "Rival" card presents.

[6] As to the "Koh-i-noor" card itself, I am of the same opinion as Judge Hough was on the preliminary injunction; i. e., that it occupies too insignificant a place in the total make-up to serve as a trade-mark. No one could have been present at the trial and failed to be impressed with the genuine difficulty of the witness Arnold in picking out that feature. But this "Koh-i-noor" card is effective evidence against abandonment, for it shows an honest intent to use the mark, though it be not effective to establish the mark itself.

An injunction will go against the use of the globe on all packages, or reels, containing snap fasteners, and the motion will be granted to cancel the defendant's registration as applied to such goods. The decree will include damages and costs.

In re DORGAN'S ESTATE.

(District Court, S. D. Iowa, Davenport Division. July 1, 1916.)

1. WILLS ⊂=634(4)—CONSTRUCTION—INTEREST DEVISED—"USE"—"FULL POWER TO SELL AND CONVEY."

A will giving the residue of his estate to testator's wife for life, with "full power to use the same * * * as she may see fit," and after her death to nieces and nephews, "all of the proceeds * * * left after death of my wife" vested at once in the remaindermen a fee simple title to whatever might remain undisposed of under the widow's power, subject only to her life estate, since the word "use" does not signify the broad power of disposal for other purposes than her own use, nor does the grant of "full power to sell and convey" signify more than that the testator wanted to leave her unhampered in the handling of the estate to her use.

[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1492; Dec. Dig. ⊂=634(4).

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

2. BANKRUPTCY ⊂=143(9)—PROPERTY VESTING IN TRUSTEE—REMAINDERS.

The interest of a nephew under such will passed to his trustee in bankruptcy as a vested remainder; it being a property right, although subject to be entirely defeated.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 223; Dec. Dig. ⊂=143(9).]

In Bankruptcy. In the matter of the estate of Edmund J. Dorgan, bankrupt. Upon questions certified by the referee. Interest of bankrupt determined.

M. V. Gannon, of Davenport, Iowa, for bankrupt.

E. M. Sharon, of Davenport, Iowa, for one objector.

WADE, District Judge. Upon questions certified by the referee, it is necessary to construe the will of John Kelly, deceased, in order to determine whether Edmund J. Dorgan has any interest in said estate which passes to his trustee in bankruptcy.

[1] The portion of the will in controversy is as follows:

"As to all the rest and residue of my property, of whatever kind of which I may die seized, I give and devise the same to my beloved wife, Mary Kelly, for and during the period of her natural life, and give her full power to use the same without let or hindrance as she may see fit, giving and granting to my said wife, full power to sell and convey any real estate left by me, and to give proper deeds and conveyances for the same.

"After the death of my wife, I hereby give, devise and bequeath to my nieces and nephews, as follows, [naming them, including the bankrupt,] all of the proceeds of my estate left after death of my wife, and same to go to said last above named parties, who are my nieces and nephews, share and share alike."

The proof shows that the estate consists of moneys and credits and a small parcel of real estate. This will, being made in Iowa and affecting property located in Iowa, must be construed under the decisions of the Supreme Court of the state of Iowa. In view of the numerous expressions of the Supreme Court of Iowa upon similar language used in wills, there can be no question about the effect of the foregoing provisions.

The purpose of the testator clearly was that the estate should pass to his wife for her use and benefit during her lifetime, with the right to use, not only the income, but such portions of the principal as might be necessary for her proper support, maintenance, and comfort. It clearly was not the intention to grant her a fee-simple title in the real estate, or an absolute title in the personal property. All the language of the will must be given effect, and if testator intended that she was to be the absolute owner of the property he would not have made a devise of the portion remaining after her death; nor can it be assumed that the testator had any intention of vesting her with the property with the purpose or intent that she should dispose of the same during her lifetime, except for her own use and benefit.

He gave her "full power to use the same without let or hindrance as she may see fit." The word "use" does not signify the broad power of disposal for other purposes than her own use; nor does the grant of "full power to sell and convey any real estate left by me" signify more than that the testator wanted to have her unhampered in the handling of the estate to her use and benefit, so that she would get the fullest enjoyment therefrom, and it was clearly his intention that, if she deemed it advisable, she should have the power to dispose of the real estate and to convey title thereto. The language of the will is as broad as possible in conferring upon her absolute control for the purposes which the language of the will clearly indicates the testator had in mind.

The language of this will is no more effective than the language in the will in Paxton v. Paxton, 141 Iowa, 96, 119 N. W. 284, where the testator bequeathed unto his wife—

"all my property real and personal, of any name or nature, to be by her used and enjoyed as she may choose during her natural life, and at her death, if any property is remaining, to be divided equally among my children."

In this case the Supreme Court of Iowa held that the widow did not acquire a fee-simple title; that she only acquired the use; and, practically settling the question submitted in this case, the Court says:

"A devise which passes only a life estate may nevertheless be coupled with a provision giving the devisee unlimited power of disposal. *The devise in remainder vests at once in the devisees thereof a fee-simple title to whatever may remain undisposed of under this power,* subject only to the life estate of the first devisee."

In Hamilton v. Hamilton, 149 Iowa, 321, 128 N. W. 380, under a similar will, the court says:

"That a life estate may be created with power annexed authorizing the life tenant to defeat or extinguish the remainder over by sale and conveyance of the fee is too well settled in this state, and in most of the states, to admit of serious argument."

In this case it is further said:

"While the interest of the children in this property is not technically a 'contingent remainder,' it is nevertheless burdened from its very inception with the superior right of their father to diminish or extinguish it entirely, if, in the exercise of good faith, believing it necessary for his reasonable support and maintenance, he shall convey the fee. This gives him no license to sell the property and dispose of the proceeds merely to defeat the remaindermen."

The rule of these cases is further applied in Pool v. Napier, 145 Iowa, 699, 124 N. W. 755; Kierulff v. Harlan, 150 Iowa, 671, 130 N. W. 789; Ironside v. Ironside, 150 Iowa, 628, 130 N. W. 414; Brunk v. Brunk, 157 Iowa, 51, 137 N. W. 1065. Some of these cases are reviewed in note, 39 L. R. A. (N. S.) 807.

[2] Under the construction of the will made necessary by the foregoing authorities, the case comes within Pollack v. Meyer Bros., 233 Fed. 861, —— C. C. A. ——, in which the majority opinion holds that in a trust fund set apart for the support and maintenance of Mary Pollack, under which she had the use of the income and such portions of the principal as was reasonably necessary for her support and maintenance, the remainder going to certain persons, including the bankrupt, the interest of the bankrupt passed to the trustee. It will be observed that in Paxton v. Paxton, supra, the Supreme Court of Iowa says:

"The devise in remainder vests at once in the devisees thereof the fee-simple title to whatever may remain undisposed of."

There is no way of avoiding the conclusion that the interest of Edmund J. Dorgan, the bankrupt herein, in the estate of John Kelly, passes to the trustee in bankruptcy. Such interest is a property right —contingent, it is true, as to the amount and value thereof, and subject to be entirely defeated, but nevertheless a property right, the value of which may be in a way approximated by taking into account the age of the widow and the prospective necessities of her life. The trustee, or the purchaser from him, simply stands in the shoes of the bankrupt, receiving something, or possibly nothing, ultimately; but it is a right which should have a value, and, having a value, under the policy of the law, in case of bankruptcy, it passes to the trustee for the benefit of creditors. The whole policy of the Bankruptcy Act is that all nonexempt property of the bankrupt—and this must include all rights having a money value—shall be subjected to the payment of debts of the bankrupt. In consideration of this confiscation of his property, he is granted the privilege of exemption from the obligation to pay any debts he may owe which are not satisfied in the bankruptcy proceeding, and within the spirit of the Bankruptcy Act (Act July 1, 1898, c. 541, 30 Stat. 544) this property right belongs to the creditors of the bankrupt.

As to the restraining order, none is necessary. The court has no jurisdiction of the executor. He is under the direction of the state court, and must be governed by the orders of that court; and the federal court should not put itself in a position where there is conflict between it and a state court, which first acquired jurisdiction.

So far as the widow is concerned, she can do nothing which will limit the rights of the bankrupt in the property, except in the exercise of her rights under the will, and there is no showing that she is wasting the property or minimizing it in any way which is not authorized.

As to the bankrupt, any action by him to conceal or dispose of assets which properly belong to the estate is a felony, and the restraint of the penal statute should be more effective than any order of court; besides, any person who should undertake to purchase or acquire the interest of the bankrupt would do so lis pendens, and would acquire no rights.

HESS v. BOWEN.

(District Court, S. D. Iowa, S. D. March 5, 1916.)

1. SPECIFIC PERFORMANCE ⊜95—RIGHT TO—DEFECTS IN TITLE.
Under a contract to furnish a merchantable title as shown by the abstract, plaintiff, the vendor, tendered a deed which was rejected by defendant on the ground of defects in title. The Supreme Court of the state, in considering plaintiff's title to another portion of the land passing under the same conveyance, found that plaintiff's estate was subject to defeasance on the birth of children. *Held*, that as specific performance is not a matter of absolute right, but rests in the discretion of the court to be exercised in consideration of all the circumstances of the particular case, defendant cannot be required to accept the conveyance tendered by the plaintiff; for under the circumstances, though the court found that the determination by the state Supreme Court was erroneous, and though such determination was not a binding adjudication as to the property involved, nevertheless defendant would, if compelled to accept the title, be exposed to litigation and possible loss of the land.
[Ed. Note.—For other cases, see Specific Performance, Cent. Dig. §§ 257–277; Dec. Dig. ⊜95.]

2. VENDOR AND PURCHASER ⊜130(2)—CONTRACTS—"MERCHANTABLE TITLE"—"MARKETABLE TITLE."
The terms "marketable" and "merchantable" title are practically synonymous, the term "marketable title" being a title in which there is no doubt involved either as to matter of law or fact, and a purchaser who contracts for marketable title will not be required to take it if there be color of outstanding title and he may encounter the hazards of litigation (quoting Words and Phrases, Marketable Title; Merchantable Title).
[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 246; Dec. Dig. ⊜130(2).]

In Equity. Bill by Francis E. Hess against Hugh Bowen. Decree for defendant.

G. B. Haddock, of Bedford, Iowa, for complainant.
H. P. Jaqua, of Bedford, Iowa, for respondent.

WADE, District Judge. This is an action for specific performance. It comes before the court upon bill and answer and replication admitting the averments of the answer. The sole defense pleaded is that the plaintiff failed "to furnish a merchantable title as shown by abstract" as provided by the contract.

The particular defect relied upon arises out of a certain deed executed by C. C. Hess to the plaintiff which conveyed to him a life estate with certain provisions for forfeiture and for transmission of title to remaindermen. This particular deed was before the Supreme Court of Iowa in Hess v. Kernen Brothers, 169 Iowa, 646, 149 N. W. 847. This case did not involve the specific land now in controversy, but involved a portion of the tract conveyed under the deed aforesaid. It is admitted by counsel for plaintiff that, if the opinion of the Supreme Court of Iowa in this case expresses the law, the defendant is not bound to accept the title, and there should be a decree in his favor.

It is contended with much earnestness, and argument showing extended research, that the opinion of the Supreme Court is not sound,

and that the deed properly construed, in view of the subsequent conveyances to the plaintiff's brother and sisters, and W. E. Crum, and from Crum to the plaintiff, vests an absolute title in him.

[1] I do not find it necessary to determine the merits of the question involved, or to consider the soundness of the opinion of the Supreme Court.

Specific performance is an extraordinary remedy; it is not a matter of right, but of discretion.

"Specific performance is not a matter of absolute right to either party, but rests in the discretion of the court, to be exercised on consideration of all the circumstances of each particular case. * * * The mere fact of the existence of a valid contract is not sufficient of itself to entitle the plaintiff to this relief." Brewing Co. v. Brywczynski, 107 Md. 696, 701, 69 Atl. 514, 516.

3 Pom. Eq. § 1405, states the rules governing actions of this kind, in which it is said:

"The contract and the situation of the parties must be such that the remedy of specific performance will not be harsh or oppressive."

In note 1 to section 1405, it is stated:

"If, then, the contract itself is unfair, one-sided, unjust, unconscionable, or affected by any other inequitable feature, or if its enforcement would be oppressive or hard on the defendant, or would prevent his enjoyment of his own rights, or would work any injustice * * * then a specific performance will be refused."

In Zundelowitz v. Webster, 96 Iowa, 587, 65 N. W. 835, the court says:

"The specific execution of a contract, in equity is not a matter of absolute right, but it is a remedy—the right to which rests alone in the sound discretion of the chancellor—a discretion controlled by established principles of equity, in view of all the facts and circumstances attending the case presented."

In Pope Mfg. Co. v. Gormully, 144 U. S. 224, 12 Sup. Ct. 632, 36 L. Ed. 414, it is said:

"To stay the arm of a court of equity from enforcing a contract, it is by no means necessary to prove that it is invalid. From time to time immemorial, it has been the recognized duty of such courts to exercise a discretion; to refuse their aid in the enforcement of unconscionable, oppressive, or iniquitous contracts; and to turn the party claiming the benefit of such contract over to a court of law. * * * Omission or mistake in the agreement, or that it is unconscientious or unreasonable, or that there has been concealment, misrepresentation, or any unfairness, are enumerated among the causes which will induce the court to refuse its aid."

Were this an action at law for damages, the court would be required to determine the legal effect of the conveyances in question; but right to relief in a court of equity does not necessarily depend upon strictly legal rights or duties. If to grant relief would be unconscionable, or gravely unjust, or if it would impose extraordinary hardship, a court of equity should not grant specific performance. A court of equity is a court of conscience, and its first inquiry is: What is right and what is just between the parties?

Suppose the court should grant the relief asked by the plaintiff in this case, and compel the defendant to accept the property described in the contract, and pay the consideration therefor; what would he

have? Under the solemn opinion of the Supreme Court of Iowa, he would have a defective title; if children be hereafter born, he would, under the opinion, have no title.

While the opinion of the Supreme Court is not an adjudication as to this particular property, I have no reason to doubt that the opinion expresses the law as it will be applied in the future should the question come before the same court. Should this court in this case decide contrary to the opinion of the Supreme Court of Iowa, it would have no effect as an adjudication except as between the plaintiff and the defendant.

The plaintiff is a resident of Iowa; if children be born to him, they will probably be born in Iowa, and if born, and they assert their right to the ownership of this property, it may be that the question will have to be determined by the Supreme Court of Iowa; and, in this event, it is apparent that the defendant, or his grantees, would lose the property which the plaintiff is now asking this court to compel the defendant to pay for. I believe it would be a grave injustice to compel the defendant to accept a title so uncertain and involved. I think it would be unconscionable to make him pay for property, the title to which is held invalid by the court of last resort of the state where the property is located.

It must be apparent that such a title would be practically unmarketable in the future, even though this court might attempt to show that the opinion of the Supreme Court was erroneous. Assuming, as I must, that the price which the defendant agreed to pay is the fair value of the property, I can see where such value might be seriously affected by the condition of the title.

[2] The title required by the contract is denominated "merchantable." It is difficult to understand just what is meant by this term as applied to real estate. I apprehend, however, that it was used as synonymous with "marketable."

"'Marketable' and 'merchantable,' are practically synonymous." Eaton v. Blackburn, 49 Or. 22, 88 Pac. 303.

It is doubtful, even if this court should hold plaintiff entitled to the relief asked, whether the title then could be held to be "marketable."

"A 'marketable title' is defined to be, in equity, a title in which there is no doubt involved either as to matter of law or fact. Dalzell v. Crawford, 1 Pars. Eq. Cas. (Pa.) 37, 45. Every title is doubtful which invites or exposes the party holding it to litigation. If there be color of outstanding title which may prove substantial, though there is not enough in evidence to enable the chancellor to say so, a purchaser will not be held to take it and encounter the hazards of litigation. Herman v. Somers, 158 Pa. 424, 27 Atl. 1050, 38 Am. St. Rep. 851." 5 Words and Phrases, 4389.

"The books define a marketable title as one that is not only good but indubitable." Ormsby v. Graham, 123 Iowa, 202, 210, 98 N. W. 724, 727.

A court of equity should not compel the defendant to accept the title tendered by the plaintiff herein, and the relief sought by the plaintiff is denied.

Counsel for defendant will prepare decree, reserving proper exceptions, and submit to counsel for plaintiff, who may file objections to the form, and it will then be passed upon by the court.

CHAMBERS v. UNITED STATES.

RUSSELL v. SAME.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1916.)

Nos. 4599, 4600.

1. CRIMINAL LAW ⊂⊃747—TRIAL—JURY QUESTION.
Where the evidence on an issue is conflicting, the question is for the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1714, 1727; Dec. Dig. ⊂⊃747.]

2. CRIMINAL LAW ⊂⊃1159(2)—APPEAL—CONVICTIONS—EVIDENCE.
Where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a conviction; but the rule does not apply where there was any substantial evidence inconsistent with the innocence of accused.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3075, 3082, 3083; Dec. Dig. ⊂⊃1159(2).]

3. POST OFFICE ⊂⊃49—OFFENSES—EVIDENCE—SUFFICIENCY.
In a prosecution for devising a scheme, and using the mails in connection with a scheme, to defraud by deceiving purchasers as to the character of lands for sale, evidence *held* sufficient to support a conviction; all the substantial evidence not being as consistent with innocence as with guilt.

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

4. CRIMINAL LAW ⊂⊃633(1)—TRIAL—CONDUCT OF TRIAL.
It is the province of the jury in actions at law to try and determine the rights of the parties according to the law and the evidence, and it is the duty of the court and its officers and counsel of the parties to prevent the jury from the consideration of extraneous issues, so as to guard it against the influence of passion and prejudice, and to secure to litigants a fair and impartial trial.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1450, 1451, 1453, 1459; Dec. Dig. ⊂⊃633(1).]

5. CRIMINAL LAW ⊂⊃1037(1), 1055—TRIAL—APPEAL—OBJECTIONS.
An objection to unfair remarks of counsel, calling the attention of the judge to them when made, together with an exception to the action of the judge, or his lack of action, on the objection, are essential to a review of the unfair remarks, or their effect.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2645, 2666, 2667; Dec. Dig. ⊂⊃1037(1), 1055.]

6. CRIMINAL LAW ⊂⊃723(1)—ARGUMENT OF COUNSEL.
In a prosecution for devising the scheme, and for using the mails in connection with a scheme, to defraud in sale of land, where it clearly appeared that the land received by the purchasers was not of the value represented, reference to them as victims in the argument of the prosecutor was not error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1663, 1674, 1676; Dec. Dig. ⊂⊃723(1).]

7. CRIMINAL LAW ⊂⊃956(11)—TRIAL—EVIDENCE.
Where accused moved for new trial on the ground that the deputy mashal had answered queries of the jurors during their deliberations, questions whether the statements of the deputy marshal were made before the jury had agreed on a conviction, and whether such statements

were prejudicial, were questions of fact, on which it was proper for the court to receive evidence.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2387–2389; Dec. Dig. ⊂⊃956(11).]

8. CRIMINAL LAW ⊂⊃1156(5)—APPEAL—DISCRETION OF COURT.

Where there was substantial evidence that statements made by the deputy marshal to the jury before they returned their verdict were not prejudicial, and were made after they had agreed upon conviction, the denial of a motion for new trial on such ground cannot be reviewed, as the granting or refusing of a motion for new trial is discretionary with the lower court.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3071; Dec. Dig. ⊂⊃1156(5).]

9. CRIMINAL LAW ⊂⊃956(11)—TRIAL—CONDUCT OF JURY.

Before the jury had returned their verdict in a prosecution for devising a scheme, and using the mails in connection with a scheme, to defraud, they called in the deputy marshal, and in answer to their questions he stated that the lowest penalty that would be inflicted was a fine of $1, or $10, or probably $25, and that, when the jury recommended defendants to the mercy of the court, the court generally followed the recommendation. *Held*, that the statements raised only a rebuttable presumption that they were prejudicial, and so, where there was competent evidence to show that the statements were made after the jury had determined on conviction, and that they were not prejudicial, it is properly received in disposing of a motion for new trial on the ground of such statements.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2387–2389; Dec. Dig. ⊂⊃956(11).]

10. POST OFFICE ⊂⊃35—OFFENSES—SCHEME TO DEFRAUD.

In a prosecution for devising a scheme, and using the mails in connection with a scheme, to defraud in disposing of land by means of false representations, where many false representations as to the character of the land were relied on, it is no defense that the evidence failed to show that defendants intended to defraud the purchasers by failing to give them land which was worth the price they agreed to pay.

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

11. CRIMINAL LAW ⊂⊃829(13)—TRIAL—INSTRUCTIONS.

In a prosecution for devising a scheme, and using the mails in connection with a scheme, to defraud, where the indictment, setting forth the false representations by means of which defendants effected sales of land, was read to the jury, and the evidence concerning the representations was most voluminous, a request to charge that the jury could not consider the testimony of any witness to the promise of defendants to return the purchase money, except as to the light it might throw on the intent of defendants, or their good faith, was properly refused, though the indictment did not specify false representations as to the return of the purchase money; the court having charged the jury that only the representations contained in the indictment could be considered.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2011; Dec. Dig. ⊂⊃829(13).]

12. POST OFFICE ⊂⊃35—OFFENSES—USE OF MAILS IN CONNECTION WITH SCHEME TO DEFRAUD.

In a prosecution for devising a scheme to use the mails to defraud in the sale of lands, and using the mails in connection therewith, it is not essential to a conviction that the false representations made to prospective purchasers amounted actually to a substantial deception.

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

13. POST OFFICE ⊜50—OFFENSES—USE OF MAILS IN CONNECTION WITH SCHEME TO DEFRAUD.

In a prosecution for devising a scheme, and using the mails in connection with a scheme devised, to defraud by disposing of lands by misrepresentations, where it appeared that many of the representations as to facts concerning the land were untrue, a requested instruction that men engaged in the business of selling land are not criminally liable for puffing their wares, so long as their statements are within any proper reasonable bounds, and that a certain degree of commendation of the lands was not criminal, so long as the statements were not actually made in bad faith and with an intent to deceive, was properly refused, being without qualification.

[Ed. Note.—For other cases, see Post Office, Cent. Dig. §§ 87–89; Dec. Dig. ⊜50.]

14. CRIMINAL LAW ⊜829(1)—TRIAL—REFUSAL.

The refusal of requested instructions, covered by the charge given, is not error.

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

15. POST OFFICE ⊜35—OFFENSES—SCHEME TO DEFRAUD.

Where several devised a scheme to defraud, intending to execute it by means of correspondence through the mails, and, pursuant to the scheme, one of the several defendants prepared and mailed letters intended to carry out the scheme, the others are bound by his acts, being partners in his criminal intent.

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

16. POST OFFICE ⊜49—OFFENSES—EVIDENCE—SUFFICIENCY.

In a prosecution for devising the scheme, and using the mails in connection with the scheme, to defraud, evidence *held* to show that one of the defendants, who did not actually use the mails, was a party to the criminal intent of his codefendant in using the mails.

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

17. POST OFFICE ⊜49—OFFENSES—USE OF MAILS IN CONNECTION WITH SCHEME TO DEFRAUD—EVIDENCE—SUFFICIENCY.

In a prosecution for devising scheme, and using the mails in connection with a scheme, intended to defraud, evidence *held* insufficient to show that one of those convicted with the principal defendants, and who moved for a new trial, was connected with the scheme or use of the mails.

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

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

Edward C. Chambers and Ernest L. Russell were convicted of devising a scheme to defraud and intending to carry it out by using the mails, and they severally bring error. Affirmed.

R. R. Brewster, of Kansas City, Mo. (Paul R. Stinson, Brewster, Kelly, Brewster & Buchholz, and E. H. Busiek, all of Kansas City, Mo., on the brief), for plaintiffs in error.

S. R. Rush, Sp. Asst. Atty. Gen. (Francis M. Wilson, U. S. Atty., and William G. Lynch, Asst. U. S. Atty., both of Kansas City, Mo., on the brief), for the United States.

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

SANBORN, Circuit Judge. Edward C. Chambers and Ernest L. Russell were indicted for devising a scheme to defraud, intending to execute it by means of correspondence through the post office department of the United States, and for executing that scheme by means of such correspondence through that department. They were tried, convicted, and sentenced, and these writs of error were sued out to challenge the legality of the proceedings at the trial.

The scheme alleged was to sell small tracts of land of from 10 to 80 acres each, which were under water and incapable of cultivation, to each of many intending occupiers and cultivators, for $65 an acre, in installments of $1 an acre per month, by means of false representations as to the character, fertility, and value of the land, and as to its availability for profitable farming operations, and for occupation by comfortable homes. The scheme was devised and executed between January 8, 1909, and July, 1913. In December, 1910, Chambers made a contract to buy of the state of Florida on the installment plan 50,000 acres of land for the price of $15 an acre. He, his agent Russell, and his other agents, proceeded by representations and statements to sell this land to purchasers for $65 an acre, payable in installments of $1 an acre a month. The land he bought and sold was situated in the Everglades of Florida southeast of Lake Okeechobee, between that lake and the ocean. The distance from the lake to the ocean through or around these lands is about 50 or 60 miles. The land from time immemorial has been, and with the exception of comparatively small tracts, contiguous to or within half a mile or a mile of one of the canals that have been dug by the state since 1908, still is, under water to a depth of from three inches to several feet, so that very much of the larger part of the tracts sold to purchasers has always been, and still is, incapable of occupation and use for farming purposes. The lake is a few feet higher than the ocean, the land slopes from the lake to the ocean, with a fall of from two to three inches to the mile, and the water upon it is inclosed by a rock rim, which reaches around it near the shore. Its access to the ocean is through a few gaps existing or made in this rim. Lake Okeechobee receives water from a watershed to the north and west of it 7½ times its area, and one of the engineers testified that it was the largest fresh-water lake wholly within the United States. In this region the annual rainfall is very large, from 20 to 80 inches, and the water from the watershed north and west of the lake overflows it, spreads over the land to the glades southeast of it, where Chambers' 50,000 acres are, and generally keeps it under water. In addition to the water from the watershed northwest of the lake, there is a very large precipitation upon the land itself.

Two or three years before Chambers made his contract of purchase the Florida Fruit Lands Company and the state of Florida conceived a scheme and entered upon the execution of it for the state to sell some of this land and to expend the proceeds of the sale in draining it. Accordingly the state sold 184,000 acres to the Fruit

Lands Company for $2 an acre, made a contract with a construction company to dig four ditches about 6 miles apart through this 184,000 acres and through or near Chambers' land from the ocean to or toward Lake Okeechobee, a distance of 50 or 60 miles. Chambers was one of the agents of the Fruit Lands Company to sell its land. The land of the Fruit Lands Company was successfully sold by the end of the year 1910. In December, 1910, Chambers purchased his 50,000 acres and paid $50,000 in cash, his first installment of the purchase price. At that time the construction company had commenced at the ocean and was digging the ditches northwesterly towards the lake and Chambers' land under a contract to complete them by July, 1913. Chambers and his agents, in their endeavors to sell the land to residents in the country surrounding Kansas City, where his general office was located, made many persuasive representations, such as that the reclamation of the Everglades was assured, that oranges, grape fruit, lemons, limes, avocadoes, pawpaws, persimmons, mulberries, figs, guavas, beans, cabbages, tomatoes celery eggplant, bananas, the plantain, sugar cane, cotton, tobacco, rice coffee, hemp, flax, Indian corn, barley, hops, buckwheat, cassava, pineapples, strawberries, watermelons, cantaloupes, peaches, pears, citrons, squash, okra, peas, cucumbers, cauliflower, lettuce, onions, sweet and white potatoes, and peanuts could be raised on Chambers' land when it was drained, and that it would be drained and ready for cultivation and occupation by October, 1912, or October, 1913; that the soil was black muck; that it was the richest soil in the United States, being worth over $6 a ton as a fertilizer; that no fertilizer was required to raise good crops upon it; that parties cultivating such soil cleared $300 to $800 an acre growing garden truck, while their grape fruit and orange groves were coming into bearing; that on December 26, 1912, Chambers' company had enough farmers on his land to demonstrate to the people of the United States what could be done on Everglade land. There was substantial evidence that these representations and others were made, and that these were false; but the testimony was conflicting, and there was substantial evidence that some of these representations were true. Each of the defendants testified that he believed them to be true when they were made, and that he never had any intention or purpose to deceive or mislead the purchasers, and the defendants produced persuasive evidence in support of their testimony. At the close of all the evidence each of the defendants requested the court to instruct the jury to return a verdict in his favor, and the refusal of the court to give this instruction is the first alleged error urged upon our consideration.

[1] It is not claimed that there was not substantial evidence that the alleged representations which have been recited were made, and that they were false, although it is insisted that the weight of the evidence was that they were true, so that it is practically conceded that the question whether or not these representations were made by means of the mails to their purchasers by the defendants, and whether or not they were true, were questions for the jury, and not for the court, and these questions are here dismissed.

[2, 3] But counsel for the defendants invoke the established rule that, where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the appellate court to reverse a judgment of conviction (Harrison v. United States, 119 C. C. A. 78, 200 Fed. 662; Isbell v. United States, 142 C. C. A. 312, 317, 227 Fed. 788, 793), and they insist that there was no substantial evidence of any facts inconsistent with the innocence of the defendants of knowledge of the falsity of any of their material representations, or with their innocence of any intention to deceive or defraud the purchasers from them.

"The rule is that, where all the substantial evidence was as consistent with innocence as with guilt, it is the duty of the appellate court to reverse the judgment against the defendant—not where there was a preponderance of the substantial evidence, or witnesses of the greater credibility in favor of his innocence, but where there was no substantial evidence, no substantial testimony nor credible witness whatever, of any facts inconsistent with the innocence of the accused. This is the only question the court is required or permitted to determine under this rule, and where there was any substantial evidence inconsistent with the innocence of the accused, although it may have been contradicted, * * * the weight of the evidence, the credibility of the witnesses, and the guilt or innocence of the defendant are left to the determination of the jury." Isbell v. United States, 142 C. C. A. 312, 317, 227 Fed. 788, 793.

The question here, therefore, is whether or not there was any substantial evidence in this case of facts which were more consistent with the intention of the defendants to deceive and defraud the purchasers than with their innocence of that intention. There is a vast mass—there are two large printed volumes—of evidence. There is neither time nor space to recite or review it. A perusal of it renders it certain that the defendants, and all who knew the land they sold, must have known that it was and would be worthless for farming or habitation unless it was thoroughly drained. The defendants knew that the canals under contract would be about six miles apart. There was substantial evidence, the testimony of one of the board that sold the land to Chambers, that at the time of the sale to him there was a conversation between the members of the board and Chambers, the effect of which was that the canals which the state was digging would be sufficient to drain the lands so far as the main arteries were concerned, but that the owners of the land would have to dig the subditches or laterals; that the state did not contemplate digging those. The distance between the canals, six miles, the saturated overflowed condition of the land, and the common knowledge of dealers in lands, render it difficult to believe that the defendants did not know, not only that these lands were neither tillable nor habitable in 1909, 1910, 1911, and 1912, but that none of them, except possibly those within a mile of the main canals, ever would be tillable or habitable until subditches or laterals were dug through the lands. One of the witnesses testified that the state contemplated the necessity of laterals, but did not contemplate digging them; that a system of laterals two miles apart would be necessary before the drainage of the lands, with the exception of those immediately contiguous to the main canals, would be perfect; but no such system

of laterals had been adopted and no laterals were being dug while these lands were being sold, or have ever been dug, and the great bulk of the lands sold is still under water. Under these circumstances the representations which the defendants made that these lands would be tillable and habitable by the fall of 1912 or 1913, and the sale of them in five and ten acre tracts for farming and homes at $65 an acre, do not appear to us to be as consistent with the innocence as with the guilt of an intention on the part of each of these defendants to mislead and deceive the purchasers into buying, as they did, untillable and uninhabitable land covered with water for productive farming land.

There was substantial evidence that the soil in these lands, if drained, would not produce reasonably profitable crops and that it was practically without value for this purpose without the use of fertilizers. No credible testimony has been discovered in the record that any of this land was worth $6 a ton as a fertilizer. The representations made by the defendants that the soil was black muck and without doubt the richest in the United States, being worth over $6 a ton as a fertilizer, does not appear to our minds to be as consistent with innocence as with guilt of an intention on the part of each of these defendants to mislead and deceive the purchasers from them into buying as the most fertile and productive land the water-covered tracts, of no present and of doubtful future use for farming purposes, which the defendants sold them. There was substantial evidence at the trial below of other facts, which it is useless to recite, that tend to lead the mind to the same conclusion. It is true that there is much testimony and that there are many established facts in this case which tend to lead the mind in the opposite direction; but it is not permissible in this action at law, under the Constitution and laws of the United States, for this court to determine the weight of the evidence, or the fact as to the belief or intention of the defendants. Where the substantial evidence in a case of this character upon these issues is conflicting in itself and in its tendencies, it is the exclusive function of the jury to decide them. The jury have done so. They have found that each of the defendants intended to deceive and mislead the purchasers, and by material false representations to induce them to buy the land they purchased, in the belief that it was of a far different and better character, and of greater value, than it was in fact. A patient examination of the evidence has forced our minds to the conclusion that there was at the trial substantial evidence of facts more consistent with the guilt than with the innocence of each of these defendants of that intention, and that there was no error in the refusal of the court to instruct the jury to return a verdict in their favor.

[4-6] The second objection to the legality of the trial is that the arguments of the counsel for the United States to the jury were "highly inflammatory, unfair, and prejudicial." The rules of practice upon this subject have been repeatedly stated by this court. In Union Pacific R. Co. v. Field, 137 Fed. 14, 15, 16, 69 C. C. A. 536, 537, this court said:

"Under our system of jurisprudence it is the province of the jury in actions at law to try and determine the rights of parties according to the law and the evidence. It is the duty of the court and of its officers, the counsel of the parties, to prevent the jury from the consideration of extraneous issues, of irrelevant evidence, and of erroneous views of the law, to guard it against the influence of passion and prejudice, and to assure to the litigants a fair and impartial trial. An omission by court or counsel to discharge this duty, or a persistent violation of it, is a fatal error, because it makes the trial unfair."

But an objection to unfair remarks of counsel to the jury, which sharply calls the attention of the presiding judge to them when they are made, and if he fails to extract the virus of them by withdrawing them from the jury if possible, or if impossible by discharging the jury and granting a new trial before another jury, and an exception to his action or lack of action, are essential to a review of the unfair remarks or of their effect in an appellate court. Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 313, 125 Fed. 470, 477; Union Pacific R. Co. v. Field, 69 C. C. A. 536, 538, 137 Fed. 14, 16. The only objection made by counsel for the defendants to any part of the address of counsel for the United States was to his calling the purchasers of the lands from Chambers victims. That objection was overruled by the court and an exception was taken. But the purchasers certainly were victims of deleterious purchases and contracts, whether through the good or evil intent of the defendants, and it was not error to call them such.

[7, 8] The third complaint is that before the jury had found and returned their verdict, and while they were deliberating concerning it, they called the deputy marshal into their room and asked him what the lowest penalty was that would be inflicted, and he replied a fine of $1, or $10, or probably $25; that they then asked him what the court usually did when the jury recommended defendants to the mercy of the court, and he answered that it generally followed the direction of the jury. After the verdict was rendered the defendants made a motion for a new trial, on the ground that each of them was prejudiced by the statements of the deputy marshal to the jury before the verdict was rendered. Thereupon a trial of the issue tendered by this allegation was had. Seven jurors were called and testified regarding the statements of the deputy marshal, the time of their receipt, and the effect of them. Five of them testified that before the deputy marshal made his statements the jury had agreed that the defendants Chambers and Russell, who are now complaining, were guilty, and that the only question then at issue among them was whether or not two other defendants, who were indicted and tried with them, and who have not been sentenced, were likewise guilty. One of these seven jurors testified rather uncertainly that the jury had not agreed upon the guilt of any of the defendants when the statements were made, and the seventh juror did not testify upon this issue. The court below found that the issue of the guilt or innocence of the defendants Chambers and Russell had been determined by unanimous agreement of the jury before the statements of the deputy marshal were made, that those defendants were not prejudiced by the state-

ments, and that the motion for a new trial must be, and it was, denied. As the questions whether or not the statements of the deputy marshal were made before the jury had agreed upon the guilt of Chambers and Russell, and whether or not those statements were prejudicial to them, were questions of fact, which it was the province and duty of the court below to receive evidence regarding and to determine (Mattox v. United States, 146 U. S. 140, 147, 151, 13 Sup. Ct. 50, 36 L. Ed. 917), as there was not only substantial, but preponderating, evidence in support of its decision of them, and as the granting or refusing of a motion for a new trial is discretionary with the trial court, and his grant or refusal of it is not reviewable by the federal appellate court (Newcomb v. Wood, 97 U. S. 581, 24 L. Ed. 1085; Mattox v. United States, 146 U. S. 140, 150, 13 Sup. Ct. 50, 36 L. Ed. 917), there was no reversible error in the action of the court regarding the statements of the deputy marshal to the jury.

[9] Counsel contend, however, that in the receipt of the evidence and in the consideration and decision of the question whether or not the statements were prejudicial, the court below committed an error of law, because the fact that the statements were made and heard by the jury raised a conclusive legal presumption of prejudice which could not be rebutted by evidence; and they cite State v. Murphy, 17 N. D. 48, 115 N. W. 84, 88, 89, 17 L. R. A. (N. S.) 609, 16 Ann. Cas. 1133, Cooper v. State, 103 Ga. 63, 29 S. E. 439, 440, Cole v. Swan, 4 Iowa, 32, 33, People v. Knapp, 42 Mich. 267, 3 N. W. 927, 36 Am. Rep. 438, and Wilkerson v. State, 78 Miss. 356, 29 So. 170, in support of this contention. The opinions in these and other cases have been read and considered, and the conclusion is that the stronger reasons and the weight of authority sustain the rule that, where a motion for a new trial is made on account of communications to the jury during their deliberations, there is a rebuttable legal presumption that they were prejudicial to the moving party, that this presumption may in some cases be overcome by evidence, and that where competent evidence is offered it is the duty of the trial court to hear and consider it, and that when it does so, and decides the motion thereon, its decision is discretionary, and is reviewable by a federal appellate court for abuse of discretion only. Mattox v. United States, 146 U. S. 140, 149, 13 Sup. Ct. 50, 36 L. Ed. 917; Holmgren v. United States, 156 Fed. 439, 443, 445, 84 C. C. A. 301; Holmgren v. United States, 217 U. S. 509, 521, 522, 30 Sup. Ct. 588, 54 L. Ed. 861, 19 Ann. Cas. 778; Oborn v. State, 143 Wis. 249, 126 N. W. 737, 748, 31 L. R. A. (N. S.) 966; State v. Stark, 72 Mo. 37, 40; State v. Shipley, 171 Mo. 544, 550, 71 S. W. 1039; McFalls v. State, 66 Ark. 16, 22, 48 S. W. 492; State v. Whalen, 98 Iowa, 662, 672, 68 N. W. 554; Williams v. Chic. & N. W. Ry. Co., 11 S. D. 463, 78 N. W. 949, 950.

[10] It is specified as error that the trial court refused to give to the jury a requested instruction to the effect that, although they found that the defendants did not believe that the lands sold to the purchasers named in the indictment would be worth the amount stated in the literature, or that it had all the qualities as to fertility stated therein, or that it would be drained, reclaimed, and ready for cultivation with-

in the time stated therein, "still you cannot convict any of the defendants upon any count in the indictment, unless you further find and believe from the evidence that the defendants intended to defraud them by failing to give them land which was worth the price which they agreed to pay." The argument in support of this specification is that the United States alleged in the indictment that one of the false representations which the defendants intended, when they devised their scheme to defraud, to use, and which they did use, to effect it, was that the farms they offered to sell and sold were worth much more than the price they were offered for sale and were sold for, that there could have been no fraud on the purchasers unless the defendants sold them land of less value than the price at which they sold them, and that the defendants could not be lawfully adjudged guilty unless the jury found and believed that the defendants intended to defraud the purchasers by selling them land worth less than the purchase price they agreed to pay for it. This argument is unsound. It might be persuasive if the only misrepresentation alleged to have been devised and used to effect the scheme to defraud was that regarding the relation of value to price. But the representation in that regard was only one of more than a dozen misrepresentations alleged in the indictment. Indeed, the indictment would have charged the offense if the averment of this misrepresentation had been entirely omitted, and the Supreme Court has expressly so decided. United States v. New South Farm and Home Company, 241 U. S. 64, 36 Sup. Ct. 505, 60 L. Ed. 890, filed April 24, 1916. If, therefore, the jury found that the defendants devised and executed a scheme to use the other misrepresentations alleged in the indictment, and intended thereby to deceive and defraud the purchasers from them, and the defendants used the mails intentionally for this purpose, they could legally have convicted them, although the defendants had no intention to defraud them by failing to give them land worth the price they agreed to pay. One may be as sorely defrauded who is induced by false representations to sell his productive farm in Kansas and with its proceeds to buy for a farm and a residence a tract of land under water in Florida, although the uninhabitable and unproductive purchase may be worth in money the price paid for it for some other purpose than the production of farm or garden products and for occupation as a home. The request for the instruction was properly denied.

[11] It was not charged in the indictment that the defendants promised to return to any of the purchasers the moneys the latter paid in case they were subsequently dissatisfied with their purchases; but there was evidence that the defendants made, and also that they did not make, such promises. Their counsel requested the court to instruct the jury that they must not consider the testimony of any witness to the promise of any defendant to return the purchase money, "except as to the light it may throw upon the intent of such defendant or his good faith." During the trial the indictment was read to the jury, and in its charge the court first clearly stated to them that the government contended that the representations made by the defendants were known by them to be false in certain respects set forth in the indict-

ment, such, for example, "as to the character of the soil, its adaptability to the cultivation of crops, its condition as to drainage and reclamation, the absence of such low temperature as would occasion frosts, the necessity or nonnecessity for the use of fertilizers in the planting of crops, etc., all as is specifically set forth and charged in the indictment, which has been read to you, and I will not read it again." The court then instructed the jury that the first issue of fact for them to decide was whether or not the defendants did devise in their minds a scheme to defraud those named in the indictment "through the false pretenses, representations, and promises set forth and charged in the indictment." In a trial occupying many days and producing more than 1,000 printed pages of testimony it would be impracticable, and would tend to confusion rather than to clarity, for the court to state in the charge to the jury every item, or every important item, of evidence that has crept into the case that does not directly prove any averment of the pleadings. In this case the trial court repeatedly told the jury that the representations, whose truth or falsity they were to determine, were those set forth in the indictment. The indictment was read to them, the representations for trial were stated to them in the charge to the jury, and in that way the court told them that they were not called upon to determine, and were not trying as a crucial issue in the case, the truth or falsity of those representations not set forth in the indictment, and it was not a fatal error for the court to refuse to charge that the evidence as to the defendants' promises to return the purchase money was not directed to any express issue on trial. Under the charge given the jury could not have failed to understand that.

[12, 13] Complaint is made that the court refused to give a requested instruction to the effect (1) that men engaged in the business of selling land have a habit of puffing their wares, and so long as the statements made are within any proper reasonable bounds they are not criminally liable; (2) that in order to find that the defendants devised a scheme to defraud in the sale of this land the jury must find that the statements which were made amounted actually to a substantial deception of those to whom the lands were attempted to be sold; and (3) that a certain degree of commendation by these defendants of their lands was allowable, and was not criminal, so long as the statements were not actually made in bad faith and with an intention to deceive. There was, however, no error in refusing to give this instruction, because the second proposition in it is not the law, and because the first and third propositions, in the absence of any qualification to the effect that positive statements of material existing facts calculated to deceive, such as the statements that the soil of the land is black muck and is worth $6 a ton as a fertilizer, do not fall within the category of innocent puffing, were indefinite, misleading, and inapplicable to the misrepresentations of facts of this nature on trial in the case in hand. Harris v. Rosenberger, 145 Fed. 449, 455, 76 C. C. A. 225, 13 L. R. A. (N. S.) 762.

[14] It is assigned as error that the court refused to submit to the jury a requested instruction to the effect that the fact that a grand

jury returned an indictment against the defendants was absolutely no evidence of the guilt of any of them, and they were presumed to be innocent until this presumption was overcome by evidence which convinced the jury beyond a reasonable doubt of the guilt of some one or more of the defendants. But these propositions are found in the general charge of the court and the refusal of a court to submit rules of law to the jury in the words of counsel when they are clearly given to them in the words of the court in its general charge is not error.

[15, 16] The defendant Russell mailed the letter described in count 3 of the indictment, he was found guilty of the offense charged in that indictment and sentenced to pay a fine of $300 and to serve a year and a day in the penitentiary. He was also found guilty and sentenced to pay a fine of $25 on each of counts 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the indictment. There was, however, no evidence that he mailed, or had knowledge of the preparation or mailing, or directed the mailing of, any of the letters set forth in any of these counts, and it is insisted that his conviction and sentence on these counts is without support in the evidence. Where two or more persons jointly devise and execute a scheme to defraud by the use of the mails, they may thereby become in effect partners in the criminal purpose of so using the mails to defraud. If they do, the acts of each thereafter, during the existence and execution of the scheme, done in furtherance of that execution, may become the acts of all the partners, and each may be convicted of the mailing of a letter which one of his partners caused to be mailed in the execution of the scheme. Blanton v. United States, 213 Fed. 320, 325, 130 C. C. A. 22, Ann. Cas. 1914D, 1238; Hume v. United States, 118 Fed. 689, 697, 698, 55 C. C. A. 407; United States v. Kissel, 218 U. S. 601, 608, 31 Sup. Ct. 124, 54 L. Ed. 1168; Burton v. United States, 142 Fed. 57, 61, 73 C. C. A. 243. Was there substantial evidence to bring Russell under this rule? It is true that the mailing of the letters, or the causing the mailing thereof, is the gist of the offenses charged in this indictment, and that, unless there is substantial evidence that Russell caused them to be mailed, he cannot be lawfully convicted. There is substantial evidence that Chambers caused each of the letters to be mailed. In 1910, prior to the time when Chambers bought the tract of land which he subsequently sold in 1911, 1912, and 1913, Chambers and Russell had been engaged in selling lands in the Everglades of Florida as agents of the Florida Fruit Lands Company. Prior to the purchase of this land by Chambers, and prior to the sale of any of it, Russell knew the character of the land, its then availability, and its probable or improbable subsequent availability, for cultivation and homes. He knew the literature used and intended to be used to sell it, the representations made and to be made in selling it, and in the spring of 1911 he entered upon the undertaking of selling these lands of Chambers for him. There was substantial evidence at the trial that Russell and Chambers together devised and executed the scheme to defraud, and shared in the intention to use the mails to carry it into effect. There was substantial evidence that in the execution of this scheme

Russell personally caused the mails to be used to convey the letter set forth in the third count of the indictment, and that Chambers in devising and executing the scheme caused the mails to be used to convey the letters set forth in the other counts of the indictment, so that there was here substantial evidence that as partners in the criminal purpose of using the mails to defraud each was the agent of the other in the mailing of these letters, and the judgment against them must be affirmed.

[17] The defendant Harper was tried and convicted jointly with Chambers and Russell, a motion for a new trial on the ground that there was no substantial evidence that he caused any of the letters set forth in the indictment to be mailed was made, and has been held under submission by the court below to await the decision of this court in the cases of Chambers and Russell. Counsel have requested an expression of the opinion of this court upon the question whether or not there was substantial evidence in this record that Harper caused the letters set forth in the indictment, or any of them, to be mailed, and they have discussed that question in their briefs. As all the evidence on this subject is before the court and has been examined, and as a statement of the view of the court may avoid a second examination of it, the court has concluded to comply with the request. There was evidence of these facts: Harper was a nephew of Chambers. He was a young man, 32 years of age at Christmas time 1909, when he visited his uncle in Kansas City. He had been graduated from the Missouri School of Mines in 1908, and was living in El Paso, Tex., where he was employed as chemist for a copper company at a salary of $125 a month. During his Christmas visit in 1909, Chambers asked him how he would like to buy some Florida land, and told him he was selling land in the Everglades of Florida. Harper replied that he had never seen the land, that he did not know what it was, and asked him if he would advise him as a relative to purchase it, and Chambers said he would. Harper returned to his work as a chemist at El Paso. About a year later Chambers offered to employ him in Florida to show purchasers and prospective purchasers the land which Chambers had bought and intended to sell. Harper declined to go unless Chambers would pay him the same salary he was receiving as chemist, $125 a month. Chambers agreed to do so, and Harper took his wife and family to Florida, where he has lived with them ever since. He has acted as the representative of Chambers in showing his land, and in showing the lands and improvements in the vicinity of this land; but he has never sold or attempted to sell any of the land, and he never knew anything about, or had anything to do regarding, the letters set forth in the indictment, or their mailing. There was evidence that he did, and there was evidence that he did not, represent that the muck on Musa Island was of the same class as that in the Everglades, and there was other conflicting evidence about statements that he was claimed to have made to some of the purchasers. No attempt is made to set forth here all the evidence regarding his acts, but a careful reading and examination of all the testimony upon this subject has

forced our minds to the conclusion that there is no substantial evidence that he ever joined with Chambers or Russell in devising the alleged scheme to defraud with the intention to use the mails to defraud, or that he ever mailed, or ever indirectly caused to be mailed, any of the letters set forth in the indictment.

Let the judgments against Chambers and Russell be affirmed.

CARLAND, Circuit Judge (concurring). I concur in the foregoing opinion, except as to the discussion as to when a criminal case may be left to the jury to pass upon the facts. Upon this branch of the case I am of the opinion that there was substantial evidence tending to show the guilt of the defendants, and that there was no error in overruling the motion for a directed verdict.

SUNDAY et al. v. MALLORY et al.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4479.

1. INDIANS ⟸15(1)—LANDS—ALLOTMENT OF DECEASED CHEROKEE—RESTRICTIONS ON ALIENATION.

Land allotted in the name of a deceased Indian, under section 20 of the Cherokee Agreement (Act July 1, 1902, c. 1375, 32 Stat. 716), is not subject to any restrictions on the right of alienation by his heirs; the restrictions imposed by sections 13–15 of the Agreement being applicable only to lands allotted to living members of the tribe.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 37; Dec. Dig. ⟸15(1).]

2. INDIANS ⟸15(1)—LANDS—ALLOTMENT OF DECEASED CHEROKEE—RESTRICTIONS ON ALIENATION.

Act April 26, 1906, c. 1876, § 19, 34 Stat. 137, imposing restrictions upon alienation of lands allotted to full-blood Indians of the Five Civilized Tribes, applies only to living allottees; and section 22, which makes conveyances by full-blood heirs of a deceased Indian of either of the tribes subject to approval by the Secretary of the Interior, does not have the effect of imposing such restriction upon lands theretofore unrestricted in the hands of heirs of a member of the Cherokee tribe, who died before receiving his allotment, and where selection was made by his administrator.

[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 Sidney T. Mallory and others against Andy Sunday and others. Decree for complainants, and certain defendants appeal. Affirmed.

D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., and Paul Pinson, Sp. Asst. U. S. Atty., of Atoka, Okl., for appellants.

J. W. Zevely, J. M. Givens, and R. W. Stoutz, all of Muskogee, Okl., for appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

BOOTH, District Judge. This was a suit in equity to cancel certain oil and gas leases covering lands in Rogers county, Okl. Appellees Mallory, Brennan, and Brennan were plaintiffs below; all of the other parties were defendants. Both plaintiffs and Bushyhead and Hale, defendants, claimed to be owners of leases covering the lands in question; plaintiffs' leases coming through defendant Warner, as grantee of the lands by conveyance from the heirs of James Sunday, deceased; defendants Bushyhead and Hale's leases coming direct from said Sunday heirs. The facts briefly stated are as follows:

James Sunday was a full-blood Cherokee Indian, and was duly enrolled by the Dawes Commission having charge of the enrollment of the members of the Five Civilized Tribes on the Cherokee roll as No. 16,212 during the year 1900. At the time of said enrollment, James Sunday was over the age of 21 years. In March or April, 1903, James Sunday died, leaving surviving him no parents and no descendants, but leaving as his sole heirs at law six brothers and sisters, as follows: Andy Sunday, David Sunday, Nicholas Sunday, Kate Sunday Hart, Betsy Sunday (later Betsy Sunday Downing), and Sarah Sunday Downing (later Sarah Sunday Downing Kirk). Andy Sunday was duly enrolled by said Dawes Commission as a Cherokee Indian of seven-eighths blood, while Nicholas, Kate, David, Betsy, and Sarah were duly enrolled as full-blood Cherokee Indians.

No selection of allotment of lands for said James Sunday had been made prior to his death, but in the year 1904 a duly appointed and qualified administrator for James Sunday made selection in the name of James Sunday of an allotment of lands described in the complaint, lying partly in section 11, township 22 N., range 14 E., and partly in section 19, township 23 N., range 15 E., all in Rogers county, Okl. Pursuant to said allotment and said selection, patents were duly issued in the name of said James Sunday by the proper tribal authorities on the 31st of March, 1908, which said patents were approved by the Secretary of the Interior of the United States on the 28th day of April, 1908.

On August 8, 1908, Andy Sunday, David Sunday, and Nicholas Sunday executed a warranty deed of their interest in said lands to Elbridge S. Warner. On August 21, 1908, Kate Sunday Hart and her husband and Sarah Sunday Downing Kirk and her husband executed a warranty deed of their interest in said lands to said Elbridge S. Warner. On October 21, 1910, Betsy Sunday executed a warranty deed of her interest in said lands to said Elbridge S. Warner. Said deeds were duly recorded in the office of the register of deeds for Rogers county, Okl.

On March 7, 1913, Elbridge S. Warner executed an oil and gas mining lease in the usual form covering all said above-described lands to Moses P. Lyon. On March 7, 1913, said Moses P. Lyon duly assigned so much of said oil and gas mining lease as covered the lands in section 11 to Sidney T. Mallory; and on April 24, 1913, Sidney T. Mallory made an assignment of an undivided one-third of his interest to Ed. J. Brennan, and another undivided one-third to Joseph H. Brennan.

On April 17, 1913, the heirs of James Sunday, above set forth, notwithstanding their deeds to Warner, executed two oil and gas mining leases to J. C. Bushyhead and Thomas Hale, covering all of the lands

covered by the deeds to Warner. On May 7, 1913, said Bushyhead and Hale filed said leases for approval by the Secretary of the Interior with the United States Indian superintendent at Muskogee, Okl.

The present suit was brought against the heirs of James Sunday, deceased (Verna Murphy and Lewis Downing, heirs of Sarah Sunday Kirk, and their guardian, being substituted for Sarah Sunday Kirk, deceased), also against Bushyhead and Hale, lessees of said heirs, to cancel the leases to Bushyhead and Hale as being a cloud upon title of plaintiffs, and to enjoin the defendants other than the defendant Warner from entering upon, interfering with, or asserting any claim, right, title, or interest in or to the lands covered by the deeds to Elbridge S. Warner; Warner being joined as a defendant as alleged fee owner of the lands in question. Cross-bills were filed by all the defendants except Elbridge S. Warner, praying cancellation of the muniments of title of plaintiffs. Cross-bill was filed by Warner, praying the same relief asked by plaintiffs.

The contention of plaintiffs and of Elbridge S. Warner is that the allotment of lands in the name of James Sunday was at all times unrestricted, and that by the deeds to Warner all the right, title, and interest of the heirs of James Sunday was conveyed, so that the oil lease executed thereafter by Warner to Lyon, and by Lyon assigned (as to part of the land) to Mallory, is a valid and subsisting lease; the plaintiffs being each one-third owners thereof.

The contention of the appellants is that this allotment in the hands of the heirs of James Sunday could not be sold at the time the allotment was selected, nor at any time thereafter: (a) Because the heirs of James Sunday were powerless to alienate his allotment for five years from the date of the ratification of the Cherokee treaty, during which five years the restrictions on alienations were affected by two acts of Congress, neither of which has been complied with in this instance. (b) If the allotment is not impressed with the five-year restriction contained in the Cherokee treaty, nevertheless restrictions were imposed thereon by a subsequent act of Congress.

The trial court held that the allotment in question was not impressed with the five-year restriction contained in the Cherokee treaty, nor with any other restriction upon alienation, and that the deeds to Warner conveyed good title. Decree was accordingly entered, canceling the oil and gas mining leases executed by the heirs of James Sunday to Bushyhead and Hale, enjoining the assertion by said heirs, or by Bushyhead or Hale, of any claim of right, title, or interest in or to said allotment adverse to the interests of the plaintiffs Mallory, Brennan, and Brennan, or the defendant Warner. Cross-bills by said Bushyhead and Hale, and by the heirs of James Sunday, deceased, were by said decree dismissed.

[1] The sections of the Cherokee Agreement having a bearing upon the questions involved, are as follows:

Cherokee Allotment, c. 1375, 32 U. S. Statutes at Large, page 716:

* * * * * * * * * * *

11. "There shall be allotted by the Commission to the Five Civilized Tribes and to each citizen of the Cherokee Tribe, as soon as practicable after the approval by the Secretary of the Interior of his enrollment as herein provided,

land equal in value to one hundred and ten acres of the average allottable lands of the Cherokee Nation, to conform as nearly as may be to the areas and boundaries established by the government survey, which land may be selected by each allottee so as to include his improvements.

* * * * * * * * * *

13. "Each member of said tribe shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to forty acres of the average allottable lands of the Cherokee Nation, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the certificate of allotment. Separate certificate shall issue for said homestead. During the time said homestead is held by the allottee the same shall be nontaxable and shall not be liable for any debt contracted by the owner thereof while so held by him.

14. "Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation, or be alienated by the allottee or his heirs, before the expiration of five years from the date of the ratification of this act.

15. "All lands allotted to the members of said tribe, except such land as is set aside to each for a homestead as herein provided, shall be alienable in five years after issuance of patent.

* * * * * * * * * *

18. "It shall be unlawful after ninety days after the ratification of this act by the Cherokees for any member of the Cherokee Tribe to inclose or hold possession of, in any manner, by himself or through another, directly or indirectly, more lands in value than that of one hundred and ten acres of average allottable lands of the Cherokee Nation, either for himself or for his wife, or for each of his minor children, if members of said tribe; and any member of said tribe found in such possession of lands, or having the same in any manner inclosed, after the expiration of ninety days after the date of the ratification of this act shall be deemed guilty of a misdemeanor.

* * * * * * * * * *

20. "If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted.

* * * * * * * * * *

25. "The roll of citizens of the Cherokee Nation shall be made as of September first, nineteen hundred and two, and the names of all persons then living and entitled to enrollment on that date shall be placed on said roll by the Commission to the Five Civilized Tribes.

* * * * * * * * * *

31. "No person whose name does not appear upon the roll prepared as herein provided shall be entitled to in any manner participate in the distribution of the common property of the Cherokee tribe, and those whose names appear thereon shall participate in the manner set forth in this act: Provided, that no allotment of land or other tribal property shall be made to any person, or to the heirs of any person, whose name is on said roll and who died prior to the first day of September, nineteen hundred and two," etc.

The date of the ratification of the Cherokee Agreement was August 8, 1902.

The controversy turns upon two questions: First. Whether the land selected by the administrator of the estate of James Sunday,

descended to Sunday's heirs under section 20 of the Cherokee Agreement free from restrictions, or subject to the restrictions mentioned in section 14 of said agreement. Second. Whether the act of April 26, 1906 (34 Stat. 137), imposed restrictions on the alienation of said lands, even if theretofore the alienation was unrestricted.

Taking up the first question, and considering the sections of the Cherokee Agreement above quoted, it will be noted that the scheme of allotment first considers allotments to living members of the tribe. Section 11 provides for an allotment to each citizen of the tribe. Section 13 provides that each member of the tribe shall out of his allotment designate a homestead, and that this homestead shall be inalienable during the life of the allottee, not to exceed 21 years from the date of the certificate of allotment. Section 14 provides that the lands allotted to citizens shall be inalienable by the allottee or his heirs, and shall not be sold to satisfy debt, or be alienated before the expiration of five years from the date of the ratification of the act. Section 15 provides that lands allotted to members, except such as are set aside for a homestead, shall be alienable in five years after the issuance of patent.

Section 20 provides for a second class of allotments, viz. allotments in cases where enrolled members of the tribe die subsequent to the 1st day of September, 1902, and before receiving an allotment. The allotment is taken in the name of the deceased member, but it descends immediately to his heirs, whether or not they are citizens of the tribe. No restriction upon alienation of such lands by the heirs is found in section 20; but it is contended that the restrictions contained in sections 13, 14 and 15 apply to allotments made under section 20.

Section 13 has to do with homesteads, and provides by implication that they become alienable by the heirs of the allottee upon the death of the allottee. If sections 13, 14, and 15 all apply to allotments under section 20, it would seem somewhat anomalous that the homestead should be alienable by the heirs immediately, but that other lands should remain inalienable for a period. This anomaly disappears if sections 13, 14, and 15 are held to be applicable to allotments to living citizens only, and as not restricting allotments made under section 20.

In the case of Mullen v. United States, 224 U. S. 448, 32 Sup. Ct. 494, 56 L. Ed. 834, the court had under consideration a very similar question arising under the Choctaw and Chickasaw Agreement (Act July 1, 1902, c. 1362, 32 Stat. 641). The sections of that agreement under consideration were as follows:

12. Each member of said tribes shall, at the time of the selection of his allotment, designate as a homestead out of said allotment land equal in value to one hundred and sixty acres of the average allottable lands of the Choctaw and Chickasaw Nations, as nearly as may be, which shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment, and separate certificate and patent shall issue for said homestead.

13. The allotment of each Choctaw and Chickasaw freedman shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of certificate of allotment.

15. Lands allotted to members and freedmen shall not be affected or incumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under this act, nor shall said lands be sold except as herein provided.

16. All lands allotted to the members of said tribes, except such land as is set aside to each for a homestead as herein provided, shall be alienable after issuance of patent as follows: One-fourth in acreage in one year, one-fourth in acreage in three years, and the balance in five years; in each case from date of patent: Provided, that such land shall not be alienable by the allottee or his heirs at any time before the expiration of the Choctaw and Chickasaw tribal governments for less than its appraised value.

22. If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted in his name, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas: Provided, that the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted.

The question in the Mullen Case was whether the restrictions on alienation provided in sections 12, 13, 15, and 16, or any of them, were applicable to lands allotted under section 22. The court held that such restrictions were not applicable. The court said:

"In the cases falling within this paragraph, there is no requirement for the selection of any portion of the allotted lands as a homestead, and there is no ground for supposing that it was the intention of Congress that a provision for such selection should be read into the paragraph so as to assimilate it to paragraph 12 relating to allotments to living members. While the lands were to be allotted in the name of the deceased allottee, they passed at once to his heirs, and as each heir, if a member of the tribe, was already supplied with his homestead of 160 acres, there was no occasion for a further selection for that purpose from the inherited lands. No distinction is made between the heirs; they might or might not be members of the tribe, and where there were a number of heirs each would take his undivided share. It is quite evident that there is no basis for implying the requirement that in such case there should be a selection of a portion of the allotment as a homestead, and all the lands allotted under paragraph 22 are plainly upon the same footing. While it appears from the record that, in the present case, separate certificates of allotment were issued for homestead and surplus lands, this was without the sanction of the statute."

Continuing, the court said:

"We have, then, a case where all the allotted lands going to the heirs are of the same character and there is no restriction upon the right of alienation expressed in the statute. Had the lands been allotted in the lifetime of the ancestor, one-half of them, constituting homestead, would have been free from restriction upon his death. The only difficulty springs from the language of paragraph 16, limiting the right of heirs to sell 'surplus' lands. But, on examining the context, it appears that this provision is part of the scheme for allotments to living members, where there is a segregation of homestead and surplus lands respectively. Whatever the policy of such a distinction which gives a greater freedom for the disposition by heirs of homestead lands than of the additional lands, there is no warrant for importing it into paragraph 22 where there is no such segregation. It would be manifestly inappropriate to imply the restriction in such cases so as to make it applicable to all the

lands taken by the heirs, and there is no occasion, or authority, for creating a division of the lands so as to impose a restriction upon a part of them."

"There being no restriction upon the right of alienation, the heirs in the cases involved in this appeal were entitled to make the conveyances. The bill alleged that the tracts embraced in these conveyances were 'allotted lands,' and certificates of allotment had been issued. These Indian heirs were vested with an interest in the property which in the absence of any provision to the contrary was the subject of sale. The fact that they were 'full-blood' Indians makes no difference in this case for, at the time of the conveyances in question, heirs of the full-blood taking under the provisions of paragraph 22 of the Supplemental Agreement had the same right of alienation as other heirs."

In our opinion the Mullen Case is controlling here. While there are some differences in the provisions as to allotments to living members between the Choctaw and Chickasaw Agreement and the Cherokee Agreement, both contain similar schemes of allotments to living members and to enrolled members dying before allotment. The provision in section 22 of the Choctaw and Chickasaw Agreement is almost identical with section 20 of the Cherokee Agreement in the instant case. If, as the court held in the Mullen Case, the provisions containing restrictions upon alienation of lands allotted to living members were not applicable to allotments under section 22 in case of members enrolled, but dying before allotment, we see no reason why the same rule should not apply as to allotments under section 20 in the Cherokee Agreement.

In Skelton v. Dill, 235 U. S. 206, 35 Sup. Ct. 60, 59 L. Ed. 198, the Supreme Court construed correspondingly similar sections in the Creek Agreement; section 16 of the Supplemental Creek Agreement (Act June 30, 1902, 32 Statutes at Large, 500, c. 1323) reading as follows:

"Lands allotted to citizens shall not in any manner whatever or at any time be incumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"Selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

Sections 7 and 8 of the Supplemental Agreement read as follows:

7. "All children born to those citizens who are entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. 861), sub-

sequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

8. "All children who have not heretofore been listed for enrollment living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895 and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

And section 28 of the Original Creek Agreement (Act March 1, 1901, 31 Stat. at Large, 861, c. 676):

28. "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

The court held that the restrictions in section 16 did not apply to allotments made in cases of members dying before receiving their allotment. After citing the cases of Rentie v. McCoy, 35 Okl. 77, 128 Pac. 244, and Reed v. Welty (D. C.) 197 Fed. 419, the court said:

"We think the better reasoning lies with the view that the restrictions apply only to allotments made to living citizens in their own right. Not only do the provisions of section 16 of the Supplemental Act lend themselves to that view, but in those sections of both acts which deal with allotments on behalf of deceased persons there is no suggestion of a restriction upon alienation. This difference in legislative treatment doubtless was deliberate and reflects a corresponding difference in purpose. In Mullen v. United States, 224 U. S. 448 [32 Sup. Ct. 494, 56 L. Ed. 834], a like question arose under the Original and Supplemental Acts relating to the Choctaw and Chickasaw lands, and we held that the restrictions upon alienation imposed by those acts were applicable to allotments to living members in their own right but not to allotments on behalf of members then deceased. We do not perceive anything in the acts relating to the Creek lands which calls for a different conclusion."

See Greenlees v. Wettack, 43 Okl. 16, 141 Pac. 282, where the Supreme Court of Oklahoma reached the same conclusion in regard to section 20 of the Cherokee Agreement. See, also, Adkins v. Arnold, 235 U. S. 417, 35 Sup. Ct. 118, 59 L. Ed. 294; Woodward v. De Graffenried, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 1310; Welty v. Reed, 231 Fed. 930, —— C. C. A. —— (C. C. A. 8th) March 9, 1916; and Reed v. Welty (D. C.) 197 Fed. 419; also Rentie v. McCoy, 35 Okl. 77, 128 Pac. 244—all placing a similar construction upon the correspondingly similar section in the Creek Agreement. See, also, Hancock v. Mutual Trust Co., 24 Okl. 391, 103 Pac. 566, placing a similar

construction upon section 22, the correspondingly similar section in the Choctaw-Chickasaw Agreement.

An opposite conclusion has been reached by the Supreme Court of Kansas as to section 20 of the Cherokee Agreement in case of Morris v. Greenlees, 90 Kan. 472, 135 Pac. 569, but we are unable to concur in the views therein expressed.

It is said, however, that section 14 of the Cherokee Agreement has no counterpart in the Choctaw-Chickasaw Agreement, and that therefore the holding in the Mullen Case is not conclusive. However this contention may be in regard to the Choctaw-Chickasaw Agreement involved in the Mullen Case, said section 14 of the Cherokee Agreement has an exact counterpart in the first portion of section 16 of the Supplemental Creek Agreement, which was construed by the Supreme Court in Skelton v. Dill, supra. Nevertheless the court said that it saw nothing in the acts relating to the Creek lands which called for a different conclusion from that reached in the Mullen Case in regard to the Choctaw and Chickasaw lands.

It is contended, further, that the first portion of section 16 of the Supplemental Creek Agreement does not correspond with section 14 of the Cherokee Agreement, but rather with section 15. This position is not tenable. It requires a mere comparison of the language in the first portion of section 16 of the Supplemental Creek Agreement with the language of section 14 of the Cherokee Agreement to show that they are an exact equivalent of each other, so far as concerns that class of allotments which is restricted in alienation.

[2] Taking up the second question, as to the effect of the act of April 26, 1906 (34 Stat. at Large, 137), it may be stated, without discussion, that inasmuch as we hold that the lands allotted in the name of James Sunday were not restricted as to alienation when they passed to his heirs, it is not necessary to consider whether the act of April 26, 1906, extended restrictions theretofore existing.

It remains to consider, however, whether said act imposed restrictions where none existed theretofore. Two sections are claimed to have this effect, section 19 and section 22. They read so far as material, as follows:

"19. That no full-blood Indian of the Choctaw, Chickasaw, Cherokee, Creek or Seminole Tribes shall have power to alienate, sell, dispose of or incumber in any manner any of the lands allotted to him for a period of twenty-five years from and after the passage and approval of this act unless such restriction shall, prior to the expiration of said period, be removed by act of Congress; and for all purposes the quantum of Indian blood possessed by any member of said tribes shall be determined by the rolls of citizens of said tribes approved by the Secretary of the Interior: Provided, however, that such full-blood Indians of any of said tribes may lease any lands other than homesteads for more than one year under such rules and regulations as may be prescribed by the Secretary of the Interior; and in case of the inability of any full-blood owner of a homestead, on account of infirmity or age, to work or farm his homestead, the Secretary of the Interior, upon proof of such inability, may authorize the leasing of such homestead under such rules and regulations: Provided further, that conveyances heretofore made by members of any of the Five Civilized Tribes subsequent to the selection of allotment and subsequent to removal of restriction, where patents thereafter issue, shall not be deemed or held invalid solely because said conveyances were made prior to issuance and recording or delivery of patent or deed; but this

shall not be held or construed as affecting the validity or invalidity of any such conveyance, except as hereinabove provided; and every deed executed before, or for the making of which a contract or agreement was entered into before the removal of restrictions, be and the same is hereby, declared void: Provided further, that all lands upon which restrictions are removed shall be subject to taxation, and the other lands shall be exempt from taxation as long as the title remains in the original allottee.

* * * * * * * * * *

"22. That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

A careful reading of section 19 clearly indicates that it has reference only to living allottees, and not to the heirs of allottees. In the instant case the heirs of James Sunday took not as allottees. See Shulthis v. McDougal, 170 Fed. 529, 95 C. C. A. 615.

It is claimed, however, that section 22 is applicable. There is nothing in the language which specifically imposes restrictions on allotments theretofore unrestricted, and especially when taken by the heirs of a deceased member on selection by an administrator, and we think it more in consonance with the language used, and more in accord with the construction placed upon the restriction clauses of the several agreements above discussed, to hold that section 22 of the act of April 26, 1906, does not impose restrictions upon lands theretofore unrestricted in the hands of heirs of a member of the Cherokee Tribe, who died before receiving his allotment, and where selection was made by his administrator.

In the case of Bartlett v. United States, 203 Fed. 410, 121 C. C. A. 520, this court held that it was not within the power of Congress to impose restrictions upon the alienation of lands allotted to an Indian after the restrictions imposed by prior laws had expired, and that acts general in their terms should not be construed as intended to apply to such cases. In that case, 160 acres had been allotted on June 30, 1902, to Moses Wiley, a duly enrolled three-quarter blood Creek Indian, and patent issued to Wiley March 10, 1903. On January 26, 1912, Wiley and his wife conveyed 120 acres, being the portion other than his homestead, to Bartlett, and Bartlett thereafter conveyed to Lashley. The United States filed its bill in equity to cancel the deeds from Wiley to Bartlett, and from Bartlett to Lashley, claiming that the act of May 27, 1908 (35 Stat. at Large, 312, c. 199) imposed restrictions upon the alienation of the Wiley land. The five-year original restriction had expired by limitation on the 7th of August, 1907. The act of 1908, so far as here material, is found in section 1, and is as follows:

"That from and after sixty days from the date of this act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: * * * And all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The Secretary of the Interior shall not be prohibited by this act from continuing to remove restrictions as heretofore, and nothing herein shall be construed to impose restrictions removed from land by or under any law prior to the passage of this act. * * *"

The court in its opinion said:

"It is contended on the part of appellants that the foregoing act of May, 1908, is inapplicable, as it expressly provided that the act should not be construed as imposing restrictions removed from land by or under any law prior to the passage of that act; that, as the restrictions in this case had expired prior to the passage of the act, they came within the exception, for, as is argued, the restriction being imposed by an act of Congress, and limited to a period of five years, when that period expired the restriction was removed by the law which imposed it. It is unnecessary for us to pass upon the correctness of this statement, however, for we are of the opinion that it was not the intent, nor within the power, of Congress, to reimpose a restriction upon the alienation of lands against which none at the time existed. True it is that the Supreme Court, in Tiger v. Western Investment Co., 221 U. S. 286, 31 Sup. Ct. 578, 55 L. Ed. 738, held that it was within the power of Congress to continue or extend the period of restriction against alienation during the period of an existing restriction against alienation. The Supreme Court, however, in that case, expressly referred to the fact that the title to the allotment was still held by the United States in trust for the Indian; that, while the land was held by the United States in trust for the Indian allottee, it was competent for Congress to extend the trust period, and prohibit alienation during such extended period. We find nothing in that case holding that, after the trust period had expired and both the legal and equitable title had fully vested in the allottee, such allottee being a citizen of the United States, Congress could thereafter reach out and withdraw the land from alienation and taxation by the state and local municipalities. As soon as the title, both legal and equitable, to the land in question became vested in Moses Wiley, it was subject to taxation by the state and county authorities, and Moses Wiley had full dominion over the same, notwithstanding in many respects the government still retained a guardianship over him."

It would seem to follow that, if Congress had not the power to reimpose restrictions upon alienation after the original restrictions had been removed, it would not have the power to impose restrictions where none whatever had theretofore existed.

The Bartlett Case was affirmed by the Supreme Court in 235 U. S. 72, 35 Sup. Ct. 14, 59 L. Ed. 137. The court, however, rested its decision upon the ground that the restrictions which had at one time existed upon the Wiley land had been terminated by lapse of time, as contemplated by the law imposing them, and that such restrictions were "removed from the land by or under" the prior law, within the meaning of the excepting clause in the section of the statute of May 27, 1908, above quoted. While the case was affirmed, therefore, the Supreme Court did not pass upon the question of the power of Congress to reimpose restrictions upon the alienation where they had been

removed. We see no reason, however, for changing the opinion of this court in the Bartlett Case, as applied to the facts therein disclosed.

United States v. Western Investment Co., 226 Fed. 726, 141 C. C. A. 482, was a case where Lewis Bird, a full-blood Indian, received an allotment on April 20, 1899, and died April 14, 1901. The allotment was therefore made prior to the ratification of the Original Creek Agreement, which was May 25, 1901. On April 24, 1907, his widow executed a deed to the Western Investment Company, and later the Western Investment Company, by its trustee in bankruptcy, conveyed to one Bilby. Under section 7 of the Original Creek Agreement, allotments made to citizens were inalienable during five years from ratification of the agreement, except with the approval of the Secretary of the Interior. This period had expired prior to the conveyance by Mary Bird. However, the act of April 26, 1906 (34 Stat. 137), had been passed, which by section 22 provided that adult full-blood heirs of deceased Indians should make no conveyance without the approval of the Secretary of the Interior. It was held that the act applied and that Mary Bird could not make a conveyance without the approval of the Secretary of the Interior. It is to be noted that in this case the allotment had been made to a citizen, prior to the ratification of the Original Creek Agreement, and that his death occurred prior to the ratification of this agreement.

The conclusion reached was based upon a holding that such an allotment was subject to restrictions as to its alienation, and followed Welty v. Reed, 219 Fed. 864, 135 C. C. A. 534; but the latter case upon rehearing (231 Fed. 930, 145 C. C. A. 309) was reversed on this point, in view of the decision in Woodward v. De Graffenried, 238 U. S. 284, 35 Sup. Ct. 764, 59 L. Ed. 1310.

Brader v. James (Okl.) 154 Pac. 560, was a case where Cerena Wallace, a full-blood Choctaw Indian, died October 27, 1905. An allotment had been made to her during her lifetime. Her daughter, Rachel James, her sole surviving heir at law, on the 17th of August, 1907, her husband joining, attempted to convey a part of the lands inherited, consisting of the homestead and a portion of surplus lands. September 13, 1909, the purchaser, Tillie Brader, quitclaimed to J. H. Brader, the defendant. The deed of Rachel James and husband to Tillie Brader was never approved by the Secretary of the Interior. Action was brought by Rachel James to recover possession. Under the Choctaw-Chickasaw Agreement, homestead lands became alienable upon the death of the allottee and the question in the case was whether the act of April 26, 1906, requiring the approval of the Secretary of the Interior applied. The court, after a full review of the authorities, held that it did, and that the statute was not unconstitutional. The court in its opinion called particular attention to the fact that the lands had been allotted to Cerena Wallace during her lifetime, and expressly refrained from holding that the same effect would be given to the act of 1906, if applied to conveyances made by full-blood Indian heirs of enrolled tribal members who died subsequent to enrollment, but before selecting their allotments and where selections were made thereafter by their administrator.

In Sampson v. Staples (Okl.) decided a month later by the same court, 155 Pac. 213, the court held that the act of April 26, 1906, and the act of May 27, 1908, did apply to conveyances of inherited lands made in 1910 and 1911 by full-blood heirs of a Choctaw Indian who died in 1903, and this though the ancestress died before receiving her allotment, and the allotment was selected in her name and descended to her heirs under section 22 of the Choctaw-Chickasaw Agreement, and that while the heirs of the deceased allottee had a right to convey their interest in the lands prior to the passage of the act of April 26, 1906, after its passage they could not do so without the approval of the Secretary of the Interior.

The case last cited appears to be squarely in point, and to support the contention of the appellant here. We feel, however, compelled to take a different view. The same reasons which have led the courts to hold that restrictions upon alienations in the several Indian Agreements above discussed do not apply to cases where heirs take lands selected by the administrator of the ancestor duly enrolled, but dying before allotment, lead us to the conclusion that section 22 of the Act of April 26, 1906, was also not intended to apply to such cases.

Congress, in passing the various acts heretofore discussed, was legislating for large classes of cases, and not for isolated instances. Furthermore, Congress was keeping in mind, while imposing restrictions upon the alienation of these Indian lands: First, whether the restrictions were necessary in certain classes of cases; and, secondly, to what extent. The broad plan of legislation was to protect the allotments of lands made to individual living members, as such, whether while remaining in the hands of the original allottee, or thereafter, while in the hands of his heirs; the purpose being to conserve such allotments, first, for the benefit of the original allottee; second, to a less full extent for the benefit of his heirs. The plan of legislation did not contemplate restricting alienations of all lands that a full-blood Indian might in any wise acquire; for example, by purchase, or in any other manner than from the government. In other words, it was not merely the relationship of guardian and ward between the government and the Indian that was the foundation and reason for restrictions upon alienation of his land, but it was this relationship plus the plan of distributing allotments of lands in severalty to living members of the several tribes, and the restrictions were limited to the reasonable carrying out of the plan. It was in view of such considerations that restrictions were imposed upon alienation of allotments to living members, first, while in the hands of the allottee; and, secondly, to a less extent while in the hands of the heirs.

There would naturally be two classes of heirs of the duly enrolled members: The first class, those heirs whose ancestors became actual allottees; the second class, those whose ancestors were duly enrolled, but died before receiving allotment. The first class would be presumably large; the second, naturally, comparatively small. Furthermore, in the second class would be naturally many persons who were living at the time of the taking effect of the enrollment, and who would be themselves enrolled and entitled to allotments, and such allotments would carry the usual restrictions, so that the necessary protection

would be afforded them in connection with their own allotments. In the instant case, all of the heirs of James Sunday were themselves duly enrolled. It is true that there might be full-blood heirs born, after the final enrollment date, to an Indian duly enrolled, but who died before receiving his allotment; but such a class would in the nature of things be very small and was probably deemed by Congress negligible. It was doubtless with these considerations in mind that Congress, in making the several Indian Agreements, saw fit not to place restrictions upon alienation in cases where the lands were taken by heirs of ancestors duly enrolled, but dying before allotment. The same considerations lead us to believe that Congress did not intend to impose restrictions upon such lands by the act of April 26, 1906. By the provisions in the several Indian Agreements, Congress had definitely relinquished its hold upon such lands. The lands did not become subject to restrictions at the time they were taken by the heirs; and it would seem to require very plain language to show an intention on the part of Congress to impose new restrictions as to such lands, where no restrictions whatever had theretofore existed.

It is our opinion that the lands in question were taken by the heirs of James Sunday, deceased, free from any restrictions upon alienation; furthermore, that the act of April 26, 1906, was not intended to place restrictions upon the alienation of such lands, and did not in fact do so.

The judgment and decree of the lower court is affirmed.

MEXICO-WYOMING PETROLEUM CO. et al. v. VALENTINE et al.*

(Circuit Court of Appeals, Eighth Circuit. October 30, 1916.)

No. 4723.

1. MINES AND MINERALS ⟸81—ENFORCEMENT OF OIL LEASE—EVIDENCE.
In a suit by a lessee of oil land to enjoin operations thereon by a later lessee, evidence offered by defendant to show the large increase in the value of the land, due to its development of the same, to affect complainant's equities, was properly excluded, where at the time of such development defendant had actual knowledge of complainant's lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 211; Dec. Dig. ⟸81.]

2. MINES AND MINERALS ⟸81—ENFORCEMENT OF OIL LEASE—LACHES.
A delay of 16 months after the execution of an oil lease before suit was commenced for its enforcement does not constitute laches, in the absence of evidence showing that the situation had so changed as to render the enforcement of the lease inequitable.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 211; Dec. Dig. ⟸81.]

3. MINES AND MINERALS ⟸74—OIL LEASE—ASSIGNEE—NOTICE OF PRIOR LEASE.
Where an assignment of an oil lease required the consent of the lessor, and the instrument by which such consent was granted recited the execution of a prior lease by the lessor, and bound the assignee to defend any suit thereon, and also provided that its conditions should be binding on the assigns of the parties, a subsequent assignee, which assumed the

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

*Rehearing denied January 10, 1917.

obligations of its assignor, was not an innocent purchaser without notice with respect to the prior lease.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 202; Dec. Dig. ⊂⊃74.]

Appeal from the District Court of the United States for the District of Wyoming; John A. Riner, Judge.

Suit in equity by W. L. Valentine and others against the Mexico-Wyoming Petroleum Company and others. Decree for complainants, and defendants appeal. Affirmed.

Henry E. Lutz, of Denver, Colo., for appellants.

Carl L. Sackett, of Sheridan, Wyo. (W. S. Metz, of Sheridan, Wyo., and C. A. Zaring, of Basin, Wyo., on the brief), for appellee Valentine.

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

CARLAND, Circuit Judge. This was a suit in equity, brought in the District Court of the United States for the District of Wyoming, by the holder of an oil and gas lease covering a tract of land in Hot Springs county, Wyo., to enjoin operations under a later and similar lease, and to obtain a discovery and accounting in respect of the oil and gas produced and sold in the course of operations already had. A trial was had upon pleadings and proofs, and a decree rendered in favor of appellee, Valentine.

The Mexico-Wyoming Petroleum Company and the Great Dome Oil Company appealed from the decree. The appellee claimed the right to the possession of the premises in question for the purpose of mining oil and gas under a lease executed and delivered by Quintin Littlejohn and Agnes, his wife, for the term of 10 years, to one H. B. Gates, on the 1st day of April, 1914. On April 4, 1914, Gates transferred the lease to one Charles E. Orchard; a formal written assignment thereof from Gates to Orchard being made on April 23, 1914. On May 9, 1914, Orchard by a written assignment duly executed transferred the lease to the appellee. On the same day appellee delivered the lease to the county clerk of Hot Springs county, Wyo., for record and paid the recording fees.

The appellants claim the right to the possession of the same premises for the purpose of mining oil and gas under a lease executed and delivered by Quintin Littlejohn and Agnes, his wife, and William Littlejohn, and Jessie, his wife, for the term of 5 years, to one X. Whiting on August 3, 1914. This lease was duly recorded in the office of the county clerk and ex officio register of deeds for Hot Springs county, Wyo., August 10, 1914. On October 10, 1914, Whiting entered into an agreement with one Foley, trustee for the Mexico-Wyoming Petroleum Company, to assign said lease to Foley when this could be done; and thereafter on December 12, 1914, Foley, trustee, procured the written consent of the Littlejohn brothers and their wives to the assignment of the Whiting lease to the Mexico-Wyoming Petroleum Company, and on the 17th day of December, 1914, Whiting assigned the lease to the Petroleum Company, which entered into pos-

session of the land and commenced development. On July 26, 1915, the Mexico-Wyoming Petroleum Company assigned the Whiting lease to E. J. De Sabla, Jr., and on August 23, 1915, De Sabla assigned the same to the Great Dome Oil Company. After the transfer of the Whiting lease to it, the Great Dome Oil Company entered into possession of the premises in question, and has remained in possession ever since.

Before entering into the discussion of the merits, we will notice certain assignments of error based upon the admission and exclusion of evidence by the trial court. It is claimed that the trial court erred in admitting in evidence certain notices dated October 28, 1915, and signed, respectively, by the attorney for appellee and his lessors, requiring appellants to vacate the premises in controversy and cease further trespassing thereon. These notices were served upon appellants on the day of their date, which was over a month after the present action had been commenced. The admission in evidence of these notices was objected to, for the reason that they could not affect the rights of the parties after suit brought. It was stated by counsel for appellees, when the notices were offered, that they were offered to prove notice. It is clear, we think, that the notices ought not to have been admitted; but the trial was to the court, and the admission of the notices could not have prejudiced appellants, as appears from the record, and they will not be allowed to do so here.

At the time H. B. Gates assigned his lease to Orchard, as above stated, Orchard deposited to the credit of the Littlejohns in the First National Bank of Worland, Wyo., the sum of $400, as the annual rental to be paid in advance on the lease for the year 1915. When the witness Gates was upon the stand for appellants, their counsel inquired of the witness as to what was done with the $400 after it was deposited in the First National Bank. The question was objected to, and the objections sustained. Then counsel made the following offer:

"We offer to prove by this witness that in January of this year the plaintiff, Mr. Valentine, took the $400 spoken of as the payment on the Gates lease and had it transferred to his own credit, and put it into a certificate of deposit in his own name, and to prove that this was done by the direction of Mr. Quintin Littlejohn and Mr. Valentine."

An objection was sustained to this offer. Then counsel made the following offer:

"Leaving out of that offer the matter about the form of the certificate, I desire to offer to prove by this witness that in January of this year, Mr. Gates being personally present, Mr. Valentine took this money which the Littlejohns were refusing to receive on the lease, on the ground that the lease had not been complied with, and other ground; that Quintin Littlejohn directed that it be turned back, and Mr. Valentine, the plaintiff here, took it and applied it to his own use."

This last offer was objected to as incompetent, irrelevant, and immaterial, and for the further reason that it assumed matters not proven. The objection was sustained as to its form.

The object of the offer was for the purpose of showing that the parties to the Gates lease had abandoned it, and therefore it could not be the foundation of any rights; but the evidence shows beyond con-

tradiction that Orchard, while he was the owner of the lease, deposited the money according to the terms of the lease, and the Littlejohns were made defendants in this action, and by their answer, verified by Quintin Littlejohn, are here asserting the validity of the lease, and asking that the same be adjudged a valid instrument. If the lessors and lessees are satisfied as to the payment of the rental, the appellants may not complain. The offer was objectionable in matter of form. It did assume facts not proven. Again, on cross-examination of William D. Littlejohn, a brother of Quintin Littlejohn, and who claimed some interest in the land in question, counsel for appellants went into the question as to whether the Littlejohns received the $400. As the questions asked related to a matter not brought out in chief, appellants were bound by the answers, and the testimony showed that there had been no abandonment of the lease. There was no error in refusing the offers.

[1] When the witness Whiting was upon the stand, counsel for appellants inquired of him as to the effect, if any, which the discovery of oil on the premises in question by Whiting and his assignees had upon the value of the property. This question was objected to, and the objection was sustained, whereupon counsel made the following offer:

"We offer to prove by the witness that by their labors in this matter they increased the value of the property from not exceeding $40 an acre to about $5,000 an acre."

This was objected to as incompetent, irrelevant, and immaterial, and the objection was sustained. This offer of proof was made in connection with the defense of laches. It was for the purpose of showing that during the time Valentine was inactive in the assertion of his rights, namely, from May 9, 1914, to the time this suit was commenced in September, 1915, the premises in question, through the labors of appellants, had greatly increased in value, and therefore that it would be inequitable to enforce the rights of appellee, if any, against them. The offer was properly refused, for the reason that, when the first well was brought in upon the premises in July, 1915, the Mexico-Wyoming Petroleum Company had actual notice of the Gates lease, and the two wells, which the evidence shows were brought in by the Great Dome Oil Company, were both brought in after the commencement of the suit, and therefore all the labor and expenditure of money which in any way enhanced the value of the premises was done with full knowledge of the claims of appellee under the Gates lease. There was no error, therefore, in refusing this offer.

At the trial Whiting testified that on May 10, 1913, he had a conversation with Quintin Littlejohn, in which Littlejohn promised him (Whiting) that he would give him a lease of the land in question at any time when he (Whiting) was ready to begin operations in the field. It was further claimed that Whiting went into the possession of the land in July, 1913, and remained in possession of the same until August 3, 1914, when the written lease was executed; this for the purpose of having the Whiting lease take effect by relation as of the date of the oral promise, and thus avoid the statute of frauds and antedate the

Gates lease. In this state of the case, when Whiting was upon the stand, counsel for appellants made the following offer:

"We offer to prove by the witness that the terms of the written lease, as executed in August, 1914, were the same as the terms under the agreement made with Mr. Quintin Littlejohn, who was then the owner of the land in 1913."

This offer was objected to as incompetent, irrelevant, and immaterial, and for the further reason that the alleged agreement was void under the statute of frauds. This objection was sustained. There was no error in this ruling for at least two reasons; one being that the evidence in the record shows beyond question that Whiting had no such possession of the premises as would take the transaction out of the statute of frauds. Whiting testified himself that from November, 1913, to the next July, he only had some stuff in a cabin situated on the premises, and was not there himself at all. The other is that Whiting, on cross-examination, was interrogated by counsel for appellee as to the same matter to which the offer referred, and Whiting without objection testified that the oral arrangement that he had with the Littlejohns was practically the same as the written lease.

Counsel for appellants, after the witness Whiting had been allowed to testify fully as to his oral agreement with Quintin Littlejohn in regard to a lease, and as to his possession of the premises in question at the time appellee became the owner of the Gates lease, made an omnibus offer to practically prove his whole case on this branch of it, to which the court replied that he thought Mr. Whiting had testified fully as to the oral agreement, and as to his possession, and that, if he had not, he would be permitted to so testify. Mr. Whiting was not sworn, nor any other witness. Thereupon the court denied the offer. We do not think there was any error in this ruling. The court was willing to admit any evidence that could be said to be material, if it did not already appear in the case.

Coming to the merits, the record discloses that appellants sought by their evidence to make three defenses: (1) Laches; (2) actual possession of the premises by Whiting under an oral promise for a lease at the time the Gates lease was taken and assigned, with the consequent claim that appellants had an equitable leasehold estate superior to that of appellee; (3) that the Great Dome Oil Company was an innocent purchaser in good faith, for value, of the leasehold granted by the Whiting lease.

[2] So far as the defense of laches is concerned, it may be summarily dismissed from consideration. From the time the Gates lease was executed to the time of the commencement of this action was about 16 months. This would be far within the statute of limitations in an action at law; hence the burden of showing that the enforcement of the Gates lease would be inequitable was upon the appellants. Mere lapse of time does not ordinarily constitute laches. The situation of the parties must have so changed as to render the prosecution of the suit inequitable. Schwartz v. Loftus, 216 Fed. 320, 132 C. C. A. 464 (8th Cir.), and cases cited.

In the present case the change in the situation of the parties,

growing out of the development of the land, was made by appellants with actual knowledge of the Gates lease, and for reasons hereinbefore stated, in discussing the admission of testimony, the defense of laches cannot prevail. Whatever the rights of appellants may have been, if Whiting, under an oral promise for a lease, had gone into the actual possession and occupancy of the premises in question, and continued in such possession, a question which we find it unnecessary to decide, there was no actual and continued possession in this case; and a court of equity would not be authorized to decree specific performance of the oral promise on the character of the possession maintained by Whiting, assuming his own evidence to be true. Beyond question he was not in possession and occupancy of the land when the Gates lease was executed and assigned. Was the Great Dome Oil Company an innocent purchaser?

[3] When the Gates lease was recorded on May 9, 1914, the record made showed no certificate of acknowledgment. It is claimed that the lease was never acknowledged, but a certificate of acknowledgment, made by Mr. Robertson, a United States commissioner for the district of Wyoming, appeared upon the lease when offered in evidence. In September, 1915, at the request of Mr. Zaring, an attorney for Mr. Valentine, the recorder of deeds added to his record a copy of this acknowledgment. This act of the recorder, however, amounted to nothing, as he had no power to change the record already made. The only way that the instrument could be recorded, so as to show the acknowledgment, would have been to refile the instrument for record, and then it would only be constructive notice from the date of the last filing. Elliott v. Peirsol, 26 U. S. (1 Pet.) 328, 7 L. Ed. 164. The trial court found that the execution of the lease was acknowledged by the lessees on the day of its date, April 1, 1914, and there is abundant evidence to sustain this finding. Under the laws of Wyoming before the lease could be lawfully recorded, it must have been acknowledged. The record, therefore, showed that the lease was not entitled to be recorded. Many decisions are cited upon the question as to whether such record is constructive notice of the lease itself.

There are three general classes of cases upon this question. There is a line of decisions which decide that, where the instrument itself is defective by reason of the fact that it was not properly witnessed or acknowledged, or contained some other vital defect, and was not entitled to record, although such defective instrument was recorded, it was not sufficient to charge a subsequent purchaser with notice. There is another line which decide that where the instrument was properly executed, witnessed, acknowledged, and entitled to record, but by some omission or mistake of the clerk the record is defective, the incomplete record, although due entirely to a mistake of the clerk or recorder, would not constitute constructive notice. There is still another line deciding that the entries upon the receiving and abstract book, when taken in connection with the record book, although the record was imperfect, taken together, are sufficient to constitute constructive notice, and that the party dealing with the land, either as purchaser or lessee,

was put upon inquiry, and would be bound by all that a reasonable inquiry would disclose.

The law of Wyoming in regard to the question of notice is found in section 3653 of the Wyoming Compiled Statutes of 1910:

"Each and every deed, mortgage, instrument or conveyance touching any interest in lands, made and recorded according to the provisions of law, shall be notice to and take precedence of any subsequent purchaser or purchasers of such land from the time of the delivery of any such instrument at the office of the register of deeds of the county in which the lands described in such instrument are situate, for record."

The Supreme Court of Wyoming, so far as we are advised, has not construed this section with reference to the point in question. The argument that under this section an instrument must be recorded in accordance with the laws of Wyoming before it is notice is very forcible. The laws of Wyoming require an instrument to be acknowledged before it can be recorded; hence it would appear reasonable to say that the record of an instrument which shows on its face that it was not entitled to be recorded is not notice. We do not think, however, that it is necessary to decide this question in the present case.

The evidence clearly shows that, when Whiting obtained his lease on August 3, 1914, he was told of the Gates lease, and that the assignee thereof, Orchard, had paid the rental as provided for therein, and that the money had been accepted; that Whiting orally agreed to protect the Littlejohns against any litigation or damages by reason of the Gates lease. The Whiting lease contained the following provision:

"It is understood between the parties to this agreement that all conditions between the parties hereunto shall extend to their heirs, executors, administrators, successors, and assigns. This contract not assignable to any other than the Big Horn Wyoming Oil Company, except by written consent of first parties."

In the agreement and consent to the assignment of the Whiting lease, executed December 14, 1914, by the Littlejohns and Foley, trustee of the Mexico-Wyoming Petroleum Company, there appears the following agreement:

"And the said party of the second part further agrees with said parties of the first part that it will defend any and all actions at law brought in any court by H. B. Gates or his assigns, under and by virtue of any rights claimed under a certain oil and gas lease obtained by false and fraudulent representation and entered into by and between the said parties of the first part and said H. B. Gates, dated April 1, 1914, recorded in the office of the county clerk and ex officio register of deeds in and for Hot Springs county, Wyoming, instrument No. 1605, recorded on May 9, 1914, on pages No. 148, 149, 150 of Mic's Records, and that it will pay all court costs and attorney's fees necessary in such defense, and all damages assessed by the court against parties of the first part in favor of H. B. Gates, or his assigns, and if said party of the second part shall fail to make said defense to any such suit, or pay said court costs and attorney's fees for such defense, this lease shall be null and void, and they shall forfeit any and all rights acquired hereunder. * * * And for the true and faithful performance of each and all the covenants and agreements above mentioned, and in said lease, said parties bind themselves, their heirs, administrators, executors, and assigns. And parties of the

second part hereby waive all right and claim for damages against first parties, in case the H. B. Gates lease shall be declared superior by the courts."

On December 18, 1914, the board of directors of the Mexico-Wyoming Company by resolution assumed the obligation made by Foley, trustee, as to protecting the Littlejohns against the Gates lease, and released Foley therefrom. July 26, 1915, as has been stated the Mexico-Wyoming Petroleum Company assigned the lease to E. J. De Sabla, Jr. August 23, 1915, De Sabla, Jr., assigned the lease to the Great Dome Oil Company. The last two assignments referred to the fact that the assignors had obtained title through mesne assignments from Whiting. De Sabla testified that he read the Whiting lease before taking an assignment thereof. If he did so, he must have learned that the lease could not be assigned without the consent of the Littlejohns, and that the conditions of the lease by the terms thereof extended to the heirs, executors, administrators, successors, and assigns of the parties to the lease. The consent of the Littlejohns was in the direct chain of title under the Whiting lease, and all purchasers were bound to take notice of it. The consent of the Littlejohns to the assignment of the lease to Foley, trustee, did not exhaust this provision of the lease, so that any future assignment could be made without the consent of the Littlejohns. De Sabla, having read the lease and being acquainted with this provision in regard to consent, received sufficient knowledge to put him upon inquiry as to whether his assignor had ever received the required consent, and this inquiry pursued would have developed the agreement between Foley and the Littlejohns. Symmes, who investigated for De Sabla the title to the property described in the Whiting lease, and made a report thereof to him, knew of the Gates lease.

The testimony of Whiting, Symmes, Stoddard, and Foley, together with their contracts and the records of the Mexico-Wyoming Petroleum Company, showed that they had examined fully into the title of the Whiting lease, and had full knowledge of the Gates lease. The Great Dome Oil Company was organized in Nevada by De Sabla and Symmes, and Stoddard and Symmes became directors thereof. Both De Sabla and the Great Dome Oil Company employed Symmes as general manager, and Whiting as superintendent in the field, in charge of the properties. The Great Dome Oil Company gave $1,200,000 par value of its capital stock to the Mexico-Wyoming Petroleum Company for the title to the lease, and also assumed as a part of the purchase price all the debts and obligations of the Mexico-Wyoming Petroleum Company, which included the obligation to fight the Gates lease and pay the costs and attorney's fees that might be incurred in contesting the same. This evidence shows that the Mexico-Wyoming Petroleum Company had a very decided interest in the Great Dome Oil Company. Whiting was superintendent of the Mexico-Wyoming Petroleum Company, and was continued as superintendent of the Great Dome Oil Company. Symmes, who was general manager of the Mexico-Wyoming Petroleum Company, was continued as manager of the Great Dome Oil Company.

Stoddard, who was president of the Mexico-Wyoming Petroleum Company, became a director of the Great Dome Oil Company.

The burden of proof in showing that appellants were innocent purchasers of the Whiting lease was upon the appellants. A careful reading of the evidence can result in but one conclusion, and that is that De Sabla and the men who controlled the Great Dome Oil Company all knew of the Gates lease, either actually or were in possession of facts which, if investigated, would have led to such knowledge. That we cannot review the motion for a rehearing is well settled. We have not relied upon the findings of the trial court, although they are all sustained by evidence in the record, but have carefully gone through the evidence on our own account, and are of the opinion that the decree below must be affirmed.

And it is so ordered.

UNITED PRESS ASS'N v. NATIONAL NEWSPAPER ASS'N.*

(Circuit Court of Appeals, Eighth Circuit. November 2, 1916.)

No. 4638.

1. CONTRACTS ⊂=324(2)—RENUNCIATION—REMEDY OF INJURED PARTY.

Where one party repudiates a continuing contract, the injured party may (1) treat the contract as rescinded and recover on a quantum meruit so far as he has performed; or (2) keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract sue and recover under the contract; or (3) he may treat the repudiation as putting an end to the contract for all purposes of performance, and sue to recover so far as he has performed, and for the profits he would have realized, if he had not been prevented from performing.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1551–1557; Dec. Dig. ⊂=324(2).]

2. CONTRACTS ⊂=313(2)—RENUNCIATION—REMEDY OF INJURED PARTY.

Defendant, a newspaper publisher, contracted with plaintiff for news service for a term of years, to be paid for weekly in advance. Before expiration of the term defendant notified plaintiff that it would no longer perform, but desired to continue a part of the service contracted for. *Held*, that the fact that plaintiff continued performance for another month, while the parties were negotiating, although it received no payments, did not preclude it from then treating the contract as ended because of defendant's refusal to perform.

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

3. CONTRACTS ⊂=313(2)—RENUNCIATION—REMEDY OF INJURED PARTY.

At the expiration of a month plaintiff notified defendant that, unless arrearages were paid within three days, it would consider the default as a breach, and proceed to collect the amount then owing for service rendered, "and the damages accruing to us on account of the failure on your part to carry out the contract." *Held*, that such notice was not to be construed as referring alone to the nonpayment of installments, but to defendant's refusal generally to perform, and that plaintiff was entitled to recover, not only the installments due up to that time, but also for loss of future profits.

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

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

*Rehearing denied January 10, 1917.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by the United Press Association against the National Newspaper Association. Judgment for plaintiff, from which it brings error. Reversed.

For opinion below, see 227 Fed. 193.

G. B. Arnold, of St. Louis, Mo. (Tyson Dines, Jr., of Denver, Colo., and J. W. Curts, of Cincinnati, Ohio, on the brief), for plaintiff in error.

Frank M. Lowe, of Kansas City, Mo. (John T. Bottom, of Denver, Colo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. Plaintiff in error, hereinafter called plaintiff, brought this action against the defendant in error, hereinafter called defendant, to recover the sum of $875, due on a contract executed between the parties November 1, 1909, and for loss of future profits by reason of the wrongful refusal of the defendant to further perform the same. The cause was tried to the court, and findings of fact and conclusions of law were made. The defendant in its answer admitted the making of the contract, but denied that it ever refused to perform the same, and also alleged that the plaintiff on its part wholly failed and refused to perform the contract. The answer also tendered the sum of $875 as payment in full for all day and Saturday night reports furnished defendant for the weeks ending February 11, February 18, February 25, March 4, and March 11, 1911, and paid said sum into court.

A large amount of evidence was taken as to whether the plaintiff had furnished the defendant with reliable and authentic news. Just upon what theory this evidence was taken does not appear, as the answer of the defendant did not allege that it refused to perform the contract and was justified in so doing; but as the court did not deem it necessary to make any finding upon this issue, and as the defendant did not sue out a writ of error, and now makes no complaint of the failure to so find, the whole question may be dismissed from further consideration. The court found the facts substantially as follows:

Plaintiff and defendant entered into a contract November 1, 1909, by the terms of which plaintiff was to deliver to defendant for a period of five years ending November 1, 1914, its full day and Saturday night reports, and to receive as compensation therefor $150 per week for the first 12 months and $175 per week thereafter weekly in advance, and in addition thereto defendant was to furnish plaintiff with the local news within 25 miles of the office of its newspaper, the Kansas City Post, and to provide a suitable office for plaintiff's operator. While the contract was being performed by both parties, except as to the nonpayment of certain weekly installments by the defendant on February 7, 1911, F. G. Bonfils, president of defendant, sent a telegram to plaintiff reading as follows:

"Kansas City, Mo., Feb. 7.

"C. D. Lee. We desire to notify you that we do not find the United Press service satisfactory nor according to your representations to us. You will therefore discontinue the daily service after this week. We would like to contract with you for your Saturday night service alone. F. G. Bonfils, The Kansas City Post. 4:20 P."

In reply thereto plaintiff sent the following telegram:

"Paid Night Letter New York, February 7, 1911.

"F. G. Bonfils, The Kansas City Post, Kansas City, Missouri. Your telegram received. In view of the fact that we have received no intimation that service was unsatisfactory or in any respect not in keeping with our representations we feel that your contract obligations should be fulfilled. You have always used our service liberally and there is every indication of its value to the Post. We have entered into other arrangements and made binding arrangements based upon our contract with the Post, and such an outcome would represent a serious loss to the United Press. C. D. Lee."

On February 11, 1911, defendant, by its president, F. G. Bonfils, wrote the following letter to plaintiff:

"W. F. Lochridge, Agent, United Press Ass'n, Office—Dear Sir: We are in receipt of two telegrams from Mr. C. D. Lee, first vice president of your company, touching the matter of the discontinuance of the day service under contract made with your company in November, 1909, and we have this to say:

"First. We have no disposition to do anything harsh in reference to this matter. We simply are determined not to continue the day service, and if, in the discontinuance of that service, your company will refuse to supply us with the night service, then in that case we will discontinue both day and night service, for the reason that the day service has not been satisfactory. The terms of the contract on the part of your company have not been complied with, and, for that reason, we are determined to discontinue that portion of the service.

"Second. We are perfectly willing to let you remain and occupy the space you now have, and to furnish you with such news items as you may desire to use, provided your company will discontinue the day service and furnish us with the night service, so that there will be no unpleasant relationship existing between our office and yourself.

"Third. If, however, your company refuses to discontinue the day service, and refuses to let us have the night service as we have requested, then and in that case, by virtue of your own act, it will become necessary for you to remove your bureau from our building and seek a location elsewhere. It will, therefore, be a matter for you to determine, and the result will depend upon your own actions.

"We request a definite and positive answer, and would ask that you take time to obtain such answer in full from your company, and, until that time, the matter will be left open.

"Very truly yours, [Signed] F. G. Bonfils."

February 14, 1911, plaintiff wrote defendant as follows:

"United Press Association,

"New York City, February 14th, 1911.

"Mr. F. G. Bonfils, The Kansas City Post, Kansas City, Missouri—Dear Mr. Bonfils: Your letter of February 11th, addressed to W. F. Lochridge, agent of the United Press at Kansas City, has been forwarded to this office. Its receipt is hereby duly acknowledged.

"In the first place, I am very frank to say that the first notification of your desire to alter the terms of our agreement providing for the delivery of our day and Saturday night reports, and for office room and news facilities at Kansas City, was a great surprise to me, particularly in view of the fact that this came in the form of an order to discontinue service of the day report,

without the giving of any reason beyond the general statement in a second communication, that the service was not satisfactory.

"When I was in Kansas City a week or so ago, Mr. Charles Bonfils told me that the Post was under the necessity of effecting economies, and that, while he had no fault to find with the United Press, he thought that he would give up our service if it could be done, but that he knew nothing about your contract obligations. In view of the fact that we have served the Post for over a year with both the day and Saturday night reports, and have had every reason to believe that service was not only satisfactory, but very useful, your complaint that it is not now satisfactory, taken in connection with the plea of Mr. Charles Bonfils that economies were necessary, strikes us as not being entirely apropos.

"It strikes us as being still more inconsistent that, while complaining that the day service is unsatisfacory, you want to continue our Saturday night service; this in view of the fact that the United Press has established a first-class reputation as an afternoon news service association. If we are entitled to news facilities and bureau room in your office and to continue the Saturday night service, we do not see why the agreement should not be carried out in its entirety, as all of these matters are covered by and contained in the same agreement, which agreement names a joint rate to be paid for both services.

"The United Press entered into its agreement with the Post in good faith, and furthermore, believing that mutual considerations, as well as the strict letter of the contract, would lead both of us to carry out the full term of the contract, we established a bureau in Kansas City and entered into contracts with other papers to provide service from that point. Your failure to carry out the agreement in its entirety does not only mean a considerable financial loss to us, as well as a loss in a news way, but would undoubtedly force litigations upon us by papers with whom we have made contracts based upon our agreement with the Post, and all made in good faith.

"Under the circumstances, we do not feel justified in altering the terms of our agreement under date of November 1, 1909, and in taking this view of the matter we feel that we are working no hardship on the Post, as we believe that our service is in many respects one of your most valuable assets. The United Press is recognized as one of the leading press associations of the country, having a larger afternoon clientele than any other press association. We are spending large sums of money on our service, and these expenditures aggregate nearly $100,000 a year more than they did when we made our contract with the Post, and the service will, we believe, be increasingly valuable to all clients.

"Aside from our reputation as a first-class news-gathering concern, our chief asset is the contracts we have made and are making with newspapers, and since we always hold ourselves in readiness to carry out our part of these agreements, and unless there are just reasons to the contrary, we feel that our clients should do likewise.

"If you can suggest some more equitable adjustment of the matter, we will, of course, be pleased to give it every consideration. Yours very truly,
"CDL—TJB [Signed] C. D. Lee."

On March 10, 1911, plaintiff delivered to defendant the following notice:

"Kansas City, Mo., March 10, 1911.

"The National Newspaper Association, Publishers Kansas City Post, Kansas City, Missouri—Gentlemen: We call attention to the following clause of your contract:

" 'Second. The second party agrees to receive and accept said news reports (publishing such parts thereof as it may desire) and pay without deduction to the first party, at its New York office, during the term of this agreement, and any extension thereof, the sum of $150 per week for the first 12 months, and $175 per week thereafter, weekly in advance.'

"We note that you are now five weeks ($875.00) in arrears, week ending March 11th, and we notify you that unless arrearages are paid up, and your weekly payments in advance begun on March 13th, 1911, we will consider your default as a breach by you of the contract, and will proceed to collect

the amount then owing for service actually rendered, and the damages accruing to us on account of the failure on your part to carry out the contract. Arrearages may be tendered to the undersigned officer of the United Press, at the Baltimore Hotel, Kansas City, Mo., or to the Kansas City manager.

"United Press Association,

"[Signed] C. D. Lee, President,

"General Offices, World Building, New York, N. Y."

On the same day plaintiff received from defendant the following telegram:

"Baltimore Hotel, Mar. 10, 1911, Kansas City, Mo.

"C. D. Lee, Baltimore Hotel, K. C., Mo.

"Mr. Bonfils who made deal with you is at Lankershim Hotel Los Angeles he will be back in two weeks if you cannot wait his return start your threat and I assure you there will be no mercy asked.

"H. H. Tammen 433 P."

Whereupon plaintiff sent the following telegram to the defendant:

"Kansas City, Mo., March 10, 1911.

"F. G. Bonfils, Hotel Lankershim, Los Angeles, Calif.

"Results posts withholding payments for service notice served here today unless arrearages paid by tomorrow both our reports be discontinued and immediate action taken, enforce contract following adjustment suggested to Charles Bonfils. Will continue Saturday night service twenty-five per week and accept weekly payment sixty eight dollars as equity in day service this save you eighty two per week unless adjusted tomorrow compelled proceed as above. C. D. Lee, Hotel Baltimore."

Plaintiff also on the same day submitted the following proposition to defendant:

"Kansas City, Mo., March 10, 1911.

F. G. Bonfils, President, The National Newspapers Ass'n, The Kansas City Post, Kansas City, Mo.—Dear Sir: In view of the fact that you have expressed the desire, for reasons of economy, to discontinue our day leased wire service, but wish to continue the Saturday night report, both of these reports having been contracted for by you, under an agreement dated November 1, 1909, we hereby submit the following modifications to the above-named agreement:

"First. We will continue our Saturday night leased wire service as per terms of our agreement, accepting for same, the weekly payment of $25.00 (twenty-five dollars).

"Second. We will discontinue our day leased wire service, accepting in lieu of the $150.00 per week (which was the rate charged for this service) $68.00 (sixty-eight dollars) per week, our cash equity in the day service, for the remainder of the term of the agreement. This rate to become effective upon the acceptance of this supplemental agreement.

"Third. The above modifications to the original agreement are not to be construed as invalidating any other features of that agreement and right of the United Press to the local news of the Kansas City Post in particular.

"United Press Associations."

After waiting three days for a reply from defendant as to the notice and proposition served on March 10, 1911, plaintiff discontinued all service under the contract and closed up its office used in connection with such service. From February 7, 1911, to March 13, 1911, plaintiff continued to furnish the service agreed to be furnished by it, and the defendant continued to receive and use part of the same, but did not pay therefor. Defendant during said time furnished plaintiff with the local news as provided in the contract. Upon these facts the trial court declared the law to be as follows:

"1. The court declares the law to be that, while plaintiff had a right to discontinue the service for nonpayment of weekly installments in advance, yet under the law the failure of defendant to pay such weekly installments in advance does not authorize plaintiff to recover more than for the services actually performed.

"2. The court declares the law to be that, while under the contract defendant was bound to pay for the services obtained from plaintiff weekly in advance, yet when plaintiff continued to deliver its service to defendant without exacting and requiring said payments in advance, it in law waived the payment in advance, and plaintiff could not exact of defendant such waived payments as a condition precedent to the continuing of future service.

"3. The court declares the law to be that in this case, while the telegram sent by defendant on the 7th day of February, 1911, to plaintiff, directing and requesting plaintiff to discontinue the day service to it on and after February 11, 1911, was a sufficient notice in law to have justified plaintiff in discontinuing such service, and if such service had been discontinued at that time would have relieved plaintiff from any further obligation under the contract to continue such service, and under the law plaintiff would have been entitled to recover all damages it sustained by reason of the failure of defendant to comply with the terms of the contract; but under the evidence in this case such service was not discontinued, but was sent by plaintiff and received and used by defendant, until the plaintiff, because of nonpayment of weekly installments, discontinued the service both day and night, abandoned its bureau, and canceled the contract, therefore under the law said telegram did not terminate the contract, and plaintiff can recover only for such service as was actually rendered."

These conclusions of law were each excepted to at the proper time by counsel for the plaintiff. Counsel also excepted to the findings of fact and law, because the court failed to find, in accordance with the evidence, that plaintiff treated the contract at an end, by reason of the communications contained in defendant's telegram of February 7th, the letter to Mr. Lochridge, agent of the plaintiff, and the telegram of March 10th, from Mr. Tammen, a part owner of the Kansas City Post, as well as on the ground of the nonpayment of weekly installments. Judgment was thereupon rendered for the plaintiff against the defendant for the amount of the installments due under the contract at the time the plaintiff discontinued its service, but no recovery was allowed for the profits which the plaintiff would have received, had the contract continued to be performed until it expired by its terms.

Plaintiff has brought the case here, claiming that under the facts and law he was entitled to recover for future profits. The trial court separated the case made by the plaintiff into two divisions. In regard to the renunciation of the contract by the defendant, it decided that, if the plaintiff had accepted the renunciation when it was made, then the plaintiff could have recovered the amount due for installments under the contract to the time of the breach thereof by the defendant, and also for future profits, but that the plaintiff did not accept the renunciation, but continued to furnish the service which it had agreed to furnish under the contract down to March 13, 1911, a period of over one month, and that by so doing the plaintiff waived its rights to treat the contract as broken by the defendant. This division of the case being thus disposed of, the court proceeded to consider the demand and notice made by the plaintiff on March 10, 1911. As to this it held there could be no right on the part of the plaintiff to discontinue

service under the contract by reason of installments which had already accrued, as the plaintiff by its mode of dealing had waived, as to these installments, the provision of the contract that they should be paid weekly in advance. In regard to the installment which was to become due on March 11, 1910, and which the evidence showed the defendant did not pay, the court held that the agreement in the contract to pay these weekly installments in advance was an independent covenant. In other words, that it did not go to the root of the contract, and therefore a failure to pay in advance, although insisted upon by the plaintiff, was not such a breach of the contract as would allow the plaintiff to recover future profits; that if the plaintiff chose to discontinue service under the contract for the nonpayment of the installment due March 11, 1911, it could do so, but could only recover the installments already earned under the contract.

[1] We hardly think that the trial court was justified in dividing up the plaintiff's case in the manner stated. It is well settled that where one party repudiates a contract, and refuses longer to be bound by it, the injured party has an election to pursue one of three remedies: First, he may treat the contract as rescinded, and recover upon quantum meruit so far as he has performed; second, or he may keep the contract alive for the benefit of both parties, being at all times himself ready and able to perform, and at the end of the time specified in the contract for performance sue and recover under the contract; third, or he may treat the repudiation as putting an end to the contract for all purposes of performance and sue to recover so far as he has performed, and for the profits he would have realized if he had not been prevented from performing. 6 R. C. L. § 389. There is no difference in the law as to the measure of recovery between anticipatory breaches before the time of the performance of the contract arrives and a refusal to further perform during the performance of a contract, except that the injured party may recover so far as he has performed. The law as to anticipatory breaches is well settled by Roehn v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953.

The plaintiff in this case, so far as the form of the action is concerned, elected to pursue the remedy described under subdivision 3 above mentioned. On this state of the record three questions arise for decision: First. Did the conduct of the plaintiff subsequent to February 7, 1911, deprive it of the right of treating the repudiation of the contract by the defendant as putting an end to the contract for all purposes of performance? Second. Did the plaintiff, by the notice of March 10, 1911, restrict its complaint to the failure of the defendant to pay the installments due under the contract, so as to waive all other complaint, or was that notice when properly construed a general complaint, because defendant had refused to carry out the contract? Third. Is the plaintiff to be limited to a complaint for nonpayment of installments, or should the nonpayment of installments be considered with all the other evidence in the case as to whether the defendant refused to perform the contract?

[2] As to the first proposition, it must be borne in mind that the

defendant never at any time retracted what was stated in the telegram of February 7th, the letter of February 11th, or the Tammen telegram of March 10, 1911. The evidence shows that the defendant intended, if it was possible, to end the contract, and its president so testified. It never by declaration or act changed its position after sending the telegrams and letter above mentioned. To act on the refusal of the defendant to perform the contract so far as the rights of the defendant were concerned, leaving out of consideration for the present the effect, if any, that the notice of March 11, 1911, would have upon the same, was the same on March 10, 1911, as it was on February 7 or 11, 1911. The defendant had not placed itself in any different position than it occupied on those dates. So far as the present record is concerned, the refusal of the defendant to perform the contract was without justification or excuse. It now remains to be seen if, under such conditions, the attempt of the plaintiff for about a month to try and get the defendant to perform the contract deprives it of its right to treat the persistent refusal of the defendant to perform it as ending the contract. It is true that the conduct of the plaintiff during the period from February 7 and 11, 1911, to March 10, 1911, kept the contract open for both parties. The defendant could have withdrawn its renunciation, either by an express declaration or by acts inconsistent therewith. It, however, said nothing, and the evidence shows that it was its intention to do nothing, towards continuing the contract. It is true that the plaintiff continued to furnish the service, but the defendant refused to pay for the same, which was the substantial consideration for the contract on the part of the plaintiff. We are of the opinion that on March 13, 1911, it was open to the plaintiff to treat the contract as ended on account of the refusal to substantially perform the same by the defendant.

[3] It now remains to be seen whether, by the giving of the notice of March 10, 1911, the plaintiff abandoned its right to treat the contract at an end because of the renunciation of the defendant, and limited its complaint simply to the nonpayment of the installments due. It will be observed that the notice of March 10, 1911, did not say anything about whether the plaintiff intended to treat the contract as at an end by reason of the refusal of the defendant to perform it. The evidence shows that the plaintiff, when it discontinued the service on March 13th, discontinued it both on the ground that the installments were not paid and that the defendant had refused in their communications to perform the contract. The notice of March 10, 1911, stated that, if the defendant did not pay the arrears due for installments and for the week commencing March 11, 1911, it would consider the defendant in default for the nonpayment of the installments, and such nonpayment as a breach of the contract, and that the plaintiff would proceed to collect the amount then due for service actually rendered and the damages accruing on account of the failure of defendant to carry out the contract. Now, in view of all the evidence in the case, there is no reason for limiting the words "failure on your part to carry out the contract" as referring alone to the nonpayment of installments, as the notice specifies two kinds of damages: One, a re-

covery of the amount due for unpaid installments; and the other to damages accruing on account of the failure of the defendant to carry out its contract. The telegram to Bonfils at Los Angeles was but a repetition of the notice. We do not think the plaintiff on this record is estopped from contending now that it discontinued its service and treated the contract at an end by reason of the defendant's refusal generally to perform the contract.

As to the third question we do not think it is fair to restrict the plaintiff as to its right to treat the contract at an end to the refusal of the defendant to pay the weekly installments in advance, but that the refusal to pay such installments should be considered with all the other evidence in the case, and, when so considered, we are of the opinion that the plaintiff had the right to treat the contract at an end, and did so treat it on March 13, 1911, for a general refusal on the part of the defendant to substantially perform it. We think it is a fair deduction from the evidence that the refusal to pay the installments was a part of the general intention and plan of the defendant to refuse performance of the contract. In this view of the case we find it unnecessary to consider whether the refusal of the defendant to pay the installment due March 11, 1911, standing alone, would entitle the plaintiff to treat the contract at an end and recover the installments due and future profits.

It is claimed by counsel for defendant that the case of Star Chronicle Pub. Co. v. United Press Association, 204 Fed. 217, 122 C. C. A. 489, is conclusive as to the rights of the defendant in this case. We cannot see how it has any bearing whatever. It was decided in that case that there had been no termination of the contract by the Star Chronicle Company. Whether the contract in the case cited had been terminated depended upon an oral conversation which took place between the manager of the Chronicle Company and the operator of the United Press, and also upon a letter of July 5, 1910, sent by the defendant in that case to the plaintiff. The Court of Appeals decided that the conversation and letter, even if the letter had been received, did not amount to a termination of the contract. The evidence is entirely different in the case at bar.

Judgment reversed, and a new trial ordered.

Appeal of JAMES REES & SONS CO.*

JAMES REES & SONS CO. v. PITTSBURGH & CINCINNATI PACKET LINE.

(Circuit Court of Appeals, Third Circuit. December 8, 1916.)

No. 2161.

1. CORPORATIONS ⊂⊃568—DISTRIBUTION OF FUNDS—PRIORITIES.

Where the final report of a receiver for an insolvent corporation after a sale of its assets was approved absolutely, all exceptions thereto being withdrawn, and on the appointment of an auditor to make distribution of the fund all parties interested therein stipulated that a certain list prepared by the receiver of creditors who had proved their claims was

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

*Rehearing denied December 30, 1916.

agreed upon as the proper creditors entitled to share in the fund, with no reference to actual or asserted priority on the part of any creditor, the auditor and the court properly distributed the fund in accordance with such list, without priorities.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2288, 2289; Dec. Dig. ⊂⊃568.]

2. CORPORATIONS ⊂⊃566(1)—DISTRIBUTION OF FUNDS—PRIORITIES.

Where, at suit of a creditor, a receiver was appointed for a ship-owning corporation, who took possession of and sold all of its property, the complainant and certain other creditors, by subsequently filing libels in admiralty claiming liens, but without seizure of the vessels, acquired thereby no right to preference over other lien claimants, who merely proved their claims in the receivership suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2283; Dec. Dig. ⊂⊃566(1).]

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Suit in equity by the James Rees & Sons Company against the Pittsburgh & Cincinnati Packet Line. From the order of distribution, complainant appeals. Affirmed.

See, also, 237 Fed. 563, —— C. C. A. ——.

The following is the opinion of Thomson, District Judge:

On August 6, 1908, at the suit of James Rees & Sons Company at the above number and term of this court, the Pittsburgh & Cincinnati Packet Line, a corporation of the state of West Virginia, was placed in the hands of James A. Henderson, receiver. The tangible property of the company consisted of three freight and passenger steamers, known as the Queen City, Virginia, and Keystone State, one wharfboat at Pittsburgh, and 50 shares, being one-half, of the capital stock of the Coney Island Wharfboat Company, which was the owner of a wharfboat at Cincinnati; a corporation known as the Coney Island Company being the owner of the other 50 shares. On November 10, 1909, the receiver filed his first and partial account which included the proceeds of the sale of the steamer Keystone State, showing a balance for distribution of $2,980.97. No exceptions were filed to this account and the same was confirmed absolutely. Alfred Kerr, Esq., was appointed an auditor to make distribution of this fund. To his report, as prepared, certain exceptions were filed, and before their determination Mr. Kerr died. On June 27, 1914, the receiver filed a second and final account, into which he carried the balance shown by his first account. To various items of this second account Lowrie C. Barton, Esq., representing certain creditors, filed exceptions, and on June 27, 1914, Albert York Smith, Esq., was appointed auditor to pass upon any exceptions that might be filed to the first account or to the second account of the receiver, to hear and pass upon all exceptions filed, and to report a schedule of distribution. No exceptions were filed to the first account, and before the auditor the exceptions to the final account were withdrawn, so that both accounts as filed were thus confirmed. It then became the duty of Mr. Smith to pass upon the exceptions which had been filed to Mr. Kerr's report, to pass upon any additional claims presented, and to make distribution of the balance shown by the second account. The auditor prepared his report and schedule of distribution, to which exceptions were filed by the commonwealth of Pennsylvania, G. W. C. Johnson, and James Rees & Sons Company. While proceedings were pending on said exceptions, and before their determination, Mr. Smith, the auditor, died whereupon by stipulation filed in court it was agreed that the report and schedule of distribution of said auditor, together with the exceptions filed thereto, be forthwith filed in court, to be heard by the court with the same effect as if said exceptions had been overruled by the auditor and renewed in court.

Proceeding now to the exceptions so filed: First, the exceptions of G. W. C. Johnson: This claimant was the purchaser, for the sum of $22,200, of the principal part of the property of the defendant company, including the one-half interest in the Cincinnati wharfboat, represented by 50 shares of the stock of the Coney Island Wharfboat Company. Claimant asserts that by reason of certain facts, it was the duty of the receiver to pay to him one-half of a certain promissory note of $3,000, made by the Coney Island Wharfboat Company, and indorsed by the Pittsburgh & Cincinnati Packet Line and the Coney Island Company. It is the position of the claimant that this note was given for the accommodation of the indorsers, each of which were indebted to the First National Bank of Cincinnati, which became the holder of the note, for one-half of the amount thereof; that the Coney Island Company has paid its half of said note, but that since the purchase of the property aforesaid the claimant has been compelled to pay one-half of the note, or $1,500, to the bank. The claimant alleges it was understood between the receiver and the various bidders at the sale of the property that the indebtedness ($1,500) aforesaid should not be paid by the purchaser of said property; that Mr. Brooks, the president of the Coney Island Company, was present and a bidder for one-half of the interest in the Cincinnati wharfboat, and that the property was offered for sale on two different occasions, and that he asked the attorney for the receiver if the stock of the Coney Island Wharfboat Company was to be sold clear of any incumbrance against the Wharf Company, and that the attorney and the receiver stated it was to be sold free of all incumbrances; and that upon receiving this information Brooks increased his bid for the one-half interest in the sum of $1,500, and that claimant based his bid upon the assumption that defendant would pay the $1,500 out of the proceeds of the sale of the one-half interest in the Cincinnati wharfboat, and that he had no understanding that he would be obliged to pay the further sum of $1,500 on account of the indebtedness evidenced by the said promissory note, and that it was his understanding that he would be compelled to pay nothing in addition to his bid. To the petition of the claimant, which was presented to court, an answer was filed denying the material averments, and the matter was submitted to Mr. Smith, the auditor, for determination. The auditor reviewed the testimony, and considered the claim carefully, and concluded that the claim should not be allowed. A careful examination has convinced me that the auditor was correct. I do not consider it necessary to go into details in the consideration of the claim. The evidence shows the wharfboat in question was originally bought by the Packet Line and the corporation known as the Coney Island Company; that extensive repairs were made on the wharfboat, part being paid in cash and the balance in note of the Packet Line and the Coney Island Company; that afterwards the Coney Island Wharfboat Company was formed, with a capital of $10,000, of which stock the Packet Line acquired 50 shares and the Coney Island Company 50 shares, this stock being paid for by a transfer of the wharfboat to the Coney Island Wharfboat Company. There was a failure to show that the indebtedness of the Wharfboat Company was really a debt of the Packet Line and the Coney Island Company. These companies had transferred all the assets to the Coney Island Wharfboat Company, and thereupon all subsequent indebtedness was assumed by the Wharfboat Company, as appears from the fact that thereafter the notes were given from time to time by that company. The 3,000-dollar note was not a lien upon the wharfboat, but was a debt apparently of the Wharfboat Company. The order of court was that the property be sold free from all liens and incumbrances, and provided for the sale of the one-half of the capital stock of the Coney Island Wharfboat Company. The order of court confirming the sale directed that possession "of said property be delivered to the purchaser free and discharged of all liens and incumbrances of whatsoever nature and kind." The purchaser paid his bid and received the property. Mr. Johnson's claim is almost solely based upon a remark made by one of the bidders, Mr. Brooks, at the second sale, to the effect, as he alleges, that the wharfboat would be sold free from liens, and that thereupon claimant and Mr. Brooks concluded that the note held by the bank would be paid out of the proceeds of sale. Mr. Johnson was secretary of the Pittsburgh & Cincinnati Packet Line, and

naturally had knowledge of the various notes given by the Wharfboat Company, and knew that they were not a lien upon the wharfboat, and were not a lien or incumbrance upon the shares of the capital stock of the Wharfboat Company. If he misunderstood the bid, immediately on discovering the facts he should have made proper application to the court for rescission of the sale and return of his money. The testimony of Mr. Johnson was contradicted by other witnesses, and on the whole I am satisfied that the auditor's conclusion with reference to this claim was correct. This exception is therefore overruled.

Second. Exceptions filed by the commonwealth of Pennsylvania: The claim of the commonwealth is for a tax of five mills upon $10,000 worth of the $100,000 capital stock of the Packet Line, for about 11 years. The defendant was a common carrier in interstate commerce between Pittsburgh, Pa., and Cincinnati, Ohio. The evidence shows very little business done by the company in the state of Pennsylvania, the operating expenses being largely in excess of the revenue. Prior to the hearing before the first auditor, the auditor general of the state was notified by letter dated December 28, 1909 (Exhibit No. 11), of the hearing, and requesting him to have a representative present to fix and determine the amount of the tax. There was no reply, no representative was present, nor any proof made before the auditor at any hearing before him, the hearings having closed on February 3, 1910. On February 14, 1910, the commonwealth presented to Mr. Kerr a tax settlement in the sum of $562.50. This settlement was made December 30, 1909, two days after the date of the letter Exhibit No. 11. This tax settlement was presented by Mr. Wasson, attorney for the state, before Mr. Smith, auditor. Passing by the question as to whether the tax should be upon a certain proportion of the capital stock of the Packet Line, or should be based upon the earnings of the company within the state of Pennsylvania, under the twenty-third section of Act June 1, 1889 (P. L. 420), in either event, the lien of the commonwealth for taxes is statutory, and the provisions of the statute must be followed, if the lien is to prevail. As appears from the case of Hays v. Commonwealth, 27 Pa. 272, the auditor general, under Act March 30, 1811 (5 Smith's Laws, p. 228), has jurisdiction to examine and adjust accounts between the commonwealth and any person or body politic or corporate, without notice. When such settlement is made, notice of the same must be given within 30 days afterwards, allowing 60 days after notice to file an appeal. If it should be held that the filing of the claim before the auditor operated as such notice, it still became the duty of the state under Act April 16, 1827 (P. L. 472), to file a certified copy of its lien in the prothonotary's office of the county where the debtor resides. In the case of William Wilson Company's Estate, 150 Pa. 285, 24 Atl. 636, it was held that the repealing clause of the Act of 1879 (P. L. 121, § 18) did not affect the acts of 1811 and 1827 in reference to the collections of moneys due the commonwealth. Speaking of these acts the court said: "Being still in force, therefore, we are obliged to hold that their provisions must be complied with in order to enforce the collection of the claims of the commonwealth, when they are in hostility to the claims of lien creditors in the county where the delinquent debtor resides. As that was not done in this case, the lien falls for the same reason expressed in the cases above cited. We do not see how we could hold otherwise, unless we are prepared to hold that the lien given to the commonwealth is a specific lien upon each item of personal property in question, so as to follow it in whatever hands it may be found. We could not possibly hold such a doctrine, as it would affect all the business carried on by corporations and limited partnerships with such an extremely oppressive and onerous liability as to destroy it altogether. We have never held such a liability by way of lien as this, and it would be entirely hostile to the spirit of our laws and the free interchange of commodities among our citizens." Under this case and the decisions therein referred to, I think the lien of the commonwealth must fall.

Third. Exception of James Rees & Sons Company: This exceptant complains that the auditor erred in intermingling the various accounts and distributing the various funds as one account without considering the rights of various creditors in particular funds. The auditor found that there were no funds derived from the operation and sale of the Queen City, but distributes

to the claimant 1 per cent. out of a general fund, which was derived from the operation and sale of the other boats, over and above the amount of lien claims against such other boats. Exceptant claims that the auditor should have incorporated the net earnings of the boat, as shown by the first account, in his statement of the balance remaining in the hands of the receiver for distribution. In other words, that the account of each vessel was a separate estate, and should have been distributed independently to the lien creditors, with balance to the general fund for general creditors. An exceptant claims that, with the first account incorporated in the final account, there would be a balance of $5,200 to the credit of the Queen City. Exceptant claims all of this balance, to the exclusion of the lien claimants who did not file libels or intervene, and exclusive, also, of all claims of operating expenses and expenses of administration. Exceptant proved three caims: One against the Queen City for $5,753.42, one for $8 against the Virginia, and one for $25 against the Keystone State, all being for material and work and labor done on said vessels at the port of Pittsburgh. As to the claim against the Queen City, the materials were furnished and work done before the filing of the bill and the appointment of the receiver in this case. Afterwards, on May 9, 1909, claimant presented its petition to court for leave to file its libel in the District Court against said vessel, for the purpose of maintaining its lien or preferred claim, and under permission of court the libel was so filed. It appears, also, that under like circumstances a libel was filed on behalf of a number of creditors against the Queen City in the District Court of Cincinnati. Exceptant claims that all creditors having a statutory or maritime lien, who did not intervene or file their libels, have lost their lien by reason of laches, and can only come in on the fund as general creditors, and that the claims of exceptant and those of the creditors in Cincinnati who filed a libel are entitled to be first paid in full, without deduction for expenses, commissions, or attorneys' fees. Counsel cite in this connection, the case of Moore v. Lincoln Park Company, 196 Pa. 519, 46 Atl. 857, where it was held that: "Where receivers of a steamship company sell vessels of the company upon which maritime liens have been fixed prior to the receivership, they cannot diminish the fund due to the owners of such liens by retaining an allowance for receivers' commissions and counsel fees. For such allowances they must look to the other property of the company."

While the general proposition contended for by exceptant's counsel is true, as shown by the cases cited, I am of opinion that the principle does not apply to the facts of this case. The admiralty rules and authorities cited apply to cases where a libel in admiralty has been regularly filed and seizure of the res has been made, and others having maritime caims have the right to intervene, in which case limitation, laches, or staleness of the claim may be successfully asserted; but in this case James Rees & Sons Company were the plaintiffs in the bill under which the receiver in this case was appointed and possession of the defendant's property taken. Plaintiff thus consented that the receiver should take possession of the boats and property. They were sold by the receiver under this proceeding. The entry ordering the same provided that the boat should be sold free from all liens and incumbrances, and that such sale should be made subject to the approval of the United States District Court. Afterwards the court confirmed the sale, and ordered the receiver to deliver to the purchaser possession of the boats free and discharged of all liens and incumbrances. All this was done in the proceeding instituted by James Rees & Sons Company, and it therefore necessarily follows that they voluntarily submitted themselves to the jurisdiction of this court. Having done so, I think he cannot, by filing a libel in admiralty, ignore such proceeding and obtain superiority in distribution to claims of others of a like character. I think the lien which the various parties had attaches to the fund, and must be paid in the same way as they would have been if the sale had been made by the marshal and the distribution made in a court of admiralty. Certainly the parties had a right voluntarily to submit to the method of sale and distribution which took place here, and so far as the exceptant is concerned this he has done. In the case of Moran v. Sturges, 154 U. S. 256, at page 277, 14 Sup. Ct. 1019, 1025 (38 L. Ed. 981), the court, after stating that a statutory proceeding to wind up a corporation is not a

common-law remedy, and that a maritime lien cannot be enforced in such proceeding, and further that the parties were entitled to have their claims submitted to a court of admiralty according to the rules and practice of admiralty, says: "If the receiver had first taken actual possession of these vessels and sold them, such sale would not have cut off maritime liens and the right to have them enforced, and while it may be true that the state courts, exercising equitable jurisdiction, might undertake, in the distribution of property, to save the rights of holders of maritime liens, yet it is certain that those courts would have no power by a sale under statute to destroy their liens unless they had voluntarily submitted themselves to that jurisdiction." The same general doctrine is announced in Cronenwett v. Baston & A. Transportation Co. (C. C.) 95 Fed. 52; Hudson v. New York & Albany Transportation Co., 180 Fed. 973, 104 C. C. A. 129. In the latter case, the Circuit Court of Appeals announces and applies this rule. In the syllabus it is stated: "While proceedings against vessels in rem to enforce maritime liens are vested exclusively in the District Courts, a Circuit Court could sell vessels free from such liens, if the lienors voluntarily submitted themselves to the Circuit Court's jurisdiction. If holders of maritime liens against vessels came into the Circuit Court having possession of the res, and ask for adjudication upon their liens, they should be held to have assented to the jurisdiction of the Circuit Court for all purposes, including a substitution of the proceeds of sale for the res whenever in the sound discretion of the court, such substitution is necessary to preserve the property from deterioration or secure a better price."

I think this is a proper case for the application of the rule. The one contended for by exceptant would permit a creditor to have a receiver appointed, bring the property to sale, have the same confirmed, and by filing a libel in admiralty assert that all other creditors had lost their lien, and that he had priority, because he had quietly filed a libel in admiralty upon his claim. The application of such a rule would be unjust, and would operate as a trap to other creditors, who were acquiescing in good faith in the receivership, supposing that their liens would be protected when the property was sold and the proceeds distributed. No lien could be asserted—that is, no process could be issued, and the property seized and sold—so long as the receivership was pending, and in this case the receivership has been carried to a finality.

I am also of opinion that the operating expenses and costs of administration must be first paid. The defendant company is a common carrier, a quasi corporation. The cases cited by exceptant's counsel relating to priority of exceptant's claim, while applicable to ordinary receiverships, I think do not apply here, which is a case analogous in principle to the receivership of a railroad company. The distinction is pointed out in Carlenwright L. & B. Co.'s Insolvent Estate, 44 Pa. Super. Ct. 644: "Rutherford v. Pennsylvania & Midland R. R. Co., 178 Pa. 38 [35 Atl. 926], Wallace v. Loomis et al., 97 U. S. 146 [24 L. Ed. 895], and other cases cited, are cases relating to receiverships of railroad companies which are public corporations, the continued operation of which, generally speaking, is important, not only to the creditors, but to the public, and the doctrine applicable to the maintenance of the physical property of such companies under receiverships rests on a different footing from that affecting private manufacturing companies."

The rule relating to priorities in railroad receiverships is stated in American & English Enc. of Law, vol. 24, p. 30: "The costs and expenses of the receivership are chargeable as a lien upon the receivership property, superior to all other liens. The expenses of the receivership are necessarily burdens on the property taken possession of, and this, irrespective of who may be the ultimate owner, or who may have the priority of lien, or who may have invoked the receivership." To the same effect is New York Security & Trust Co. v. Louisville R. R. Co. (C. C.) 102 Fed. 390. It is said in American & English Enc. of Law, vol. 23, p. 1119: "Where the receivership is at the instance of or for the benefit of lien holders, all the property charges, expenses, and disbursements incident to the receivership are a first charge on the funds coming into the hands of the receiver prior to the existing liens upon the property."

I think the exceptant is right in his position that the account of each vessel should stand as a separate fund, to be distributed to the creditors who have

liens on that particular fund; the balance, if any, to pass into the fund for distribution to general creditors. This is effected as follows: On the debit side of the account of each steamer are moneys received from the operations of the boat and the proceeds derived from its sale; on the credit side the disbursements for operating expenses, as shown by the accounts. In the case of the Keystone State there were no operating expenses. The aggregate amount of these balances is a sum greater than the balance shown for distribution. This difference represents what may be called the entire expense of administration. It would seem equitable that each fund should bear its proportion of the cost of administration. This has been worked out in the schedule of distribution. As shown by the auditor's report, it is conceded the schedules B, C, and D thereto attached correctly represent the creditors whose claims have been approved and who have liens on the respective funds.

Lowrie C. Barton, of Pittsburgh, Pa., for appellant.

Charles G. McIlvain, W. R. Murphy, and McIlvain & Murphy, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. This appeal is from a decree of the District Court distributing a fund in the hands of a receiver. The facts appear in the opinion of Judge Thomson, and we shall only repeat a few of them in order to explain the questions that are now decided.

[1] We note first that the fund distributed is a balance arising from two accounts, and that both accounts were confirmed absolutely. The first showed a balance in hand of $2,980.97, and to this no exceptions were filed. It was confirmed absolutely on December 4, 1909, and on December 11 Alfred Kerr was appointed auditor to make distribution. Numerous claims were presented and proved, and he prepared a preliminary report—which he did not live to finish—containing a schedule of distribution in which he preferred eleven of these claims and awarded the whole balance to them. To this schedule exceptions were filed before him by the receiver "and such creditors as may join herein," and these exceptions were accompanied by lists of claims, "presented and duly proven or admitted to be due by the receiver at the time of taking testimony and receiving claims." For a reason to be presently stated, these lists are important.

Nothing further was done upon this incomplete report, and, when the receiver filed his second and final account several years afterward, he properly carried into that account the balance of $2,980.97. Including this sum, the second account showed a balance of $8,713.71. Exceptions were filed, but these were afterward withdrawn, and the account was confirmed absolutely. A second auditor was appointed to make distribution, and all parties concerned (including the present appellant) admitted before him:

"That the creditors set forth in exceptions filed to the report of Alfred Kerr, the former auditor, be agreed upon as the proper creditors, and the distribution therein claimed as a proper distribution of the funds in the hands of the receiver."

Whereupon "the record of approved claims heretofore presented to Alfred Kerr, auditor, and particularly set forth in exceptions filed

to his report," were offered and received in evidence before the second auditor.

The record thus makes clear (1) that decrees confirming the receiver's two accounts were and are in full force, and therefore that the correctness and the proper application of the debit and credit items in these accounts were not subject to attack either at the audit or in the district court. The duty of the auditor was to distribute the balance of $8,713.71 to the proper claimants, and (as long as the decrees of confirmation remained undisturbed) he had no power to decide that certain items therein had been improperly credited. So far, therefore, as the present appeal seeks to disturb any of these items, we decline to consider it.

It is also clear (2) that by agreement of all parties concerned in the audit a specified list of persons was accepted as "the proper creditors"—the persons entitled to share in the fund. On this appeal, we have chiefly to do with the lien creditors of the steamer Queen City, and when we turn to the list in question to find such creditors we discover the names of numerous persons, with the amounts of their respective claims. This part of the list is expressly described as composed of "claims which are liens upon funds derived from steamer Queen City"; and in it we find, not only the claim of James Rees & Sons Company, but many other claims, the total being nearly $15,000, all of them set out on the same footing, and with no reference to either actual or asserted priority on the part of any. This is the list Judge Thomson accepted and used in the distribution now complained of, and we think the agreement before the auditor justified him in so doing. He has given other reasons for refusing priority to the claim of the Rees Company, and we must not be understood as intimating a disagreement with what he has said on this subject; we think it enough to say that the agreement before the second auditor—which clearly designates the lien creditors of the Queen City, and accepts the list that set them out as equal in rank at the audit of the first account—is not now to be disregarded.

[2] The principal ground on which the Rees Company asserts precedence for its own claim, and for a few others, is the fact that after the receiver was appointed libels were filed upon these claims, although the steamer was not seized and although nothing further was done. This, it is argued, was the exercise of diligence, and as no such action was taken by any of the other lien claimants the latter have lost their lien by laches in analogy to the statute of limitations. If the appellant can avail itself of this position, we think the argument overlooks the further fact that the other creditors have been just as diligent as those who filed the libels referred to; the presentation and proof of their claims before the first auditor was the full equivalent of filing a libel without seizure of the vessel. The statute of limitations ceases to run when the creditor sues, and a creditor sues—i. e., he pursues his legal right before a judicial tribunal—when he asserts his claim to share in the distribution of a fund. It is clear to us that there was no laches, and that all the liens contained in the list stand on the same footing.

Therefore, as the questions raised by this appeal attempt to disturb a situation that we regard as definitely settled either by (1) or by (2), we need not take time to discuss them further.

The decree is affirmed.

(At the argument of this appeal, the receiver presented a petition asking us to make a further allowance for counsel fees and expenses, and to this the appellant filed an answer. We have examined these papers, and, finding them to contain averments with which the District Court is better fitted to deal, we dismiss the petition, but without prejudice to the right of the receiver to make a similar application to the District Court, if he shall be so advised.

(And, in the event of such application, we empower the District Court to modify the decree of distribution that has just been affirmed, if modification thereof shall seem to be justified.)

Appeal of COMMONWEALTH OF PENNSYLVANIA.

JAMES REES & SONS CO. v. PITTSBURGH & CINCINNATI PACKET LINE.

(Circuit Court of Appeals, Third Circuit. December 8, 1916.)

No. 2163.

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Suit in equity by the James Rees & Sons Company against the Pittsburgh & Cincinnati Packet Line. From order of distribution, the Commonwealth of Pennsylvania appeals. Appeal dismissed.

Henry G. Wasson, of Pittsburgh, Pa., for appellant.

Charles G. McIlvain, W. R. Murphy, and McIlvain & Murphy, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. It is not necessary to discuss this appeal. The commonwealth concedes its claim to be inferior in rank to the liens that are referred to in Appeal of James Rees & Sons Co., 237 Fed. 555, — C. C. A. —, and as these are in excess of the fund for distribution there is no money to be applied to the claim now before us. We do not pass upon the merits, therefore, but merely dismiss the appeal.

MEIER DENTAL MFG. CO. v. SMITH et al.*

(Circuit Court of Appeals, Eighth Circuit. October 19, 1916.)

No. 4641.

1. CONTRACTS ⊜10(4)—VALIDITY—MUTUALITY.

A contract by which defendant agreed to supply complainants with certain of its manufactured products for sale on commission as ordered during a term of years, and complainants agreed to order a minimum quantity each year under penalty of cancellation of the contract, is not invalid as unilateral.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 37; Dec. Dig. ⊜10(4).]

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

*Rehearing denied January 26, 1917.

2. CONTRACTS ⊜211—CONSTRUCTION—TIME AS OF THE ESSENCE OF THE CONTRACT.

If the provisions of a contract between merchants, taken in connection with the circumstances of the case and the purposes sought to be accomplished by its execution, disclose that the parties at the time of execution intended to make the time of performance essential, the contract will be so construed, although there is no express provision making time of its essence.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 938–943; Dec. Dig. ⊜211.]

3. PRINCIPAL AND AGENT ⊜33—SALES AGENCY—CONSTRUCTION—TIME AS OF ESSENCE.

Defendant entered into a contract by which it constituted complainants exclusive agents for the sale of certain goods of its manufacture in North and South America and Japan, for a term of eight years. Defendant agreed to supply goods as ordered, and complainants agreed that, if they did not order $10,000 worth of the goods during the first year and in an increasing ratio of 5 per cent. in each succeeding year, defendant might on notice cancel the agreement. *Held* that, in view of the evident purpose of defendant to build up an increasing business, time was of the essence of the contract, and that on the failure of complainants to order the required amount of goods in any year, although it approximated the amount, defendant was within its rights in canceling the contract.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. § 54; Dec. Dig. ⊜33.]

Appeal from the District Court of the United States for the Eastern District of Missouri; David P. Dyer, Judge.

Suit in equity by Lee S. Smith and W. Linford Smith, doing business as the Lee S. Smith & Son Company, against the Meier Dental Manufacturing Company. Decree for complainants, and defendant appeals. Reversed.

This was a suit in equity brought by appellees, Lee S. Smith and W. Linford Smith, doing business under the firm name of Lee S. Smith & Son Company, against the Meier Dental Manufacturing Company, the appellant, for an injunction restraining the defendant from enforcing a stipulation of a contract made between the parties on May 7, 1913. The facts disclosed by the pleadings and proof are substantially these:

Defendant, for many years prior to 1913, had been engaged in the manufacture of dental supplies at St. Louis, Mo., and plaintiffs had been jobbers of such supplies, doing business in Pittsburgh, Pa., and had been acting as agents for defendant in selling certain of these supplies; but on May 7, 1913, the parties canceled all prior contracts existing between them, and made a new one to govern their future relations, of which the following are stipulations necessary for consideration in disposing of this case:

(1) Plaintiffs were appointed exclusive agents for a period of eight years for the sale, both at wholesale and retail, in North and South America and Japan, of certain specified articles of dental supplies manufactured by defendant.

(2) Defendant obligated itself to supply plaintiffs with these different articles at prices specified in the contract, as and when plaintiffs might order them or any of them.

(3) Plaintiffs were to get certain commissions on all sales made by them, and were required to sell to customers only at certain specified discounts from wholesale and retail prices.

There was no express provision requiring plaintiffs to order any amount of the articles at any time, or to make any effort to make sales throughout their territory, except what may be found in the provisions of section 26 of the contract, which reads as follows: "The party of the second part [the plaintiffs in

this case] covenants and agrees that if it does not, during the first year of this agreement, purchase from the party of the first part [the defendant in this case], and pay for as hereinbefore provided, at least ten thousand dollars ($10,000.00) worth of Usona and Helios brands of regulating appliances, ankrite, iridiumoid, and duplex [these being the dental supplies for the sale of which plaintiffs were given the exclusive agency], net, after all discounts have been taken off, and during each year of the life of this agreement purchase and pay for, as hereinbefore provided, a net amount of said Usona and Helios brands of regulating appliances, ankrite, iridiumoid, and duplex in an increasing ratio of five per cent. (5%) from the first year compounded, then it is agreed and understood that the party of the first part may cancel this agreement, by giving written notice, sent by registered mail, to the party of the second part, which notice shall be given within thirty days (30) after the close of any year from the signing of this agreement."

Plaintiffs failed to purchase during the second year of the contract—that is, within the period of time between May 7, 1914, and May 7, 1915—the minimum amount of $10,500 worth of the articles agreed to be purchased by them, in the amount of $230.83, as admitted by plaintiffs, and in the amount of $1,191.83, as claimed by defendant. Defendant did not, on May 1, 1915, when its president visited plaintiffs at Pittsburgh, notify plaintiffs that they had fallen under the minimum for that year, or advise them of their purpose to exercise their right of cancellation of the contract for that reason. In explanation of this silence, Mr. Meier, the president of defendant company, when on the stand as a witness, in answer to a question propounded by plaintiffs' counsel, asking him why he did not, when in Pittsburgh on May 1st, advise plaintiffs that they had failed to order the required minimum, said: "Because they had not made any effort in the spring of the year, for six months, to sell my products, to help sell them, and advertise them, and there was no reason why I should go there and tell them they were not going to make their minimum." He also testified that the business with plaintiffs had been decreasing and decreasing; that they should have done a business in excess of $15,000 to $20,000 annually. This evidence was not contradicted. It also appears that defendant had been complaining to plaintiffs for several months prior to May, 1915, that they were not showing satisfactory results, and that the business was not "going right."

On May 14 or 15, 1915, defendant's president had a conversation with L. S. Smith, one of the plaintiffs, over the long-distance telephone, and requested him to consent to a modification of the contract respecting discounts, saying that defendant wanted to go out and do business direct with the trade, and that unless these changes were consented to they would cancel the contract. There is no evidence that any changes were consented to by plaintiffs, or that they were willing to make any concessions. Afterwards, on May 14, 1915, the defendant wrote and sent by registered mail to plaintiffs the following letter:

"Gentlemen: Pursuant to the provisions of paragraph 'twenty-sixth' of articles of agreement dated May 7, 1913, between the Lee S. Smith & Son Co. and the Meier Dental Manufacturing Co., inasmuch as you have failed to purchase and pay for a minimum net amount of the Usona and Helios brands of regulating appliances, ankrite, iridiumoid, and duplex during the year ending May 7th, 1915, by order of our board of directors we hereby notify you that under the terms of the provisions of said contract we elect to cancel said contract and said contract is hereby canceled.

"[Signed] The Meier Dental Manufacturing Co.
"A. G. Meier, President."

At about the time of the telephonic conversation, in which defendant's president advised plaintiffs of the defendant's purpose to cancel the contract, plaintiffs sent an order for goods to defendant which would have made up the deficiency for the year. After receipt of the registered letter notifying plaintiffs of the cancellation of the contract, plaintiffs advised defendant that the failure to order the full amount of goods for the second year was due to oversight, and they then tendered to defendant the estimated amount of profit defendant would have made if the full amount had been ordered, and also ordered an amount of goods which would make up the full minimum

for the year, and this tender and offer were refused by defendant, and it refused to honor any further orders for merchandise made by plaintiffs under the contract. As a result, this suit was brought to restrain the defendant from enforcing the cancellation and to compel it to continue filling plaintiffs' orders for goods according to the terms of the contract.

On final hearing, after the foregoing facts had been shown, the court below rendered a decree setting aside the cancellation of the contract and enjoining the defendant company from selling any of its goods in the exclusive territory given to plaintiffs, except by and through the plaintiffs, during the remainder of the eight-year term specified in the contract. From this decree defendant appeals, assigning its rendition as error, and that the court should have dismissed the bill.

Davis Biggs, of St. Louis, Mo. (Bishop & Cobbs, of St. Louis, Mo., on the brief), for appellant.

John F. Green, of St. Louis, Mo. (Frederick N. Judson and J. Porter Henry, both of St. Louis, Mo., on the brief), for appellees.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

ADAMS, Circuit Judge (after stating the facts as above). [1] Defendant contends, first, that the contract of May 7, 1913, is unilateral, and for that reason unenforceable in law or equity. This contention, in our opinion, is untenable. The covenants of the contract conferring rights and imposing obligations upon the respective parties afforded ample consideration for each other, and clearly validated the contract so far as this contention is concerned.

It is next argued that plaintiffs had an adequate remedy at law, and for this reason the equitable remedy of injunction was not available to them. In the view we take of other questions, we do not consider it necessary to decide this one.

It is next contended that the twenty-sixth paragraph of the contract conferred absolute power upon defendant to cancel the contract in the event plaintiffs failed to order and pay for, during the second year of the duration of the contract, the minimum quantity of merchandise specified by the contract, namely, $10,500 worth, and that, the plaintiffs having failed to order that quantity of goods during that year, defendant, in the exercise of power conferred upon it, canceled the contract, as it had a right to do. In the contract defendant appointed plaintiffs sole and exclusive agents for the sale of its goods in the very extensive territory of North and South America and Japan, and obligated itself to supply them with goods as and when ordered by them at prices definitely fixed in the contract. In consideration of this and other rights and privileges conferred upon them, plaintiffs agreed as follows:

"Twenty-Sixth. The party of the second part [the plaintiffs in this case] covenants and agrees that if it does not, during the first year of this agreement purchase from the party of the first part [the defendant herein] and pay for as hereinbefore provided, at least ten thousand dollars ($10,000.00) worth of Usona and Helios brands of regulating appliances, ankrite, iridiumoid, and duplex [these being the dental supplies for the sale of which plaintiffs were given the exclusive agency], net, after all discounts have been taken off, and during each year of the life of this agreement purchase and pay for as hereinbefore provided, a net amount of" those articles "in an increasing ratio of five per cent. (5%) from the first year compounded, *then it is agreed and understood that the party of the first part may cancel this agreement, by giv-*

ing written notice, sent by registered mail, to the party of the second part, which notice shall be given within thirty days (30) after the close of any year from the signing of this agreement."

This language is very plain and explicit, and without doubt in terms gave defendant the right to cancel the contract if plaintiffs should fail during the year ending May 7, 1915, to purchase and pay for at least $10,500 worth of defendant's goods. But it is claimed (1) that paragraph twenty-sixth did not make time of the essence of the contract, and that, if plaintiffs ordered the required amount of goods within approximately the time specified, or (2) ordered approximately the amount of goods required within the specified time, this would constitute substantial performance, enough at least to prevent cancellation of the contract.

Plaintiffs' counsel argue that, because plaintiffs had substantially performed the contract by ordering nearly all the merchandise required of them to be ordered for the second year, the right reserved in the defendant to cancel the contact for nonperformance should not have been exercised. They also argue that because they inadvertently failed to take notice that the year was about to expire and they had not ordered the required amount, and because defendant's president when conversing with plaintiffs at about the expiration of the year failed to advised them of their pending peril, and because after the year had expired they offered to make good the deficiency either by then ordering the deficient amount of goods or by paying defendant the profits it would have made if the deficiency had not occurred, they are, on high equitable grounds, excused from failure to keep their covenant and released from the agreed consequences of it.

If the only purpose of the contract on defendant's part was to dispose of $10,500 worth of goods in the year in question, there might (which we hardly concede) be some merit in this argument. But it is manifest from a consideration of all the provisions of the contract that defendant's main purpose was not to sell that specific quantity of goods in the time mentioned, but was to build up a substantial and enduring trade for the goods manufactured by it. In order to do so it sought to stimulate plaintiffs' zeal and activity in its behalf by giving them the sole and exclusive right to sell its goods throughout a large territory for a long period of time, and gave them attractive terms whereby their income was made dependent upon their success in disposing of its goods. The only covenant defendant required of plaintiffs to insure it of their diligence was that they should agree to dispose of at least $10,000 worth of goods in the first year, with an annual increase of 5 per cent. in each succeeding year, reserving to itself as its only effective means of self-protection against plaintiffs' possible disloyalty or inefficiency, the right to cancel the contract if plaintiffs should fail to perform this covenant.

[2] But plaintiffs, through their counsel, now say they did not mean what they said and agreed to in the twenty-sixth paragraph of the contract, but did mean that if they should not purchase approximately the amount specifically agreed to be purchased within the year, in other words, if they should not substantially perform this one stipulation as required by defendant for its protection, in that event only, the

right of cancellation might be exercised by defendant. While the argument of counsel extended into some minor considerations, it was mainly confined to the one question: Whether the time within which the required amount of goods should be disposed of annually was of the essence of the contract, and this presents the main and controlling question for our present consideration.

It is true the parties did not, in express terms or in so many words, say that time should be of the essence of the contract; but such an explicit statement as that was not necessary to make it so. If the provisions of the contract, taken in connection with the circumstances of the case and the purposes sought to be accomplished by its execution, disclose that the parties at the time of execution intended to make the time of performance essential, that intention should not be thwarted, and the time so fixed should be regarded as essential, without any express stipulation to that effect; and this, we think, is especially true in contracts of merchants and manufacturers, where special preparations to perform are often necessary, and time within which deliveries are needed are peculiarly insistent. In the case of Telegraphone Corporation v. Telegraphone Co., 103 Me. 444, 454, 69 Atl. 767, 771, the Supreme Court of Maine, in treating of this general subject, said:

" * * * If it satisfactorily appears from the terms of the stipulation and all the circumstances that the parties actually intended to make the time specified an essential element of the contract, and that the consequences of a failure of performance must have been contemplated by the parties at the time of the execution of it, such an express stipulation as to time will be held decisive of the question in a court of equity as well as a court of law."

In the case of Norrington v. Wright, 115 U. S. 188, 6 Sup. Ct. 12, 29 L. Ed. 366, the Supreme Court of the United States, speaking by Mr. Justice Gray, said:

"In the contracts of merchants, time is of the essence. * * * A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty; * * * that is to say, a condition precedent, upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract."

And in the case of Cleveland Rolling Mill Co. v. Rhodes, 121 U. S. 255, 7 Sup. Ct. 882, 30 L. Ed. 920, the Supreme Court adopted the language just quoted from the Norrington Case, and approved its doctrine. See, also, to the same effect, Jones v. United States, 96 U. S. 24, 24 L. Ed. 644.

[3] We think it very clear that the parties to this case intended, when they executed the contract in question, to make the time within which it should be performed an essential element of the contract. They said in clear and unambiguous language that the plaintiffs should take $10,500 worth of defendant's goods during the second running year of the contract. Persons are presumed, and ought to be held, to mean what they say. As indicating that they regarded this stipulation as creating a serious and binding obligation on the part of the plaintiffs, they not only expressly so agreed, but agreed in no less clear and unambiguous language that, if they failed to take that amount of goods within the second year, the defendant might cancel

the contract, and thus deprive them of all its valuable rights and privileges. This last stipulation discloses that plaintiffs understood well the consequences of their failure to perform as agreed. As all men are presumed to intend the necessary consequences of their act, we must conclude that plaintiffs, by consenting to the drastic remedy of cancellation of their contract for failure to keep its stipulation as to time of performance, were keenly alive to the importance attached to the time of delivery, and must have known that it was regarded as essential by the defendant, and they conceded it to be so at the time. Moreover, the purposes of the defendant company, as already pointed out, and all the circumstances attending the execution of the contract, converge to the conclusion that time of performance was regarded by both parties as important and essential. We therefore cannot escape from the necessity of holding that time was of the essence of the contract between plaintiffs and defendant.

Plaintiffs' counsel have also argued that defendant acted arbitrarily and oppressively in canceling it (1) without notifying plaintiffs of its purpose to do so; (2) without giving plaintiffs an opportunity to perform after the expiration of the time for performance; (3) without accepting plaintiffs' offer to compensate defendant in money for the profits it would have made if there had been full performance; and they have also argued that because plaintiffs unintentionally overlooked the requirement of the contract in question, and failed to keep themselves advised as to the quantity of goods ordered, and were, therefore, as the end of the second year drew near, ignorant of the fact that they had not complied with the requirement of the contract for the second year, the defendant should be deprived of its only effective remedy of cancellation. All such considerations as these are, in our opinion, foreclosed by the holding that time of performance, as fixed in the contract, was of the essence of the contract. But, if they were not foreclosed by that holding, we should not be inclined to regard them with much favor. They are considerations which plaintiffs might have presented to the defendant as excuses for nonperformance, with a hope that they might secure favorable concessions from it and thus avoid cancellation.

They might also have been of some importance, if defendant was seeking affirmative aid of a court of equity, in the determination of a question, which might possibly then have been raised, whether it approached its portals with clean hands; but as plaintiffs are alone invoking equitable relief, and defendant's legal right to do what plaintiffs complain of is established, we refrain from any discussion of the evidence tending to justify defendant's conduct in these respects, and also from any discussion of the merits of these considerations, which we regard, so far as their bearing on this case is concerned, as purely ethical and immaterial.

On the whole, we are unanimously of the opinion that the court erred in setting aside the cancellation and ordering the defendant to proceed with the contract as if no cancellation had been made.

The judgment is reversed, and the cause remanded to the District Court, with instructions to enter a decree dismissing plaintiffs' bill.

SMITH-POWERS LOGGING CO. et al. v. BERNITT et al.*

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

No. 2591.

1. FRAUDS, STATUTE OF ⊂⊃139(4)—ORAL AGREEMENT FOR INTEREST IN LAND —EFFECT OF PERFORMANCE.

An oral agreement creating an interest in land, which has been carried into effect by the acts of the parties, is not affected by the statute of frauds.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. §§ 338, 339; Dec. Dig. ⊂⊃139(4).]

2. LOGS AND LOGGING ⊂⊃15(1)—PAROL CONTRACT FOR CONSTRUCTION AND OPERATION OF BOOM—VALIDITY.

Under an oral agreement with a partnership which owned tidelands, complainants' predecessors in interest, constructed and operated log booms in the land as a joint adventure, the cost, expenses, and profits being shared equally between them and the partnership. This continued for a number of years, during which there were changes in the partnership, a lumber company being formed, which took title to the land, and also transfers of interest by some of the other parties to the agreement; but by common consent the booms continued to be operated under the agreement. Subsequently defendants purchased the property of the lumber company. At that time the booms were being operated by complainants and were full of logs. The books of the vendor also showed the accounts with the booms, with charges and earnings. *Held*, that the agreement was valid, and that defendants took with notice of complainants' rights and subject thereto.

[Ed. Note.—For other cases, see Logs and Logging, Cent. Dig. §§ 40, 41; Dec. Dig. ⊂⊃15(1).]

Appeal from the District Court of the United States for the District of Oregon; Charles E. Wolverton, Judge.

Suit in equity by E. W. Bernitt and Victor Wittick against the Smith-Powers Logging Company and the C. A. Smith Lumber & Manufacturing Company. Decree for complainants, and defendants appeal. Affirmed.

For opinion below, see 213 Fed. 378.

The appellees brought a suit in the court below to recover certain moneys alleged to be due them for an interest in a boom, and for boomage and rafting of logs and piles, under a partnership agreement with the predecessors in interest of the appellants. The facts in the case, as found by the court below, are in substance the following: In 1882 Dean, Wilcox, and Merchant were partners, doing business under the firm name of E. B. Dean & Co. They entered into an oral agreement with Bernitt, Klahn, Wulff, and Young, whereby the parties to the agreement were to construct and operate upon tidelands owned and controlled by E. B. Dean & Co. in the channel of Coos river log booms and dolphins for the purpose of catching and storing logs and piles and making up rafts for transportation in Coos Bay. Dean & Co. were to receive one-half of the boomage charges, and the other parties were to receive each one-eighth thereof, and in that proportion all parties were bound to contribute to the maintenance of the booms. Bernitt, Klahn, Wulff, and Young were to capture the logs as they came down the river and assemble them in the booms, for which they were to receive 25 cents per thousand, log measure, one-half of which was to be paid to Dean & Co.; but Bernitt, Klahn, Wulff, and Young were privileged to put logs in rafts and transport them to the mills about the bay, in the charges for which Dean & Co. were to have

*Rehearing denied February 13, 1917.

no share. The booms were constructed at a considerable expense, of which Dean & Co. contributed one half, and Bernitt, Klahn, Wulff, and Young the other half. Dean & Co. was dissolved by the death of Wilcox, and thereafter the Dean Lumber Company, a corporation, became the owner of the partnership property. But later the property passed to C. A. Smith, and from him to the C. A. Smith Lumber & Manufacturing Company, and subsequently to the Smith-Powers Logging Company; C. A. Smith being the principal stockholder in the C. A. Smith Lumber & Manufacturing Company, and that company being the principal stockholder in the Smith-Powers Logging Company. Bernitt and Wittick succeeded to the original interests of Bernitt, Klahn, Wulff, and Young.

It was one of the contentions of the appellants that, Dean & Co. having been dissolved by the death of Wilcox, the original partnership agreement between that firm and Bernitt and his associates was likewise dissolved; but the court found from the record that all the successors in interest to Dean & Co. recognized the agreement and treated with Bernitt and his associates and successors strictly according to the terms thereof, and that the appellants cannot now controvert the appellees' interest in the booms. The court further found that for the season of 1908–1909 the appellants permitted the use of the boom by the appellees, but refused to recognize their right to compensation under the old agreement, and that in June, 1909, the appellants wholly ousted the appellees from the use and occupation of the property, and that by ousting the appellees, and appropriating their interests in the booms, the appellants rendered themselves liable to the appellees for that interest. The court found the value of the booms to be $2,000, and the value of the appellees' interest therein to be $1,000, and that the appellees were entitled to an accounting from June, 1909, of boom charges on logs caught in the boom, and also found that the charges so payable by the appellants to the appellees, after allowing all proper credits, was the sum of $2,667.34. For those sums judgment was entered for the appellees.

John D. Goss and Herbert S. Murphy, both of Marshfield, Or., for appellants.

W. U. Douglas and John F. Hall, both of Marshfield, Or., and Watson & Beekman, of Portland, Or., for appellees.

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

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellants rely upon the statute of frauds, and contend that that statute applies to a boom and the tidelands on which it is constructed, and that, since the tidelands belonged to E. B. Dean & Co., the predecessors in interest of the appellees could acquire no interest therein, except by a conveyance in writing. But the statute of frauds does not affect the rights of the parties under the circumstances which are shown by the evidence in this case. "Where an oral contract, which is unenforceable by reason of the statute of frauds, has been entirely performed, the rights of the parties are no longer affected by the statute, and it is immaterial that either party might have refused to perform. Where oral agreements creating interests in land have been carried into effect by the acts of the parties, the rights acquired thereunder are not affected by the statute." 20 Cyc. 302, 303; White v. Cleaver, 75 Mich. 17, 42 N. W. 530; Knecht v. Mitchell, 67 Ill. 86; Anderson v. Simpson, 21 Iowa, 399; Newman v. Nellis, 97 N. Y. 285; Brown v. Bailey, 159 Pa. 121, 28 Atl. 245; C. C. C. & St. L. Ry. Co. v. Wood, 189 Ill. 352, 59 N. E. 619; Anderson

School Tp. v. Milroy Lodge, 130 Ind. 108, 29 N. E. 411, 30 Am. St. Rep. 206; Mich. Cent. R. Co. v. Chicago, etc., R. Co., 132 Mich. 324, 93 N. W. 882.

[2] The appellants contend that the testimony fails to show any partnership between the copartnership of E. B. Dean & Co. and the predecessors in interest of the appellees. The evidence, however, shows clearly that the original agreement was that of a joint venture. The final situation was complicated by the changes that subsequently occurred, such as the retirement of Young and Klahn. But through all the changes the business continued to be operated as before, without any objection upon the part of Dean & Co. or any one. From the conduct of the parties, the court below was clearly justified in holding that there was consent to the changes in membership by the concurrence of all the parties, evidenced by their conduct. It is well settled that, with such concurrence, the purchaser of an interest may become a partner with the consent of all the parties, either expressed, or implied from their conduct. 30 Cyc. 605; Meaher v. Cox, 37 Ala. 201; Rosenstiel v. Gray, 112 Ill. 282; Harvey v. Ford, 83 Mich. 506, 47 N. W. 242. But it is not important to inquire how long the partnership continued to exist. The important fact is that the predecessors in interest of the appellees were induced by E. B. Dean & Co. to enter upon lands which the latter owned and to contribute one-half the expense of constructing booms thereon, with the understanding that all parties were to have a joint interest in them, and that the booms were operated under that understanding until the appellees were ousted.

It is contended that the court below erred in finding upon the evidence that the Dean Lumber Company and the appellants recognized the appellees' rights and acted under the partnership agreement. We have carefully considered the testimony which bears upon this contention, and, although the evidence is conflicting, we find no ground to disturb the conclusion of the court below. It is clearly established that, after the Dean Lumber Company acquired its interest, the appellees continued in the possession and management of the booms, and that they continued as before to receive the profits, and shared with the Dean Lumber Company the expenses of the maintenance of the booms. Squire, who was bookkeeper for the Dean Lumber Company from 1903, until he became manager of the company in 1905, who was called as a witness for the appellants, testified that he learned from Bernitt that he and his partners had built the boom under an agreement that they were to have the exclusive use of the same, and he testified that agreement was made at the time when the boom was first built, and continued "during the time I had anything to do with it."

The appellants contend that, even if there were a copartnership agreement, as found by the court below, the sale to C. A. Smith, a bona fide purchaser, passed the title of all parties. C. A. Smith purchased the property in February, 1907. He was a man of experience in the sawmill and logging business. He had an understanding with Powers, who became the president of the Smith-Powers

Company, that the property when purchased should be turned over to a logging corporation which they would organize. The time of the purchase was the middle of the logging season, the booms were full of logs, and the appellees were busily engaged catching and rafting the same. Their raftsmen had scows there in which they lived. Entries were at that time being made upon the books of the Dean Lumber Company, showing the charges and earnings of that company arising out of the operations of the appellees. The evidence is that the Smith-Powers Logging Company is controlled by C. A. Smith, who holds a large majority of the stock, and that Powers is the president thereof. Bernitt testified that in July, 1907, Powers told him that Smith wanted him (Powers) to purchase the boom property, but that he would have nothing to do with it so long as Bernitt and Wittick had an interest in it. There is other evidence tending to show that Smith had actual notice of the appellees' rights. But, aside from any actual notice that he may have had, the possession of the appellees was sufficient to put him upon inquiry to ascertain their rights. Randall v. Lingwall, 43 Or. 383, 73 Pac. 1; McDougal v. Lame, 39 Or. 212, 64 Pac. 864; Jennings v. Lentz, 50 Or. 483, 93 Pac. 327; Cantwell v. Barker, 62 Or. 12, 124 Pac. 264.

It is said there is nothing in the record to justify the fixing of June, 1909, as the date when the appellees were ousted. The complaint alleges that the ouster was in June, 1909, and the answer does not deny it. The testimony is that, during the rafting season of the fall, winter, and spring of 1908 and 1909, the appellees continued to catch logs in the booms as formerly, and to make up rafts and tow them to the mills, and that thereafter they were not allowed to do so. This sufficiently establishes the time of the ouster. But the precise date is unimportant.

It is contended that the court below erred in not requiring the appellees to contribute to the expense and maintenance of the boom. The appellants offered in evidence a statement of the account of the Smith-Powers Company with the Coos river boom, commencing September 20, 1907, and ending July 1, 1912, in which it appears that the total sums expended by that company on the booms, including $14,615 paid for various tracts of tidelands, amounted in the aggregate to $31,450.95. There is no evidence that the appellees were ever asked to contribute to any of this expense, or that they ever consented thereto. They were ousted before the major part of the improvements were made. The court below took into consideration the value of the booms, irrespective of the extensive improvements made thereto by the appellants, and fixed the appellees' interest therein at the time of the ouster at the sum of $1,000. We find no ground for holding that that estimate was not just and proper.

The decree is affirmed.

KEMP LUMBER CO. v. HOWARD.

(Circuit Court of Appeals, Eighth Circuit. November 8, 1916.)

No. 168.

1. STATUTES ⊂=158—REPEAL—REPEAL BY IMPLICATION.
Repeals by implication are not favored.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 228; Dec. Dig. ⊂=158.]

2. STATUTES ⊂=225—CONSTRUCTION—STATUTES IN PARI MATERIA.
All statutes in pari materia are to be read and considered together, as if they formed part of the same statute.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 302, 303; Dec. Dig. ⊂=225.]

3. STATUTES ⊂=159—CONSTRUCTION—REPEAL.
Where there are two acts upon the same subject, they must stand together, if possible, and in case of repugnancy the later operates as a repeal only in so far as its provisions are repugnant to the earlier one.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 229; Dec. Dig. ⊂=159.]

4. MECHANICS' LIENS ⊂=195—PRIORITY—STATUTES.
Comp. Laws N. M. 1897, § 2228, originally enacted by Sess. Laws 1880, c. 16, § 13, requires the court in cases of mechanics' liens, to declare in its judgment the rank of each lien or class of liens which shall be in the following order: First, all persons other than original contractors and subcontractors; second, subcontractors; third, original contractors—and declares that the proceeds must be applied to each lien or class of liens in the order of its rank. Section 2238, which was Act Jan. 2, 1852, § 8, declares that all liens shall take effect as to the different persons who may have liens from the time of filing the same for record; priority in time giving priority in right. *Held*, that the later statute did not repeal the earlier act in toto, and that as among lienholders of the same class priority in time would give priority in right.
[Ed. Note.—For other cases, see Mechanics' Liens, Cent. Dig. § 336; Dec. Dig. ⊂=195.]

5. BANKRUPTCY ⊂=192—LIENS—PRIORITY.
Mechanics' liens are not liens created by or obtained in or pursuant to any suit or proceeding at law or in equity, but are liens created by statute by the act of the lienholders pursuant to the statute without legal proceedings, and though obtained within four months of the institution of bankruptcy proceedings by or against the owner are not dissolved by Bankr. Act July 1, 1898, c. 541, 30 Stat. 564, §§ 67c–67f (Comp. St. 1913, § 9651), providing for dissolution of liens obtained by judicial proceedings within four months of bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 294; Dec. Dig. ⊂=192.]

Petition to Revise Order of the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Petition by the Kemp Lumber Company, a corporation, against Thomas Howard to revise an order of the District Court in bankruptcy. Order vacated and set aside, with directions.

George S. Downer, of Albuquerque, N. M., for petitioner.
J. C. Gilbert, of Roswell, N. M., for respondent.

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

SANBORN, Circuit Judge. [1-4] By a petition to revise an order of the District Court in bankruptcy this case presents the question whether the proceeds of the sale of property of a bankrupt in New Mexico, subject to mechanic's liens of the same class recorded at different times, should be distributed to the lienors pro rata, or in the order of the filing of their respective claims for liens for record. The answer is found in the statutes of New Mexico as they stood in 1914, when the liens accrued and the claims for them were filed. The codification of the laws of New Mexico of 1915 provides that statutes in force prior to the time when that codification took effect remain in force thereafter for the preservation and enforcement of all rights existing when it took effect. Statutes N. M. 1915, p. 1665.

The codification of 1915 is therefore laid aside, and recourse is had to the Compiled Laws of New Mexico of 1897. The act of the territorial Legislature of New Mexico which authorized the compilation of 1897 in section 7 declares that:

"When the said laws have been printed and are ready for distribution, the Governor shall issue his proclamation announcing such fact, and thirty days after the date of such proclamation said compilation shall go into effect, and thereafter the laws so compiled shall be received by all the courts and officers of this territory, and shall in all respects be as valid and as binding as original enrolled acts approved and filed in the office of the secretary of the territory as now provided by law." Laws 1897, c. 43.

Title 24 of the Compiled Laws of New Mexico of 1897 treats of the subject of liens in a single chapter, in sections 2216–2248. Sections 2217 and 2218 provide that every person performing labor upon or furnishing materials to be used in the construction, alteration, or repair of any building, wharf, bridge, etc., has a lien thereon and upon the land upon which it stands for the labor or materials. Section 2221 provides that every person claiming the benefit of the act creating the lien shall, within a time specified, file for record with the county recorder a claim containing a statement of his demands. Section 2223 requires the recorder to make a record of such claims and an index thereof. Provision is made for suits to enforce the liens. The sections of the statute determinative of the issue are 2228 and 2238. The former requires the court in every case in which different liens are asserted against any property to declare in its judgment—

"the rank of each lien or class of liens, which shall be in the following order, viz.: First. All persons other than the original contractors and subcontractors. Second. The subcontractors. Third. The original contractors. And the proceeds of the sale of the property must be applied to each lien, or class of liens, in the order of its rank. * * *"

Section 2238 reads:

"All liens shall take effect as to the different persons who may have liens, from the time of filing the same for record, priority in time giving priority in right, should the property not be of sufficient value to pay all the liens created on it."

All the lienholders in the case at bar are in the same class, the class of original contractors, and it is indisputable that, unless some portion or all of section 2238 was for some other reason, not apparent from the Compiled Laws of 1897, not in force, these sections required the proceeds of the property subject to these liens of the same class to be distributed in the order of the filing of the respective claims therefor. The court below, however, was of the opinion, and counsel for the junior claimants contend, that section 2238, which was section 8 of the act of January 2, 1852, and has ever since been a part of the law of New Mexico upon the subject of mechanics' liens, was either repealed by section 2228, which was originally section 13 of chapter 16 of the Session Laws of 1880, or so far modified that all lienholders of the same class must share pro rata, and that between them priority in time no longer gives priority in right. The acts of 1852 and 1880, their relation to each other, the subsequent history of the various sections therein, the place of sections 2228 and 2238 in the revisions and compilations of the laws of New Mexico from the time of their respective enactment until these liens were filed, have received investigation, consideration, and deliberation. It would be helpful to no one to review the history of this legislation. Suffice it to say that our conclusion is that each of the two sections has been a part of the law of New Mexico upon the subject of mechanics' liens from the time of its respective enactment; that until the enactment of section 2228 in 1880 all mechanics' liens, as between the lienholders, took effect from the respective times of the filing of the claims therefor; that from the time of the enactment of section 2228 in 1880 all mechanics' liens in the same class, as between the lienholders of that class, took effect from the respective times of the filing of the claims therefor for record, and that between the members of each class priority of time gave priority of right; but that the priority of the classes created by section 2228, as between themselves, was fixed from 1880 to 1915 by section 2228.

No express repeal of section 2238 has been found among the laws of New Mexico, and repeals by implication are not favored. "All statutes in pari materia are to be read and considered together as if they formed part of the same statute." Potter's Dwarris on Statutes, 145. Thus read, these two sections provide that the three classes shall have the relation between themselves prescribed by section 2228, and that the lienholders in the same class shall have priority in the order of the filing of their respective claims for liens.

When there are two acts upon the same subject, they must stand together, if possible; if the two are repugnant in any of their provisions, the later act operates as a repeal of the earlier one, so far, and only so far, as its provisions are repugnant to those of the earlier act. In re Henderson's Tobacco, 11 Wall. 652, 657, 20 L. Ed. 235; Frost v. Wenie, 157 U. S. 46, 57, 58, 15 Sup. Ct. 532, 39 L. Ed. 614; Board of Com'rs v. Ætna Life Ins. Co., 32 C. C. A. 585, 590, 90 Fed. 222, 227; City Realty Co. v. Robinson Contracting Co. (C. C.) 183 Fed. 176, 181; Hemmer v. United States, 123 C. C. A. 194, 201, 204 Fed. 898, 905; Soliss v. General Electric Co., 129 C. C. A. 548, 552, 213 Fed. 204, 208. Section 2228 is repugnant to section 2238 only so far

as it fixes the priority of the three classes of claims it names between themselves. It is not repugnant to the rule established by section 2238 in so far as that rule gives to the members of the same class of lienholders as between themselves priority in right according to their priority in time. The proceeds of the property subject to mechanics' liens of the same class must, therefore, be paid to the lienholders in the order of the filing for record of their respective claims. Between them priority in time gives priority in right.

[5] The suggestion that these liens were dissolved by the commencement of bankruptcy proceedings within four months after the claims were filed by reason of the provisions of sections 67c–67f of the Bankruptcy Act is baseless. Mechanics' liens are not liens created by or obtained in or pursuant to any suit or proceeding at law or in equity. Nor are they liens obtained through legal proceedings. They are liens created by statute, and by the act of the lienholders pursuant to the statute, without suits or legal proceedings, and the paragraphs of the bankruptcy law cited are inapplicable to them. In re Emslie, 42 C. C. A. 350, 102 Fed. 291, 292; In re Laird, 109 Fed. 550, 556, 48 C. C. A. 538, 544; In re Kerby Dennis Co., 95 Fed. 116, 36 C. C. A. 677; In re West Norfolk Lumber Co. (D. C.) 112 Fed. 759, 765; In re Mero (D. C.) 128 Fed. 630, 633; In re Lillington Lumber Co. (D. C.) 132 Fed. 886.

The referee, Mr. David W. Elliott, ruled that the liens under consideration in this case should be paid out of the proceeds of the property subject to them in the order of the filing for record of the claims for them; the court below reversed that ruling and ordered them paid pro rata.

The order of the District Court is vacated and set aside, with directions to cause the liens to be paid in the order of the filing for record of the claims for them.

GREAT LAKES TOWING CO. v. MASABA S. S. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1916.)

No. 2858.

1. NAVIGABLE WATERS ⟸26(3)—BRIDGES—INJURY FROM COLLISION WITH DRAWBRIDGE.

The failure of the owner or operator of a drawbridge over a navigable stream to promptly open the draw upon reasonable signal for the passage of a boat, as required by Act March 23, 1906, c. 1130, § 4, 34 Stat. 85 (Comp. St. 1913, § 9964), raises a presumption of negligence, which such owner or operator must overcome in a suit against it for injury to a passing vessel.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 152–166; Dec. Dig. ⟸26(3).]

2. NAVIGABLE WATERS ⟸20(8)—BRIDGES—INJURY FROM COLLISION WITH DRAWBRIDGE—NEGLIGENT MANAGEMENT.

The failure of the owner of a drawbridge to provide means by which the operator can signal approaching boats in the daytime is in itself evidence of negligence.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. § 96; Dec. Dig. ⟸20(8).]

3. NAVIGABLE WATERS ⟸26(3)—BRIDGES—INJURY TO VESSEL FROM COLLISION WITH DRAWBRIDGE.

Injury to a steamer by reason of her mast striking the partly opened draw of a bridge held due to the concurring faults of the bridge operator in failing to fully open the draw and the towing tug in not keeping the steamer under control after the master saw that the draw was only partly raised.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 152-166; Dec. Dig. ⟸26(3).]

4. ADMIRALTY ⟸88—SUIT FOR INJURY TO VESSEL—RIGHT TO ENFORCE CONTRIBUTION BETWEEN RESPONDENTS.

The owner of a vessel injured by the concurring fault of a towing tug and the owner of a drawbridge is entitled in admiralty to a decree for half damages against each, with the right to collect from either any deficiency arising through default in payment by the other.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 627-634; Dec. Dig. ⟸88.]

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

Suit in admiralty by the Masaba Steamship Company, owner of the steamer Joe S. Morrow, against the Great Lakes Towing Company and the Cleveland Terminal & Valley Railroad Company. Decree for libelant against the Towing Company alone, which appeals.. Reversed.

Goulder, White & Garry, of Cleveland, Ohio (Harvey D. Goulder and Robert G. McCreary, both of Cleveland, Ohio, of counsel), for appellant.

Holding, Masten, Duncan & Leckie, of Cleveland, Ohio, for appellee Masaba S. S. Co.

Tolles, Hogsett, Ginn & Morley, of Cleveland, Ohio, for appellee Cleveland Terminal & V. R. Co.

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

WARRINGTON, Circuit Judge. On August 26, 1913, the steamer Joe S. Morrow, while in tow of two steam tugs, sustained damages through collision with the partially raised lift of a bascule bridge maintained by the Cleveland Terminal & Valley Railroad Company across the old bed of the Cuyahoga river at Cleveland, Ohio. The Morrow and the tugs were owned, respectively, by the Masaba Steamship Company and the Great Lakes Towing Company. The owner of the Morrow sought to recover these damages through libel in admiralty against the towing company and the railroad company. The towing company in its answer presented exceptions to certain alternative charges of negligence set up in the libel, but the exceptions are not mentioned either in the assignments or the briefs. At the trial both respondents disavowed any complaint of negligence on the part of the Morrow, and the answers were thus confined to charges made by each of the respondents against the other of negligent conduct which caused the damages in issue. At the close of the testimony offered by the

towing company, the trial court, of its own motion and without hearing from the railroad company, found the towing company liable and entered a decree against it for an agreed amount of damages. From this decree the towing company appeals against both the Masaba Company and the railroad company.

[1] Upon careful examination of the evidence we see no reason to disturb the trial judge's conclusion so far as it finds negligence of the towing company directly contributing to the damages sustained by the vessel in tow. The facts here are distinguishable from those found in The Louise Rugge (D. C.) 234 Fed. 768, 770; but under the present record we think the railroad company should have been held jointly liable with the towing company for such damages. Congress has distinctly imposed positive duties touching the management of drawbridges, including, we think, such bridges as that of the railroad company. Act Aug. 18, 1894, c. 299, 28 Stat. 338, 362, § 5 (Comp. St. 1913, § 9973), and Act March 23, 1906, 34 Stat. 84, 85, § 4, provides, among other things:

"If the bridge shall be constructed with a draw, then the draw shall be opened promptly by the persons owning or operating such bridge upon reasonable signal for the passage of boats and other water craft."

Admittedly, the old river bed in question is navigable. It results that upon receiving or being reasonably chargeable with notice of the approach of a vessel, failure either promptly to open the draw or the lift of a bridge maintained across such a river as this, or, if the facts justify, seasonably to notify the approaching vessel that failure to open or delay in doing so is unavoidable, raises a presumption of negligence which the owner or operator of the bridge must overcome. Dorrington v. City of Detroit, 223 Fed. 232, 245, 246, 138 C. C. A. 474 (C. C. A. 6); Clement v. Metropolitan Railroad Company, 123 Fed. 271, 273, 274, 59 C. C. A. 289; Pennsylvania R. Co. v. Central R. Co. (D. C.) 59 Fed. 190, 192, per Judge Addison Brown, affirmed 59 Fed. 193, 8 C. C. A. 86 (C. C. A. 2); Hartley v. American Steel Barge Co., 108 Fed. 97, 98, 47 C. C. A. 229 (C. C. A. 8). This presumption, instead of being overcome here, was strengthened by the evidence.

While the Morrow was being towed down the river, with the Abbott as its pilot tug and the Alva as the steering tug, the Abbott sounded the customary signals for opening the draw of the Willow Street bridge and also for raising the lift of the railroad bridge. However, when the Abbott came within some 500 feet of the railroad bridge, her captain noticed that the lift of the bridge was not raised to its full height, but was standing at an angle of from 60 to 70 degrees; yet he gave no further attention to the bridge until it was too late to avoid collision between the mainmast of the Morrow and the lift of the bridge. The captain of the Abbott confessedly relied upon the operator of the bridge to cause the lift fully to be raised in time to afford a clearance for the vessel in tow. The lift of the bridge was operated by electricity, and could be and usually was raised quickly for the passage of boats. The collision occurred between 8 and 9 o'clock in the morning, and the day was bright and clear. No

sufficient reason is disclosed to excuse the operator for failing, if he did fail, to hear the signals of the Abbott; and yet the operator gave no signal of any sort to the Abbott that the lift would not be seasonably raised to its full height.

[2, 3] True, there is testimony tending to show that, apart from lights that were used at night to show that the lift was either closed or open, there was no mechanical contrivance maintained upon the bridge for the purpose of signaling approaching boats. Failure in this respect alone tends to show negligence on the part of the owner of the bridge (City of Chicago v. Chicago Transp. Co., 222 Fed. 238, 241, 137 C. C. A. 654, L. R. A. 1915F, 1062 [C. C. A. 7]; Pennsylvania R. Co. v. Central R. Co., supra, 59 Fed. at page 192); and, further, it is hard to understand how a bridge operator of reasonable alertness could have failed to observe the approaching tow and in some way to signal the officers in charge of the pilot tug of the fact, if it had been a fact, that the lift could not be further raised; but such an excuse was not available, for the lift was fully raised immediately after the collision. The testimony is clear enough that some warning might have been given by the bridge operator in time to enable those in charge of the tow to stop and so avoid the collision. Here then we have the captain of the Abbott and the operator of the bridge failing, the one to notice plainly sounded signals of the Abbott, and the other to observe whether the bridge lift had been fully raised, until it was too late to prevent injury to the tow. It must therefore be concluded upon the facts disclosed that this mutual neglect brought about the damages that admittedly ensued.

[4] The remedy for such a situation as this admits of no serious doubt. If two vessels, instead of the pilot tug and the bridge, had through mutual fault caused these damages, a decree would have been awarded against each of the offending vessels for one-half the damages, with the right, however, in the libelant to collect from either of the respondents any deficiency arising through default in payment on the part of the other. The City of Hartford and the Unit, 97 U. S. 323, 329, 24 L. Ed. 930; The Alabama and the Game-Cock, 92 U. S. 695, 697, 23 L. Ed. 763. This would also be true if at the time of the collision one of the offending vessels had been at anchor. Owners of Brig James Gray v. Owners of Ship John Fraser et al., 62 U. S. 184, 16 L. Ed. 106. If the libelant had failed to sue the owners of both of the offending vessels, an order would have been entered on application to make the absent owner a party, so that under the facts a decree in the form stated could in the end have been rendered. The Hudson (D. C.) 15 Fed. 162, 176, decision by Judge Addison Brown. And as Chief Justice Fuller pointed out in Re New York, etc., Steamship Co., Petitioner, 155 U. S. 523, 528, 15 Sup. Ct. 183, 185 [39 L. Ed. 246], "the decision [in The Hudson] was announced February 7, 1883, and on March 26, 1883, rule 59 in admiralty was promulgated by this court. 112 U. S. 743." And that rule was a recognition of the practice approved by Judge Brown in The Hudson. See The No. K 1, 150 Fed. 111, 112, 80 C. C. A. 65 (C. C. A. 2); The Galileo (C. C.) 29 Fed. 538, 540. The principle underlying these decisions is that, regardless of

the rule against exaction of contribution among wrongdoers at common law, the enforcement in admiralty of contribution among offending vessels is a matter of right. The Mariska, 107 Fed. 989, 991, 47 C. C. A. 115 (C. C. A. 7); Erie & W. Transp. Co. v. Erie R. Co., 142 Fed. 9, 13, 73 C. C. A. 195 (C. C. A. 7). It was averred and admitted in the pleadings of the instant case that the suit was within the admiralty and maritime jurisdiction of the district court. We have seen that Congress has imposed distinct duties concerning the management of bridges like the one in issue, and that the rule of judicial decision is that failure to perform such duties subjects the owners to liability in favor of navigators suffering injuries in consequence of such neglect.

We therefore conclude that the decree must be reversed, with costs, and the cause remanded, with directions to enter a modified decree, dividing the damages and providing for recovery in accordance with this opinion, unless the railroad company shall upon good cause shown, within a reasonable time to be fixed by the court below, obtain permission to put in proofs.

AMERICAN TRUST & SAVINGS BANK v. RUPPE.

In re POWELL et al.

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

No. 172.

1. BANKRUPTCY ⟸288(2)—PROCEEDINGS—SUMMARY PROCEEDINGS.

One who, prior to the filing of a petition in bankruptcy, has by other means than the legal proceedings specified in Bankr. Act July 1, 1898, c. 541, § 67c, 30 Stat. 564 (Comp. St. 1913, § 9651), and section 67f, declaring that liens obtained by judicial process within four months of the commencement of bankruptcy proceedings shall be invalid, acquired a lien on the property of a party subsequently adjudged bankrupt, is an adverse claimant, whose rights cannot, as in the case of an agent of the bankrupt or an officer of the bankrupt corporation withholding possession of the bankrupt's property, be summarily determined, but must be determined by a plenary suit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288(2).]

2. BANKRUPTCY ⟸288(2)—JURISDICTION—PLENARY SUIT.

A bank, having a mortgage lien on the property of a bankrupt, instituted an action of replevin, under which the sheriff took possession of the property and the bank proceeded to advertise it for sale under the power of the mortgage. Within less than four months of the replevin suit the mortgagors were adjudged bankrupt. *Held* that, as the lien of the bank depended on the mortgage and had been created without judicial proceedings, such lien was not vacated by Bankr. Act, §§ 67c, 67f, providing for the vacation of liens dependent on judicial proceedings within four months of bankruptcy, and so the rights of the bank could not be determined in summary proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288(2).]

3. BANKRUPTCY ⟸156—PENDING ACTIONS—JUDGMENT—PERSONS CONCLUDED.

After bankruptcy of a mortgagor the trustee caused himself to be substituted for the bankrupt in an action of replevin brought by the mort-

gagee before bankruptcy. The trustee renounced all claim to return of the property, relying on a counterclaim for damages for the taking and detention of the property, and participated in the trial, securing a verdict and judgment of one dollar damages. This the mortgagee paid. *Held*, that the issue of damages thus became adjudicated, and the trustee could not thereafter assert any claims to the proceeds of the mortgaged property.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 240–246; Dec. Dig. ⟸156.]

Petition to Revise Order of the District Court of the United States for the District of New Mexico; William H. Pope, Judge.

In the matter of the bankruptcy of Monte L. Powell and Minnie A. Powell. Petition by the American Trust & Savings Bank to revise an order of the District Court, made on application of B. Ruppe, trustee in bankruptcy. Order reversed and set aside, and cause remanded.

O. N. Marron and Francis E. Wood, both of Albuquerque, N. M., for petitioner.

Reed Holloman, of Santa Fé, N. M., for respondent.

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

SANBORN, Circuit Judge. The American Trust & Savings Bank, a corporation, presents a petition to revise an order of the District Court made April 28, 1916, directing the bank to pay over to the trustee of the estates of Monte L. Powell and Minnie A. Powell, bankrupts, a specified part of the proceeds of the sale of property formerly owned by them made by the bank under a mortgage to it given by the Powells on May 6, 1914, to secure their debt of $4,600 to the bank. On October 17, 1914, the bank brought an action in replevin in one of the district courts of the state of New Mexico based on the mortgage and the alleged breach of its provisions by the mortgagors, the sheriff took the mortgaged property under the writ of replevin of that court and delivered it to the bank which had the possession of it and was proceeding to advertise it for sale under the terms and power in the mortgage when on October 20, 1914, the Powells filed in the United States District Court for the District of New Mexico a voluntary petition in bankruptcy and were adjudged bankrupts. On October 30, 1914, in a summary proceeding in the bankruptcy court over the objection and protest of the bank on the ground that the bankruptcy court had no jurisdiction of the mortgaged property, of it, or of its adverse claim to the property, an objection and protest which the bank maintained throughout all the proceedings, that court ordered the bank to cease prosecuting its replevin suit and to take no further steps toward the sale of the property under its mortgage. On November 18, 1914, on the petition of the trustee, the state court substituted the trustee for the Powells as defendant in the replevin action. On November 21, 1914, the bank applied to the bankruptcy court for a dissolution of its injunction, the court vacated it, but also ordered that the sale of the property should not be made by the bank for less than $6,000, that the sale should not affect the liens upon or

rights in the property, that the proceeds should stand in the place of the property and that the proceeds should be subject to the further order of the bankruptcy court. On December 19, 1914, the bankruptcy court in response to an application of the trustee for an order on the bank to hold $6,050, the proceeds of the sale of the property, until the determination of the action in replevin and upon the prayer of the bank in reply for the payment of its mortgage debt, interest and attorneys' fees out of this $6,050, ordered that the prayer of the bank be denied without prejudice and that its motion remain on the files of the court until the final determination of the action in replevin. The trustee answered the complaint in the replevin action and by his answer admitted the validity of the note, mortgage and claim of the bank for $4,600 and interest, denied that there had been any breach of the terms of the mortgage at the time action in replevin was commenced, demanded a return of the property and interposed counterclaims for damages to the amount of $20,000 for the taking and detention of the property. When the action came on for trial the trustee in open court waived all claim and right to a return of the property and elected to rely upon his claim for damages. The case was then tried to a jury which rendered a verdict in favor of the trustee for the sum of $1. Judgment was entered by the state court in his favor for that dollar and the bank paid and satisfied the judgment. Subsequently in April, 1916, the trustee made an application to the bankruptcy court for an order on the bank to pay over to him all of the $6,050, except what was due on its note for $4,600 on October 20, 1914. The bank claimed and demanded, in addition to its debt and interest to October 20, 1914, interest on its debt thereafter, expenses for caring for the property previous to the sale, about $900 for rent alleged to be secured by a landlord's lien upon these proceeds, and attorneys' fees in the replevin action. The court ordered that the bank retain out of the $6,050, the amount of its principal debt, interest thereon until November 30, 1914, and $81.25 for expenses, and that it pay over to the trustee the remainder of the fund. This is the order the revision of which is sought by the bank upon the facts which have been recited.

[1, 2] The first question is: Did the bankruptcy court have jurisdiction, without the consent and over the objection of the bank, to adjudge in a summary manner the validity or extent of its claim to the mortgaged property in its possession when the petition in bankruptcy was filed, or the validity or extent of its claim to the proceeds of that property?

"There are two classes of cases arising under the act of 1898 and controlled by different principles. The first class is where there is a claim of adverse title to property of the bankrupt, based upon a transfer antedating the bankruptcy. The other class is where there is no claim of adverse title based on any transfer prior to the bankruptcy, but where the property is in the physical possession of a third party or of an agent of the bankrupt, or of an officer of a bankrupt corporation, who refuses to deliver it to the trustee in bankruptcy. In the former class of cases a plenary suit must be brought, either at law or in equity, by the trustee, in which the adverse claim of title can be tried and adjudicated." Babbitt v. Dutcher, 216 U. S. 102, 113, 30 Sup. Ct. 372, 377 (54 L. Ed. 402, 17 Ann. Cas. 969); In re Rathman, 183 Fed. 913, 919, 920,

923, 924, 928, 106 C. C. A. 253, 259, 260, 263, 264, 268; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 978, 979, 142 C. C. A. 433, 436, 437; Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175; Mueller v. Nugent, 184 U. S. 1, 14, 15, 22 Sup. Ct. 269, 46 L. Ed. 405; Jaquith v. Rowley, 188 U. S. 620, 23 Sup. Ct. 369, 47 L. Ed. 620; Metcalf v. Barker, 187 U. S. 165, 175, 23 Sup. Ct. 67, 47 L. Ed. 122; Pickens v. Roy, 187 U. S. 177, 180, 23 Sup. Ct. 78, 47 L. Ed. 128; In re Lummus (D. C.) 214 Fed. 891, 892.

Owners of claims of the first class are adverse claimants and have the right to an opportunity to prosecute and defend their claims in plenary suits according to the course of the common law, or the rules and principles of equity jurisprudence. One who, prior to the filing of a petition in bankruptcy, has acquired by other means than the legal proceedings specified in sections 67c and 67f of the bankruptcy law, a lien upon the property of a party subsequently adjudged bankrupt is an adverse claimant, and is entitled to all the rights and privileges of such claimant to the same extent as one who has acquired a claim of title to property from such a party. In re Rathman, 183 Fed. 913, 920, 921, 106 C. C. A. 253, 260, 261; Stone-Ordean-Wells Co. v. Mark, 227 Fed. 975, 976, 142 C. C. A. 433, 434; In re Shea (D. C.) 211 Fed. 365, 369; Jaquith v. Rowley, 188 U. S. 620, 621, 625, 626, 23 Sup. Ct. 369, 47 L. Ed. 620; Harris v. First National Bank, 216 U. S. 382, 383, 385, 30 Sup. Ct. 296, 54 L. Ed. 528; In re McMahon, 147 Fed. 684, 685, 77 C. C. A. 668, 669; Frank v. Vollkommer, 205 U. S. 521, 522, 526, 529, 27 Sup. Ct. 596, 51 L. Ed. 911; Carling v. Seymour Lbr. Co., 113 Fed. 483, 484, 485, 490, 51 C. C. A. 1, 2, 3, 8; In re Silberhorn (D. C.) 105 Fed. 899.

A bankruptcy court has no authority or jurisdiction, in the absence of lawful possession of the property by its officers, to draw to itself and determine in a summary proceeding the adverse claim of one claiming for his own benefit a lien upon or title to property of the bankrupt which was created, or is claimed to have been created, otherwise than by the legal proceeding specified in sections 67c, 67f, prior to the filing of the petition in bankruptcy. In re Rathman, 183 Fed. 913, 925–927, 106 C. C. A. 253, 265–267; First National Bank v. Title & Trust Co., 198 U. S. 280, 281, 282, 25 Sup. Ct. 693, 49 L. Ed. 1051; Louisville Trust Co. v. Comingor, 184 U. S. 18, 25, 22 Sup. Ct. 293, 46 L. Ed. 413; Murphy v. John Hofman Co., 211 U. S. 562, 569, 570, 29 Sup. Ct. 154, 53 L. Ed. 327; Tripp v. Mitschrich, 211 Fed. 424, 426, 128 C. C. A. 96, 98. At the time of the filing of the petition in bankruptcy the bank had a lien upon the mortgaged property which had been created prior to that time without suits or legal proceedings and had the possession of the mortgaged property. The action in replevin did not create the lien of the bank. That lien was created in May, 1914, by the act of the parties to the mortgage and the laws of the state of New Mexico. The bank was an adverse claimant in possession when the petition for the adjudication in bankruptcy was filed. Neither the bankruptcy court nor any of its officers ever acquired any possession of the mortgaged property or of its proceeds. The bank had the right to the trial of its claim in a plenary action according to the course of the common law, or in a suit in equity according to the rules and principles of equity jurisprudence,

and the bankruptcy court was without authority or jurisdiction in the absence of the consent of the bank to adjudge in a summary proceeding either the validity or the extent of its claim.

[3] Again, the trustee caused himself to be substituted for the bankrupt in the action in replevin, answered the complaint of the bank, renounced all claim to a return of the property, relied on its counterclaims for $20,000 damages for the taking and detention of the property, joined and participated in the trial of the action, and secured a verdict and judgment of $1 damages, which the bank has paid. That judgment was a conclusive adjudication that the value of the trustee's interest in the property and in its proceeds, and hence his damages from the appropriation of them by the bank, did not exceed $1. The bank has paid that dollar, and the trustee was estopped by that judgment from subsequently litigating in the bankruptcy court, or in any other court, the amount or value of his interest in the mortgaged property or its proceeds. That issue became res adjudicata by the judgment in replevin. The conclusions which have now been reached render the other questions discussed in the briefs immaterial. The orders of the bankruptcy court staying the action in replevin, directing the sale of the property and the distribution of the proceeds were erroneous. The order of the court below of April 28, 1916, and all other orders of that court, so far as they interfere with the disposition by the bank of the proceeds of the sale of the mortgaged property, must be, and they are hereby, set aside and held for naught.

Let the case be remanded to the court below, with instructions to proceed in accordance with the views expressed in this opinion.

TRIEBER, District Judge, concurs, on the ground that the bankruptcy court had no jurisdiction without the consent of the claimant to determine the validity or extent of its claim summarily, but expresses no opinion upon the question of res adjudicata.

ARIZONA COPPER ESTATE v. WATTS et al.*

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

No. 2663.

1. MORTGAGES ⊂=32(5)—VALIDITY—NECESSITY OF INDEBTEDNESS.
   A debt, either pre-existing or created at the time, is an essential requisite to a mortgage; and a deed cannot be construed as a mortgage, where there was no indebtedness to be secured.
   [Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 61; Dec. Dig. ⊂=32(5).]

2. VENDOR AND PURCHASER ⊂=3(4)—OPTION CONTRACT—CONSTRUCTION—PAROL EVIDENCE.
   The owners of a large tract of land desiring to sell the same, certain other persons undertook to effect a sale, and a price was agreed upon, which they were to pay if they succeeded. To facilitate the sale they organized a corporation, to which at their request the owners conveyed the land by a quitclaim deed. At the same time the corporation executed

⊂=For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*Rehearing denied February 13, 1917.

its notes for the agreed price, and also a reconveyance, to be void in case the notes were paid according to their tenor and effect. There was no agreement at any time for a sale of the land to the corporation, nor intention that it should pay the notes, unless it made a sale to others. It never paid anything on the notes, nor did any corporate act, and 15 years later grantees of the original owners brought suit against it to quiet their title and have the deed to it canceled as a cloud. It then set up ownership, claiming that the reconveyance was a mortgage to secure the purchase money. *Held*, that parol evidence was admissible to show the real transaction and intention of the parties, that a court of equity would construe all the instruments together in the light of such intention, which was merely to grant an option, and that defendant never acquired any interest in the land.

[Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. § 3; Dec. Dig. ⊜3(4).]

Appeal from the District Court of the United States for the District of Arizona; Wm. H. Sawtelle, Judge.

Suit in equity by Cornelius C. Watts and Dabney C. T. Davis, Jr., against the Arizona Copper Estate. Decree for complainants, and defendant appeals. Affirmed.

Mathews and Syme were the owners of 99,000 acres of land in Arizona, which they wished to sell. Through the intermediation of Col. Boyce as a broker, Syme met Senator Dorsey, a prospective purchaser. They first discussed an option, but Dorsey wished to obtain a deed to the property, because he thought he could use that better for the purpose of selling the land. It was finally agreed that the purchase price of the property should be $100,000, to be paid in installments running over two years, and that the property should be deeded to a corporation; but, as it was agreed that the sale was not to be made unless and until the price was paid, it was arranged that the corporation would reconvey the property to the owners, "subject to divestiture if the purchase price was paid as agreed." It was the testimony of all parties to the transaction that there was never an intention that, in case the corporation was unable to sell the land, it should be indebted to the payees of the note in any sum whatever. Syme testified that Dorsey wanted a deed, "because he said that he thought he could use that better, and he wanted to give me a deed in exchange at the same time." Dorsey explained that the deed would be of such a character that the property would be held by the owners, and the title in them, and not go out of them, and if the notes were not paid the whole property would be still in the owners. "Everything would be void, notes and all." Dorsey stated: "My understanding has always been and is now that the transaction, on account of the failure of the Arizona Copper Estate to make the payments agreed on, was as though it had never taken place, and that Mathews and Syme had the title to the property free of any claim on the part of those who had proposed to organize the corporation, or of the Arizona Copper Estate itself." Syme testified: "If all the notes weren't paid, the property was to remain in us, and the notes were to become void, and the whole thing wiped out." After this agreement was made, Mathews and Syme went to New York, and there, on August 3, 1899, met Dorsey, Reynolds, and Simmonds. The terms of the agreement were restated. A quitclaim deed was then executed on August 3, 1899, from Mathews and Syme to the Arizona Copper Estate. Simultaneously with the execution of the deed, an indenture was made between the Arizona Copper Estate, party of the first part, and Mathews and Syme, parties of the second part, the consideration whereof, as recited, was $10, and which conveyed to the parties of the second part the 99,000 acres of land. The indenture contained a recital of the execution of the notes and a description of the same, and provided that, "if said notes are paid according to their tenor and effect," then the indenture should be void, and the estate granted should cease and determine and be void, otherwise to remain in full force and effect, and it contained the recital that the party of the first part covenants with the parties of the second part

"that the party of the first part will pay the indebtedness as hereinbefore provided, and, if default be made in the payment of any part thereof, the said parties shall have power to sell the premises herein described according to law." On August 12, 1899, the indenture was recorded as a mortgage in Pima county, Ariz. On the same day the deed was recorded. No payment was ever made on the notes, and no foreclosure suit was ever brought upon the indenture which purports to have been given to secure the payment thereof. The Arizona Copper Estate never at any time took possession of said real estate, nor asserted ownership over the same. Fifteen years after the execution of the notes, Watts and Davis, who had acquired the interest of Mathews and Syme, brought this suit to quiet their title, alleging that the quitclaim deed and the indenture were made and recorded on the same day and hour, and were intended as a conditional sale, and were made to enable Boyce and his associates to raise in advance money with which to purchase the land for $100,000, with the understanding that the failure to do so in time to pay the notes would leave the title in Mathews and Syme, just as it was prior to the making of the deed, and avoid the transaction so far as said Arizona Copper Estate and Boyce and his associates were concerned; and the complaint alleged that the deed and the indenture constitute a cloud upon the plaintiffs' title. The complaint prayed that the conveyance from Mathews and Syme to the Arizona Copper Estate be declared a nullity, or that the deed from the Arizona Copper Estate to Mathews and Syme be declared to be a deed in fee with a condition subsequent, which condition never was complied with, and that the defendants be decreed to have no interest in the land. The Arizona Copper Estate admitted the execution of the deed to it, and alleged that the indenture was intended to be a purchase-money mortgage, and denied on information and belief nearly all the other allegations of the complaint. The court below found that the two instruments were to be construed as one, and that they constitute a conditional sale of the land; that the condition was not performed, and that no part of the purchase price was paid; that the Arizona Copper Estate acquired and has no right, title, or interest in the land; and the court adjudged that said instruments constitute a cloud on plaintiffs' title, that the cloud be removed, and that the plaintiffs' title be quieted.

J. N. Gillett and F. A. Cutler, both of San Francisco, Cal., Ben C. Hill, of Tucson, Ariz., and G. H. Brevillier, of New York City, for appellant.

Samuel L. Kingan, of Tucson, Ariz., and Hartwell P. Heath, of New York City (Herbert Noble, of New York City, and Samuel L. Kingan, of Tucson, Ariz., of counsel), for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that the intention and express agreement of the parties cannot be shown by parol to change the essential nature of the instruments, and that a conveyance to secure a debt is a mortgage, and the stipulation of the parties cannot make it otherwise. But there can be no mortgage unless there is a debt to be secured thereby. "A debt, either pre-existing or created at the time, is an essential requisite to a mortgage. When there is no debt and no loan, it is impossible to say that an agreement to resell will change an absolute deed into a mortgage." Jones on Mortgages, § 265. Here there was no debt. The relation of debtor and creditor did not exist. The undisputed evidence is that the appellant never at any time owed Syme and Mathews any sum whatever. It is true that the appellant signed promissory notes to the amount of $100,000; but they were not intended to be obligatory upon the maker, or ever to be paid unless the

appellant made a sale of the land. They were intended only to register the nature of the transaction, which, while it was in the contemplation of the parties only an option, was placed in the form of a deed to the appellant and notes and a mortgage from the appellant to the owners. In Daniels v. Lowery, 92 Ala. 519, 8 South. 352, the court said:

"In determining whether a particular transaction was a mortgage or a conditional sale, there are some facts which may be regarded as of controlling importance. Did the relation of debtor and creditor exist before and at the time of the transaction? Or did the transaction begin in a negotiation for the loan of money? Was there great disparity between the value of the property, and the consideration passing for it? It there a debt continuing for which the vendor is liable?"

[2] It is universally held that a deed absolute upon its face may by parol evidence be shown, as between the parties, to have been intended as a mortgage. The reason why such evidence is admissible, notwithstanding the statute of frauds, is that a court of equity will not construe a statute designed to prevent fraud in such a manner as to produce fraud. That reason applies in full force to the present case. Said the court in Peugh v. Davis, 96 U. S. 332, 336 (24 L. Ed. 775):

"The object of parties in such cases will be considered by a court of equity. It constitutes a ground for the exercise of its jurisdiction, which will always be asserted to prevent fraud or oppression, and to promote justice."

The appellant says there is no allegation here of fraud or mistake. But such allegations are unnecessary. When the appellant insists that the reconveyance is a mortgage, the fraud is established, and equity takes jurisdiction. 2 Pomeroy, Equity Juris. (2d Ed.) § 1196; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671. The contention of the appellant, if sustained here, would result in a monstrous fraud. The appellant was incorporated for the sole purpose of accomplishing the transactions which are evidenced by the instruments executed between the parties in the year 1899. From that time on it did no corporate act until after the commencement of the present suit. At that time it seems to have been resurrected and resuscitated sufficiently to make an answer to the complaint. In the meantime, if the indenture is to be held a mortgage, the statute of limitations has long since run thereon, and, according to the appellant's contention, it has acquired title to 99,000 acres of land without having paid a dollar therefor. Every consideration of justice and equity requires that the real intention of the parties be given effect. We find no error in the decree of the court below, which accomplished that result.

The decree is affirmed.

BLEZNAK v. SPRINGFIELD FIRE & MARINE INS. CO.

(Circuit Court of Appeals, Third Circuit. December 13, 1916.)

No. 2166.

1. APPEAL AND ERROR ⊂=1002—REVIEW—VERDICT.
A verdict on conflicting evidence will not be disturbed on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3935–3937; Dec. Dig. ⊂=1002.]

2. INSURANCE ⊂=668(5, 6)—FIRE INSURANCE—POLICIES—PROOFS OF LOSS.
A fire policy covered a lot of sweet potatoes contained in a shed in the rear of insured's dwelling. Title to the dwelling was in insured and his father, and in making proof of loss of the sweet potatoes the blank used was a duplicate of the one used as a proof of the loss under the policy covering the dwelling. Because of this reason, statements of joint ownership in the potato policy proof were the same as in the proofs on the other policy, and obviously referred to joint ownership of the dwelling, and not to joint ownership of the potatoes. Such was shown by the accompanying affidavit, alleging a joint ownership of the dwelling, but a sole ownership of the potatoes in insured. *Held* that, in such case, the proof of loss could not be disregarded, on the ground that the statements improperly included constituted false swearing by the insured touching matters relating to the insurance, and showed that the interest of insured was other than unconditional and sole ownership, but the matter was properly submitted to the jury.
[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 1737–1740, 1758–1760; Dec. Dig. ⊂=668(5, 6).]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Isaac Bleznak against the Springfield Fire & Marine Insurance Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Lewis Starr, of Camden, N. J., for plaintiff in error.

Ethan Wescott and John Wescott, both of Camden, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Isaac Bleznak, a citizen of New Jersey, brought suit against the Springfield Fire & Marine Insurance Company, a corporate citizen of Massachusetts, on two policies of fire insurance. At the trial the court held that on one policy, which covered a building, the proofs of loss were insufficient, and there could be no recovery. As to the other policy, it in effect submitted the question of the sufficiency of the proofs to the jury, which found that and the other issues involved in favor of the plaintiff. To a judgment entered on such verdict, the plaintiff sued out this writ, and here contends the court should have given binding instructions in its favor.

[1, 2] A study of the record satisfies us that the court below committed no error. The policy on which plaintiff recovered covenanted against loss on a large lot of sweet potatoes contained in a shed in the rear of his dwelling house. While the ownership of such pota-

toes by the insured, the fact that they were burned, and indeed that they were even in the shed, was denied by the defendant, yet there was evidence to the contrary which compelled the submission of those questions to the jury. A verdict settling those issues must therefore be sustained, unless as a question of law the court was bound to hold the proofs of loss were insufficient. But this it could not do. It is true they are inartistically drawn; but, reading them and the accompanying affidavit in the light of attendant facts, they evidenced such a substantial compliance with the requirements of the policy that a court would not have been justified in holding as a matter of law they were insufficient. As to the proof itself, it certainly contained some statements which, if they referred to the sweet potatoes, showed that the ownership of them was in Bleznak, the assured, and his father. But the blank used for the proof of loss was a duplicate of one used as a proof for the other policy, which was upon real estate the legal title of which was in Bleznak and his father, and the attempt to use for personal property a blank which was meant for proof of a real estate loss necessarily led to the use of some language not fitted to a proof for the loss of personalty.

As the sweet potatoes were in a shed on that land, and the statements of joint ownership written in the potato policy proof are the same as in the proofs on the other or real estate policy, it is evident such statements were meant to refer to such joint real estate ownership, and not to a joint ownership of the potatoes. That such was the case is shown by the accompanying affidavit which alleged a joint ownership of the realty, but a sole ownership of the potatoes.

We are therefore of opinion the court below could not have held that these papers, in and of themselves, constituted a "false swearing by the insured touching any matter relating to this insurance," or that they show that "the interest of the insured was other than unconditional and sole ownership," as provided in the policy. And as the jury, under the way the cause was tried and submitted to it by the court, have found the sole ownership of the potatoes was in the insured, and that he made no false statement in the proofs, it follows defendant has no ground of substantial complaint, and the judgment below should be affirmed.

AMERICAN CASTING MACH. CO. v. PITTSBURGH COAL WASHER CO.

(Circuit Court of Appeals, Third Circuit. November 13, 1916.)

No. 2119.

1. PATENTS ⟸328—VALIDITY—APPARATUS FOR CASTING METAL.

The Scott patent, No. 788,334, for an apparatus for casting metal, *held* void on the ground that the patentee had caused the invention to be patented in a foreign country more than seven months prior to his application for the United States patent.

2. PATENTS ⟸97—RIGHT TO PATENT—PRIOR PATENTING IN FOREIGN COUNTRY—"CAUSED TO BE PATENTED."

While an application for a patent in the name of three persons as joint inventors was pending, one of such persons, representing also the other

two, caused the invention to be patented in Great Britain. Afterward the joint application in this country was abandoned, and more than seven months after the British application was filed one of the joint applicants filed an application for a patent for the same invention in his name as sole inventor. *Held*, that the foreign patent was caused to be issued by such sole applicant, within the meaning of Rev. St. § 4887, as amended by Act March 3, 1897, c. 391, § 3, 29 Stat. 692 (Comp. St. 1913, § 9431, note), which was then in force and was a bar to the granting of a United States patent on such application.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 130, 131; Dec. Dig. ⟸97.]

3. PATENTS ⟸328—INVENTION—LINKS FOR CONVEYORS.

The McKennan & Helander patent, No. 806,700, for links for conveyors, *held* void for lack of invention.

Appeal from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suit in equity by the American Casting Machine Company against the Pittsburgh Coal Washer Company. Decree for defendant, and complainant appeals. Affirmed.

The following is the opinion of Orr, District Judge:

This patent suit originally involved three patents. Plaintiffs, prior to the trial, gave notice to the defendant that they would withdraw from consideration United States patent No. 629,480, issued July 25, 1899, to E. A. Uehling and James W. Miller, for "casting and conveying apparatus." No objection was made by the defendant to the withdrawal of such a patent. While no amendment of the bill was made, the bill must be deemed to have been amended in accordance with the notice. It is also deemed to have been amended by striking out the name of the plaintiff Fannie S. Miller as administratrix. These amendments upon the eve of trial have scarcely tended to clarify the issues between the parties, because the pleadings are weighted by irrelevant averments. Moreover, the affidavits of the experts now contain many immaterial matters.

The suit as it now stands involves United States patent No. 788,334, issued April 25, 1905, to James Scott, for "apparatus for casting metal" and United States patent No. 806,700, issued December 5, 1905, to J. B. McKennan and A. H. Helander, for "links for conveyors." Both of said patents are owned by the plaintiffs.

The answer denies conjoint or other use by the defendant, denies notice by the plaintiffs to the public, and denies that the patentees either solely or jointly were the original inventors of the apparatus shown in the respective patents. It admits notice to the defendant by the plaintiffs of the latter's claim of title. It sets forth in detail as prior disclosures 43 United States patents, 7 British patents, and 1 German patent. By stipulation dated a month or more before the trial, but filed thereafter, it was agreed that the answer might be amended by the addition of five more prior patents and by adding averments that the Scott patent, No. 788,334, is void because the application therefor was not filed within seven months of the filing of the application for British patent No. 3,880 of 1898, dated February 16, 1898, granted to James W. Miller, partly as communication through Edward A. Uehling and James Scott; that said Scott patent in suit, if valid when issued, expired with the limitation of said British patent, to wit, February 16, 1912; and that the acts charged in the bill occurred after said date, and after the alleged invention of the said patent in suit had become public property. By the stipulation it was further agreed that the application for British patent No. 3,880 of 1898 was filed February 16, 1898, and was accepted May 20, 1898, and that the patent, in pursuance thereof, was sealed on August 2, 1898. It was further stipulated that said E. A. Uehling, James W. Miller, and James Scott, named in the several United States and British patents involved in this case, are

the persons named in the patents here in suit, and further that the subject-matter of claims 2 and 5 of the Scott patent in suit is disclosed in the application for United States letters patent of said Uehling, Miller, and Scott filed December 7, 1897, Serial No. 626,022, which application never matured into a patent. The answer was never amended, but is deemed to have been, because the trial proceeded as if such amendment had been made.

The departures by the solicitors of both parties from the rule that the allegata and probata should agree in material matters has created a condition which may confuse a court in which the case was not originally brought. For that reason especially this court calls attention to them, and as well also that the members of the bar may be reminded of the rule mentioned. The stipulation contains a provision that proof of the facts referred to therein is waived. The stipulation was offered at the trial, but the facts were not, except inferentially, through the medium of the writing in which they are contained. The stipulation, and not the official notes of the stenographer, must be examined to find them.

Now, giving attention to the two patents in suit, it is to be first observed that they are by no means pioneer patents. They relate to improvements in apparatus for casting and conveying metals. But the apparatus described therein (for the improvements are capable of conjoint use) is chiefly used in the casting and handling of pig iron.

It is sufficient to refer to an expired United States patent of the above-named E. A. Uehling, No. 548,146, under date of October 15, 1895, where the disadvantages of casting pigs in the open sand molds upon the floor in front of the blast furnace is pointed out, and where the advantages of pouring the molten metal into molds of a uniform size, which are presented by mechanical operation, immediately under the metal as it flows from the furnace or ladle, and which carry the pigs formed therein to a proper dumping end, where they are automatically delivered into a suitable conveyance, are set forth. That patent of Uehling seems to be so broad in its scope that the subsequent patents referred to in this record, and relating to the same subject-matter, must be limited to the actual construction shown therein, if any invention be found.

The application for the Scott patent, No. 788,334, was filed August 31, 1899. More than seven months prior to that time, the application for the British patent, No. 3,880 of 1898, was filed. As appears from a copy of said English patent, James Willard Miller, as the applicant, states that the specifications are "partly as communication from Edward A. Uehling * * * and James Scott of Pittsburgh, * * * U. S. A." by section 3 of the act of Congress of 1897 (29 Statutes at Large, p. 692, c. 391) section 4887 of the Revised Statutes was amended so as to read as follows:

"Sec. 4887. No person otherwise entitled thereto shall be debarred from receiving a patent from his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country."

By section 8 of the said act it is provided that such section of the Revised Statutes as amended should not apply to any patent granted prior to January 1, 1898, nor to any application filed prior to said date, nor to any patent granted on such application. If, therefore, James Scott had made an invention in accordance with the application for the patent in suit, and had the same first patented or caused to be patented by himself or his legal representatives or assigns more than seven months prior to the date of such application, he had no right to receive the patent in suit for such invention. It is necessary, therefore, to determine whether James Scott authorized the application for the British patent. If he did, then the patent procured upon the application of Mr. Miller can fairly be considered to have been Mr. Scott's act within the meaning of the said act of Congress.

The subject-matter of the Scott patent in suit was disclosed in the English patent. Without giving much weight to the fact that Mr. Scott is named in the English patent, we must conclude from the evidence that Mr. Scott authorized and approved the application therefor. There is in evidence a certified

copy of an application made by said Uehling, Miller, and Scott to the United States for a patent for "apparatus for casting metal." That application was filed December 7, 1897, and is No. 661,022. The 17 drawings which accompanied that application appear to be, in all respects, like the 17 drawings which became part of said British patent. On the 10th of November 1897, said Scott, as well as each of the others, made an affidavit in support of that application that the three named were joint inventors. That the application for the United States patent never ripened into a patent and seems to have been abandoned is perhaps immaterial here.

Mr. Scott, who at that time was in the employ of the Carnegie Steel Company, testified in this case upon cross-examination as follows: "Q. I understand from you that Mr. Uehling established an office in Pittsburgh, and had a draftsman, and made drawings in connection with these castings machines. Is that correct? A. Yes. Q. Who was the draftsman? A. If you will kindly ask Mr. White, he will give you the draftsman's name—Prochasky, I think. Q. Mr. Miller worked with Mr. Uehling? A. Oh, yes, yes. He was supposed to be the salesman. He was the fellow that went to Europe and tried to introduce it in Europe." Again: "Q. Will you please state what the circumstances were which led you to make that joint application with these three men? A. On account of the company saying they were to have access to all the improvements we were making on the machine, naturally; but I can't remember of going directly and swearing and giving them that, I can't remember. Q. Then you can't remember as to whether or not you did make the application for patents with them? A. I don't remember that. Q. Do you remember who was the attorney that drew up that application? A. I do not know, sir; I do not know. Q. Do you know why the application for patent was never granted? A. I really don't know anything about it. It never gave me any concern. My concern was to make the thing good, and to get it up the best that could be. The patent was a secondary consideration." Again: "Q. Well, now, did you ever talk with Mr. Uehling and Mr. Miller about Mr. Miller going to Europe to introduce the invention? A. I suppose that just came up. We would have to do something about it, naturally. I suppose they may have had a talk with me about going to Europe. I knew Miller did go to Europe to introduce the patents, but I don't remember that he was going to take out any patents. I am not sure about that. I don't know whether he did or not. I never spoke to Miller but once afterwards, after he came back from Europe. Q. I am speaking about before he went to Europe. You and Miller and Uehling had talked together about his going to Europe, and about the introducing of the invention over there in Europe, had you? A. I may have. I wouldn't deny that, but I can't remember. We were friendly enough while the thing was being put through, and no doubt exchanged ideas."

It is a proper inference from all that testimony that Mr. Scott knew and approved of the introduction of the subject-matter of the patent in countries outside of the United States, of course including England. It must be inferred that he authorized the protection of such rights as he might have in the invention in the best way, and it must be inferred that he knew that the best way to protect his rights in England was to procure a patent for the invention. The failure to procure Uehling and Miller as witnesses and to account for their absence is confirmatory of the conclusion reached.

It is impossible to conceive that the acts of Congress relating to patents would permit a joint inventor, who was a party to the procurement of a foreign patent, to obtain a patent for the same invention upon his sole application filed more than seven months after the application for the foreign patent. It is clear by the words of the statute that those who had applied for a patent in England, for a joint invention, could not, under the act, have procured a patent from the United States by an application for the same joint invention, filed more than seven months afterwards.

It is expressly disclaimed by the solicitors for the plaintiffs that the Scott patent in suit was a division of the United States application filed by Scott and his associates. This seems to be eminently proper, because it is hard to conceive it a division of the joint invention. Scott's early affidavit that it was a joint invention should have more weight than his testimony after the lapse of years to the effect that he was the sole inventor. The conclusion

therefore reached is that the Scott patent in suit was granted to him contrary to law and is therefore invalid.

A consideration of the claims of the Scott patent leads to the conclusion that they are met in the prior art, except perhaps with respect to two elements in claim 2 and one element in claim 5, which claims are the only claims of that patent in litigation. These claims are as follows:

Claim 2: "In casting apparatus, the combination with one or more sets of molds, of mechanism for moving them, and a casting pot arranged to receive molten metal, said pot having a well and one or more integral lateral troughs, substantially as described."

Claim 5: "In casting apparatus, a mold having at its sides upwardly projecting splashers, substantially as described."

Taking up claim 2 first, we find in United States patent to Uehling, No. 548,146, and in United States patent to Uehling and Miller, No. 629,480, each for casting and conveying apparatus, a combination of the elements in claim 2 of the Scott patent in suit, except the well with which the intermediate casting pot is provided and the troughs integral leading from it. We find in the prior patents the troughs leading from the casting pot. We are not satisfied, however, that there is anything of invention in making parts integral with each other which before were separate. We find in those prior patents an intermediate casting pot, and if there should be a depression in the bottom of such casting pot there would be the well called for in the patent in suit. The intermediate casting pot of the Scott patent in suit is not a deep pot, because it is not intended to retain much of the molten fluid, but enough thereof to permit an even flow through the troughs to the molds. The pot and the troughs leading therefrom are lined with fire brick, but the fire brick in the bottom of the casting pot is so placed as to form a depression, which is called the well. This well is nothing more or less than an arrangement to protect the workmen from the splashing which would result from pouring the metal upon a flat surface. Mr. Scott, in his testimony, said that the pouring of molten metal was just like the pouring of water, and that if you let water run on the bottom of a bucket it will splatter all over it, but if there be water in the bucket it does not splatter so much. This well is but a depression of a few inches, and of course some of the molten metal remains therein and has to be removed therefrom by workmen. Mr. Scott stated that he has known men, in carelessness, rather than take the metal out of the well which had accumulated by the use of the apparatus to "put sand at each side of it, which the sand gave them the same thing—or a brick—because it would fall over either side, gave them the pool of iron." It is clear, therefore, that there could be no invention in having the well for the purpose for which it was intended, especially when the apparatus can be used without cleaning it out, and when the men prevent the splashing by raising an additional protection. This is not an instance of where difficulty had presented itself to the inventor and was not overcome until after experiment, but is rather the adoption of a practice apparent to any one desiring the result. There is nothing of invention in claim 2 of the Scott patent in suit. The same may be said of claim 5. The molds have at their sides what are called upward projecting splashers. The upward projecting splashers are merely extensions of the sides in order to retain the proper amount of molten metal in the molds and prevent it splashing out upon the machinery.

In the patent to Uehling, No. 548,146, and in the patent to Uehling and Miller, No. 629,480, the molds which are carried by the conveyor from the points where they are filled to the dumping end, and returned empty to be filled again, have an overlapping which prevents the molten metal from falling between the molds upon the links of the carriers. In the earlier patent the metal was poured transversely of the molds, and there was therefore no uneven flow of the metal toward the sides of the mold. In the later patent it was contemplated that the molten metal should be poured longitudinally of the molds. This necessarily made an uneven flow of metal as between the two sides of the mold. The side of the mold opposite the point of flow would resist a greater current than the opposite side, and yet the repulsion of that current towards the opposite side would tend to drive the liquid against it with a greater force than would be found if the arrangement of the Uehling

patent had been followed. It is such a self-evident proposition that to prevent an overflow by a current of liquid you must raise the height of the obstruction against which it flows that no invention can be found therein. This is specially true where the difficulty overcome has not been of long duration, and therefore has not been the subject of consideration by many men. From Mr. Scott's own testimony it seems that the matter of procuring a patent was a secondary consideration, to say the least. It is therefore reasonable to assume that he did not believe that he had invented anything valuable, else he would have been anxious to have the protection which the law affords. The conclusion is therefore reached that, apart from the effect of the statute hereinbefore referred to, claims 2 and 5 of the Scott patent in suit are void for lack of invention.

Taking up the other patent, we find in the patent to McKennan and Helander, No. 806,700, that the claims in issue read as follows:

"8. In a pig-casting machine, the combination of a series of molds, chains supporting said molds, each chain including a series of links having side members and a member rigidly connecting said side members, pins connecting successive links, and guide wheels on said pins between the side members of said links, each of the molds having its ends supported by the connecting members of a pair of links, substantially as described.

"9. In a pig-casting machine, the combination of a series of molds, chains for supporting said molds, each chain including a series of links, having side members, and a member rigidly connecting said side members, pins, connecting successive links, and guide wheels on said pins between the side members of said links, each of the molds having its ends supported by the connecting members of a pair of links, the connection between each mold and the links being arranged so that the weight of said mold is distributed equally between the two side members of the link, substantially as described.

"10. The combination in a pig-casting machine of a series of molds and chains for conveying the same, said chains including links each having two side members and a member rigidly connecting said side members, with a plate for each end of each mold, said plate being connected to the mold and to the connecting member of the link so that the weight of the mold is distributed equally between the side members of the link, substantially as described.

"11. The combination in a pig-casting machine of chains each having a series of links, pins connecting the links, and a series of pig molds having means for connecting them to the links so that their weight is distributed equally upon the two ends of each pin, substantially as described.

"12. The combination in a pig-casting machine of a series of molds each having projecting lugs at its ends, chains for the molds each including a series of links having two side plates and a substantially horizontal plate connecting the same, a wheel between the side plates of the adjacent ends of successive links, and pins connecting successive links and extending through their respective wheels, with a connecting piece fixed to the horizontal portion of each link and attached to the projecting lug at the end of the mold, substantially as described."

From the foregoing claims it would appear that the patent was perhaps limited in scope to the art of casting and conveying pigs. The patent, however, is not so limited, as appears from the specifications and the other claims which are not in suit. It relates to the art of conveying materials, regardless of their character. While relating to conveyors generally, it specially relates to the form of links in the chains to which the buckets or molds or other receptacles for the material to be conveyed are attached. In order that the material may be carried, the chain must be connected with wheels or rollers so placed that the axis of each wheel or roller is located at the point of connection between the successive links of the chain. If the periphery of the wheels or rollers be enlarged sufficiently, the receptacles for the material to be carried may be returned by a comparatively endless process, notwithstanding the nature of the receptacles, for there will be sufficient clearance for them upon the return track if the diameter of the wheels or rollers be made sufficiently great. Such receptacles are necessarily attached to the links between the wheels or rollers.

That the foregoing is illustrative of the functions and operations of links for conveyors for years prior to the application of the McKennan and Helander patent is apparent from the evidence in this case. It is urged, however, by the plaintiffs, that the patent now under consideration is the first appearance in the art of rigid connection with the side members of the links, and indeed of means for equally distributing the weight upon the pins upon which the guide wheels turn. The evidence in this case has failed to satisfy us that such contention on the part of the plaintiffs should be sustained. The patent, if valid at all, cannot be so broad as contended. Numerous examples of the prior art show such rigidity of connection and such equal distribution of load. It is unnecessary to refer to any but the Taplin patent, No. 413,635, of October 22, 1889. It is true the Taplin patent does not show the enlarged wheels by which clearance is given to the molds while they are being moved. It certainly is not invention to make the wheels as large as may be necessary to give clearance to that which the wheels may carry.

It is urged that invention should be found because there is shown to be economy in the operations of the apparatus of the patents in suit. Economy of operation is the effort of every successful manufacturer, and is the aim which induces the great majority of variations in mechanical operations and shop practices. The tendency to secure to one man a monopoly of an improvement which may reduce the wear and tear upon machinery should not be encouraged, where such improvement is one which any one skilled in the same art would have adopted to reach the same end.

The claims in suit of the McKennan and Helander patent are met in the prior art, and are void for want of invention.

The bill should be dismissed at plaintiffs' cost. Let a decree be drawn.

Clarence P. Byrnes and G. H. Parmelee, all of Pittsburgh, Pa., for appellant.

James I. Kay, A. Leo Weil, and Charles M. Clarke, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the American Casting Machine Company, the owner of patent No. 788,334, granted April 25, 1903, to James Scott for "apparatus for casting metal," and of patent No. 806,700, granted December 5, 1905, to J. B. McKennan and A. H. Helander for "links for conveyors," filed a bill against the Pittsburgh Coal Washer Company, charging infringement of certain claims of said patents. On final hearing that court dismissed the bill, holding both patents lacked invention, and that the Scott patent was also invalid because, more than seven months before Scott applied for it, he had caused the same device to be patented in England. On entry of a decree dismissing the bill, the complainant appealed to this court.

[1] In the view we take of the Scott patent, it will not be necessary for us to decide whether the court below was right in holding it did not involve invention, for, apart from that question, we are of opinion that court rightly held the English patent avoided the Scott patent.

[2] By section 3 of the act of Congress of 1897 (29 Statutes at Large, p. 692), and by the act of March 3, 1903 (32 Statutes at Large, p. 1227), section 4887 of the Revised Statutes was amended to read as follows:

"No person otherwise entitled thereto shall be debarred from receiving a patent for his invention or discovery, nor shall any patent be declared invalid, by reason of its having been first patented or caused to be patented by the inventor or his legal representatives or assigns in a foreign country, unless the application for said foreign patent was filed more than seven months prior to the filing of the application in this country, in which case no patent shall be granted in this country."

Now, the patent here in suit, No. 788,334, for an apparatus for casting metal, was applied for by James Scott August 31, 1899, and granted April 25, 1905. More than seven months prior to Scott's application, to wit, on February 16, 1898, application was made for English patent No. 3,880, which patent was granted to James Willard Miller, who in his specification described himself as a manufacturer's agent, and therein stated that the said improvement was "partly a communication from Edward A. Uehling, a metallurgical chemist and engineer, of Newark, Essex, New Jersey, U. S. A., and James Scott, of Pittsburgh, Allegheny county, Pennsylvania, United States of America." Without entering into details, it suffices to say that the subject-matter of the Scott American patent is embodied in the Miller English patent, and, as the American patent was not applied for until more than seven months thereafter, the statute above recited forbade the grant of such patent, if Scott's invention or discovery had been "patented or caused to be patented by the inventor or his legal representatives or assigns" in England. After hearing the proofs the court below held that Scott had caused his invention to be patented in England more than seven months before he had applied for his American patent, and that under the statute quoted above the latter patent was void. In view of all the proofs, the relations of the parties concerned, and the inferences fairly deducible therefrom, we are of opinion the court below committed no error in decreeing Scott's patent void on that ground.

From the proofs it appears that this case concerns the change in pig metal casting from the old sand bed method in universal use to the modern casting in conveyor metal molds. The old process and the underlying features of the new method are contrasted in patent No. 548,146, applied for November 28, 1892, and granted October 15, 1895, to Edward A. Uehling, of Birmingham, Ala., for an apparatus for and method of casting and conveying metals. In such patent it is said:

"In the casting and handling of pig iron as now generally practiced the iron is run into open sand molds called 'pigs.' In this operation the iron runs direct from the furnace into a long sand runner, from which side runners are led off, called 'sows,' which feed the 'pigs.' The sows are cut off from the main runner as the 'pig beds' fill up, but the pigs must be detached from the sows and the latter broken into proper lengths for handling after the iron has set. This breaking off is done either while the iron is still red hot in the beds, making it an exceedingly hard task, or the iron is left to cool, in which case heavy bars and sledge hammers are required to break the pigs off the sows and then break the latter into proper lengths. After this breaking, water is sprayed over the iron, and when it has sufficiently cooled is gathered, loaded on trams, and taken to the yard, where it is piled. The scrap is then gathered from the beds, and the sand is wet down and molded up for another cast. These operations must be repeated from four to six times a day to take care of the product of a modern blast furnace, and they depend

almost entirely upon the brute force and physical endurance of the operators. The product is rough and irregular, and the operation is very wasteful, producing large quantities of scrap, which must be remelted, and carries much sand with the iron, which reduces the value of the iron. Moreover, this method of running the iron from the furnace into the sand is under very poor control. It sometimes runs so slowly that the iron chills in the long runner before it reaches the lower pig beds. At other times the running of the iron is with such a rush that the cores, which form the partitions between the pig molds, are washed away and the beds sheeted. In either case the iron must be taken up from the sand beds and remelted to make it marketable, besides the expense of having to break it up and remove it from the beds. The method above stated has also the disadvantage that the iron, as it runs from the furnace, is frequently of varying quality, and it is of common occurrence that several grades of iron are run from the furnace at the same cast. In this it not infrequently happens that a portion of the pig is deficient in those elements which are necessary to constitute good cast iron—as, for example, silicon and graphite carbon—while another portion has an excess of these elements. In either the iron has less value that it would have if the elements were properly mixed. In addition to all this, much difficulty is often experienced in keeping the slag from running with and contaminating the iron, as well as preventing some of the iron from being wasted with the slag. To avoid the disadvantages and difficulties above stated, and to reduce the cost of the production and improve the quality of the product, is the object of my invention, and which embraces a novel construction of plant, in which the metal is run from the furnace into a large reservoir, so mounted that it can be brought in communication with a series of movable molds, and its contents can be poured into the latter in a continuous and perfectly controlled stream, forming pigs of uniform size, which solidify on their way to the dumping end, where they are automatically delivered into a car or other suitable conveyance."

From the testimony of Scott, who was superintendent of the Isabella furnaces of the Carnegie Steel Company, it appears that he began in 1895 experimenting on the same general lines, but without knowledge of Uehling's work. Before, however, he had evolved any method or practical device, Scott's attention was called to Uehling's patent, then just issued. His account of the matter is, viz.:

"I remember, before we were about to start the machine, I said to H. N. Curry, who has since deceased, 'We ought to get Bakewell & Byrnes to furnish us with all the drawings or all the inventions that have ever been used for the handling of molten metal.' H. N. Curry was sitting across the table from me. He was looking at the Patent Office Gazette, and I had looked at it, looked it over, and here was the Uehling machine showing the conveyor, a man sitting under it, with a hose, and a ladle at the other end. I said to Curry, 'Lord, look at that. You better make some arrangements about seeing Uehling.' And they did; they made arrangements with Uehling, and Uehling came up here and opened an office, and had a draftsman, and had Miller, 'Shoebox' Miller, that is who he had with him, and after Uehling was given the half of the machine and the Carnegie Steel Company the other half, I was there to work it out for the money my company had put in and for my own reputation."

The half of the Uehling patent having been acquired by the complainant, a subsidiary company of Scott's employer, and the other half being held by Uehling and one Miller, it appears Scott was directed to improve on what Uehling had done, and to give Uehling and Miller full access to all he was doing in endeavoring to so improve. As we understand the proofs, Scott was to have no part in any patented improvements thus made in the line of his employment. In that regard, his testimony is:

"I was thus to work it out for the money my company had put in and for my own reputation. The patents gave me no consideration. I was told that Uehling and Miller had access to anything that I did. There is the whole thing."

As a result of further experimentation, certain departures were made from Uehling's device and were embodied in the commercial machine made and sold in large quantities by the complainant. Briefly stated, these changes consisted in three things: First, a well or dam was provided, which received the stream of metal poured from the assembling vessel into the device, a change which stopped the dangerous splashing incident to Uehling's device; second, the molten metal was made to run into the molds longitudinally, instead of transversely, and barriers were placed at the far end of the mold, changes which prevented overflow and clogging of the conveyor mechanism. These changes are embodied in the claims here in issue, and the question whether they involved invention over Uehling we do not, as we said above, here discuss or describe. These changes were embodied in an American patent application made jointly by Uehling, Scott, and Miller in Serial No. 661,002, filed December 7, 1897. In this application Scott united with Uehling and Miller in alleging "that they verily believe themselves to be the original, first, and joint inventors of the improvement in apparatus for casting metal described and claimed in the foregoing specification," and that "our invention is in the nature of an improvement upon the apparatus for casting metal described and claimed in letters patent No. 548,146, granted to Edward A. Uehling on October 15, 1895." This joint application for a joint invention was prosecuted for nearly three years, and this by the same firm of attorneys who were originally named by the three applicants as their attorneys, without any repudiation of their action by Scott. The last entry in this application is dated November 6, 1900, and is:

"Amendment filed October 20, 1900, has been entered. This puts the case for allowance, but it is withheld from issue on account of probable interference of another pending application."

While this joint application of the three patentees was pending, to wit, on February 16, 1898, Miller, one of the applicants, was sent to England to exploit the conveyor there. He is now dead, and Uehling was not called as a witness, so the only witness as to Miller's errand, and his authority, and the joint action and interest of the three, is Scott, who says:

"Q. I understand from you that Mr. Uehling established an office in Pittsburgh and had a draftsman and made drawings in connection with these casting machines. Is that correct? A. Yes. * * * Q. Mr. Miller worked with Mr. Uehling? A. Oh, yes. He was supposed to be the salesman. He was the fellow that went to Europe and tried to introduce it in Europe. * * * Q. Well, now, did you ever talk with Mr. Uehling and Mr. Miller about Mr. Miller going to Europe to introduce the invention? A. I suppose it just naturally came up. We would have to do something about it, naturally. I suppose they may have had a talk with me about going to Europe. I knew Miller did go to Europe to introduce the patents, but I don't remember that he was going to take out any patents. I am not sure about that. I don't know whether he did or not. I never spoke to Miller but once afterwards, after he came back from Europe. Q. I am speaking about before he went to

Europe. You and Miller and Uehling had talked together about his going to Europe, and about the introducing of the invention over there in Europe, had you? A. I may have. I wouldn't deny that, but I can't remember. We were friendly enough while the thing was being put through, and no doubt exchanged ideas. * * * Q. When you knew that Mr. Miller was going to Europe, you knew that he was going there for the purpose of introducing this casting machine into the European market? A. That is what I understood; yes."

It will also be noted that at the time of Miller's visit to Europe, early in 1898, the improvements on Uehling's device had been perfected and put into practical, successful, commercial use. The improvements then having proved successful, the three men having pending a joint application for an American patent, and Miller going abroad to exploit the invention, it is clear to us that sufficient facts and circumstances existed from which it could be fairly inferred that Miller's act in securing patent protection in England for the device came within the scope of their joint enterprise, and the patenting thereof by him was an act caused to be done by Uehling and Scott, and therefore such a prior patenting as the statute contemplated. In view of the lapse of years, of the fact that Miller is dead, that Uehling was not called to deny or disavow Miller's act, and of Scott really going no further than saying he had, after these years, no recollection of having specifically authorized the patenting, we are warranted in regarding the patenting by Miller as one authorized by Scott. And such, indeed, would seem to have been the attitude of Scott himself until this present controversy arose, for in an ex parte patent controversy to which we will hereafter allude, in which there was no one but Scott's counsel to suggest the status, it was assumed the English patent was taken out by Miller in behalf of himself, Scott, and Uehling. Thus, in a Patent Office opinion delivered in that case in 1900, it was said:

"The question here presented is one of law, arising from the fact that this sole applicant Scott jointly with one Uehling caused the invention of the appealed claims to be patented in Great Britain more than seven months prior to the date of his application in this country. The British patent thus jointly obtained is numbered 3,880 and the application therefor was dated February 16, 1898. The patent was sealed August 2, 1898. The pending application was not filed until October 27, 1900."

In view of all the foregoing facts and circumstances, we are of opinion the court below was justified in finding and holding that Scott caused the device of the patent in suit to be patented in England in 1898. Such being the case, and he not having applied for the American patent here in suit until 1900, the case falls within the literalism of the statute, from which there is no escape, unless by a construction which modifies its clear language. This construction the complainant urges by reason of the fact that, some three years after Scott joined in the joint application with Uehling and Miller above referred to, Scott in 1900 applied for the patent here in suit, alleging he was the sole inventor. It is now contended by the complainant Scott's sole patent application should have the benefit of the prior joint application, and hence the seven months limit should not apply. The Patent Office, in granting the present patent, yielded to that contention, holding:

"In order to make the foreign patent a bar against this application, it is necessary to hold that the causing of an invention to be patented in a foreign country by two joint applicants is a causing of that patent by one of the two joint applicants. That being held, and there having been filed in this country an application prior to the foreign patent by the same two persons, it ought to be held that either of these applicants, as respects a sole invention by him of what is disclosed in that prior domestic application, and for the purpose of deliverance from the bar of the statute, caused the prior domestic application to be filed in this country. The same ruling against him which brought him within the bar of the foreign patent should be made in favor of him to put him without that bar. That being so, this applicant is entitled, for this purpose, to the date of filing of the joint application as the date of filing an application in this country for the invention of the later foreign patent, and, the date of the joint application being prior to the date of the foreign patent, that patent is not a bar to the allowance of this application."

We cannot accede to this reasoning. Congress, in passing this statute, was dealing with the broad subject of the relative terms of foreign and domestic patents, and its purpose was to so synchronize the patent system of this and foreign countries that American patents should not monopolize in this country a device which had been freed from patent monopoly abroad. The statute was dealing with inventions and their monopoly, and not with the details of the forms by which individual applicants could secure their individual rights. In this case the device of the patent in suit secured patent monopoly in England in 1898. That patent expired in the year 1912, and after that date the invention was open to public use in Great Britain. More than seven months later Scott applied for the patent in suit, and it was granted in 1905. It will thus be seen that, under the ruling of the department, the whole purpose of the statute is defeated, for in this country the public is subjected to patent monopoly for years after the English public is free to use the invention. And on reflection it will appear that the fact that Scott had joined in an earlier joint application for a patent for the device should not alter the case. Had that application been pursued and granted, that patent would have duly protected the device. But *this joint application* was abandoned by Scott, and his subsequent sole application for a patent was not a division under the original application, but was a hostile and independent application, standing on its own ground. So far as time is concerned, the sole application had to stand on its own independent status, and its sole and only date of application was 1899. Such being the case, it was confronted by the fact that two years before the device in question had been caused by the applicant to be patented in England. Under such facts, we are clear the Patent Office was forbidden by the statute in question from issuing the patent in suit. The court below committed no error in dismissing the bill so far as Mr. Scott was concerned.

[3] It remains to consider the patent to McKennan and Helander. Without entering into the details of this device, we may say that its substantial feature, so far as pig-casting device went, lay in dividing the load, so that, instead of being supported eccentrically on one end of an axle, it rested on both ends. This, of course, reduced friction and wear, and was a more economical and efficient device than the eccentric carrying theretofore in use. But, conceding this, we do not

see that the adoption of a well-understood method of supporting a load at two ends of an axle, where it was theretofore carried eccentrically, involved anything more than the engineering skill, effort, and progress incident to progressive efficiency in a great art, such as blast furnace practice. Without further enlarging on the matter, we limit ourselves to stating our conclusion that we find no error in the court's conclusion that the claims in question in the McKennan and Helander patent did not involve invention.

The decree below is therefore affirmed.

CLIPPER BELT LACER CO. v. E-W CO. et al.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1916.)

No. 2814.

1. PATENTS ⊂=176—CONSTRUCTION—MEANING OF TERMS USED—"INTEGRAL."
The word "integral," as used in a patent claim in describing two parts of a device as integral, is not necessarily used in its narrowest sense, as meaning that they are structurally integral and constitute a single piece, but it may mean that they are permanently held together and are operatively or functionally integral.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 250⅔–252; Dec. Dig. ⊂=176.

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

2. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—BELT STAPLING TOOL.
The Mitchell & Gunn patent, No. 806,556, for a belt stapling tool, claim 1, construed, and in the light of the proceedings in the Patent Office, which indicate its scope, *held* infringed.

3. PATENTS ⊂=157(1)—CONSTRUCTION—MEANING OF WORDS USED.
The meaning of a word as used in patent claims may vary with the context and with the circumstances.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 229, 230; Dec. Dig. ⊂=157(1).]

4. PATENTS ⊂=178—EQUIVALENCY—RANGE OF.
In comparing the rule that a claim limitation must be given effect and the rule that the use of an equivalent does not escape infringement, the question is how far the patentee intended to restrict the range of equivalents.

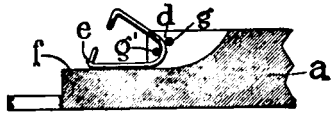
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 254½; Dec. Dig. ⊂=178.]

Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

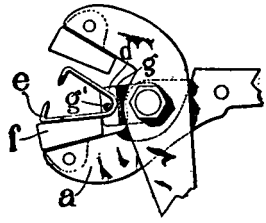
Suit in equity by the Clipper Belt Lacer Company against the E-W Company and others. Decree for defendants, and complainant appeals. Reversed.

The appellant brought suit below, alleging infringement of patent No. 806,556, dated December 5, 1905, issued to Mitchell and Gunn, for a belt stapling tool. The first claim of the patent is: "A tool or appliance for the purposes referred to, comprising a bracket formed with a stepped portion integral with the bracket, and having a series of slits formed in it adapted to receive jointing staples, and also having a hole formed transversely through the intermediate portions of the bracket between the slits, and a pin adapted to

be passed through said hole, substantially as and for the purposes described." Illustrations prepared by complainant, showing the patent in suit and the defendants' goods, are here reproduced.



The Patent.



Defendants' Device.

In the patented device, the part *a* is shown as a base or anvil, evidently intended to rest upon any suitable support. Part of this plate is thicker than the remainder, leaving a square flange or shoulder, as shown. The upper face of the anvil therefore may be said to be stepped. In the raised portion are cut, side by side, a series of slots indicated by *d*. The portions not cut away remain to form partition walls between the slots. Transversely through these walls are bored holes indicated by *g* and *g'*. When the device is used, prepared staples of the form shown by *e* have their closed ends inserted in these slots with their bottoms resting on the stepped down part of the anvil. In this way, a series or gang of these staples is held upright and in position to have a belt end inserted between the prongs. When the series of staples has been so placed, a pin is inserted laterally through the series of holes, *g*, holding the staples against backward motion, and another pin through the series of holes, *g'*, holding them against forward motion. Then, after the belt end is in position, a suitable pressure or blow from above drives both prongs of the staple into the belt from above and from below and leaves the bend of the staple projecting free from the belt end. Another belt end having been similarly treated and each being thus provided with a series of projecting loops, these loops on the respective ends are overlaid and a pin passed through all of them, whereby the two ends become fastened together with a pivoted joint.

Defendants use pivoted jaws, both upper and lower jaws having the face portion pivoted so as to permit slight rocking and insure parallelism in the final pressure in spite of some variation of the belt thickness. Pivoted to the lower jaw—or, rather, carried by the same pivot which carries both jaws—is a forwardly projecting block practically rectangular and marked *d*, the front portion of which is provided with a series of vertical slots having partition walls left between them and pierced transversely by a hole for the reception of the provided pin, *g'*. This block may swing slightly up and down, and it results that when a larger size of staple is used, the bending point of which should be a little higher from the lower jaw, this block and the pin which it carries may rise somewhat, and there comes a feature of adjustability, not found in the patent.

The District Court thought the patent was not infringed and this appeal was taken.

Cyrus W. Rice and Luther V. Moulton, both of Grand Rapids, Mich. (Lewis E. Flanders, of Detroit, Mich., of counsel), for appellant.

W. J. Belknap, of Detroit, Mich., for appellees.

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

DENISON, Circuit Judge (after stating the facts as above). The patented device is very simple. If only one staple is considered the device is seen to be a mere driving guide of suitable shape, and its

patentability would be, at least, doubtful; but the invention consists in providing a series of these, side by side, so that several staples can be driven at once and will be held and driven in that precise position necessary to bring all the extended loops in lateral alignment so that when the two belt ends are united and a pivot pin inserted, every loop will bear on the pin. This might have been done by inserting in the slots and from the front a gang of formers all moving into position simultaneously and over which the staples could have been bent, but the insertion and withdrawing of such formers would have been difficult. Perhaps other means could be devised, but the idea of accomplishing this by a laterally sliding pin, easily inserted after the staples were in place, and easily withdrawn after the staples were driven, was entirely new with the patentees and seems to have been a happy thought solution. So far as this record indicates, no pins or other resisting means had ever been placed in the inner bend of the partly formed staple to serve during the remainder of the forming and during all the driving process, first as a forming anvil, and then as a holding means, and there had never been any device for holding, aligning, forming, and driving a series of staples of this class. We know nothing about the earlier clamping tools to which the patent refers; they may well have been for a single staple. The use of a pin inserted laterally through a series of apertures was known in a device for weaving a continuous wire belt lacing, which, after manufacture, was removed from the forming device and fastened to the belt end by some independent means. This hardly even suggested the use of a pin with a series of separate staples during the driving process.

This case is an appropriate one for giving some force to public use in determining whether the new step taken by the patentees was so simple and obvious that it cannot be called patentable invention. Fastening belt ends together by staples of this kind was known, but there was no tool of this class for doing the work. The patent was followed by a considerable sale, in the exact patented form, and if the invention was of the scope we have supposed, it is embodied in the later forms, which had a very large sale. We conclude that Mitchell and Gunn were entitled to a patent covering the use of this retaining pin in this situation, whereby the series of otherwise independent slots were united into one combination for the purpose and with the result of getting perfect alignment; and the patent which they secured is entitled, so far as the language of its claim will permit, to a range of equivalents accomplishing this measure of monopoly.

The dissimilarity which we observe when such a plate or base as the patent shows is compared with a pair of pivoted jaws is only superficial. Not only is the lower or anvil member of a pair of jaws the plain equivalent of a separate plate having the same resisting and forming functions; but this very pivoted jaw construction was proposed by the patentees as one form of using their invention. When they filed their application, they said that the necessary closing of the staples could be accomplished by hammering from above, or by applying a suitable pressure plate, or by uniting their forming plate with such a pressure plate in the form of pivoted jaws; they say the separate base plate, used alone, is the "simplest form" of their invention. Although

they struck out this part of the description in supposed compliance with Patent Office objections, the original application serves to illustrate that the equivalency of a pivoted upper jaw and other means for pressing the staples home was apparent then as now.

[1] It is plain, also, that the defendants have adopted the substance of the invention, as above analyzed. We come, therefore, to the question whether, when we have invention of considerable merit, and adoption by the defendant of everything that was patentably new therein, the language of the claim has been so limited that the defendants' device is not within the monopoly. The answer to this question depends upon the force to be given to the word "integral," as found in the claim. If it means that the portion of the device upon which the lower leg of the staple rests horizontally, and which resists the downward pressure, and the portion which is raised higher and is slotted, so as to hold and guide the staples vertically, are integral with each other in the strictest sense of the word—i. e., structurally integral—defendant does not infringe. If we speak of two parts of a cast metal structure as structurally integral, we mean that they are cast together in one piece, not that they are made separately and assembled, no matter how permanently. In defendants' device, the lower or anvil portion is cast separately and pivoted to the lower jaw; and its higher or slotted guide portion is formed separately and then pivoted to the same lower jaw, so as to be adjacent to the other co-operating portion. Each has a slight rocking motion on its pivot, and the two parts, therefore, have some motion relative to each other, and they are not integral with each other in the narrowest meaning of the word; but the word does not, necessarily, have only this meaning.

When we say "integral," we may be thinking of structure or we may be referring to performance and function. When two parts, though made separately, are permanently fastened together, so that they work in the same way as if they were a physical unit, they may well be said to be functionally integral. In this sense, they are to be distinguished from two parts which operate independently of each other, and in this sense, defendants' parts may be called integral. The lower part and the raised part are held permanently in the same substantial relation to each other, and neither part can be removed or made inoperative. The guiding slots with openings for the pin are always ready to receive, hold, and position staples resting on the lower part, and during both the forming and the driving of the staples the two parts do not lack the smallest fraction of co-operation which they would have if they were structurally of one piece. True, they have an additional capacity. They have the strength and permanency of association and capacity to co-operate in resisting opposing strains, which would be found if they were made of one piece, and, in addition to this, they have some relative adjustment in one direction only. That this difference in functions is in addition, and not in substitution, is apparent from an exhibit in which these two parts and the jaw which carries them in defendants' tool have all been united rigidly by welding; and this modified device, for the appropriate size of staples, is just as operative as plaintiff's or defendants' unmodified device. It would be an equivalent variation from the patented form to give the raised por-

tion a relative vertical sliding motion, but by means which prevented the two parts from being separated. Such a device, like defendants', would be structurally nonintegral, but for every functional purpose integral. Are there sufficiently compelling reasons for adopting, in this case, the most limiting definition of the word?

[2] We find in the Patent Office proceedings no estoppel which requires the same strictness of construction as if integrality had been the feature upon which applicant and the Patent Office both relied to avoid the cited references and to import patentable novelty into a claim otherwise devoid of it. The claim, as first presented, contained no reference to integrality, and no reference to the hole and pin method of positioning and holding the staples, but claimed broadly a block with a stepped portion, and with the upper portion slotted to receive the staples. This was rejected on reference to Southwick, who had a device for uniting belt ends by driving vertically parallel legged staples, one leg into each end. It had a solid lower plate or die to receive and clinch the lower staple ends, and the upper part, containing the staple guides, was split vertically and centrally at right angles to the plane of the staples. The two halves of this guide were permanently pivoted at one end to the lower plate. In operation, the two belt ends were laid abutting each other on the lower plate. The upper guide halves were then brought together and clamped into position and down on the belt ends, and the staples were then driven by staple plungers, which followed them down through the guides. To meet this reference, applicants inserted in the claim the statement that the lower and the raised portions of their bracket were integral. If the Patent Office had thereupon granted the patent, there would have been a perfect case for applying, as far as it might go, the rule of estoppel; but it did not. It rejected the amended claim, and upon the same reference. Applicants' attorney then insisted upon this distinction, and said:

"It should be particularly noted that, in the present application, the stepped portion of the bracket is formed integrally therewith and is immovable on the base portion. This, I contend, forms a much simpler device than Southwick's and, I think, shows a patentable difference, such as is claimed in claim 1."

The Patent Office again rejected the claim upon the same citation. Thereupon applicants inserted the reference to the transverse holes and pin, and the patent issued. The reasons for the repeated rejections of the claim, after it was amended by inserting the word "integral," were not given by the Patent Office; but it must be assumed that the rejections were because of the familiar principle that there is, normally, no patentable difference between making an article in one piece or in two pieces. In this ruling the applicants acquiesced, and so we find applicants and Patent Office agreeing that the patentability of the invention over the references did not lie in the feature of integrality. It is evident that if the applicants had finally erased this reference to integrality, and left the claim in this particular the same as it was originally, the patent would have issued just the same. Neither is it now sought to give the claim such construction as would cover Southwick and similar devices. They are of a different class from the one in which both plaintiff and defendants are found. They do not contain at all the chief characteristics of the present invention; i. e., trans-

verse holes and the pin for simultaneous positioning. The claim of estoppel by what occurred in the Patent Office must therefore be discarded; and the limiting reference to integrality must be treated both as unnecessary and as voluntary.

Although it cannot be arbitrarily disregarded because it was unnecessary and voluntary, and because it had nothing to do, and was not finally thought to have anything to do, with patentability, yet the defendants' stepped staple holder, which is otherwise the full equivalent of the patented bracket, will not be denied such equivalency merely because the two portions are not, in every sense, integral, if they do, nevertheless, in any fair way, respond to that word. Although the Patent Office proceedings do not raise an estoppel, they do aid in determining the meaning of this limitation. It was intended by the applicants to distinguish from Southwick. In the applicant's device, the base or clinching face portion and the slotted portion were always and permanently held in a certain relation to each other, whereby the slotted portion was always in a position to receive and hold the series of staples ready for driving. From the beginning to the end of the using process, the slotted portion lay at the end of and stepped above the clinching face. It could not be removed from that position, unless one destroyed the tool instead of using it. In Southwick, the upper slotted portions of the tool were necessarily removed from position and swung out of the way to allow the belt to enter, and when they were united to make a complete staple guide, they were clamped in position over the lower plate and held rigidly in reference to each other only by a binding screw or such other temporary adjustment as might be made. Both by the use of the word and by the communications addressed to the Patent Office, applicants showed that they intended "integral" to refer to a device having the characteristics of the former class as distinguished from the latter. They pointed out that, if one of the Southwick members were opened and turned away, it would be inoperative with such a staple as theirs, while, in their device, the slotted portion was immovable on the base portion, and they urged that they were justified in claiming a device in which the vertical slots for holding the staples are "stationary."

Applying this differentiation to defendants' tool, we see that it is to be classified with Mitchell and Gunn rather than with Southwick. In defendants' tool, the base portion and the slotted portion are permanently held together. The slotted portion lies at the end of and rises above the base portion, and is always ready to receive and hold staples. This mutual working relationship of the two parts cannot be changed, unless one destroys the tool instead of using it. The precise fixed lateral relationship of the two parts cannot, in any wise, be varied; such variation as there may be is vertical only. Interpreting the term by the intent thus evidenced, and by its entire immateriality in giving patentable invention, and by the very strong presumption that there could have been no intent to make the patent worthless through a provision that, by an improvement, the patent would be avoided, we do not hesitate to conclude that the two parts of defendants' bracket are integral in that functional sense which is sufficient to bring them within the field to which the patentees confined themselves.

[3] We do not overlook our recent decision (Michigan Co. v. Monarch Co., 233 Fed. 107, —— C. C. A. ——), in which we considered this same word "integral," and held that it referred to, and so limited the patent to, structural integrality. The two cases only illustrate that the meaning of the same word may vary with the context and with the circumstances. In that case, the device comprised two members, and each member, several parts. The claim specified that one part should be integral with its member, and, in defendants' device, this part, constructed separately, was first permanently fastened to, and became a permanent part of, the other member. Such integrality as resulted between that part and that member, with reference to which the patent used the term, came only after both members had been assembled into permanent relationship. There, also, we interpreted the word with reference to the way which it distinguished from the reference which had been cited before the word was inserted in the claim, and, by all the circumstances, we were led to conclude that such ultimate functional integrality as there was did not satisfy the limitation as the applicant had intended it to mean. Somewhat similarly, in Rowley Co. v. Columbus Co., 220 Fed. 127, 134, 136 C. C. A. 81, we considered the limitation implied by the word "independently," and found that there was infringement, even though defendants' device was not independent in every sense, if it was independent to the extent necessary to get the result which the patentee had in mind when he selected the word. His selection—as here—was unfortunate, because his chosen word was capable of too broad a meaning. So the Circuit Court of Appeals of the Second Circuit, in Thacher v. Transit Co., 234 Fed. 640, —— C. C. A. ——, where the limiting force of the word "independent" was under consideration, and, applying the familiar rule that when two meanings are possible, the claim should be interpreted so as to give life to the patent, made a distinction between "independent mechanically" and "independent in action."

[4] The rule that a claim limitation must be given effect, and the rule that the use of an equivalent does not escape infringement, sometimes seem to have an uncertain line of demarcation; but, after all, the question is how far the patentee, by his action and by his choice of words, either did intend or must be deemed to have intended that the range of equivalents should not extend far enough to include defendant's device. We have frequently declined to give to a word or phrase in a claim its prima facie limiting effect, and we have felt at liberty so to decline when there was room for construction, but not when a specific meaning was clearly intended. For recent examples in this court of applying a liberal construction of claim language, so as to include devices which might seem beyond the claim, see National Co. v. Mark, 216 Fed. 507, 513, 133 C. C. A. 13; Schiebel Co. v. Clark, 217 Fed. 760, 771, 133 C. C. A. 490; Frey v. Auto Co., 236 Fed. 916, —— C. C. A. ——, October 3, 1916.

We conclude that defendants infringed the first claim of the patent, and thus it becomes unnecessary to consider whether their backwardly resisting rear slot wall is or is not the full equivalent of the patentees' backwardly resisting pin, as specified in the second and narrower claim.

The judgment must be reversed, and the case remanded for the usual injunction and accounting.

MINERALS SEPARATION, Limited, v. MIAMI COPPER CO.

(District Court, D. Delaware. September 29, 1916.)

No. 331.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF ORE CONCENTRATION.

The Sulman, Picard and Ballot patent, No. 835,120, for a process of concentrating ores known as an air flotation process, was not anticipated and is valid. The process consists in finely pulverizing the ore and mixing it with water and less than 1 per cent. of oil computed on the weight of the ore, and subjecting the ore pulp to such agitation as will distribute the metallic particles of ore throughout the mixture and bring them in contact with bubbles resulting from the introduction of air into the mixture, the bubbles becoming attached to such metallic particles and carrying them separate from the particles of gangue up through the surface of the mixture where they can readily be collected by skimming, overflow, or other well-known means. Claims 1 and 12 *held* infringed, and claim 9 *held* void as too indefinite as to the amount of oil.

2. PATENTS ⟸44—PROCESS—PATENTABILITY.

The fact that the principle of operation of a process is not understood does not negative patentability.

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

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PROCESS OF ORE CONCENTRATION.

The Sulman, Greenway and Higgins patent, No. 962,678, for improvements in ore concentration, being for a process in which the ore particles are caused to float by the introduction into the acidified ore pulp of a small quantity of a mineral frothing agent, *held* valid and infringed.

4. PATENTS ⟸328—INVENTION—PROCESS OF ORE CONCENTRATION.

The Greenway patent, No. 1,099,699, for a process for concentration of ores, *held* void for lack of invention, in view of the process of patent No. 962,678 and of the prior art.

In Equity. Suit by the Minerals Separation, Limited, against the Miami Copper Company. On final hearing. Decree for complainant.

Henry D. Williams and William Houston Kenyon, both of New York City, and Thomas F. Bayard, of Wilmington, Del., for plaintiff.

Thomas F. Sheridan and Walter A. Scott, both of Chicago, Ill., and John F. Neary, of Wilmington, Del., for defendant.

BRADFORD, District Judge. The bill in this suit was brought by the Minerals Separation, Limited, a corporation of Great Britain, against the Miami Copper Company, a corporation of Delaware, charging infringement of three United States process patents relating to ore concentration, owned by the plaintiff, namely, No. 835,120, of November 6, 1906, to H. L. Sulman, H. F. Kirkpatrick-Picard and J. Ballot, No. 962,678, of June 28, 1910, to H. L. Sulman, H. H. Greenway and A. H. Higgins, and No. 1,099,699, of June 9, 1914, to H. H. Greenway, assignor to the plaintiff.

Under the processes shown in the three patents a signal advance has been made in the art of ore concentration in point of simplicity, economy and efficiency, and in their practice large commercial success has been realized. Ore concentration in metallurgical operations is the

separation of the metalliferous or metallic part of the ore from the non-metallic and worthless material, known as gangue, found associated with it in nature, in order that the valuable mineral or metallic particles may be in proper condition for the subsequent process of smelting. The ores to which the process of the patents in suit are applicable are mainly chemical compounds of metal and sulphur, copper sulphides, zinc sulphides, or lead sulphides. Prior to the invention or rather discovery covered by the first patent in suit ore concentration had assumed a number of forms differing from one another in the principle of their operation, but all of them requiring, as do the processes now practiced, as an essential condition of the separation of the mineral from the gangue, the crushing or grinding of the ore into particles of such a degree of fineness as to produce useful results. The ore having been so crushed or ground was subjected to treatment to secure the desired concentration; such treatment varying, according to the particular process employed. In what was known as water or gravity concentration the ore was mixed with water forming the ore pulp, and through shaking or agitation of the pulp by well-known devices the metallic particles, becoming separated from the particles of gangue and having greater specific gravity than the water, sank to the bottom, while the particles of gangue, having less specific gravity than the mineral particles, although greater than that of the water, were subjected to an up-current, not strong enough to prevent the metallic particles from sinking, but strong enough to carry the particles of gangue to the surface where they would escape over the edge of the containing vessel or be otherwise disposed of. Such processes, however, were far from commercially successful, being wasteful of water, of power and of a considerable proportion of the metallic particles in the slimes which were carried by the up-current to the surface and were lost with the gangue. Without pausing at this point to consider other processes of ore concentration disclosed in the prior art, hereinafter discussed, an important and, indeed, vital difference between water or gravity concentration under such processes as those above referred to, on the one hand, and concentration under the processes of the patents in suit, is that while in the former the metallic particles after being separated from the gangue in the ore pulp sank to the bottom, in the latter the metallic particles coated with an extremely thin film of oil, become attached to air-bubbles in the ore pulp, and the bubbles with the attached metallic particles rise to the surface, forming a mineral froth of such coherency and permanency as to afford full opportunity for its removal from the surface for further treatment of the metallic particles. The ore pulp in the process of each and every of the three patents in suit consists of a mixture of water and crushed or pulverized mineral ore, together with one or more other ingredients. In each the agitation of the pulp coupled with the introduction of air into it develops and distributes throughout the mixture small bubbles of air which attach themselves to the metallic particles, to the exclusion of gangue, and rise with them and form a metallic air froth on the surface, readily removable therefrom, the gangue particles sinking to the bottom and being disposed of as refuse.

[1] In the description of the first patent in suit, No. 835,120, for "Improvements in Ore Concentration" it is stated:

"This invention relates to improvements in the concentration of ores, the object being to separate metalliferous matter, graphite, and the like from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue. In the process described in the previous United States Patent, No. 777,273, granted to A. E. Cattermole, an amount of oil varying from four per cent. to six per cent. of the weight of metalliferous matter present is agitated with an ore pulp, so as to form granules which can be separated from the gangue. In the previous United States patent, No. 777,274, granted to A. E. Cattermole and others, a similar method of separation is employed, oleic acid being produced in situ in the ore pulp.

"We have found that if the proportion of oily substance be considerably reduced—say to a fraction of one per cent. on the ore—granulation ceases to take place, and after vigorous agitation there is a tendency for a part of the oil-coated metalliferous matter to rise to the surface of the pulp in the form of a froth or scum. This tendency is dependent on a number of factors. Thus the water in which the oiling is effected is preferably slightly acidified by adding, say, a fraction of one per cent. up to one per cent. of sulfuric acid or other mineral acid or acid salt, the effect of this acidity being to prevent gangue from being coated with oily substance, or, in other words, to render the selective action of the oil more marked; but it is to be understood that the object of using acid in the pulp according to this invention is not to bring about the generation of gas for the purpose of flotation thereby, and the proportion of acid used is insufficient to cause chemical action on the metalliferous minerals present. Again, we have discovered that the tendency for the oily substance to disseminate through the pulp and the rapidity with which the metalliferous matter becomes coated is increased if the pulp is warmed. The formation of froth is assisted by the fine pulverization of the ore, and we find that slime mineral most readily generates scum and rises to the surface, while larger particles have less tendency to be included in the froth. The proportion of mineral which floats in the form of froth varies considerably with different ores and with different oily substances, and before utilizing the facts above mentioned in the concentration of any particular ore a simple preliminary test is necessary to determine which oily substance yields the proportion of froth or scum desired.

"The following is an example of the application of this invention to the concentration of a particular ore. An ore containing ferruginous blende, galena, and gangue consisting of quartz, rhodonite, and garnet is finely powdered and mixed with water containing a fraction of one per cent., or up to one per cent. of a mineral acid or acid salt, conveniently sulfuric acid or mine or other waters containing ferric sulfate. To this is added a very small proportion of oleic acid, (say from 0.02 per cent. to 0.5 per cent. on the weight of ore.) The mixture is warmed, say, to 30° to 40° centigrade and is briskly agitated in a cone mixer or the like, as in the processes previously cited, for about two and one-half to ten minutes, until the oleic acid has been brought into efficient contact with all the mineral particles in the pulp. When agitation is stopped, a large proportion of the mineral present rises to the surface in the form of a froth or scum which has derived its power of flotation mainly from the inclusion of air-bubbles introduced into the mass by the agitation, such bubbles or air-films adhering only to the mineral particles which are coated with oleic acid. The minimum amount of oleic acid which can be used to effect the flotation of the mineral in the form of froth may be under 0.1 per cent. of the ore; but this proportion has been found suitable and economical. If the ore were crushed to ninety mesh to the linear inch, (half of which ore will pass through one hundred and fifty mesh sieve,) the froth may contain about seventy per cent. to eighty per cent. of the metalliferous matter present in the ore. This froth is removed from the pulp by spitzkast, upcast, skimming, draining, or otherwise. After subsidence the oil-coated metalliferous matter removed as froth is separated from any liquid which may have accompanied it and treated with a dilute solution of caus-

tic alkali; which removes the oleic acid in the form of a solution of soap. If desired, the oleic acid used in the first instance may be produced in situ in the pulp by decomposing a dilute soap solution with mineral acid, as described in the previous patent, No. 777,274, cited above. The oleic acid or other fatty acid forming the coating on the metalliferous matter which produces the froth may give rise to insoluble soaps on the surface of the metalliferous matter, if soluble lime, iron, or other salts are present in small quantity during the production or on the breaking down of the froth with alkali. Such insoluble soaps are difficult to remove and are capable of adhering to air and causing flotation, much the same as the fatty acids do. The metalliferous matter which did not form part of the froth (generally the larger particles) remains in admixture with the gangue in the pulp. To recover this, the pulp is distributed in a thin layer on a shaking-table, convex buddle, or the like, whereon the mineral is exposed to a free-air surface, which exposure may be increased by the application of air-blast or air-jets or the like and thereafter brought onto the edge or surface of liquid, whereby the metalliferous matter floats and is separated from the gangue, which sinks, as described in the specification of our previous United States application Serial No. 246,637, filed February 20, 1905. The proportion of mineral recovered in the froth and that recovered by table flotation may be considerably varied; but, generally speaking, the froth will separate the slime mineral while the larger particles are recovered by the latter method."

The charge of infringement of patent No. 835,120 is restricted to claims 1, 9 and 12, as follows:

"1. The herein-described process of concentrating ores which consists in mixing the powdered ore with water, adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter, (amounting to a fraction of one per cent. on the ore,) agitating the mixture until the oil-coated mineral matter forms into a froth, and separating the froth from the remainder by flotation."

"9. The process of concentrating powdered ores which consists in separating the mineral from the gangue by coating the mineral with oil in water containing a small quantity of oil, agitating the mixture to form a froth, and separating the froth."

"12. The process of concentrating powdered ore which consists in separating the minerals from gangue by coating the minerals with oil in water containing a fraction of one per cent. of oil on the ore, agitating the mixture to cause the oil-coated mineral to form a froth, and separating the froth from the remainder of the mixture."

The first patent in suit is for what is known as an air flotation process, in which, owing to the use of a frothing agent in conjunction with such agitation of the ore pulp as will distribute the metallic particles of the ore throughout the mixture and produce bubbles of air and bring them in contact in the mixture with the metallic particles so distributed, the bubbles will become attached to such metallic particles, carrying them separate from the particles of gangue up through the surface of the mixture where they can readily be collected by skimming, overflow, or the use of other well known devices. In this process the frothing agent consists of an oil or other immiscible substance or material of an oily nature, and the bubbles and metallic particles become attached to each other through affinity between the bubbles and the metallic particles enhanced by the coating of the latter with an extremely thin film of oil. The old water processes of ore concentration were in some features gravely objectionable. Under those processes it was desirable to avoid very fine grinding of the ore as being calculated to cause the fine particles containing metal constituting the

slimes to escape with gangue particles and be lost, such fine metallic particles, as before stated, not sinking so readily and quickly as those which were larger. In those processes there were two things to be avoided; first, the crushing or grinding of the ore to such a degree of fineness as to lead to the loss of metallic particles through their escape with gangue particles, and secondly, too coarse a crushing or grinding whereby particles of ore containing both metal and gangue might, with the gangue preponderating, too readily be carried to the surface and lost with the other gangue particles. The defendant admits in its brief that the air bubbles collect the metallic particles, and the oil or other modifying agent in the mixture gives permanency to the mineral froth; that the attraction of the air bubbles for the metallic sulphide particles leads to the separation of those particles from the gangue; that in the absence of oil or other modifying agent in the pulp, facilitating the formation of air or other gas bubbles, no process of ore concentration employing such bubbles is possible; that air flotation may be brought about (1) by introduction of air at the bottom of the mixture or sub-aeration; (2) by beating air into the mixture or supra-aeration, (3) by generation of gas or liberation of air in the mixture. But there is an accentuated difference of opinion between the parties on the point of preferential affinity of oil for metallic particles as compared with gangue. The defendant in its brief states that "in ore flotation processes the oil or other modifying agent does not have any more attraction for the metallic particles than for the gangue." This position, however, is in conflict with evidence on the part of the defendant, with the evidence on the part of the plaintiff, with the documents of the art, and with the result of the physical demonstrations made by both parties in open court. In the Cattermole process patent No. 777,273, it is stated that "the oil has a more or less selective action and will coat the particles of metalliferous matter in preference to the particles of gangue, while the particles of gangue will be wetted by the water," and further, that "if the water which is mixed with the oil is acidulated with mineral, fatty or other acid, the selective action of the oil will thereby be rendered more marked and decisive." So the process of the Haynes British patent, No. 488 of 1860, depends wholly upon the adhesion of the oil or fat to the metalliferous matter in preference to the gangue. In the Everson patent No. 348,157 it is said:

"The discovery which forms the basis of my invention is that metals and metallic substances in a comminuted state will unite with compounds of fats or oils and acids, and that such compounds will not unite with comminuted quartz or other rocky gangue."

In the Fryer Hill Publication of October 30, 1889, it is stated that "the whole system of concentration appears to be based on the well known affinity of the lighter forms of sulphuret and chloride of silver for oils." In the Sulman and Picard patent No. 793,808 it is stated that "the present invention relates to the concentration of ores by separation of the metalliferous constituents * * * from the gangue by means of oils, grease, tar, or any similar substance which has a preferential affinity for metalliferous matter over gangue." In the California Journal of Technology of November, 1903, it is stated

that "the process depends upon the fact that minerals with a metallic lustre, when treated in the form of a wetted pulp, adhere to oil, while earthy minerals do not." In the Kirby patent No. 838,626 it is said:

"The object of this invention is to effect with substantial completeness the segregation of those pulverized mineral particles which have a preferential adhesion for water from those which have a preferential adhesion for a liquid immiscible in water—for example, oil, or a solution of bitumen in kerosene."

So, in the Sulman patent No. 835,143 it is said:

"This invention relates to improvements in the concentration of ores, the object being to separate metalliferous matter, graphite, and the like from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue."

The defendant offered no evidence in contradiction of the above statements in patents and other documents, but on the contrary did submit evidence confirming those statements. Dr. Sadtler, one of the defendant's experts, testified:

"Within recent years it has been found necessary to look further than the simple question of the relative selective action of oil for mineral particles, as contrasted with the effect upon the gangue, or the question as to whether the gangue was more readily wetted than the mineral sulphide particles."

With respect to his statement just quoted he was asked, "Now, as I understand that, you do not mean that you have to discard that selective action of oil for mineral particles, do you?" to which he replied, "No; I do not mean that."

One of the principal questions in the case is whether patentable invention was involved in the discovery that the minute proportion of .1% of oil to the ore was sufficient for commercially successful operations in ore concentration. On this question I had some doubt during the presentation of the case. But that doubt has since been removed. Sulman, Picard and Ballot had for more than two years prior to March, 1905, been interested in conducting ore concentration under what was known as the "Cattermole process," and had been seeking to improve the same in such manner as to render it more efficient and less expensive. There were a number of patents relating to this process, using the term in a general sense, among which were No. 763,259 of June 21, 1904, No. 763,260 of June 21, 1904, and No. 777,273 of December 13, 1904, all to A. E. Cattermole. In the process of each of these patents metalliferous granules are formed and separated from the gangue and fall to the bottom, while the gangue is carried up and away. In No. 777,273 the patentee states:

"The present invention relates to improvements in the separation of the metalliferous constituents of ores and the like from gangue by means of the selective action of oils and certain tar products or similar compounds (all hereinafter referred to as 'oil') on metallic or metalliferous matter. The invention depends upon the application of the following facts: First, when a mixture of powdered metalliferous matter and gangue is treated with oil suspended in water—that is to say, in emulsion—the oil has a more or less selective action and will coat the particles of metalliferous matter in preference to the particles of gangue, while the particles of gangue will be wetted by the water; second, if the water which is mixed with the oil is acidulated with mineral, fatty, or other acid the selective action of the oil will thereby

be rendered more marked and decisive; third, if the proportion of oil is kept within reasonably low limits (differing in different cases, according to the nature of the mineral to be treated and the consistency and nature of the oil) and if the mixture of water, oil, metalliferous particles, and gangue be thoroughly agitated the metalliferous particles which have become coated with oil will adhere together and form granules, which granules, partly by reason of gravity or partly on account of their bulk, as compared with the individual grains of gangue, will offer ready means for separation in an up-current separator, a jig, or other similar appliance. This action is facilitated if the oil before addition to the liquor is brought into the condition of an emulsion in water containing a small percentage of soap or other emulsifying agent. These facts are utilized for the purpose of separating the metalliferous constituents from the gangue of the ore in the following manner: In a suitable apparatus, an example of which will be hereinafter described, the ground or pulped ore is caused to be violently agitated, as by a revolving stirrer, in a mixture of water and oil, the liquor being acid. As the agitation proceeds the particles of metalliferous matter agglomerate together and may be observed in the form of granules, the size of which will depend, among other things, upon the percentage of oil used. This granulation of the metalliferous constituents of the ore affords the means by which at a later stage of the process it is possible to separate the metalliferous material from the gangue, as will be hereinafter particularly described. In practice a continuous process is used—that is to say, water, ground ore, or pulp and oil, preferably emulsified, are continuously fed into a series of vessels, and the products of the agitation are continuously fed into an up-current separator or jig or similar device, which in the case of the up-current separator separates the metalliferous granules from the gangue by allowing them to fall to the bottom of the vessel and to be carried away by a downward stream, while the particles of gangue are carried away by an upward stream. * * * The proportion of oil used depends upon its viscosity, the fineness of the ore and other factors, and the consistency and size of the mineral granules desired. The more oil used the larger, softer, and less numerous the granules. With, say, ten per cent. of oil to the weight of metalliferous mineral a few pasty masses of oil-agglomerated metalliferous mineral matter will generally result. Oil in excess of this may cause all the granules to coalesce into one soft mass. Usually an amount of oil varying from four per cent. to six per cent. of the weight of metalliferous mineral matter present in the ore yields granules of suitable size, consistency, and specific gravity for ready separation from the gangue in the up-current or other apparatus used for classification."

All of the claims of patent No. 777,273 are restricted to a process by which the oil-coated metalliferous matter is agglomerated into granules and the granules by classification separated from the gangue. And the same is true of all the claims of patents No. 763,259 and No. 763,-260, above mentioned. It is also true of both claims of patent No. 777,274, of December 13, 1904, to Cattermole, Sulman and Picard. Shortly before March, 1905, Sulman, Picard and Ballot instructed A. Howard Higgins, one of the plaintiff's experts, to investigate by experiments, certain points in their bearing upon the Cattermole process of granulation. They were as follows:

"(1) Influence of acidity on granulation,
"(2) Influence of temperature on granulation,
"(3) Influence of speed of Gabbett agitation on granulation,
"(4) Influence of ratio of ore to liquor on granulation,
"(5) Influence of metallic salts on granulation,
"(6) Influence of the size of particles and of the influence of slimes on granulation,
"(7) Influence of the amount of oil on granulation."

And the above points were to be determined on "(a) oleic acid; (b) residuum oils." In consequence of his investigations Higgins made

a report March 16, 1905, on granulation as affected by the percentage of oil used, in which he said:

"The effect of diminishing the percentage of oleic acid is to alter the type of oiling; the higher percentages producing granules, and the lower ones froth. 6% of the oleic acid on the *mineral* is sufficient to form good granules without much froth. This froth consists of insufficiently oiled mineral mixed with large quantities of air. As this percentage of oleic acid is decreased, the time for clean up of the sands is increased and more froth is formed. 0.62% oleic acid on the mineral is insufficient to form any granules and nearly the whole of the mineral comes to the surface, on stopping the cone, as froth. 0.2% acts in the same manner leaving the coarse sands with rather more mineral in them. (This is 0.1% on Broken Hill *Ore.*) In all cases the oil has been measured in cubic centimeters and the percentage calculated as though they weighed grams but as the specific gravity of the oleic acid is less than unity this is not the case, and all percentages will be lower than those actually given."

[2] There was, I think, patentable invention in the discovery thus made in March, 1905. Prior to that time there had been no suggestion in the art that the proportion of .1% of oil to ore or of any other fraction of 1% of oil to ore would or might result in successful concentration. Further, the result reached was an utter surprise. Experiments were conducted with reference to the Cattermole process, and all of the Cattermole patents required the formation and sinking of granules containing the metallic particles, and not their flotation. The teaching of that process was that the metallic particles should go to the bottom and that of the process of the first patent in suit that they should go to the top. But while the ascertainment that such a minute proportion of oil would effect a successful concentration of ore through a flotation process was a discovery, it was nevertheless of such a character, viewed with respect to the circumstances under which it was made, as to involve invention and confer patentability. The statutes provide for patenting new and useful inventions and discoveries, but a bare discovery unaccompanied by the exercise of any invention in reaching it or utilizing or reducing it to practice would not justify or support a monopoly in the discovery. In the present case, however, the facts disclose not a bare discovery, but a discovery coupled with invention in usefully applying it. In such cases patents properly may be granted. The defendant lays much stress upon the proposition that the reduction of the amount of oil in the process for the concentration of ore did not and could not involve patentable invention, but only an ascertainment of the proper degree in which oil should be used, which was readily discoverable by any one competent to conduct or superintend a process of ore concentration; and further, that motives of economy would naturally have suggested a reduction in the quantity of oil to the extent of its excess over what was necessary for the accomplishment of the purposes of the process. But if such a reduction was obvious, why is it that it was never made prior to the discovery in question? The fact that economy required the use of the least quantity of oil sufficient for the conduct of the process affords cogent evidence that the feasibility of effecting a reduction was not obvious, but properly the subject of patentable invention. No one to-day understands how the use of only .1% of oil operates to secure

the mineral froth of the first patent in suit. This is testified to by the experts and is admitted on both sides. If the principle of operation of the discovery is insolvable to the human mind to-day it could not have been predicted or anticipated by the human mind in March, 1905. The fact that the underlying principle of the process was not understood by no means negatives patentability. In Diamond Rubber Co. v. Consol. Tire Co., 220 U. S. 428, 31 Sup. Ct. 444, 55 L. Ed. 527, the Court said:

"A patentee may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor. And how can it take from his merit that he may not know all of the forces which he has brought into operation? It is certainly not necessary that he understand or be able to state the scientific principles underlying his invention, and it is immaterial whether he can stand a successful examination as to the speculative ideas involved."

This case is unlike those in which the discovery of the use of an element in a process in the degree insuring the best results is a matter within the competency of those skilled in the art, but, on the contrary, is one where clearly there was patentable invention or discovery in ascertaining the degree. The experiments made with respect to the Cattermole process were initiated with a view to its improvement and the securing of granulation of a higher efficiency. The prosecution of the experiments relating to a sinking and not a flotation process would naturally tend to divert the mind from the contemplation of any process of the latter character. Pertinent to this point is the following testimony of Mr. Higgins:

"I do not remember anything being said about the quantity of oil, except the quantity used was always adjusted to give granulation.

"44Q. In adjusting the oil to give the best granulation, I presume you experimented with different quantities of oil?

"A. Yes, there may have been different quantities, but whenever the granulation became imperfect by reason of the drop in the quantity of oil, the oil was naturally increased."

I perceive no escape from the conclusion that the discovery was patentable. To decrease the amount of oil used in an old process, so long as the characteristic mode of operation and result of such process are preserved, even though in less degree, does not as a general rule involve invention. But when the old mode of operation and its result through a decrease in the amount of oil disappear and a new and different result is disclosed the change ceases to be one of mere degree, and may support a patent monopoly in favor of one whose inventive genius or research has discovered the process. The patentability of the process of the first patent in suit resides in the use of only the minute quantity of oil contemplated by the patent. The reduction of the oil to this quantity effected a change, not merely in the degree, but in the "type of oiling," leading to results which cannot be accounted for on the assumption that a mere change in degree as distinguished from patentable discovery was involved.

The defendant contends that a substantial increase in the amount of oil used will not affect the nature or efficiency of the process of

separation, but will only add to the cost by carrying it on with an unnecessary amount of oil. But this position is in conflict with the decided weight of the evidence and with the showing of the experiments conducted by Higgins at and immediately prior to the time of the discovery. It is satisfactorily proven that the process of the first patent in suit, depending upon the selective affinity of the air-bubbles in the mixture for oil-coated metallic particles, that affinity is strongest when the film of oil surrounding the metallic particles is so thin as to be imperceptible to the senses, and that with any substantial increase in the quantity of oil on the metallic particles the character of the process is changed and its efficiency diminished for some reason as yet unrevealed.

A great advance in the art of ore concentration has resulted from the process of the first patent in suit in the efficient recovery of slimes. With the use of that process ore may be so finely ground as to insure the thorough separation of the metallic particles and gangue, and great savings effected. The profit so saved in a single year from the output of the principal porphyry copper mines, including the defendant's, has been estimated by one of the expert witnesses as more than $17,000,000. In Moore Filter Co. v. Tonopah-Belmont Development Co., 201 Fed. 532, 540, 119 C. C. A. 626, the circuit court of appeals for the third circuit, in dealing with an ore concentration case, said:

"When, therefore, Moore disclosed a process by which such recovery was made enormously profitable, and by which he turned a dump heap, which, under all known processes, machines, and laboratory methods, was worthless, into profitable ore, we are constrained to give little weight to the suggestion that his process was either anticipated, a mere advance incident to the art, or involved no invention."

The defendant sets up as part of the prior art to negative invention United States patent No. 689,070 of December 17, 1901, to A. S. Elmore. This patent was for an "Improvement in separating mineral substances by the selective action of oil," and contains but one claim as follows:

"The process for separating metallic and rocky constituents of ore which consists in mixing pulverized ore with water and mixing the ore and water with oil in the presence of an acid, allowing the mixture to rest whereby the oil having the metallic substances entrapped in it floats at the top of the mixture, and separating the metallic constituents from the oil, substantially as described."

In the description it is stated:

"The selective action of oil has been utilized for separating metallic substances from earthy or rocky constituents of ores. This has generally been done by pulverizing the ore and suspending it in a considerable quantity of water, so as to make a freely-flowing pulp, then mingling with it oil, preferably heavy oil, such as is obtained from petroleum after some of the lighter oils have been distilled from it. When the mixture rests, the oil, with most of the metallic substances entrapped in it, floats at the top and is separated from the rocky or earthy matters, which are run off with the water as tailings. The oil is afterward separated from the metallic substances, usually by centrifugal action."

The patent nowhere states the amount of oil which is to be used or the ratio between the weight of the oil and the weight of the ore or

its metallic content. It, however, clearly appears from the evidence that the process was what has been termed a "bulk oil process," employing from one to two and a half or three tons of oil to each ton of the pulverized ore to be treated. By reason of the large amount of oil used and the loss of a considerable proportion of it in operation the process was expensive and unsatisfactory. There was but a small recovery from the slimes, probably for the reason that the extremely minute metallic particles contained in them did not yield to centrifugal action employed in the separation as readily as the larger particles. The Elmore bulk oil process was litigated abroad in Minerals Separation Ltd., v. British Ore Concentration Syndicate, Ltd., which was an appeal to the House of Lords by the plaintiff herein from a judgment of the Court of Appeal, holding that it had infringed the A. S. Elmore British patent No. 11,307 of 1901, corresponding substantially with United States patent No. 689,070 of December 17, 1901, to A. S. Elmore. The judgment of the Court of Appeal was reversed by the House of Lords. The opinions delivered to that house differed with respect to the validity of the A. S. Elmore patent, but it is to be gathered from the opinions so delivered that the plaintiff herein was held by the House of Lords not to have infringed. Lord Shaw said:

"The question is, have the appellants infringed this patent? In order to determine this question it is necessary to look at the patent under which they work, viz., 7,803, of 1905, for 'Improvements in or relating to ore concentration' granted to Sulman, Picard and Ballot. The complete specification is dated 2d June 1905. My Lords, one cannot peruse that specification without being struck by the fact that at all events the mixture to which the application of acid was to be made was of a very different character to that described in the Elmore patent. And the striking difference occurs in this, that the oil in the appellants' mixture, instead of being from one to two-and-a-half tons per ton of ore to be treated is only from two to three pounds per ton of ore to be treated.

"The next contrast is this. As already shown the natural law relied upon in the Elmore patent was the lesser specific gravity of oil which, operating in bulk upon the mineral particles, would carry them to the surface of the mixture when it rested, and thus effect the separation aimed at, viz., the separation of those mineral particles from the rest of the ore. But it would have been absolutely impossible for such flotation and separation to have occurred with the minute fraction of oil used in the appellants' process, however much acidulation had been employed. * * * How then was the flotation of mineral particles to the top of the mixture, and thereby the method of separation of these from the gangue to be accomplished? My Lords, it is in the answer to that that four-fifths of the specification and claim of the appellants consist. That is to say, they are not promoting a method of separation which had before been described, but they are engaged upon a new method of separation. Instead of relying upon the lesser specific gravity of oil in bulk they rely upon the production of a froth by means of an agitation which not only assists the process of the minute quantities of oil reaching the minute particles of metal, but forms a multitude of air cells, the buoyancy of which air cells, forming around single particles of the metal, floats them to the surface of the liquid."

The process of the first patent in suit was also considered in Ore Concentration Company, Ltd., v. Sulphide Corporation, Ltd., in the Supreme Court of New South Wales, and on appeal in the Privy Council of Great Britain. The action in the court below was brought by the owner of and a licensee under British patent No. 10,001 of 1900,

to F. E. Elmore, and British patent No. 11,307 of 1901, to A. S. Elmore, to restrain the infringement thereof by a licensee of the plaintiff herein conducting the process of the first patent in suit. The suit was abandoned at the trial with respect to the F. E. Elmore patent, and was dismissed by the Court below as to the A. S. Elmore patent, July 24, 1911. On appeal the Privy Council affirmed the judgment of the Court below, March 6, 1914. The case turned on the questions of the validity of the A. S. Elmore patent and its infringement by the licensee of the plaintiff herein, no reference being made to the first patent in suit or the corresponding British patent, although the novelty of the process was recognized. With respect to the general nature of the A. S. Elmore process and the alleged infringement by the process of the first patent in suit it was said by Lord Parmoor, who delivered the judgment:

"The patent commences with a narrative statement of the method by which the selective action of oil has been utilised to separate metals and metallic substances from gangue. This is said to be generally done by pulverising the ore and suspending it in a considerable quantity of water, so as to make a freely flowing pulp, and then mingling it with oil, preferably heavy oil. The effect is that most of the metallic substances are entrapped in the oil, and when the mixture rests, the oil floating on the top is separated from the gangue which is run off with the water as tailings. * * * Unless the oil used has sufficient tenacity to retain the entrapped metallic particles separation would not be effected. The oil is afterwards separated from the metallic substances usually by centrifugal action. * * * The real difficulty which their Lordships have to determine is whether the respondents in the process of separation which they employ, entrap or coat and hold or carry the metallic particles in oil, using oil as the selective agent. The respondents deny that they in any way use the appellants' invention, and say that their process is essentially distinct, and that its successful operation depends on the law of surface tension. It is not incumbent on the respondents to explain the law on which the success of their process depends. * * * Apart from any question of theory, the respondents use oil in their process under conditions which make it almost impossible to entrap or coat and hold the metallic particles by the selective agency of oil. The respondents use a thin oil at a temperature of 120° Fahr., the quantity is minute, not more than 2 or 3 pounds to a ton of ore, or about 2 or 3 pints of oil to 10,000 pints of water; the resulting concentrate is practically free from oil and no mechanical contrivance to separate the oil from the metallic particles is required or used."

The judgment concluded with the statement that "their Lordships find that the respondents do not either directly or indirectly use the invention claimed by the appellants, but a process essentially distinct, and that there is no infringement." While, as already stated, the validity of the first patent in suit was not before the court in either of the British cases, but the question of infringement by the practice of that process, the opinions delivered in the House of Lords, as well as the decision of the Privy Council in declaring that the process covered by the first patent in suit was one "essentially distinct" from the Elmore process, are entitled to much weight. It is too clear for further discussion that the bulk oil Elmore process in no way affects the validity of the first patent in suit.

The defendant sets up as an anticipation of the first patent in suit the Haynes British patent No. 488 of 1860. I am satisfied that the Haynes patent is not an anticipation, and, equally, that as part of the

prior art it cannot operate to negative invention. In the first place, aside from all other features, the patent does not limit the quantity of oil, fatty or oleaginous matter to the oil proportions of the first patent in suit, and, secondly, the patent does not require agitation of the pulp other than such as may result from the passage of the same into a "triturating machine." And it appears from the testimony of Dr. Sadtler that without the use of some means to produce agitation not mentioned in the patent its process will not produce mineral froth flotation. Dr. Liebmann states that the process is "quite impracticable" and "quite impossible," and further testifies:

"Q. 10. And what have you to say as to whether or not you find, in this patent, a disclosure of a process for producing a froth by agitation? A. I have never found one. I should add to that, I think it is impossible to find one with the data given in this patent."

In the judgment of the Privy Council reference was made to the Haynes British patent as follows:

"It was known many years prior to 1901 that oil, by its affinity to metal, operated to differentiate metal from gangue in a mixture of oil, water and ore. Haynes's patent, published in 1860, describes a method of separation of metal from gangue by the use of an agent containing fatty or oleaginous matter. This document is, however, not more than an indication of the date at which attention was first directed to the affinity of oil for metals."

Two patents to Edmund B. Kirby, No. 809,959 of January 16, 1906, applied for December 14, 1903, for an "Improvement in process of separating minerals," and No. 838,626 of December 18, 1906, applied for December 17, 1903, for an "Improvement in separating tanks," are relied on by the defendant as part of the prior art. The process patent recommends from 25% to 75% of oil to the ore, stating that "preferably the pulverized ore is mixed with three to five times as much water, by weight, and to this is added a sufficient amount of the kerosene-bitumen solution, excellent results being obtained by using one-fourth to three-fourths as much by weight as ore." It is fair to assume that Kirby would not have specified oil to the extent of from 25% to 75% on the weight of the ore had he deemed it practicable or possible to do with less. An examination of the process patent and of the evidence relating to it shows, I think, that the patent contemplated an oil buoyancy flotation in contradistinction to the metallic air froth of the first patent in suit, and was for a different process, not suggestive of that of the latter, with its economical and successful use of a fraction of only one per cent. of oil. The Kirby apparatus patent No. 838,626 is for a separating-tank intended for use in the Kirby process. In view of what has been said touching that process the apparatus patent does not call for discussion.

The defendant sets up as part of the prior art a number of patents granted to Alfred Schwarz, but offered in evidence only three of them, No. 807,501 of December 19, 1905, applied for April 19, 1905; No. 807,502 of December 19, 1905, applied for May 27, 1904; and No. 807,503 of December 19, 1905, applied for May 27, 1904. All of these patents relate to the concentration of ores. Although offered and admitted in evidence no testimony has been adduced by the defendant in

explanation of any of them, nor have counsel for the defendant made any argument in support of them. It is unnecessary to consider patent No. 807,501 as owing to the fact that the invention of the first patent in suit was made early in March, 1905, and before the date of application of the former patent, that patent cannot be treated as part of the prior art with respect to the first patent in suit. There is no evidence that any process under either patent No. 807,502 or patent No. 807,503 was carried on as part of the prior art, and evidently each of them requires the use of a larger quantity of oil than the minute proportion required by the first patent in suit; the former stating that "the selective agent being added in sufficient quantity to thoroughly saturate the ore and to make a thick pasty mass," and "the metallic constituents adhering to and being entrapped in the resinous and oil or fat compound will be buoyed up thereby and rise to the top," etc., and the latter, that "the ore is mixed with sufficient of the selective material to make a thick pasty mass, the agitation being continued long enough to bring the selective material into intimate contact with all portions of the ore," and "the mass is then allowed to subside, when the selective material, with the entrapped metallic constituents of the ore, will rise to the top," etc. There is, I think, no evidence or legitimate inference to warrant the conclusion that either of these patents can affect the validity of the first patent in suit.

The defendant also relies upon patent No. 348,157 of August 24, 1886, to Carrie J. Everson, for an "Improvement in processes for concentrating ores," as part of the prior art. The patent specifies two methods of conducting the process. It is admitted that the first method requires oil amounting to 5% on the weight of the ore. With respect to the second method it is stated in the patent description:

"I have found three fluid drams of oil abundant for properly moistening two ounces of heavy ore, or in the ratio of about a barrel of oil to the ton of ore, the amount being, of course, variable with the relative bulkiness of the ore."

Dr. Liebmann testifies that the oil used in the process was 16.5% of the weight of the ore, and Dr. Sadtler says that the amount of oil so used was from 16% to 17% of the weight of the ore. The Everson process has never been used commercially and Dr. Liebmann states that it could not be so used; that "it is not a process for large scale operations"; but that there was a possibility of its application to gold and silver in small quantities. Dr. Sadtler expresses no opinion upon the applicability of the Everson process to the concentration of ore on a commercial scale, and states, in substance, that he had never practiced the Everson process in either of the methods disclosed in the description of the patent. The defendant argues that in the Everson process the concentrate "could not possibly float by the bulk oil flotation principle, for the simple reason that the amount of oil was insufficient for that purpose", that with the use of only 17% of oil no bulk oil flotation is possible; and that the process "could not have resulted in surface tension flotation, skin flotation or film flotation, so-called, for the simple reason that the conditions for that form of flotation were absolutely wanting." But this contention fails, I think, to negative patentable

invention in the process of the first patent in suit. I am not satisfied by any experiment or demonstration made in the case that the process described in the Everson patent would produce the economical and efficient concentration secured by the process of the first patent in suit. Certainly, were there nothing else, a reduction in the quantity of oil from 17% or even 5% to a fraction of 1% on the weight of the ore, under circumstances similar to those attending the discovery of the sufficiency of that minute proportion for successful metallurgical operations would be sufficient to confer patentability.

An analogy is furnished in Loom Co. v. Higgins, 105 U. S. 580, 26 L. Ed. 1177, where Mr. Justice Bradley, delivering the opinion of the court, said:

"It was certainly a new and useful result to make a loom produce fifty yards a day when it never before had produced more than forty; and we think that the combination of elements by which this was effected, even if those elements were separately known before, was invention sufficient to form the basis of a patent."

The defendant also relies upon a newspaper article taken from the Daily Herald Democrat, of Leadville, Colorado, October 30, 1889, referred to as "Fryer Hill Publication," and an article taken from the Engineering and Mining Journal of November 10, 1890, referred to as "Criley and Everson Publication," as part of the prior art. It appears that both articles refer to tests or experimental applications of the process of the Everson patent, with some slight modifications. Neither of these articles contains anything rendering it necessary to add to what has been said in direct connection with the Everson process.

Much stress is laid by the defendant upon an article in the California Journal of Technology of November, 1903. This article was prepared by three young men, students in the class of 1903 in the mining department of the University of California, and is entitled "Experiments on the Elmore process of ore concentration." This article is suggestive, but cannot, I think, be justly treated as negativing the exercise of invention with respect to the process of the first patent in suit. The experiments were laboratory tests and did not disclose or suggest the idea that such a minute quantity of oil as one-tenth of one per cent., or any fraction of one per cent., on the weight of the ore could be efficiently and successfully employed in ore concentration. There were a number of tests with respect to the concentration of molybdenite ore with percentages of oil to ore running from 2.1% to more than 100%, with the result that the highest extraction of molybdenite sulphide was obtained by the use of 8.9% of oil; the extraction in that case being 75% as against an extraction of 43.5% obtained by the use of 2.1% of oil. The teaching of these tests was that 2.1% of oil, was less efficient than the use of 8.9%, and the article as a whole, far from suggesting the possibility of the use of only a fraction of one per cent. of oil points to an opposite conclusion.

The defendant contends there is nothing new in the employment of only a fraction of one per cent. of oil relative to the weight of the ore in the process of the first patent in suit, for the reason that, as alleged, an equally small proportion of oil was used in the process of the Catter-

mole Patent No. 777,273, mentioned in the first patent in suit. The Cattermole patent mentions from four to six per cent. in weight of oil to the weight of the metalliferous mineral present in the ore, and consequently, under the Cattermole process the amount of oil to be used depends upon the weight of the metalliferous mineral, and not upon the weight of the entire ore, and there is evidence to the effect that the larger part of the copper ores mined and concentrated in this country contain about two per cent. of copper. Hence the argument is made by the defendant that the weight of oil employed in the Cattermole process is only from .8% to .12% of the weight of the copper contained in the ore, and that any proportion of oil less than one per cent. of the weight of the ore comes within the quantity mentioned in the first patent in suit, namely, "a fraction of one per cent. on the ore." This contention ignores the following statement in the description of the Cattermole patent now considered:

"In certain cases, as where but little mineral is present in the ore, to increase the nucleating or granulating factor pulverized mineral matter obtained in a previous operation or other matter having an affinity for oil from a different source may be introduced into the ore, or a portion of already granulated and separated mineral matter may be returned to maintain the necessary amount of mineral in the ore under treatment."

It is evident that the weight of "pulverized mineral matter" introduced to "maintain the necessary amount of mineral in the ore under treatment" is, for the purpose of determining the necessary amount of oil, to be added to "the weight of metalliferous mineral matter present in the ore." Such must be the meaning of the patent or it is insensible. And this accords with the requirement in the seventh claim of "adding particles of material having an affinity for oil to assist in the formation of granules of oil-coated particles." The defendant has made no demonstration, as might have been done, of the amount of oil required by the Cattermole process in its application to lean copper ores, but indulges in speculation and conjecture on that point. The defendant contends that in the Cattermole process of the above patent there were necessarily two degrees of agitation of the mixture; the first being violent and the second gentle. On the assumption that two degrees of agitation were required in the Cattermole process; first, violent agitation of the mixture in order to bring the oil into intimate contact with the mineral particles; and, secondly, the subjection of the mixture to a slower or rolling form of agitation to cause the agglomeration of the oiled metalliferous particles and the formation of granules, it by no means follows that with the omission of the second step the mineral froth of the process of the first patent in suit would have been formed, had there been in the mixture oil in excess of the proportions contemplated by that patent. And if it be further assumed that the mixture containing oil and other elements in Cattermole proportions can first be violently agitated so as to produce a froth and then slowly agitated so as to produce granules, and again violently agitated so as to destroy the granules and restore the froth, and so on by alternation, and that, the mixture remaining the same, the production of froth on the one hand, or granules on the other, is simply a matter of manipu-

lation, it is not to be inferred that the froth so formed with Cattermole proportions of oil would be the froth of the first patent in suit. Dr. Liebmann, for the purpose of distinguishing between the Cattermole process and that of the first patent in suit, during the trial conducted two experiments, identical in their nature, save that in one a larger amount of oil was used than in the other. In the former case granules were formed which sank; and in the latter a mineral froth was formed, the agitation and other factors being the same. 3.6% of oil and .1% of oil were respectively used in the two experiments. Both were performed in the same apparatus with similar materials and manipulation. These experiments served to show that the variation in the amount of oil used, other things being equal, may result in the formation of the mineral froth of the first patent in suit, or in the formation and sinking of the granules of the Cattermole process. In this connection it is to be observed that the Cattermole patent in its descriptive portion states:

"With certain ores it may be preferable to use in some stages of the process a rolling form of agitation, as in cylinders or barrels, to obtain good granulation of the mineral."

The description of the patent nowhere specifies that its process is necessarily dependent upon two degrees of agitation, one violent and the other slow or rolling, and in none of the seven claims of the patent, with the exception of the fifth, is such a requirement mentioned or suggested. In that claim only is there a provision for "further agitating the mass to increase the size of the granules," and even in that claim there is no suggestion of a difference in degree between such further agitation and the agitation which has preceded it. For the foregoing reasons I think that the contention of the defendant that the quantity or proportion of oil used in the Cattermole process was not materially in excess of that used in the process of the first patent in suit, and that, not a difference in the quantity of oil, but a resort to two degrees of agitation was essential to the formation of Cattermole granules, cannot be sustained.

The defendant also relies upon two patents granted to Alcide Froment; one of them being British patent to Henry Harris Lake, communicated by Alcide Froment, No. 12,778 of 1902, and the other an Italian patent to Froment, No. 63,723, the specification of which is dated May 20, 1902. The Froment Italian patent was in the French language, and there is an English translation in evidence. The process covered by this patent was entitled "A process for enriching sulphide and copper ores, lead ore and blende by gases combined with fatty bodies." The inventor stated as phenomena which had been studied by him and served as the basis of the patented process the following:

"1. When the natural sulphides reduced to fine powder are moistened by a fatty substance, they have a tendency to unite in spherules and to float upon the surface of water.

"2. This tendency is simply retarded by the specific weight, and opposed by the gangue which imprisons the moistened sulphides in its pulverulent mass.

"3. If a gas of any kind is generated in this mass, the bubbles of this gas become covered with an envelope of sulphides and thus rise readily to the surface of the liquid where they form a kind of metallic magma.

"4. The formation of these metallic spherules is singularly active, if the gas is in a nascent state."

The weight of the evidence is that the quantity of oil to ore necessary for the conduct of the process specified in the patent would amount to from 12% to 15% of the weight of the ore, and this seems to accord with the statements in the patent that a "kind of metallic magma" is formed and that "the metallic spherules pressed one against the other, will become grouped in a magma clearly separated from the remainder of the liquid." These statements, I think, are inconsistent with any idea that under the Froment process the metallic particles were coated with oil of the extreme thinness characterizing the process of the first patent in suit; the thickness of the film in that process, according to scientific evidence, being only one one hundred thousandths part of an inch and imperceptible to the senses, as compared with a thickness of from sixteen to thirty-two one hundred thousandths of an inch in the Cattermole process and from eighty-eight to two hundred and forty one hundred thousandths of an inch in the Froment process. The British Froment patent is in substance the same as the Italian patent and in neither of them does it appear that there was present in the Froment process the very minute quantity of oil of the first patent in suit. The Froment British patent was assigned to Ballot, one of the patentees in the first patent in suit, November 17, 1903, for the benefit of the plaintiff when organized, and in the assignment Froment covenanted that he would forthwith forward or hand to the purchaser the "plans and diagrams of the plant relating to the said invention with a full description of the working of the process." Pursuant to this covenant there were transmitted to Ballot plans and diagrams and a paper, in evidence, containing a "description and instructions for the concentration of ores" under the Froment process. It is dated December 29, 1903. The instructions recommend the use of oil in proportions varying from 1% to 3½%, according to the different percentages of metal in the ore. Notwithstanding the low percentage of oil mentioned in the Froment description, I have reached the conclusion that it contained no disclosure of the process of the first patent in suit. The evidence on the subject of the Froment description is voluminous and conflicting, but there are facts and circumstances which have satisfied me that the process of the first patent in suit was not discoverable from that description by men skilled in the art of ore concentration. Dr. Liebmann states that the Froment process as disclosed in the patents as well as the Froment process as disclosed in the description are "incapable of being carried out successfully." There is uncontradicted evidence that Sulman, Picard and Ballot, after the assignment of the Froment British patent and the receipt of the Froment description and instructions, made persistent efforts to operate the Froment process successfully, but only met with failure, and that the model apparatus sent by Froment to Ballot was treated as worthless and discarded or "scrapped." Sulman, Picard and Ballot were scientific men of large experience in the art of ore concentration, and had the Froment patents or description disclosed or suggested the process of the first patent in suit, it is to be assumed that they would

have utilized it instead of prolonging their attempt until March, 1905, to perfect granulation under the Cattermole process. The fact that they did not utilize it affords the strongest evidence that the Froment description did not suggest a process in which the minute quantity of oil required by the first patent in suit could be successfully used in ore concentration.

The defendant relies on patent No. 793,808, of July 4, 1905, to Sulman and Picard, for "Improvements in or relating to ore concentration." The patent states:

"The present invention relates to the concentration of ores by separation of the metalliferous constituents and graphite, carbon, sulfur, and the like from the gangue by means of oils, grease, tar, or any similar substance which has a preferential affinity for metalliferous matter over gangue. According to this invention we utilize the power which is possessed by films or bubbles of air or other gas of attaching themselves to solid particles moistened by oil or the like."

Two methods of carrying out the invention are stated. The first is as follows:

"According to one method of carrying out our invention suitably-crushed ore is suspended in water. To this suspension a proportion of oil, grease, or tar (hereinafter referred to as 'oil') is added and duly mixed with the mass by any suitable means in quantity insufficient to raise the oiled mineral by virtue of the flotation power of the oil alone. A suitable gas is now generated in or introduced into the mixture, such as air, carbonic-acid gas, sulfureted hydrogen, or the like. For example, bicarbonates or carbonates, either soluble or insoluble in water (preferably the latter) or easily-decomposable sulfids and the like may be used with acid solution. In such cases, if desired, the addition of acid may be made to the mixture after the addition of the gas-producing reagent. In the case of solutions containing free alkali the addition of acid sufficient to neutralize this must be made before the gas is produced. If desirable, gaseous bubbles may be produced by electrolytic methods or by means of various other known reactions."

The second method is stated as follows:

"According to another method of carrying out this invention the oil is not added alone; but the pulp is submitted to the action of a current of air or other gas bubbles, the air or other gas being first suitably charged either with the vapor of a volatile oil, such as petroleum of low boiling-point, or with the spray of any other suitable volatile or non-volatile or fixed oil or the like. The oil may be sprayed or reduced to a state of such fine division that minute globules of the same can remain temporarily suspended in an air or other gas current by the use of any suitable spraying or atomizing device and the air-current introduced into the ore-pulp, preferably at the bottom, by means of a pipe or pipes provided with suitable perforations or by other suitable contrivance. The minute oil globules or the condensed vapors or volatile oils attach themselves to the metalliferous particles in preference to the gangue."

The patent then states:

"The oiled metalliferous particles resulting from either of the processes above described have the power of attaching to themselves with a greater comparative strength than the gangue particles the films or bubbles of gas which exist in the mass and are thus raised to the surface of the liquor by gaseous flotation. They can then be removed by skimming or other suitable means. The gangue particles unwetted by oil or grease are not floated up with the oiled mineral particles, and thus in the main remain at the bottom of the vessel containing the mixture. The oil can then be removed from the oiled mineral by any suitable known means."

There are certain features in this process as described similar to features in the process of the first patent in suit. The amount of oil coating the metallic particles being insufficient to raise them through the flotation power of the oil alone, gaseous bubbles, whether generated in the mixture, or introduced into it through the perforated spiral coil, attaching themselves to the oiled metallic particles, rise to the surface with those particles, so as to be removed by skimming or other suitable means, the gangue particles remaining in the main at the bottom of the vessel containing the mixture. This process patent, issued to Sulman and Picard upon an application filed October 5, 1903, affords cogent circumstantial evidence of the patentability of the process of the first patent in suit. I have been unable to read the description of the patent immediately under consideration without reaching three conclusions; first, that Sulman and Picard had conceived an idea, though imperfect, of an air flotation of the metallic particles; secondly, that they had no conception whatever of the possibility of conducting such a process with the minute quantity of oil specified in the first patent in suit; and thirdly, that they contemplated the use of a very much larger proportion of oil. In view of the fact that both patentees in No. 793,808 were two of the three patentees of the process of the first patent in suit, it is so improbable as to amount to a moral impossibility that for nearly a year and a half after the filing of the application for patent No. 793,808 they should have devoted their attention and efforts to the solution of the problem of the proper quantity or proportion of oil to be used in securing improved granulation in the Cattermole process, and have been astonished at the making of the discovery in March, 1905, if they had recognized or believed that an economical and efficient process of ore concentration could be carried on by the use of oil amounting to only a fraction of one per cent. Any further discussion of patent No. 793,808, I think, is unnecessary.

I have found nothing in the prior art to anticipate the process of the first patent in suit or to negative invention. Objection has been made that the disclosures of the patent are not sufficient, in that the application of the process to different ores necessitates some difference in treatment involving a variation in temperature, or in the amount of acid or of oil, and the patent omits to specify the degree or amount of such variation with respect to the treatment of the different ores. But to require of an inventor such a specification would be to demand an impossibility. The patent recognizes that different ores may require a different treatment. The description states:

"The proportion of mineral which floats in the form of froth varies considerably with different ores and with different oily substances, and before utilizing the facts above mentioned in the concentration of any particular ore a simple preliminary test is necessary to determine which oily substance yields the proportion of froth or scum desired. * * * The minimum amount of oleic acid which can be used to effect the flotation of the mineral in the form of froth may be under 0.1 per cent. of the ore; but this proportion has been found suitable and economical."

And claims 1 and 12 mention oil amounting to "a fraction of one per cent." A close or exact adjustment of quantities and proportions

of oil in the treatment of different ores within the limits prescribed in the patent is a matter calling, not for the exercise of inventive genius, but for the skill of the metallurgical engineer conducting or superintending the operation. In Mowry v. Whitney, 14 Wall. 620, 20 L. Ed. 860, the court said:

"The specification, then, is to be addressed to those skilled in the art, and is to be comprehensible by them. It may be sufficient, though the unskilled may not be able to gather from it how to use the invention. And it is evident that the definiteness of the specification must vary with the nature of its subject. Addressed as it is to those skilled in the art, it may leave something to their skill in applying the invention, but it should not mislead them."

Some embarrassment in the treatment of this case has been caused by the use of different adjectives and descriptive phraseology as applied to the same thing. If a patent for a process of ore concentration, or any other process, clearly sets forth the ingredients and the practical steps to be observed in conducting it the misuse of terms as applied to the operation of natural laws involved in the process is immaterial. In the administration of justice it is the aim of courts to deal with substance and not to be influenced by mere form not calculated to mislead as to substance; and where a material and substantial thing is plainly identified in the patent claims and description a mistaken misnomer is harmless and negligible. Inventors are not required to understand the natural laws under which new and useful results are obtained from ingredients, elements, apparatus and manipulation requisite for the conduct of the process. There are occult laws, unknown and inexplicable, to which tangible results must be attributed. In the nature of things an inventor, so long as he clearly sets forth the practical means and steps for securing those results, does all that the law requires or can reasonably be expected of him. So, it is unimportant that to the same thing one name may be applied by one person and a different name by another, the identity clearly appearing. The truth of this statement has been strikingly exemplified in this case in the language of patents and other publications, judicial decisions, the oral testimony and the arguments of counsel.

During the trial a large number of experiments were made for the purpose of illustrating ore concentration processes described in patents and other printed publications of the prior art. Such experiments are illuminating and helpful, or deceptive and misleading, according to the conditions under which they are performed. As a general rule, in such experiments processes of the prior art should be illustrated by means of apparatus of the prior art in which such processes were conducted at or about the time of invention and under the conditions then understood and observed. To construct apparatus long after, and in view of subsequently acquired knowledge, in order to show a prior process tends to produce embarrassment and confusion touching the nature and operation of the process inquired into. In Naylor v. Alsop Process Co., 168 Fed. 911, 94 C. C. A. 315, the Circuit Court of Appeals for the Eighth Circuit said:

"An expert, however, cannot take a process patent which has never been applied industrially and work the process in his laboratory and discover therefrom something which is not disclosed on the face of the patent, and

then transfer that experience back to the time of the patent, and make it a part of the prior art for the purpose of defeating a meritorious invention."

In Schmertz Wire Glass Co. v. Western Glass Co. (C. C.) 178 Fed. 977, the court said:

"By using twentieth century magnifying glasses, a nineteenth century method has been found efficient, which never was so before, and the immensely important point of view of an advanced art is thus unfairly used to discover an original conception never acted on or made anything of, and which never had any practical or beneficial existence."

The material question for the court is not whether any given apparatus is capable, under manipulation employed in view of existing knowledge, of carrying on the prior process inquired into, but whether the process was carried on as part of the prior art, and, in case of an ore concentration process, by way of illustration, under what conditions as to ingredients, strength and extent of agitation and other essential factors; and only so far as those conditions are reproduced and faithfully observed in demonstrations in court, due allowance being made for the difference in the requirements of mill operations, is the experiment entitled to probative force. The difference between the conduct of the process in the mill and the necessarily interrupted or broken character of the process as disclosed in experiments in court and laboratory tests in subsequently constructed apparatus must be borne in mind in determining the weight to be given to such experiments or tests.

On the whole I am satisfied that the first patent in suit must be sustained as to claims 1 and 12, but not as to claim 9. The two former are definite, specifying and limiting the amount of oil to be used; claim 1 mentioning "a small proportion * * * amounting to a fraction of one per cent. on the ore," and claim 12 "a fraction of one per cent. of oil on the ore." Claim 9 mentions "a small quantity of oil." This is so indefinite as to render the claim void, unless on consideration of the patent as a whole the claim can by construction be limited to the use of oil amounting to only a fraction of one per cent. The patentability of the process of the first patent in suit resides in the use of oil in the extremely minute proportion disclosed in the descriptive portion of the patent to effect separation of froth with its metallic particles from the remainder of the mixture by flotation. The amount there disclosed is not in excess of "a fraction of one per cent. on the ore" and may be only one-tenth of one per cent. on the ore, or even less. If, then, by construction claim 9 should be so limited as to be restricted to the use of oil amounting to only a fraction of one per cent. on the ore, that claim is in substance, though not in exact phraseology, the same as claim 1 for the reason that in any event from the nature of the invention it would be necessary to read "by flotation" into claim 9, if in other respects valid. But a limitation by construction producing such a result is inadmissible. It is suggested by one of the plaintiff's counsel in his consideration of claim 9, that one for the purpose of securing immunity from the consequences of infringement might use an oil useful in the process, and add to it an oil not useful as applied to his particular ore, and, on being sued for infringe-

ment contend, "I am using 1.1% of oil. I do not infringe. I am using more than a fraction of 1% of oil." But the existence of this possibility does not, I think, warrant such a construction of claim 9 as is urged; for the disclosure of the patent does not extend to the use of 1.1% of oil, but is limited to a fraction of 1%. If it be assumed, however, that the claims in suit contemplate and require the use of efficient, as distinguished from inefficient, oil, and if in the case suggested an inoperative oil should be used by way of addition to the efficient oil so contemplated and required it might be a question, upon which, however, no opinion is here expressed, whether the addition of the inoperative oil to the efficient oil could be treated as an increment to the amount of oil so contemplated and required, operating as a shield to protect the wrongdoer. But this question would arise in a suit based upon claim 1 or 12, as well as in a suit based upon claim 9, were it proper by construction, in order to save it, to limit "a small quantity of oil" to a quantity of oil amounting only to a fraction of one per cent. on the ore, and therefore fails to require or justify the suggested limitation of claim 9, without which it must fall.

On the question of infringement of the first patent in suit I have no doubt. It was practically admitted by counsel for the defendant in opening the defense that it had infringed the three patents in suit by its operations at Miami within four months next before the filing of the bill; he stating "in the first installation which was made at Miami, we make no serious contention that it did not represent the operations set forth in the three patents in suit." It appears that the infringing operations were carried on in apparatus built in imitation of the plaintiff's standard machine. But the defendant denies that it infringed by its concentration of ore in its pneumatic flotation plant through its practice of the process of patent No. 793,808 of July 4, 1905, to Sulman and Picard, hereinbefore discussed, as modified by the use of what is known as the Callow cell. Counsel for the defendant, however, stated with respect to the process of the patents in suit and the process as carried on by the defendant under the Sulman and Picard patent, with the apparatus of the Callow cell:

"The broad principles are the same in both. In both we have the pulp, consisting of ore held in suspension in water. In both the water is modified to lower its surface tension. In both the buoyancy comes from air-bubbles."

The defendant in its operations also used the minute proportion of oil mentioned in the first patent in suit. It does not use acid in its process; but this fact is immaterial so far as the question of infringement is concerned for the reason that it appears both from the claims and the description of that patent that the use of acid is optional, the description stating that "the water in which the oiling is effected is preferably slightly acidified," and claims 1 and 12, as well as claim 9, unlike a majority of them not requiring acid. The defendant's counsel also stated that the difference between its process and that of the complainant "comes after the air-bubbles have attached themselves to the mineral particles." I do not think there is any such difference between the processes as to negative infringement. It was in substance admitted on the part of the defendant that if the first patent in

suit is a pioneer patent and properly drawn the operations carried on at Miami were an infringement. Whether that patent is technically a pioneer patent or not, it certainly was highly meritorious and, I think, partook of the nature of a pioneer patent so far as the very successful use of oil amounting to only a fraction of one per cent. is concerned. Its claims merit much liberality of construction and when so construed embrace the operations of the defendant at Miami. The purpose of each process is the concentration of the ore through the separation of the metallic particles from the gangue. In the plaintiff's process the separation is effected through the rising of air-bubbles to which are attached the metallic particles, through the mixture to the top, and the formation of a froth or scum on the surface, which can by simple means be removed with the contained metallic particles. In the defendant's process the separation is effected through the rising of air-bubbles to which are attached the metallic particles through the mixture to the top and the floating away into a launder of either the original bubbles to which the metallic particles were first attached or succeeding and oncoming bubbles which have caught and buoyed up to the surface the metallic particles escaping from bursting bubbles. By the use of a launder a recovery of the metallic particles is readily effected. The defendant contends that since its abandonment of its original infringing process at Miami above referred to, it has not and does not infringe the first patent in suit, for the reason that it does not in its process produce the coherent and permanent froth of the process of that patent. It appears from the evidence, it is true, that the bubble froth in the defendant's process is not as coherent and permanent as the froth of the process of the first patent in suit; but both are mineral froths, and that of the defendant is sufficiently permanent to effect through air flotation an efficient separation of the metallic particles from the rest of the mixture. Air-bubbles, however produced, in water not modified or contaminated—pure water—on reaching the surface will immediately collapse, and the formation of bubble or air froth is impossible; but air-bubbles in modified water will not instantly disappear on gaining the surface. The degree of their permanency after reaching the top largely depends on the degree of modification of the water.

There has been much expert evidence relating to the subject of surface tension to the effect that in the case of pure water it is so great as to cause the instant collapse of bubbles of air rising to the surface; but that through modification of the water, the tension is so reduced in force as to permit the continued existence for a greater or less period of bubbles of air reaching the surface. The water in the ore pulp of the defendant's process is strongly modified and of necessity the bubbles on reaching the surface do not and cannot instantly disappear; but, on the contrary, in accordance with the operation of natural laws about which there is no conflict, persist and continue on the surface as a bubble or air froth. But whatever may be the true explanation of the phenomenon of the continuance and disappearance of escaping bubbles, the fact remains that the defendant's process discloses a froth consisting of bubbles which have passed through modi-

fied water to the surface of the mixture, and float thereon, and with their freight of metallic particles flow over the edge of the containing vessel into a launder, thus effectively separating the valuable mineral from the gangue particles. Coherency and permanency in a froth admit of degrees, and such a degree as insures by air flotation an efficient and final separation between the metal and the gangue, whatever may be the duration of the froth, comes within the process of the first patent in suit.

The defendant further insists that its process lacks violent agitation which it claims is an essential of the process of the first patent in suit. Each of the twelve claims of the patent mentions as an element of the process "agitating the mixture," but not one of them mentions violent agitation. It is, however, urged that as the descriptive portion of a patent for a process must contain a full and fair disclosure of the patented invention the claims must be read in the light of the description, and as violent agitation is included in the description the claims with respect to agitation must be limited to violent agitation. But the description nowhere mentions "violent agitation" or uses any equivalent expression. It mentions "vigorous agitation," and states that in the case of the application of the patented process to an ore containing "ferruginous blende, galena, and gangue consisting of quartz, rhodonite, and garnet," the mixture is "briskly agitated." It also describes as a part of the apparatus for carrying on the process a "rotatable stirrer." But I do not find in the description any specification of any rate of speed for the rotatable stirrer, or of any standard for the determination of what constitutes a "vigorous agitation" of the mixture, or a specification of any test for ascertaining whether the mixture is "briskly agitated." All these matters were left to the judgment and skill of the metallurgical engineer conducting or superintending the operation of the process, involving empirical investigation to reach the best results. The strength of agitation referred to in the description clearly admits of different degrees, varying from one another in the application of the process to different ores and under changing conditions. There is no room for doubt that agitation of the mixture in the process of the defendant is sufficiently vigorous or brisk to insure efficient ore concentration by an air flotation process such as is accomplished by the complainant by agitation under the process of the first patent in suit. This being true the use of mere adjectives in the descriptive portion of the patent with respect to agitation is unimportant. In order that the bubbles in the pulp mixture may come in contact with the metallic particles there must be such movement between them as cannot be wholly accounted for by selectivity as between them, and their movement so far as not accounted for by selectivity is the result of agitation; and whether such agitation results from the stirring or beating of the mixture or the forcing or admission of air into it is immaterial; for what this court is dealing with is not an apparatus patent but a process patent.

Patent No. 1,104,755, of July 21, 1914, to John M. Callow, covers apparatus relating to ore concentration. The evidence shows that the defendant in its concentration of ore in its pneumatic flotation plant

employs the process of patent No. 793,808, of July 4, 1905, to Sulman and Picard, hereinbefore discussed, as modified by the use of certain apparatus substantially the same as a portion of the apparatus, the operation of which is described in the above-mentioned Callow patent, as follows:

"From the foregoing, it will be understood that I employ no mechanical propellers for producing the necessary agitation and beating into the froth of large volumes of air, but that I depend upon the compressed air admitted through a porous body which has the function of splitting up the air into innumerable fine streams and distributing these fine streams over and into substantially the entire surface of the pulp, whereby immediately upon the introduction of the air, a more or less violent agitation or ebullition takes place and a froth begins to generate and to finally rise and form on the surface of the pulp."

The character of the agitation above described is also clearly recognized in the claims of the Callow patent.

The combination of claim 1 of the first patent in suit contains the following elements: (1) Mixing powdered ore with water; (2) adding a small proportion of an oily liquid having a preferential affinity for metalliferous matter (amounting to a fraction of one per cent. on the ore); (3) agitating the mixture until the oil-coated mineral matter forms into a froth; and (4) separating the froth from the remainder by flotation. The elements in the combination of claim 12 are (1) separating the mineral from gangue by coating the mineral with oil in water containing a fraction of one per cent. of oil on the ore; (2) agitating the mixture to cause the oil-coated mineral to form a froth; and (3) separating the froth from the remainder of the mixture. The elements entering into the defendant's infringing process are the same as those of claims 1 and 12 of the first patent in suit. There is no escape, I think, from the conclusion, not only that the defendant infringed the first patent in suit by carrying on the process of ore concentration in its first installation at Miami in apparatus in imitation of the plaintiff's standard machine, but also has infringed and is infringing the same patent by carrying on the process of ore concentration in its pneumatic flotation plant at the same place.

[3] The second patent in suit, No. 962,678, of June 28, 1910, to Sulman, Greenway and Higgins, is for "Improvements in ore concentration." The patentees state that the object of the invention is "to separate certain constituents of an ore such as metallic sulfids from other constituents such as gangue when the ore is suspended in a liquid such as water." This patent is distinguishable from the first patent in suit; the object of the invention of that patent being, as stated, "to separate metalliferous matter, graphite, and the like from gangue by means of oils, fatty acids, or other substances which have a preferential affinity for metalliferous matter over gangue." It appears from the patent as a whole that "other substances which have a preferential affinity for metalliferous matter over gangue" are restricted to those of an oily nature. Such substances as mentioned in the various claims of the patent are "an oily liquid," "an oily substance," "oleic acid," "oleic soap solution" and "oil." No other frothing agent than the above substances enters into the process of the patent. The essence

of the invention of the first patent in suit was the restriction of the "oily substance" to "a fraction of one per cent. on the ore." In the process of the second patent in suit no oil, fatty acid, or oily substance is introduced into the mixture. The description contains the following statement:

"According to this invention the crushed ore is mixed with water containing in solution a small percentage of a mineral-frothing agent, (that is of one or more organic substances which enable metallic sulfids to float under conditions hereinafter specified) and containing also a small percentage of a suitable acid such as sulfuric acid, and the mixture is thoroughly agitated; a gas is liberated in, generated in, or effectively introduced into the mixture and the ore particles come in contact with the gas and the result is that metallic sulfid particles float to the surface in the form of a froth or scum, and can thereafter be separated by any well-known means. Among the organic substances which in solution we have found suitable for use as mineral-frothing agents with certain ores are amyl acetate and other esters; phenol and its homologues; benzoic, valerianic and lactic acids; acetones and other ketones such as camphor. In some cases a mixture of two such mineral-frothing agents gives a better result than a single agent. * * * The present process differs from the two before mentioned types and from other known concentration processes by the introduction into the acidified ore pulp of a small quantity of a mineral-frothing agent, i. e., an organic compound in solution of the kind above referred to and by the fact that the metalliferous particles are brought to the surface in the form of a froth or scum not by mechanical means but by the attachment of air or other gas bubbles thereto. In the frothing processes hitherto known the substances used to secure the formation of a mineral-bearing froth has been oil or an oily liquid immiscible with water. According to this invention the mineral-frothing agent consists of an organic compound contained in solution in the acidified water."

The charge of infringement has been restricted to claims 1, 2, 5 and 6, as follows:

"1. The hereindescribed process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture to form froth and separating the froth.

"2. The hereindescribed process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture to form a froth and separating the froth."

"5. The hereindescribed process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of a mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form a froth and separating the froth.

"6. The hereindescribed process of concentrating ores which consists in mixing the powdered ore with water containing in solution a small quantity of an organic mineral-frothing agent, agitating the mixture and beating air into it in a finely divided state so as to form a froth and separating the froth."

It will be observed that no one of the claims of the second patent in suit requires as an element an oily substance or liquid, as is essential in the process of the first patent in suit, and all of the claims relied on require the introduction into the mixture of "a small quantity" of a "mineral frothing agent" or an "organic mineral frothing agent." The amount of the mineral frothing agent employed in the process is not confined to a fraction of one per cent. on the ore, but must be a small quantity, evidently to be determined by the metallurgical engi-

neer conducting or superintending the operation according to the requirements of the different ores. The novelty of this invention is to be found, not in any restriction of the amount of the mineral frothing agent to any stated proportion, for there is none, but in the fact that a mineral frothing agent as the means of separating the metallic particles from the gangue is substituted for the oil, fatty acid or other oily substance essential to the process of the first patent in suit. Such substitution has produced successful results, and, I think, involved invention. Frothing agents had theretofore been used in ore concentration, but not in the absence of an oily ingredient. Even were the grounds on which the validity of the patent can be sustained less clear, it should have the benefit of the presumption of validity arising from the grant of letters. That the defendant has infringed the claims in suit of the second patent is established by the evidence.

[4] The third patent in suit, No. 1,099,699, of June 9, 1914, to H. H. Greenway, assignor to plaintiff, is for "Improvements in the concentration of ores." In the description it is stated:

"This invention relates to the concentration of ores and has been applied in practice to the concentration of copper ores the object being to separate certain constituents of the ore such as copper sulfids (for example in the form of copper pyrites) or metallic copper (natural or reduced) from other constituents such as gangue when the ore is suspended in a liquid such as water. The present process is a modification of the invention described in U. S. patent to H. L. Sulman, A. H. Higgins and myself, No. 962,678, granted June 28, 1910. The process therein described is applicable generally to the recovery of metallic sulfids and like floatable metalliferous matter and in the case of lead and zinc sulfids to which the process has been largely applied it is necessary for efficient working that the pulp should be slightly acidified, and in most cases in practice the pulp is heated. It is now found that with copper ore such as an ore containing copper pyrites effective separation is obtained in the cold without the use of acid by employing as mineral frothing agents, aromatic hydroxy compounds such as phenol, cresol, or mixtures containing the same. The process of concentrating ores containing copper sulfid or metallic copper according to this invention consists in mixing the powdered ore with water containing in solution a minute quantity of aromatic hydroxy compound such as phenol or cresol but without mineral acid and in the cold, agitating the mixture to form a froth and separating the froth."

The first twelve claims of the patent are in suit, but it is unnecessary to set them forth in full. I do not find any element of patentability in the process of this patent. It is stated in the description that the process can be carried on "without mineral acid and in the cold," and "is carried out in the cold and no acid is added to the pulp." Under the second patent in suit the use of heat is optional, and no patentability can be attributed to the process of the third patent in suit on the ground that the process is carried on in the cold or without heat; for patentability can never result from the mere omission to do something, the doing or not doing of which is optional. There is a question on which a difference of opinion has been expressed, whether in the process of the second patent in suit the use of acid is also optional. The description in the patent considered alone requires the use of acid; but while five of the nine claims mention "acidified water," the remaining four do not refer to acid. It is not altogether clear to me under these circumstances whether the use of acid is not optional. But how-

ever that may be, I think that, in view of the processes of the prior art an omission to use acid in the process of the third patent in suit cannot confer patentability upon it.

Many actual or supposed inconsistencies or contradictions in the testimony have been commented on by counsel, but, while they have been considered, I do not deem it necessary to a proper decision of this case that they should be discussed in this opinion.

A decree in accordance with this opinion may be prepared and submitted.

CRONE v. JOHN J. GIBSON CO.

(District Court, W. D. New York. July 21, 1915. On Rehearing and Reargument, October 25, 1916.)

1. PATENTS ⟸112(4)—SUIT FOR INFRINGEMENT—EVIDENCE OF ANTICIPATION—INTERFERENCE PROCEEDINGS.

In a suit for infringement against one not a party nor in privity with the parties to an interference proceeding in the Patent Office, wherein it is sought to antedate the patent to which priority was awarded, certified copies of Patent Office decisions or examiner's opinions as to the facts adduced in the interference proceeding, if admissible at all, are so only in support of independent evidence to establish prior invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 165; Dec. Dig. ⟸112(4).]

2. PATENTS ⟸112(4)—SUIT FOR INFRINGEMENT—PRIORITY OF INVENTION—BURDEN OF PROOF.

While the burden of proof rests in the first instance on the defendant in an infringement suit to establish prior invention by another, when a certified copy of a prior patent is introduced, it is presumptive evidence that the patentee was the original inventor of the device described therein, and that it was completed at the time the application for the patent was filed, and the burden is shifted to the complainant to establish to the satisfaction of the court a still earlier date of invention.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 165; Dec. Dec. ⟸112(4).]

On Rehearing and Reargument.

3. PATENTS ⟸328—ANTICIPATION—STARTING DEVICE FOR GAS ENGINES.

The Baldwin patent, No. 1,009,011, for a starting device for gas engines, the function of which is to prime the cylinders in gasoline engines to facilitate the starting of the engine when cranked, *held* not anticipated, valid, and infringed.

4. PATENTS ⟸58—SUIT FOR INFRINGEMENT—PROOF OF ANTICIPATION.

The burden rests on the defendant in an infringement suit to establish anticipation by cogent evidence, such as leaves no reasonable doubt in the mind of the court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. ⟸58.]

In Equity. Suit by Francis G. Crone against the John J. Gibson Company. On final hearing. Decree for complainant.

J. Wm. Ellis, of Buffalo, N. Y., for complainant.

Josiah McRoberts, of Chicago, Ill., and Clifford Nichols, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. In this action for infringement are involved claims 1 to 8, inclusive, of patent No. 1,009,011, issued to Dayton Baldwin November 14, 1911, for a starting device for gas engines. Such engines are of the internal combustion type, requiring a certain amount of combustible mixture or fuel in the engine cylinder, so that the operation of the piston will cause the mixture to explode or ignite to start the engine. The art recognizes three types of internal combustion engines: The gas engine, by which the combustible material is caused to reach the cylinder without being first vaporized; the gasoline engine, which is a gas engine proper, having added thereto a carbureter and using only gasoline or naphtha as fuel; and the oil engine, which is of special design, and which uses a vaporizer and external heat as a power agency.

Complainant's device has been designed particularly for use on automobiles, and the specification says:

"Sometimes it is very difficult to start or crank a gas engine when the same is cold, or after it has been standing for a long time. This is usually occasioned by failure to get the proper amount of gasoline into the cylinders, or to get the gasoline properly vaporized. To overcome this objection I extend a branch pipe line from the supply and connect the same to a spray nozzle in the intake pipe, and arrange a forcing device, such as a pump, in this branch line. Then, when it is desired to prime or start the engine, the valve is opened and the pump is worked to force gasoline in the form of spray into the intake pipe. As there is usually plenty of air in the cylinders and intake pipe, the next crank or so of the engine will draw a proper mixture into the cylinders and compress the same, whereby the motor will be easily started."

The function of the patent in suit is to prime the cylinders to facilitate the starting of the engine when cranked, either manually or by electric or pneumatic means. The first claim is typical of the others, and reads as follows:

"1. The combination of a gas engine, a carbureter, an intake pipe extending from the carbureter to the gas engine, a gasoline supply, a pipe connecting therefrom to the carbureter, a branch pipe line extending from the supply and connected to the intake pipe, and means for forcing gasoline through the branch pipe into the intake."

The other claims are specific, with the exception of the eighth claim, which is broad, and specifies no forcing means through the branch pipe to the intake. The element of novelty consists in the combination of parts by which a branch pipe is extended from the supply pipe to the intake pipe of the engine, and a forcing means, or pump, adapted in the branch line. The device, though simple, has by its usefulness justified its existence.

The defendant pleads anticipation and prior use. Although a number of prior patents for priming engine cylinders were introduced in evidence, the defendant's expert witness indicated that the Steele patent, No. 992,920, of May 23, 1911, filing date November 25, 1907, the Maxwell patent, No. 878,888, of February 11, 1908, the Robinson patent No. 565,033, of August 4, 1896, the Baverey patent, No. 907,953, and the Coleman patent, No. 867,797, are principally entitled to consideration on the questions of anticipation and limitation of the claims in controversy. On comparing the claims in suit with the Robinson patent, it will be observed that the latter uses no carbureter, but in-

stead has a receptacle within the engine cylinder wherein the air and combustible liquid are combined for vaporization and ignition. No intake pipe extending from a carbureter to the gas engine is shown, although there is a branch pipe line, without, however, any connections for pumping or forcing the oil through. The evident object of the patentee was to position the fuel chamber in the automobile high enough to permit the fuel to flow to the engine cylinder by gravity, first through pipe *12*, thence to a heating jacket where the fluid is vaporized. Obviously such a construction did not suggest the patent in suit. Robinson may have designed to adapt his construction to perform the functions of the Baldwin construction; but, as it did not embody the essential features of the claim in suit, his patent is not of controlling importance as an anticipation.

In the Maxwell patent, issued but a week or so before Baldwin's application in suit was filed, there are no means for forcing the liquid fuel into the engine or intake pipe. The pump there used forces air into the float chamber of the carbureter; that is, it overflows the carbureter, which results in sucking the liquid into the cylinder by the stroke of the piston. There are no means for priming the engine by forcing the liquid into the intake pipe of the engine; indeed, the fuel is drawn directly through the cylinder from an auxiliary tank, instead of from the main supply, as in complainant's device, and when it is ignited the engine will start without cranking. I think the functions of the Maxwell device and its mode of operation are materially different from those of the Baldwin device, and that therefore the Maxwell patent is not anticipatory.

In the Riotte patents, to which defendant attaches importance, there is a contrivance in which a pump is located in the carbureter and connected up with the float chamber and mixing chambers, while the gasoline is sucked through the jet nozzle, but there is no branch line extending from the gasoline supply to the intake pipe of the engine as in complainant's patent. The combination of elements in suit is not shown, as by the arrangement of pipe lines from the gasoline tank to the float chambers of the carbureter the fuel is introduced into the carbureter through the jet nozzle, which also introduces the fuel to the air supply of the engine. There are no pipes through which gasoline may be drawn to the intake pipe at a point where it branches off to a plurality of cylinders.

Other prior patents are emphasized in the briefs, to anticipate the Baldwin patent; but, in view of the fact that I consider the Steele patent an anticipation, they need not be here considered. I have referred briefly to the Robinson, Maxwell, and Riotte patents, because of the importance attached to them at the hearing. The complainant frankly admits in the brief filed by him that:

"The disclosure of Steele is substantially the same as the disclosure of Baldwin, and if there was no evidence before this court, except the evidence of the filing dates of the applications of Baldwin and Steele, Steele should be declared to be the first inventor of the patented device in suit."

Under the defense of noninvention the defendant has the right to show prior invention by prior patenting, or by disclosure in some

printed publication of the alleged invention set forth in the specification; and pursuant to the filed stipulation of the parties to the litigation the Patent Office copy of the Steele patent was rightly offered in evidence to establish prima facie the filing date of the Steele application as the date of the invention. The defendant has also introduced in evidence a certified copy of Steele's application as originally filed in the Patent Office, from which it plainly appears that his application was filed November 25, 1907, several months before the Baldwin application. To contradict such evidence, the plaintiff in rebuttal offered a copy of a decision by the examiner of interferences in an interference proceeding between Baldwin and Steele, which was tentatively received. In such decision it is stated that the evidence in the interference proceeding was sufficient to prove that Baldwin constructed an operative starting device embodying the features of his invention during the fall of 1907; that it became practicable some time in October, 1907; and priority of invention of the subject-matter was therefore awarded to him.

[1] The defendant concededly was not a party or privy to the interference proceeding. Had he been involved therein, the said judgment or decree of priority of invention would no doubt, in the absence of convincing evidence to the contrary, have been controlling evidence on that point. But in an action for infringement against another person not in privity with the parties to the interference, wherein it is sought to antedate the patent to which priority was awarded for the express purpose of avoiding anticipation, a different rule is thought to apply. In such a case, if certified copies of Patent Office decisions or examiner's opinions as to the facts adduced in the interference proceedings are admissible at all, they are so only in support of independent evidence to establish prior invention.

The complainant has cited several authorities to support the contention that the Patent Office decision shifted the burden of proof onto the defendant, but according to my interpretation of them they relate to actions between the same parties or their privies as were parties to the Patent Office controversy. The proper rule to apply to the facts here is inferable from the rule enunciated by the Supreme Court of the United States in Morgan v. Daniels, 153 U. S. 120, 14 Sup. Ct. 772, 38 L. Ed. 657, which was an action to obtain the reissue of a patent to a defeated party in an interference proceeding. It was there substantially stated that decisions of the Patent Office relating to priority of invention must be accepted as controlling upon that point in any subsequent action between the same parties, unless the evidence negativing such showing "carries thorough conviction." This would seem to expressly limit the effect of testimony adduced in interference proceedings, to parties and their privies.

[2] In Day v. Combination Rubber Co. et al. (C. C.) 2 Fed. 570, the defendant sought to impeach the prima facie effect of a patent by producing copies of opinions in prior cases showing that MacDonald's invention was prior to that of De Forest, and Judge Wheeler said generally that it was elemental that in order for judgments and decrees to be evidence of facts, or evidence at all, in other proceedings the

same parties or their privies must be concerned. In Westinghouse Electric & Mfg. Co. v. Catskill Illuminating & Power Co., 121 Fed. 831, 58 C. C. A. 167, the Circuit Court of Appeals for this circuit held that certain Tesla patents were anticipated by a prior printed publication of a lecture describing the invention, and quoted from Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. Light Co. (C. C.) 108 Fed. 221, that:

"The burden which rested upon the defendant in the first instance had been transferred to the complainant, and it must furnish the court with convincing proof that the anticipation has been anticipated."

In the case at bar the prior Steele patent raised a presumption that Steele was the original inventor of the priming device described in his patent, and that it was completed at the time the application for a patent was filed. The burden of proving priority of invention, it is true, was at the outset upon the defendant; but when a certified copy of the Steele patent was introduced in evidence the burden was shifted to the complainant to establish to the satisfaction of the court a still earlier date of invention by the patentee in suit. Consolidated Ry. Elec. Lighting & Equipment Co. v. Adams & Westlake Co., 161 Fed. 343, 88 C. C. A. 355; Westinghouse Elec. & Mfg. Co. v. Saranac Lake Elec. Light Co., supra; Westinghouse Elec. & Mfg. Co. v. Mutual Life Ins. Co. (C. C.) 129 Fed. 213 and cases cited; St. Paul Plow Works v. Starling, 140 U. S. 184, 11 Sup. Ct. 803, 35 L. Ed. 404. As the defendant in this case was not represented before the Patent Office in the interference between Steele and Baldwin, and as it does not manufacture its priming or starting device under the Steele patent, such proof must necessarily be made by competent primary evidence and according to the principles and procedure of equity jurisprudence. Dover v. Greenwood (C. C.) 154 Fed. 854, affirmed 194 Fed. 91, 114 C. C. A. 169.

In Ecaubert v. Appleton et al., 67 Fed. 917, 15 C. C. A. 73, there was introduced in evidence testimony in interference proceedings, together with the opinion of the Commissioner of Patents, and Judge Shipman, writing for the Circuit Court of Appeals, held that such testimony was irrelevant, and that the suit was an independent one, although between the same parties as the interference proceeding. It is true, the opinion states that the judgment or decree in the interference proceedings would have been admissible, but obviously this applied to actions between the same parties. In Dickerson et al. v. De La Vergne Refrigerating Mach. Co. (C. C.) 35 Fed. 143, Judge Lacombe, on an application for a preliminary injunction wherein an interference decision was urged against a third party, said:

"An examination of these decisions shows that the courts have heretofore been cautious in accepting the decisions of the patent office in interferences. Their effect is strictly confined to parties and privies."

In Westinghouse Electric & Mfg. Co. v. Roberts et al. (C. C.) 125 Fed. 6, interference proceedings were introduced in evidence establishing the patentee's right to priority, and the court said:

"It is evident, upon the most cursory consideration, that, as against the defendants, the complainants are entitled neither to the result nor the evidence

by which it was obtained," and, the controversy being between parties with whom the defendants were not in privity, "they cannot, therefore, be affected thereby."

Dover v. Greenwood, supra, was suit between the parties to a previous interference proceeding, and Judge Brown held therein that testimony taken in interference proceedings is inadmissible unless a foundation is first laid for secondary evidence, and he cited, on this point, Weeks on Law of Depositions, § 6, and Wigmore on Evidence, §§ 1402, 1414, and 1415. On appeal to the Circuit Court of Appeals, 194 Fed. 91, 114 C. C. A. 169, Judge Putnam in the opinion expressly approved the decision of the lower court with reference to introducing any part of the record in the Patent Office to which it related, and took occasion to say:

"It is to be regretted that Congress has not provided that decisions like that in the Court of Appeals in Greenwood v. Dover should be conclusive, in the same way in which any decisions of the superior courts of federal or state jurisdiction are ordinarily held to be effectual. While the proceedings in the Patent Office out of which this decision arose were not strictly in accordance with the practice either at law or in equity in the jurisdictions where the common law prevails, yet they have all the elements of the fundamental principles of the 'law of the land,' and might well have been pronounced by Congress to end the litigation accordingly, and thus to avoid the opportunity of further holding up of patents, and of leaving the rights of both the public and the patentee indecisive for another series of years."

In Edward Barr Co., Ltd., v. New York & New Haven Automatic Sprinkler Co. (C. C.) 32 Fed. 79, Judge Lacombe, considering the question of the presumption of validity, which I conceive is analogous to a presumption of priority, arising from interference proceedings, said that such presumption applied only to parties to the action and their privies and that it did not extend to litigants who were not making the infringing article under a grant from a party to the interference proceeding.

The defendant's right, therefore, to urge the Steele patent as anticipatory, is not defeated merely by a decree of the Patent Office in proceedings to which the defendant was a stranger; but, as heretofore stated, this case must be decided upon the merits. See Western Electric Co. v. Williams Abbott Electric Co. (C. C.) 83 Fed. 842, which held that an interference proceeding raised a presumption of the validity of the patent only against the parties thereto and their privies.

Complainant, however, places reliance upon Pac. Cable Ry. Co. v. Butte City St. Ry. Co. (C. C.) 52 Fed. 863, which I have carefully considered. There, however, the court considered, not only the decision of the Commissioner of Patents, but also the evidence in the interference proceeding between the patentee therein and one Patterson. The statement of facts conveys the impression that there was also additional uncontradicted evidence from which it appeared that the invention had been put in practice in San Francisco prior to the issuance of the alleged anticipatory patent. The learned court quoted from Walker on Patents that:

"The decision of the Commissioner is prima facie evidence in favor of the patent last granted, because, it is said, he would not have granted it if he had not decided it entitled to priority in point of date of invention."

But, on reading sections 317 and 318, from which this excerpt is taken, it will be observed that they relate to the subject of interfering patents, and that the quoted portion seems to have special reference to interference decisions between parties who afterwards become parties to actions in equity. Nor does John R. Williams v. Miller, Du Brul & Peters Mfg. Co. (C. C.) 107 Fed. 290, by intendment deviate from the broad rule expressed in Morgan v. Daniels, supra, although on first reading the decision would seem to support the view of counsel for complainant. Such facts as are stated in the opinion show that Williams was in interference with Hammerstein, and that the latter was awarded priority; but the invention described in the Hammerstein patent was expressly disclaimed, and such disclaimer, of course, precluded him from afterwards asserting that his invention was prior. Complainant contends that, as Steele was subsequently restricted to a single claim, which is slightly different, he must be deemed to have disclaimed the broad invention; but there is no such disclaimer indicated as will bring this case under the doctrine of the case last considered or convince the court that Steele did not claim to be the inventor of the particular matter in issue.

There was evidence on behalf of defendant, to support the defense of prior use, that as early as 1904 a priming device, consisting of priming cups mounted on the cylinders and mounted on the dash with valve control discharge pipes leading to the intake, was used, and that later, in 1906, a pump was added, which, however, pumped lubricating oil to the engine; but such testimony requires no examination, in view of the conclusion I have reached on the present record that Baldwin was not the prior inventor of the starting device for gas engines described in the specification and claims in suit, that the presumption of prior invention by Steele arising from the earlier date of the Steele application has not been overcome, and that the decision of the examiner of interferences, determining that Baldwin was such prior inventor, is incompetent and irrelevant, and must therefore be disregarded.

A decree dismissing the bill may accordingly be entered.

On Rehearing and Reargument.

[3] In the prior opinion herein, it was held that the Robinson, Maxwell, and Riotte patents failed to disclose the Baldwin combination in suit, but that the Steele patent was anticipatory, unless Baldwin could be proven to be the original inventor. To establish priority of invention over Steele, whose application was filed November 25, 1907, the complainant relied solely upon the decision of the examiner of interferences awarding priority of invention to Baldwin in an interference proceeding in the Patent Office between Steele and Baldwin. As the defendant was not a party or privy to the interference proceeding, the decision of the examiner was disregarded by me, and the Steele patent was held to anticipate the patent in suit. Complainant afterwards applied for leave to introduce further testimony to establish priority of invention by Baldwin, which was granted, the evidence being taken de bene esse, and the case is again before me for consideration.

A number of witnesses have sworn that Baldwin actually completed his invention during the summer of 1907, and that the priming device in question was successfully used on an automobile during the summer and autumn, prior to November, 1907. These witnesses, in the main, had previously given testimony in the interference proceeding pending in the Patent Office, and it was upon their testimony that the decision awarding priority of invention to Baldwin, was based. After carefully reading such testimony I have become satisfied that it is entitled to weight, as it is quite improbable that the recollection of all the witnesses could be at fault as to the time of year when the device was completed and operated. It is unnecessary to narrate the testimony in detail. Taking it in its entirety, I am convinced of complainant's right to antedate the Baldwin patent to November 1, 1907, prior to the filing date of the Steele application.

In the interference proceeding the oral testimony of Dr. Holden was corroborated by a book of entries of appointments with patients, which has since been lost, and which, after diligent search, cannot be found. Nevertheless, as the appointment book was previously considered in the interference proceeding, the presumption is strong that proper weight was there given it, and failure to produce the same on this trial does not weaken the force of the examiner's decision, nor affect its correctness. In these circumstances, proof beyond a reasonable doubt is not required; it is sufficient that it is clear, convincing, and satisfactory. Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74, and cases cited.

But, aside from this, complainant insists that Steele, in accepting a narrow claim, disclaimed Baldwin's broad invention, and that such disclaimer binds both him and third persons. Upon this phase it may be said that his failure to dispute Baldwin's claim to priority certainly supports the presumption that he believed he was entitled simply to a specific claim for a particular form of device for practicing the fundamental invention, and, thus considered, the Steele patent is not anticipatory.

I come now to a consideration of the additional patents which defendant asserts anticipated the Baldwin patent, and to which no reference was made in the prior opinion. Whatever novelty there is in the Baldwin patent concededly resides in the priming device, consisting of the inlet pipe *11*, extending from the gasoline supply to the priming pump, and the discharge pipe or branch pipe *12*, extending from the pump to the intake. By this arrangement, complainant claims, the priming device, because of its connection with the intake at a point between the engine and carbureter, was caused to act independently of the supply pipe or carbureter.

Does the McCadden patent of April 12, 1904, disclose such a pipe system for gasoline engine primers? Although it is a close reference, complainant has successfully distinguished it. McCadden missed success because he connected the priming device directly to the carbureter, making it in a sense dependent thereon in priming the cylinder, instead of independent thereof, as did Baldwin. In complainant's brief this distinction is thus emphasized:

"If the engine suction in this device fails to pull the valve *i* from its seat, there could be no pull on the nipple *r*, nor through the connection *r'*, for the chamber *C* would then be a *closed pocket* with no access to the air; then the primer would not function, nor would the engine run. The sticking of a valve, such as that marked *i*, would be quite probable. The priming function is, therefore, entirely dependent upon the proper operation of the carbureter. Baldwin's primer is so constructed that it will work, whether the carbureter works or not, and if the carbureter does not work the engine can run with the primer alone."

Defendant denies that the McCadden device operates in this manner, and argues that the dependence or independence of the primer on the carbureter is determined by the character of the fuel supply, and not by the point of its discharge; but the McCadden drawing shows that the patentee intended to prime the engine through a pipe dependent upon the carbureter, as the pipe connection from the supply to the carbureter, or branch pipe to the cylinder, indicates, while in Baldwin's construction the inlet pipe from the supply tank to the carbureter and branch pipe from the pump to the intake show a method of priming regardless of the carbureter. The latter adaptation has gone into extensive use on automobiles, while McCadden's, if in practical use at all, was certainly not preferred by defendant. In comparing the drawings of the two structures it will be observed that McCadden has omitted the intake pipe extending from the carbureter to the gas engine, and uses instead a connecting means *r'*, passing to the cylinder. He has no branches from the intake to the cylinder, no pipe from the supply to the carbureter, and no pipe from the supply to the intake that branches to the cylinder. These specified variations were not simply a "matter of mechanical choice" according to the form of engine employed, as claimed by defendant, but were elements substantially contributing towards success or failure. What has been said to distinguish the McCadden patent from the Baldwin device applies equally to the prior Gaskill patent and other prior patents cited by the defendant as anticipatory, and to which reference was not made in the prior opinion.

Baldwin's method of extending the branch priming pipes to the supply pipe and connecting thereto a pipe running to the carbureter and branching to the intake pipe to produce a primer independent of the carbureter, was not "an expedient obvious to an intelligent mechanic." While the invention, in view of later priming devices, may be regarded as of minor importance, the proofs show that before Baldwin's invention there was annoying difficulty in starting or cranking gas engines of automobiles, especially after they had stood for a while in the cold, and that such difficulty was generally due to inability to get the right quantity of gasoline into the cylinder, or to get it properly vaporized. This difficulty Baldwin overcame.

There are prior patents containing some of the elements of the Baldwin invention, but the combination is new and novel. In the Gaskill patent there is a gasoline engine, supply pipe, branch pipes to the intake, etc., but no carbureter. Baldwin's device was clearly limited to a priming device used in connection with a gas engine provided with a carbureter. Gaskill uses a hand pump for drawing the liquid gaso-

line from the supply tank to the cylinder; but, as he does not have a carbureter in connection with his engine, it is doubtful if the hand pump was feasible for forcing gasoline vapor into an engine cylinder.

[4] The essentially novel feature of the Baldwin patent, as heretofore, indicated, is the adaptation of means to prime the engine by drawing the priming charge directly from the supply, thus securing priming independently of the carbureter; while in prior structures the engine was primed by first priming the carbureter. The burden rested upon the defendant to point out a clear anticipation and to prove its anticipatory character by cogent evidence, such as leaves no reasonable doubt in the mind of the court. Underwood Typewriter Co. v. Elliott-Fisher Co. (C. C.) 165 Fed. 927; Seymour v. Osborne, 11 Wall. 516, 20 L. Ed. 33. Utility is sufficiently established by the fact that the patent has been infringed by the defendant which in its commercial structures utilizes every element of the claims in controversy. Lehnbeuter v. Holthaus, 105 U. S. 94, 26 L. Ed. 939.

Complainant may have a decree, with costs.

SAFETY CAR HEATING & LIGHTING CO. v. UNITED STATES LIGHT & HEAT CORP.

(District Court, W. D. New York. October 19, 1916.)

No. 163–B.

1. PATENTS ⇐328—INFRINGEMENT—SYSTEM OF ELECTRICAL DISTRIBUTION. The Creveling patent, No. 747,686, for a system of electrical distribution as applied to axle-driven car-lighting apparatus, *held* not infringed.
2. PATENTS ⇐328—INFRINGEMENT—SYSTEM OF ELECTRICAL DISTRIBUTION. The McElroy patents, Nos. 720,605 and 893,533, for systems of electrical distribution as applied to car lighting, *held* not infringed.

In Equity. Suit by the Safety Car Heating and Lighting Company against the United States Light & Heat Corporation. On supplemental bill by complainant, and counterclaim by defendant. Decree for defendant on bill, and for complainant on counterclaim.

See, also, 233 Fed. 1007.

Duell, Warfield & Duell, of New York City (C. H. Duell, F. P. Warfield, H. S. Duell, and L. A. Watson, all of New York City, of counsel), for plaintiff.

Jones, Addington, Ames & Seibold, of Chicago, Ill. (W. Clyde Jones and Arthur B. Seibold, both of Chicago, Ill., of counsel), for defendant.

HAZEL, District Judge. The bill alleges infringement of Creveling patent, No. 747,686, dated December 22, 1903, which was adjudicated valid and infringed as to claims 1 to 8, inclusive, in a prior action against the predecessor of the defendant company. See Safety Car Heating & Lighting Co. v. United States Light & Heating Co. (D. C.) 222 Fed. 310, affirmed 223 Fed. 1023, 138 C. C. A. 651.

[1] The present defendant is charged with marketing a structure embodying the essentials of the adjudicated patent. The claims insisted upon are the third, sixth, and eighth, but it will suffice to set out the third, as the others embody substantially the same elements. It reads as follows:

"3. In a system of electrical distribution, the combination of a generator, automatic means for maintaining the output of the generator practically constant throughout changes in speed, and electromagnetic means determining the said output to be maintained."

In the former case the complainant moved for a reference for an accounting of the infringing structures manufactured and sold by defendant's predecessor and known as constant current or stop charge and taper charge lighting systems, including later adaptations by this defendant, which were stated to be colorable modifications; but it was claimed in opposing affidavits that the later apparatus disclosed a principle of operation patentably different from Creveling's, and was indeed constructed under two prior patents to McElroy, No. 720,605, dated February 17, 1903, and No. 893,533, dated July 14, 1908, describing a voltage or potential regulation to which the defendant connected an ampere hour meter for battery protection, claimed to have been invented by one Bliss, and functioning to cut off current passing to or from the battery.

Upon the filing of a supplemental bill alleging infringement by the later structures, a motion was heard for a preliminary injunction based upon the prior adjudication. It was urged by defendant that it had departed from the so-called constant generator output regulation during speed variations, and was operating a system described in two McElroy patents of which it was owner in combination with the ampere hour meter, and thereupon the motion for an injunction was denied. The answer of the defendant, in addition to the denial of infringement, contains a counterclaim under new equity rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi), charging infringement by complainant of the McElroy patents in the manufacture and sale of its system, known as "Safety Type F." Considerable testimony of a highly complicated nature was taken in open court on behalf of both sides, much of which bears only remotely on the merits of the controversy.

For convenience it may again be stated that the Creveling patent discloses a generator which supplies current to the lamps and to a storage battery, from which the lamps are supplied when the train stops or travels at greatly reduced speed. The generator has a shunt field winding with a variable resistance in its circuit, controlled by a regulator having a current coil *8* "in the generator main circuit," which is shown to be responsive to current changes, owing to the opposing influence of field coil *9*. By such regulating arrangement the electric current is maintained constant, though normally its tendency would be to increase or decrease according to the speed of the train, as the generator, it should be understood, is geared to the axle of the car. The structure embodies a relay which is subject to battery voltage and is automatically varied with changes in the

lamp load, and which functions to protect the battery from overcharge.

The specification refers to modified structures. In Figure 1 the regulator coil is connected in circuit to maintain constant the total output of the generator. When the battery is being charged, while current flows to the lamps, there is a variation in the battery current, due to the demands upon it of the lamp load, but the total output of the generator remains constant. Figures 2 and 3 show a relay or solenoid having an opposing winding in the circuit, to neutralize the effect of the solenoid through wires in the lamp circuit, with the result that the resistance *15*, which by its wire connections is in shunt with the regulator coil *8*, is varied. In consequence of such arrangement the charging of the storage battery is determined by the relay, and is subject to variation by a lamp switch or resistance, which also causes a varying of the effect upon the regulator coil. In this manner the lamps are energized, including circuits *40* and *41* in series therewith. It is clear that Figure 2 differs from Figure 1, in that the resistance which is introduced by rheostat *15* is not introduced in the circuit of coil *9*, but is in a circuit arranged as a shunt around coil *8*, thus weakening the latter and causing a definite current to be delivered to the line for supplying both the battery and lamps. In this way the constant current output of the generator is modified, so as to supply sufficient current for the varying demands of the load. In Figure 3 is shown another modified construction attaining substantially the same result. Reference is made to a relay or solenoid *31* in shunt to the generator circuit by wires *45* in series with the resistance to the lamp circuit; that is to say, not across the generator mains, but connected across the lamps and between the resistance *18* to the lamp switch. A further detailed description of Figure 3 is unnecessary; it being sufficient to state that it shows a regulation for constant battery current which may be modified by changes in the lamp load without impairing constancy of generator output. The specification discloses a dual arrangement, viz., a generator which controls for constancy of current to compensate for speed changes, and supplementary means for protecting the battery from overcharge.

The opinion of this court in the former action states that the combination of the litigated claims was a new combination producing a new and useful result, and that the claims were entitled to a fairly liberal interpretation. As to this aspect of the controversy the opinion still obtains, since insufficient ground is shown for imposing a limitation requiring the regulating coil to be located in the main circuit. Merely changing the regulating coil from the main circuit to the battery branch, if its function remained unchanged, would not avoid infringement. But defendant contended that the claims under consideration were limited by the proceedings in the Patent Office, by the testimony of complainant's expert witness Hammer in the former suit, and by counsel at the hearing, and that complainant, therefore, is precluded from asserting anything more than was allowed him in the Patent Office. These insistences were involved in

considerable dispute, especially the statement that Mr. Hammer's testimony in the present suit was inconsistent with that given by him in the former suit. After reading his testimony in both suits in connection with the specification and Figures 2 and 3, it cannot justly be contended that his prior testimony limited the Creveling invention to maintenance of constant total generator output, regardless of variations in speed and lamp load; nor has he testified, as claimed, that the Creveling system is one wherein the dominating coil of the regulator must be connected in the main circuit. Counsel for defendant have seemingly overlooked the fact that the excerpts reproduced in their brief from Mr. Hammer's testimony in the former suit relate mainly to one form of construction, that illustrated in Figure 1, and that the claimed inconsistencies occurred in answers to assumptions embodied in certain questions put to the witness on cross-examination in respect to the capacity of the generator, etc. A careful reading of Mr. Hammer's testimony in both suits indicates clearly enough that from his viewpoint, as specified in Figure 1, the Creveling system discloses means for regulating for constant battery current, while the constant generator output at the same time is responsive to varying speed, or while the constant battery current is modified to compensate for variable lamp load.

On both sides it is recognized that when the application for the patent in suit was filed there were two systems of current regulation in the car axle lighting field, operating by fundamentally different methods. Although these systems came into interference in the Patent Office, both patentees from the beginning, as appears by the file wrapper and contents, were satisfied that the means described in their respective applications for regulating the current charged to the battery were very unlike and operated on essentially different principles. In the one case the means were for regulating a *constant current* from the generator, while the voltage varied, and in the other (McElroy patent, No. 893,533) for securing a *constant potential* on the main circuit, regardless of the quantity of current flowing therein, and the variation in speed and load. To this extent both the Creveling and McElroy patents are limited to specific types of regulators. In dismissing the interference, with the consent of the interferants, the Commissioner of Patents said:

"The parties have different objects in view and have produced different structures for accomplishing their objects."

Therefore, it is believed, in view of the decision in the former case, wherein the prior art was sufficiently differentiated from the Creveling patent, that the principal questions involved herein are whether defendant's constructions, the ampere hour systems as outlined in Exhibits H and S, are infringements of the claims in suit, and whether complainant's "Safety Type F" apparatus is an infringement of the McElroy patents. Do defendant's systems contain a regulation by voltage control, tending towards constancy of voltage, or are they regulated by current control, tending towards constancy of current? Do such systems embody evasions of the Creveling claims in suit by the continuance of a regulating coil as the dominant feature in the con-

trol to compensate for varying speed and load? Answers to these inquiries are fraught with difficulty, inasmuch as the opinions of the expert witnesses are very contradictory, and, in fact, in positive disagreement on many important points. Without recourse to the testimony of witnesses relating to the construction and adjustment of defendant's panel and the results achieved, as indicated by tests made, it would be almost impossible to believe that the experts had been of any great assistance to the court. It has been said that upon no question do experts disagree oftener than on the question as to whether a difference is a difference in form or in principle, and that therefore the weight of their opinions must be judged by the other circumstances of the case. In patent law it is settled that if the alleged infringing device shows a substantially different mode of operation, even though the result of the operation remains the same, infringement is avoided. Cimiotti Unhairing Co. v. American Fur Refining Co., 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100; Brooks et al. v. Fiske et al., 56 U. S. (15 How.) 212, 14 L. Ed. 665.

Defendant's constructions, as shown in Exhibits H and S, are practically alike in mode of operation, each embodying a generator delivering current to the battery and lamps; the strength of the generator field being governed by resistances (carbon pile) in its circuit, and operated by a relay or solenoid (coils *13* and *11*) positioned, not in the main circuit, but between the supply mains and in shunt with the lamps. Coil *13*, concededly a voltage coil, normally has in its circuit a resistance *14* which in action limits its energizing power, while coil *11*, concededly a current coil in series with the battery, acts to maintain the charging current constant. By such arrangement, the defendant contends, a constant voltage is maintained upon the current supply main without regard to variable speed or variable lamp load, a result opposite from complainant's is secured, and the voltage or potential of the generator is maintained constant, and varies the dynamo output to meet variations in lamp load, while in Creveling the output of the dynamo is maintained constant with varying voltage.

Counsel for complainant in their brief state:

"If coil *13*, the voltage coil, is the dominant coil—that is, exerts the major corrective force in the regulation—this system is voltage control. Conversely, if the series coil *11*, the current coil, is dominant, and is the determining factor in the regulation and exercises the major corrective force, the system is current controlled. The conflict between Mr. Hammer and Professor Clifford, and Mr. Webster and Mr. Bentley, is as to the relative dominance of the voltage and current coils."

The evidence of defendant in its entirety preponderatingly shows that in defendant's structure the voltage coil *13* is the dominating force for constant voltage regulation; that there is a co-operation between coils *11* and *13*, which results in constant generator voltage in spite of changes in speed or lamp load, coil *11* functioning to respond according to battery conditions, modifying the flow, while coil *13* is principally responsible for the constant voltage regulation.

Upon this phase of the controversy there was much evidence regarding the action of the two systems when some, or all, of the lamps were turned on and the load varied; the defendant contending that

its use of the constant voltage system with the ampere hour connection, and not the constant current or current control system of Creveling, is indubitably shown. Complainant objected to the admission of testimony by defendant relative to certain tests made by it, characterizing the tests as impracticable and unreliable; but such testimony is entitled to weight—more weight, in view of the fact that it relates to matters actually within the knowledge and experience of the witness, than is given to testimony based simply upon theory or opinion. Overweight Counterbalance Elevator Co. v. Improved Order of Red Men, 94 Fed. 155, 36 C. C. A. 125.

The chart, Exhibit M, indicates the result of a test made with the stop charge system which was held an infringement in the former action, and illustrates the total output of the generator, maintained at 43 volts regardless of lamp load. Exhibit Y is illustrative of generator action when there is variation of speed and load, and shows characteristics of constant generator output, regardless thereof. In both charts are indicated increase and decrease of generator voltage to meet changing conditions. In Exhibit K is shown a test of defendant's standard system, Exhibit H, with constant speed and variable lamp load, indicating that the total generator output was variable. It is fairly shown that the normal current of the battery is undisturbed by the lamp load addition to the generator output, indicating that the battery may be charged while the generator supplies current to the lamps. The regulator operates to increase or decrease the generator output and its supply to the lamps, while at the same time the generator voltage is maintained substantially constant in spite of variations of speed or variations in lamp load; the generator output, however, being subject to changes due to lamp conditions.

The testimony of the witnesses Mead, Gaertner, Cunny, and Wray relates to the manner of constructing the panels used by defendant. It is shown that coil *11*, a modifying coil, was always connected in the battery branch; that all the panels were adjusted and tested to maintain constant current and variable output; that the voltage coil *13* (Exhibit S) was adjusted in relation to resistance *14* to maintain the generator voltage at 45 volts on an open circuit; and that with the circuit closed coil *11* operated to lower the generator voltage, which was maintained constant. It was further shown that frequent measurements were made of the voltage for current in the defendant's system, and that the generator voltage was always maintained constant, regardless of changes in speed and changes in lamp load. The witness Wray testified that he had made tests or measurements of defendant's system in operation on the New Haven Railroad by connecting ammeters and voltmeters in the circuit, noting the effect of the starting and stopping of the train at frequent intervals, and that the voltage remained practically constant in spite of varying conditions of load, while the generator ampere varied with the number of lamps used, increasing as lamps were turned on, and decreasing as lamps were turned off. That the character of the tests was not improper or unusual is evidenced by the acquiescence of Professor Clifford, who said that placing a voltmeter on the system to measure

the voltage was a good way to make the test. His calculations in opposition to their correctness, based upon the number and character of the ampere turns in the series coil, have not been overlooked; but the probative force of such calculations does not outweigh the demonstrable fact that the voltage coil *13* in defendant's system is the principal factor in the regulation, and not the current coil, as in complainant's.

Nor, according to a preponderance of the evidence, has the defendant departed from the McElroy patents by the addition of the ampere hour meter, thereby acquiring the supplemental battery protective means of claims 3, 6, and 8, in suit. The single purpose of the meter device, which is independent of the back voltage of the battery, is to measure the amount of current flowing to the battery, and the mere presence of the ampere hour meter is no particular aid in establishing that defendant's system is either current regulated or voltage regulated. In the Creveling patent the protective device has reference to a regulator for determining a constant generator current, and a broad construction of the claims, including such element, would seem to encroach upon the prior McElroy patent, No. 893,533. In the earlier McElroy patent there is an axle-driven car-lighting system, in which the generator was capable of charging the storage battery and supplying current to the lamps at the same time, regardless of changes in the lamp load. The storage battery had a variable voltage, and the patentee, to overcome difficulties in maintaining the same constant to the battery and lamps in spite of variation, adapted a double-deck arrangement. He devised means for an automatic readjustment of the lamp resistance, and provided a second regulator for correcting speed variations, while in his improvement patent he positioned a modifying coil in the battery branch to co-operate with the main regulating coil and to modify its action so as to accommodate the storage battery and protect it from overcharge.

A comparison of defendant's present systems with McElroy's shows that, though they are not alike in all particulars, the essential elements of one are present in the other. For instance, the resistance *8* in the shunt field circuit of defendant's structure corresponds to the resistance *K* in the McElroy patent, the carbon pile being the equivalent of the wire resistance, and the principal coil *13*, connected in circuit between the supply mains, is the voltage coil *C* of McElroy, while the modifying coil *11*, or the means for protecting the battery, is connected in the battery branch. In operation, the defendant's system maintains a constant generator voltage in spite of variations in the lamp load, while varying the total generator output to correspond with changes in the lamp load. Such system, therefore, is believed to be the McElroy constant voltage system—a system which is operated upon a different principle from the Creveling patent in suit.

The assertion that the McElroy structure was impracticable and worthless, as a constant voltage system has not been proven. It appears, on the contrary, that in 1899 it was used experimentally on half a dozen railroad cars, and that later it was redesigned to in-

case the lamp and generator regulator, and to overcome minor troubles due to defective commutation, troubles which, however, did not interfere with maintaining the voltage on the lamps practically constant. In addition to such use, it has been used commercially by the defendant since its discontinuance of the stop charge and taper charge systems.

[2] As to the counterclaim: The "Safety Type F" apparatus manufactured by the complainant is claimed to be an infringement of both the McElroy patents, in that it utilizes the double-deck idea of constant voltage, with the addition of the modifying coil. But it is believed that the primal embodiment in the first McElroy patent was the governing coil *C*, connected across the generator mains to affect the generator regulator, and to induce responsiveness to generator voltage by which it was exclusively controlled. Complainant's apparatus does not embody such a regulation or its equivalent. Much was said, it is true, regarding the arrangement of what was designated the two-level or double-deck voltage, but the McElroy patent does not broadly claim such an arrangement; its primary object, as already stated, being the regulation by a constant voltage generator regulator with a constant voltage lamp regulator. Under such a lighting system the constant voltage regulation is continuous from the beginning of the battery charge to the end. In "Safety Type F" the arrangement of the various elements is such that in operation there is a period of current control tending towards constancy of battery charging, superseded by a period of voltage control tending towards constancy of voltage control to protect the battery from overcharge.

Both McElroy patents were on essentially different lines from the Creveling patent, their modes of operation were different, and they produced different results. In complainant's structure the current is maintained constant during most of the time of battery charging, that is, for about four hours at from 64 to 60 amperes, and, upon imminence of overcharging, the protective means operate to reduce the generator output. Defendant's counsel, contending that complainant has adapted the McElroy principle in its apparatus, argues that the current coil *L* (see Exhibit R) operates only during the greater part of the battery charging period, and then only to prevent a tendency of the current to increase, but without preventing any decreasing tendency. But this contention is strongly negatived, and it is believed that the regulating coil of complainant's structure prevents the flow of excessive current, regulating both for increase and decrease of current.

It would be of no benefit to discuss these patents at greater length, nor need other points argued herein be considered. The conclusion reached is that the "Safety Type F" system is not an infringement of the McElroy patents, or either of them.

A decree may be entered establishing that Exhibits H and S, defendant's systems, are not infringements of the Creveling patent in suit, and dismissing the supplemental bill and the counterclaim.

MAYER v. MUTSCHLER et al.

(District Court, W. D. New York. November 2, 1916. On Petition for Rehearing, December 7, 1916.)

1. PATENTS ⟸26(2)—INVENTION—NEW COMBINATION OF OLD ELEMENTS.
An invention is patentable, where it consists entirely of old and well-known ingredients or elements, provided a new and useful result is thereby attained.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⟸26(2).]

2. PATENTS ⟸58—ANTICIPATION BY UNPATENTED DEVICE.
Where a patented device is claimed to be anticipated by one that is unpatented, it must be proven that the anticipating structure was capable of practical and successful use.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 75; Dec. Dig. ⟸58.]

3. PATENTS ⟸75—PRIOR USE—PUBLIC USE.
Where alleged prior use machines were shown to customers and were familiar to employés using them, their use was a public use within the meaning of the patent law, although they were kept secret from competitors.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92–97; Dec. Dig. ⟸75.]

4. PATENTS ⟸75—PRIOR PUBLIC USE.
The sale of the product of a machine which is still being experimented with and improved, and the use of which is kept secret, does not take the machine out of the experimental stage, so as to constitute a public use, to invalidate a subsequent patent for the completed machine.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 92–97; Dec. Dig. ⟸75.]

5. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—PAPER COATING MACHINE.
The Mayer patent, No. 1,043,021, for a machine for coating paper, mainly adapted for coating paper with carbon, etc., and the essential feature of which is the assembling of coating roll equalizer, and finishing or smoothing roll so closely together as to eliminate as far as possible exposure of the paper to the atmosphere after coating and before chilling or annealing, was not anticipated, discloses invention, and is not void for prior public use; also *held* infringed.

In Equity. Suit by Charles W. Mayer against A. & H. G. Mutschler, the Rochester Wax Paper Company, and Daniel J. Coakley. On final hearing. Decree for complainant against the defendants other than Coakley.

Dominick & Ryan, of Buffalo, N. Y., for complainant.

Church & Rich, of Rochester, N. Y. (Frederick F. Church, of Rochester, N. Y., of counsel), for defendants.

HAZEL, District Judge. The bill alleges infringement of patent No. 1,043,021, issued to complainant October 29, 1912, for a coating machine mainly adapted for coating waxed paper, carbon paper, or any kind of paper with sensitized emulsion coating. The defendants A. & H. G. Mutschler manufacture coating machines at Rochester, N. Y., which are claimed to be infringements of the Mayer patent in

suit, the Rochester Wax Paper Company is a user of said machine, while the defendant Coakley is charged with conspiring with the other defendants to manufacture and sell the same.

Coating machines for applying to paper single or double coats were old, having been used for many years prior to the invention in suit. In such machines the paper travels from a supply roll to a coating roller, usually made hollow for holding steam or hot water, which revolves in a bath of coating material to keep it in a fluidous condition, so that when the paper comes in contact with it a quantity of the material adheres to its surface. The paper then passes to one or more idler rolls of varying size before it reaches a knife, scraper, or so-called equalizer, which distributes the coating, removing excess quantities from the paper. In some of the older devices the equalizer was adjustable for thin or heavy coating. Other rolls were also positioned in the frame of the machine beyond the equalizer for tensioning the paper, and in the patent under consideration there is a roller or smoother adjacent to the equalizer, with steam and cold water connections for heating or chilling the coating. Heating the coating produces a dull finish, while chilling it produces a bright or glossy finish. The specification says:

"When the machine is used for coating paper on one side, the coating roller *33* and the square tube *54* are heated, preferably by steam, while all the other rolls in the machine are cooled by the circulation of cold water through them or are left of neutral temperature. When the machine is used for coating both sides of the paper, the coating roller *33* and the square tube *54*, the roll *38*, the coating roll *72*, and the tube *85* are heated; the remainder of the rolls being cooled or left of neutral temperature. The operation of the machine may be varied. For example, in coating the paper on one side the roller *33* and the square tube *45* may be run hot, and the roller *38* and the roller *72* may also be run hot, leaving the paper to cool gradually as it passes under the fan *104*; it being my experience that, when the paper is chilled quickly by keeping the roller *38* cold, a gloss surface will be left on the paper, while, if the paper is kept warm for a considerable period of time, the solution will soak into the paper and more thoroughly impregnate it, and when dry it will have a dead finish instead."

The patent also includes a roller at the back end of the machine having a friction drive, for winding up the coated paper. The defenses are anticipation, prior use, and disclosure, limitation of claims, and noninfringement.

[1] It is undeniable that all the elements of the disputed claims were old and are found in prior publications in evidence, but the manner of their combination and arrangement was new and novel. If such rearrangement had simply produced a cheaper or a superior article, it would scarcely be regarded as a patentable invention; but it produced a machine of a distinct character, in which the combined elements function differently than in any of the prior art structures. An invention is patentable, as is well settled, where it consists entirely of old and well-known ingredients or elements, provided a new and useful result is thereby attained. Seymour v. Osborne, 78 U. S. (11 Wall.) 516, 20 L. Ed. 33; Griswold v. Harker et al., 62 Fed. 389, 10 C. C. A. 435.

At the date of the Mayer invention the art was presented with the problem of how to improve the quality of carbon paper without

great waste in production. It was substantially proven that only about 25 per cent. of the coated paper produced by known coating machines was marketable. The patentee, after much experimentation, ascertained that by assembling the coating roll, the equalizer, and the finishing roll close together within the frame of the machine, in such a way as to accelerate the spreading and annealing or tempering of the coating, and at the same time co-operate with the feed and tension mechanism, waste was decreased, and a better quality of paper produced. The patentee became satisfied that the intervention of idlers or tension rolls, or even subjection to the atmosphere for any appreciable length of time, interfered with proper chilling or annealing of the coating; therefore he arranged the equalizer close to the coating roll and the smoothing roll *38* close to the equalizer, thus eliminating everything between the essential instrumentalities which would tend to affect the temperature or the course of the paper. As said by complainant's expert, he eliminated "the cold zone of the prior art extending from equalizer to the cooling or annealing roll." The specification, in stating his purpose, says:

"The position of the smoothing roll *38* close to the equalizing bar *56* and to the dope roll is important, whether the roll *38* be run hot for annealing the paper or cold for chilling it to produce a gloss surface, since in either case it is necessary that this roll act on the paper before its chilling from contact with the atmosphere commences. After such chilling begins, the coating cannot thereafter be releveled and smoothed to make a perfect coat."

It will be observed, as heretofore pointed out, that roll *38* and the equalizer bar are required to be in a position of immediacy to the dope roll, with no intervening idler in the path of the paper as it travels from the coating roll to roll *72*, which acts as a chilling or annealing medium.

The claims involved are the first, second, third, fourth, seventh, eighth, fourteenth, fifteenth, forty-seventh, forty-eighth, and forty-ninth. Claims 1 to 4, inclusive, are for the broad invention; claims 7 and 8 specify the combination with an adjustable equalizer; claim 14 relates to the feeding and tensioning means; claim 15, to the adjustable equalizer; claim 47, to the smoothing roll *38*, combined with roll *72*, and their location in the frame of the machine, permitting easy inspection of the coating; claim 48, to tensioning mechanism; and, finally, claim 49, to cooling means. Claim 1 reads as follows:

"1. A machine for coating paper, comprising means for feeding paper under tension, means for coating the paper as it is fed, an equalizing device adjacent said coating means arranged to receive the paper therefrom before it touches another object, and a roll for releveling and smoothing the paper, arranged to receive the paper web directly from the equalizing device, said roll being arranged adjacent said equalizing device."

The defendants contend that the Mayer patent in suit was anticipated by the Bedells British patent, No. 2,720 of 1858, which it is said discloses the identical arrangement of elements and parts; but the Bedells specification clearly indicates the presence of a cold zone, as the web, after passing a dope roll and scraper, contacts with two idlers before it reaches the roller *11*, and therefore it is not anticipatory. The patent to How, No. 739,313, for impregnating paper, as distinguished

from coating it, includes, true enough, all the essential elements of the patent in suit; but, as in the Bedells patent, it had intervening idlers, back of the scrapers, which from the point of view of Mayer were objectionable features, and the distance from the idler to the finishing roll was such as to create a cold zone. The British patent to Lake, No. 11,453, was for a carbon paper making machine, wherein the paper passed from a dope roll into contact with a steam-heated scraper or equalizer, and then under a guide roll; but an idler was interposed between the dope roll and the scraper, and therefore the efficiency claimed to be secured by complainant's arrangement of parts, eliminating intervening objects and the cooling zone, was not attained.

The patents to Hammerschlag, Pembroke, and Pulsifer are also distinguishable from the Mayer patent, in that they belong to a type of machine operating on a different principle; i. e., by scrubbing or wiping the dope into the paper. In the Pembroke patent, for instance, the coating roll was purposely rotated slower than the paper, so that the coating could be wiped on, and the paper then passed to a heated drum, where the dope was scrubbed in by a vibrator device having toothed edges for bearing against the paper. In making highly glossed paper, the paper was heated in the Pembroke machine by a gas flame before traveling to the dope roll, while a dull finish was obtained by turning off the gas and allowing the roll to run cold. By this method the paper was impregnated, and not coated, as by complainant's method, and therefore such patents, wiping or scrubbing the dope into the paper, were not anticipations.

The Prior Use Defenses.

[2] To supersede a patent, the prior use of an invention must be a public and not a private use; but just what constitutes a public use had been the subject of numerous adjudications. Where the original invention was a part of an incomplete machine, a use kept secret until after another inventor obtained a patent for the same invention was not regarded as public. The rule is that, where a patented device is claimed to be anticipated by one that is unpatented, it must be proven that the anticipating structure was capable of practical and successful use.

[3] But the various prior use machines in evidence were not privately used, as claimed by complainant, as that term is understood in the patent law. Although users in every instance kept all knowledge of the manner of running the machines and of their essential elements from competitors, to prevent simulation of the details of operation, the machines nevertheless were not infrequently shown to customers and others, and of course were familiar to many employés, which constituted a public use of what they contained. Walker on Patents (4th Ed.) § 71; Reed v. Cutter et al., Fed. Cas. No. 11,645; Egbert v. Lippmann, 104 U. S. 333, 26 L. Ed. 755; Macbeth Evans Glass Co. v. General Electric Co. (D. C.) 231 Fed. 183.

Much testimony was submitted to anticipate the Mayer patent in suit by the Republic-Dodge machine, built in 1906, and by various prior coating machines built by Mayer and sold in 1907 to Archbald,

who rebuilt them in 1908, selling two of them to the International Carbon Paper Company. Diagrams, photographs, and sketches of such prior machines, and testimony in relation thereto, prominently challenge the validity of the claims in suit. Indeed, the evident similarity between the Republic-Dodge coating machine and the coating machine described and claimed in the patent under consideration is quite striking, as will readily be perceived on inspection. Complainant, however, contends that the testimony of the defendants in support of prior use is so dubious that it should be disregarded, and that the photographs and drawings of such machines (Exhibits 43, G. H. I, and 44), when closely scrutinized in connection with the evidence explanatory thereof, indicate clearly that the prior constructions failed to embody the patentee's method of assembling the equalizer bar adjacent to the coating roll for immediately receiving the paper therefrom and the smoothing roll adjacent to the equalizer to eliminate the injurious cooling zone.

Blueprint (Exhibit No. 4) produced in response to complainant's interrogatory No. 60 correctly outlines the Republic-Dodge machine as it existed at the time the blueprint was prepared, and assists in following the path of the paper, which, after leaving the supply roll, passes about idler rolls, an oilcloth covered drive, two other idlers, and thence to the dope roll *G*, from which it passes over the scraper *H* to the under side of a stationary heating drum *I*, and thence to a cooling roll *J*, past idlers, and over rolls *M* and *N*, to the wind-up roll *O*. Archbald swears that there is also a vibrator *17* near the drum which bears against the coated paper while on the drum, spreading and impregnating it. Exhibit 44, prepared by counsel for the defendant, as illustrative of the Republic-Dodge machine, is claimed to show the precise arrangement of the essential parts of the Mayer patent; but on careful inspection it will be seen to vary from blueprint No. 4, in that the paper on leaving the dope roll passes immediately to the cooling roll *J*, instead of first passing around the heated drum. It was, however, explained that the paper traveled around either the heated drum or the cooling roll in the Republic-Dodge machine, according to the finish desired, and that when it passed directly to roll J from the dope roll the mode of operation was substantially the same as in complainant's patent. If I were satisfied that such was the true path of the paper, my conclusion would be that the Republic-Dodge machine anticipated the broad claims of the patent in suit; but a comparison of Exhibit 44 with blueprint No. 4 shows the impracticability of the Republic-Dodge machine, as the paper therein passes clear of the equalizer and does not contact with it. Moreover, the blueprint shows no means for adjusting the scraper to come in contact with the paper in its run to the cooling roll, and as bearing upon its absence Archbald testified that since acquiring the Republic-Dodge machine (which occurred after this action was begun) he remounted the equalizer, adapting it for lowering or raising to contact the paper as desired. Accordingly I do not agree that such exhibits are corroboratory of Archbald's general testimony, or that the entire showing is of sufficient weight to induce the conclusion that the Republic-Dodge machine an-

ticipates claims 1 to 4, inclusive, 7 to 15, inclusive, and 48 and 49 of the patent in suit. I think the drum heater and vibrator were intervening objects injuriously affecting the paper on its way from the equalizer to the cooling roll *10*, an objection that the patentee designed to overcome by providing means for running the paper directly to the smoothing roll adjacent to the dope roll, thus "eliminating, or as nearly as possible eliminating, the cooling zone."

The prior Mayer machines (Exhibits 35 and 36) to which reference has herein been made, which were sold in February, 1907, to the Pen Carbon Manifold Company, of which Mr. Archbald was president, and were afterwards rebuilt by him, were carbon coating machines embodying therein steam heated equalizers. One of such machines applied coating to one side of the paper only, and the other to both sides. The supply and rewind rolls were located one above the other on the back end of the frame, and certain of the rolls were connected to hot or cold water pipes. Exhibit 35 contains practically all the elements of claim 47, but arranges them differently than does complainant. After the paper leaves the equalizer in the earlier machine it travels about two feet before reaching the chilling or annealing roll, as opposed to five inches in the patent in suit. The gist of the Mayer invention, as already pointed out, was the assembling of the coating roll, equalizer, and finishing or smoothing roll so closely together as to eliminate as far as possible the exposure of the paper to the atmosphere, after coating, and before chilling or annealing. Defendants' Exhibit 38 shows an idler interposed between the dope roll and the equalizer, which the experts on both sides agree would affect the physical condition of the paper before it reached the equalizer. Therefore the earlier Mayer patents are not anticipatory of the patent in suit, and the claims in controversy are not readable thereon.

The prior Stull machine (Defendants' Exhibit 57) built by the patentee herein, is claimed by defendants to be a complete anticipation; but complainant contends that it was never in fact completed and was incapable of producing a marketable product. In such machine the dope roll, adjustable equalizer, and smoothing roll were assembled close together to eliminate the cold zone, and hot and cold piping connections were provided. The rewind roll with friction drive mechanism was located above the supply roll at the back part of the machine frame, as in the patent in suit. The distinguishing features, however, were the employment of two equalizers between the coating and smoothing rolls, instead of one as in the patent in suit, and the interposition between the dope roll and the equalizer of an idler roll, which the defendant contends is similar to idler *7* in its machine, being used to keep the paper in contact with the dope roll when engaged in adjusting the equalizers.

There was much testimony regarding the transfer of such machine to Stull by a bill of sale in the autumn of 1908, about three years before the application for the patent in suit was filed. Complainant contended that the bill of sale did not constitute either prior public use or disclosure of the invention within two years before the filing

of the application, as the bill of sale was merely security for a debt, which subsequently culminated in delivery of the machine for nonpayment on April 15, 1910. The machine is shown to have remained in complainant's factory continuously from 1908 until the date of delivery, where no one except Mr. Stull and employés were permitted to inspect it. Work of one kind or another was constantly being done upon it; for instance, the equalizers and drill rolls were changed several times, as in operation they caused the paper to vibrate, thus impairing its quality. Later on, one scraper was abandoned, the machine redesigned, various rolls located in different positions, the inlets and outlets for steam and water placed on the same side, the frame changed, and the idler roll abandoned.

[4] The sale of the product of the machine did not take the machine out of the experimental stage. Penn Electrical & Mfg. Co. v. Conroy, 159 Fed. 943, 87 C. C. A. 149. The witness Albrecht testified that defects were constantly occurring in the machine, and that it was generally understood by all, including Stull, that the carbon paper in question was produced by an incomplete machine, the use of which was still secret. The defendants have not sustained the burden of proving prior public use beyond a reasonable doubt. The Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 36 L. Ed. 154.

[5] Complainant claims that the defendant Coakley, who had been in his employ, engaged his services as sales agent to the defendants A. & H. G. Mutschler in 1911, and from then on assisted them in the production of a fac simile of his coating machine. The evidence, however, is insufficient to sustain this claim. Coakley testified that he had no knowledge or information as to the exact character of the defendants' machine during its construction, that he made no suggestions of any kind as to the design, and, indeed, that he believed it would be a noninfringing machine of the kind previously sold by defendants to the Federal Carbon & Ribbon Company. Importance is attached to certain letters in evidence passing between him and one Bentley, a prospective purchaser; but such letters do not disclose an intention on the part of Coakley to sell a machine possessing the characteristics of complainant's and for these reasons the bill as to him should be dismissed.

The next question is whether the remaining defendants have appropriated in their coating machine the elements in combination of the various claims in controversy. Defendants contend that claims 1 to 4, inclusive, 7, 8, 14, and 15, embodying the feature of a reveling or smoothing roll arranged for receiving the paper directly from the equalizer, are entitled to only a narrow construction, and that as defendants in their machine utilize an idler roll between the equalizer and the smoothing roll "for bearing the arc of contact of the paper on the dope roll," infringement is thereby avoided. While it is true that immediacy and directness of travel of the paper are of the essence of the invention, still, as heretofore indicated, the claims should be construed in the light of what the patentee intended to accomplish, i. e., the passage of the paper directly from the coating roll to the equalizer and then to the smoothing roll, thus "traveling the minimum

distance before coming in contact with, or being contacted by, any other object which would have a physical effect upon the coat as it is applied." As defendants' smoothing roller 7 bears only slightly on the back of the paper traveling at the rate of about two feet per second, such bearing is a negligible factor, functioning more particularly to align the paper. It certainly does not in its position appreciably delay the progress of the paper and thus affect the temperature of the coating, and even though the paper is apt to get out of alignment when the scraper is upwardly adjusted, infringement of said claims in my judgment is not avoided. The exhibit drawing of defendants' machine shows the embodiment of a coating roll, equalizer, and smoothing roll closely assembled as in complainant's patent, the smoothing roll being hollow and capable of rotation, and designed, no doubt, for containing a heating or cooling fluid.

It is unnecessary to further detail the features of the many claims in controversy, or to point out specific or equivalent similarities in defendants' machine. I have referred to the broad claims, and have said that in my opinion they are appropriated by defendants in their construction, and upon comparing the more specific claims with it, it will be perceived that all the elements of the claims in combination, their method of arrangement, not only as to directness and immediacy of the travel of the paper, but as to the hot and cold piping connections of the finishing roll, the adjustable equalizer, the feeding and tensioning means, including the friction held roll from which the paper starts, the ironing device, the power-driven rolls, and friction wind-up roll located at the end of the machine, are all contained in defendants' structure, and are used in combination with the principal elements of the patent in suit. Claims 47, 48, and 49 are obviously not to be considered as containing independent elements or features, as their novelty resides wholly in their constituent adaptations with the primary invention to which they are limited, and, thus limited, they are not anticipated by the patents to Pembroke and Pulsifer.

Inasmuch as defendants' structure actually embodies the elements of the claims in controversy, or contains an embodiment of such a nature as will enable users easily to adapt the device to become an infringement of such claims, the defendants Mutschler and the Rochester Wax Paper Company must be deemed to infringe the same; and therefore a decree may be entered, except as to Coakley, holding the patent valid and the claims in controversy infringed, with two-thirds costs and disbursements.

On Petition for Rehearing.

It was not intended to attribute to the Mayer patent more praise than the proof warranted. That the art was presented with the problem of how to improve the quality of carbon and wax paper without great waste in production, as "only about 25 per cent. of the coated paper produced by known coating machines was marketable," was perhaps an overstatement; but close analysis of the testimony of the witnesses Peterson and Marcellini nevertheless shows that the prior Republic-Dodge and Stull machines, which were largely dwelt upon by the de-

fense, and which were constructed by Mayer, were not wholly free from the objection due to the presence of a cold zone and retarded efficiency. The testimony of the witness Babcock, who made test sheets of coated paper on the Mayer machine in suit with various kinds of coating, would certainly indicate that a step in advance had been made in coating machines by which waste of both paper and dope was largely decreased. The expert witness Macomber testified that the Pulsifer and Pembroke patents showed coating machines of a different type from Mayer's machine, wherein a thinner coating of the dope proved efficacious.

2. It was not strictly correct to state in the prior opinion that the Lake British patent disclosed an idler interposed between the dope roll and the scraper. The specification says that "*8* is the scraper for the underside of the paper strip after it passes from the first ink roller *6*," "a guide roller *9* is provided for the strip after it leaves the first scrape or doctor *8*," and "strip *8* passes from the inking mechanism, or mechanisms, over a drum *D*, which is made cold to harden the wax," thus indicating that the paper passes directly from the dope roll to the scraper and then to the idler *9*; but the arrangement of the roll nevertheless was such that the efficiency of production of complainant's patent was not attained, as the paper had to travel through a cold zone.

3. The questions of the ownership of the Stull machine and of whether or not it was an experimental machine are sufficiently treated in the former opinion.

4. When it is considered that all the elements of claims 47, 48, and 49 were used in combination to complete the automatic operation of coating, unrolling, and then rolling up the paper, the claims, notwithstanding the presence of friction drives in the Pembroke, Pulsifer, and Republic-Dodge machines, are not for an aggregation. The question is not free from doubt, but as the various elements were all used together in combination, I think the doubt should be resolved in favor of the validity of said claims.

The petition for rehearing is denied.

HALL PRINTING PRESS CO. et al. v. GEORGE MANN & CO., Limited, et al.

(District Court, S. D. New York. December 11, 1916.)

No. E 13-178.

PATENTS ⇐328—INVENTION—PRINTING MACHINE.

The White patent, No. 770,488, for a rotary planographic transfer printing press, and relating to the device for tripping the transfer cylinder when a sheet is missed, *held* void for lack of invention, in view of the prior printing press art.

In Equity. Suit by the Hall Printing Press Company and the Miehle Printing Press & Manufacturing Company against George Mann & Co., Limited, George C. H. Wichmann, Arthur B. Evans, and Harold Dawson. On final hearing. Decree for defendants.

This is the usual bill for infringement of a patent. The machine is in the art of rotary planographic transfer printing presses, the patent, No. 770,488, being for the "tripping," or movement of the middle or transfer cylinder from the other two; such movement being within the control of the pressman, with sufficient speed to remedy the difficulties otherwise arising whenever a sheet is missed. In machines of this character the "form," or printing, cylinder, which is furthest removed from the impression cylinder, has a sector of its periphery covered by the printing surface, which generally consists of a zinc or aluminum plate tightly stretched, and upon each rotation inked by various inking and dampening devices which are well known in the art. The second, or transfer, cylinder, which contacts with the "form," also has upon a sector of its periphery a rubber "blanket," so called, which takes the ink impression from the aluminum plate in sufficient quantity to do the printing. Having received the ink from the aluminum plate, the transfer cylinder continues to rotate, and eventually contacts with the third, or impression, cylinder. When all goes well, the sheet separates the impression cylinder from the transfer cylinder during that part of the cycle when the transfer blanket is in contact; but, if a sheet be missed, the blanket will print upon the impression cylinder, losing a part of its ink. As the transfer cylinder continues to rotate, the zinc plate, which itself has been re-inked by the ink rolls, will give it a double quantity. The result will be that the next sheet will not only get upon its front too great a quantity of ink, but it will receive an offset from the impression cylinder upon its back, and thus it will be ruined. The invention consists in the mechanism by which the transfer cylinder may be immediately moved out of contact with both the form cylinder and the impression cylinder, as soon as the operator sees that he has missed a sheet. This is accomplished by mounting the transfer cylinder eccentrically in a way quite common in the arts. The claims in suit are the following:

"13. In a printing machine, the combination of a planographic form-carrying cylinder, ink and water rollers adjacent thereto, a transfer cylinder having a yielding surface, an impression cylinder, and means for separating the transfer cylinder from both the form cylinder and the impression cylinder, substantially as described."

"15. In a printing machine, the combination of a planographic form-carrying cylinder, ink and water rollers adjacent thereto, a transfer cylinder having a yielding transfer surface, an impression cylinder, and means for moving the transfer cylinder to place the transfer cylinder out of printing relation with both the form cylinder and the impression cylinder, when desired, substantially as described."

"23. In a printing machine having a planographic form-carrying cylinder, the form consisting of a metal sheet, clamps for holding said sheet to the cylinder, a transfer cylinder having a yielding blanket and straining devices for said blanket, and an impression cylinder, means for moving the transfer cylinder to place the transfer cylinder out of printing relation with both form cylinder and the impression cylinder, substantially as described."

The defendant raised two questions, invalidity and double patenting. As the second point is not considered in the claim, the facts are not given in regard to it.

Charles C. Linthicum and George F. Scull, both of New York City, for plaintiffs.

Victor D. Borst, of New York City, for defendants.

LEARNED HAND, District Judge (after stating the facts as above). In this case infringement, though not formally conceded, is so obvious, however the claims be taken, that I may pass it over without more.

The next—and, as I view it, the only—question is of validity under the prior art. To an intelligent understanding of the patent it is necessary to consider what is the art of rotary planographic printing

and how it grew. It represents in fact the convergence of two quite independent branches of the printing art: First, lithography, which, as its name implies, is the printing from a flat stone bed; and, second, the rotary press. Each of these arts was very old at the beginning of the twentieth century, but they had, at least in the United States, never been combined. In lithography no substance had for long been perfected which could be rolled upon a cylinder, without which the flat bed remained a necessity. It is true that the German patent to Bohn & Huber, which was applied for in April, 1893, was for a rotary planographic press; but either it was not successful, or its use was confined to Germany, because there had appeared nothing of the sort in the United States before 1901. In September of that year White, the patentee here, filed his application for a true rotary indirect planograph, which resulted in patent No. 705,180; but the record does not show that it was ever made and used. It was a modification of his earlier rotary direct press, patented in No. 689,527, and was intended only for heavy materials, such as tin, glass, and the like. In August, 1903, Rubel planned a true rotary indirect planograph, which was worked out by Tucker, and bore the name of the capitalist, Kellogg, who put it out. This press was for printing paper and completed the art. The question in this case turns wholly upon the relative movements of the cylinders in such a press as Kellogg's.

I have presupposed heretofore, with substantial accuracy, that all rotary presses, not of planographic type, printed directly from the form cylinder. A patent like Clause, 585,907, was an exception in the art, and the rubber transfer sheet was apparently added for printing on tin or other hard substances. The transfer cylinder was, however, well known in the lithographic art, at least in the early 80's, and had been thoroughly developed just, as it appears, after the rotary planograph went into use.

In both kinds of press, the rotary direct and the indirect lithograph, obviously the pressman would occasionally miss a sheet, because we are considering always a sheet-fed press, and no one has yet made an automatic sheet feed. When this happened in the direct rotary press, if it kept running, the form would touch the impression cylinder and ink its surface. The next sheet would therefore carry an offset on its back, and the next, and so on, till the impression cylinder had been cleaned by successive sheets. It became, therefore, practically a necessity to trip the impression cylinder from the form, or the form from the impression cylinder, and the art responded to the need in repeated instances. In some of the patents cited by the defendants this purpose expressly appears: Toyc, 557,626, page 3, lines 85–112; White, 689,527, page 2, lines 65–67. A very common means of tripping the press was to mount the impression cylinder eccentrically, and have a hand lever or pedal by which the operator could throw it out of contact with the form, by a device similar to that shown in Fenner, 276,015. Sometimes it was the impression cylinder that was moved, as in Hawkins, 272,835, and many others cited by the defendants; sometimes it was the form, as in the little auxiliary cylinder of Buxton et al., 405,009, Figure 8, cylinder B, or in Spalckhaver, 703,491. Thus, in the rotary

press art, the separation of the cylinders for all the purposes which White's present patent shows was a well-understood commonplace.

The same need was differently answered in the lithographic press, because of its different constitution, and of the necessarily intermittent nature of its operation. It must be remembered that the printing stone must by hypothesis be flat, and its movement therefore rectilinear. Obviously that movement must therefore be reciprocating, and if it was coupled directly with an impression cylinder it was equally necessary that during the return stroke the contact between them should be in some way broken. When indirect lithographic presses came in, the contact between the transfer cylinder and the stone had also to be broken in the same way, though the transfer and impression cylinder might remain together. Whether there was or was not a transfer cylinder, the separation of the bed stone from its contact during the reciprocating movement was accomplished by cutting away enough of the transfer or impression cylinder to effect a clearance at the proper part of its circumference. The cylinder was then automatically stopped when the stone was to return, and the clearance was enough to keep the face of the stone from being smudged. The impression cylinder was likewise stopped, and in contact with the transfer cylinder, during this portion of the cycle, if the press was indirect. In such a press, if the sheet were to be missed, however, the impression roller and the transfer cylinder would begin to rotate again on the next stroke, and the impression cylinder would carry off the ink from the transfer, and the transfer cylinder itself would be inked twice by the stone. Hence the same necessity arose for some device by which these results could be avoided, and this device was only a prolongation of the stasis of both cylinders for one and one-half cycles, instead of one-half a cycle. While this effected a separation of stone from transfer, it did not move them apart. Ford likewise devised a separation of the impression from the transfer cylinders in such machines; but it was not necessary to use this when a sheet was missed, and it was not in fact capable of being used for that purpose.

Such was the situation in each of the two lines which converged in the first years of the century to form the rotary planograph transfer press which is here in question. The press being the old lithographic transfer press in which the stone was superseded by a rotary cylinder, it must be apparent that the same problem arose when a sheet was missed as had arisen in each of the arts from which it was descended. Therefore it took no invention from the vantage ground of prior experience to see that there must be either a stasis of the machine, or a separation, not only of the transfer and the form, but of the impression and the transfer. A stasis of the press was well known to be a disadvantage; indeed, its avoidance was one of the important reasons for a rotary press. The throwing out of the cylinders was therefore directly indicated by the whole history of the rotary direct presses. But to abandon the stasis as a means involved with equal obviousness the separation of all three, because, though the form were separated from the transfer cylinders, the latter would smudge the impression roller and print a set-off on the back of the next sheet, and, though

the impression were separated from the transfer, the form would smudge the transfer, or at least give it too much ink for the next sheet.

The first efforts at a rotary planograph which appear to have been made in the United States, as has been said, were those of White himself, in his machine described in 705,180 and 705,181, and this press was not for the printing of paper, but of thick materials, such as tin or the like. White combined the impression and the form cylinders into one, and put his transfer cylinder above that. It followed that this transfer cylinder must bob up and down, since it must at once allow for a substantial space between itself and the impression roller when the metal sheet was being printed, and must be in direct and more or less forcible contact with the form cylinder when it was to be inked. This White accomplished by a complicated toggle joint, which is not important here, except to say that he annexed a tripping device by which the transfer cylinder could be permanently kept out of engagement with both the form and the impression cylinder. Moreover, it is quite apparent from Figure 5, if proof were necessary, that White regarded two cylinders and three as interchangeable. Here, then, was an incontestable example in the prior art of a transfer cylinder which was movable into and out of position with the form and impression cylinders, except that these chanced to be united into one.

However, the defendant distinguishes this patent by the fact that, if this machine be used on paper, the tripping mechanism will not work, because the upper limit of the transfer cylinder's motion is fixed by a set-screw, *22*, which determines the pressure upon the metal sheet to be printed; the set screw being stopped by the frame when the sheet is passing through. Hence, they say, if the set screw were so fixed as to print paper, the transfer cylinder must always contact with the lower cylinder, which carries the two surfaces. This is plausible, but unsound, as White's earlier patent, 689,527, for a direct rotary press, discloses. This was obviously the immediate ancestor of the planograph of 1901, as any study of its details will show. It had two inking surfaces and two printing forms, all upon the same cylinder, and the transfer cylinder of 705,180 was still an impression cylinder. White had, moreover, in this press to provide for the separation of these cylinders whenever the inking surfaces became tangent with the impression cylinder, and this he did by a cam groove, precisely the same as in 705,180. All he did was to take over this earlier press, consolidate his two form surfaces into one surface, change one of his inking surfaces into an impression surface, and make over his impression cylinder into a transfer cylinder. Of course, I am not suggesting that this was not an invention; I am trying to come at changes in the mechanism. When he had done this, however, his machine would not work, for one reason, which was that, when the impression surface of this reconstituted machine was opposite the now transfer cylinder, the toggle was broken, and that cylinder, having no stop, would separate by as much as the resilience of the springs, *17*, allowed. Hence he found it necessary to add the set screw and the stop, *23*, in his patent. But all this was because he wished to print on thick sheets. The press, 689,-

527, as it stood, from which he got his idea of a rotary indirect planograph, would have been more easily adapted to paper printing than to metal sheet printing. All White had to do in that case with the large cylinder was to change one form surface into an impression surface, and eliminate one inking surface. His trip would then have operated when a sheet was missed, exactly as he had expected it to do when the press was direct. He had, in short, to work out an added difficulty, just because he did not confine it to printing paper.

A comparison of these patents, therefore, shows a greater departure from patent 689,527 in 705,180 than in the patent in suit, of course assuming that a single cylinder with two surfaces is an obvious equivalent for two cylinders, as White has confessed in Figure 5 of patent 705,181. If so, it can hardly be said that there was any invention in the patent in suit over 705,180 and 705,181. It is apparent that the only reason why these patents do not answer the patent in suit is because White was not aiming at a paper press at that time, but at metal sheets. This, indeed, he says himself (questions 73–75, in rebuttal). He had in mind the possibility of printing paper, but it was not till after the Kellogg press came out that he made the trial. Indeed, I am not sure that he did not think his disclosure adequate already to the printing of paper (705,180, page 2, lines 20–32; 705,181, page 1, lines 92–99). Why the art continued to the idea that a rotary transfer lithographic press must be used on heavy material the record does not show; but it does show, I think, beyond the possibility of doubt, that the reason did not lie in any difficulty in separating the cylinders, which is the important matter here. It is, of course, possible to let any new combination paralyze our whole thinking and to stand inert before it, mouthing sententiousness; but, if we are to exert ourselves in such cases to examine just what the advance is, I can have no doubt that we must find it did not lie in the combinations here claimed.

Yet, even laying aside White's earlier patents, I think that the same result follows from the art as a whole. The Kellogg press was completed in August, 1903, though all the cylinders were without tripping devices. The machine had been used, however, hardly a month when it became apparent that some arrangement was necessary to trip the impression roller when a sheet was missed, and this feature was added at once without difficulty, borrowing from the rotary art. It is quite true that the machine still left the transfer and form cylinders always in connection, and was to that extent not an anticipation. What is invention in this aspect, therefore, depends upon whether, taking the art as a whole, that step is enough. Invention is, of course, not susceptible of certain formulation; but I have no doubt that such a change is not enough. The first inventor tripped the cylinder which he had seen tripped before—the impression cylinder. He did not think to trip the transfer cylinder, probably because the thing was new. I agree that it was not immediately obvious that the transfer cylinder should also be tripped, but I entirely decline to recognize as invention every advance which is not immediately forecast as the art progresses. In the lithographic art the transfer cylinder had

always been kept separated, when the sheet was missed. It was absolutely inevitable, as soon as the rotary planograph went into operation, that the same necessity would develop as had developed in the old stone presses. The art carried the "problem" implicit in it in such wise that not the stupidest artisan could have eventually failed to recognize it. As soon as it was recognized, the means lay already at hand, means even applied already in the same case in 750,180, and generally in all the rotary presses. With means at hand and need inevitable, what room is there for invention?

Nor is the case one where such a priori considerations are upset by the history of the industry. The case is not one where men were waiting for this element, which, when once discovered, liberated an art and created a new industry. There is not the slightest reason to suspect that this combination had anything to do with the time at which rotary planographic transfer presses appeared. Indeed, we know the contrary, because we know that Kellogg's was the first, and did not have it. Just what the art waited for does not certainly appear; but there had been no tentative and unsuccessful efforts, which failed because no one could manage the separation of cylinders, or because no one saw that cylinders should be separated. Under such circumstances it would, in my judgment, be a wholly gratuitous bestowal to give White a monopoly of the whole industry by virtue of a detail which he had in fact himself disclosed more than two years before.

In this view, it becomes unnecessary to consider the question of double patenting.

Bill dismissed, with costs.

JOHNSTON v. DAVENPORT BRICK & TILE CO.

(District Court, S. D. Iowa, Davenport Division. April 3, 1916.)

1. PATENTS ⊜168(2)—CONSTRUCTION—ESTOPPEL BY PROCEEDINGS IN PATENT OFFICE.

While a patentee, who acquiesces in the rejection of his claim, and abandons it on references cited in the Patent Office, and accepts a patent on an amended claim, is thereby estopped from maintaining that the latter claim covers the combination shown in the references, and that it has the breadth of the abandoned claim that was rejected, that is the limit of the estoppel.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 244; Dec. Dig. ⊜168(2).]

2. WORDS AND PHRASES—"ADJACENT."

The word "adjacent" is not inconsistent with something intervening, but is to be construed with reference to its context (citing Words and Phrases, First and Second Series, Adjacent.)

3. PATENTS ⊜226—INFRINGEMENT.

Directions given to purchasers of an infringing article, made and sold by a defendant, as to the manner of its use, cannot evade infringement.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 357; Dec. Dig. ⊜226.]

4. PATENTS ⊜328—VALIDITY AND INFRINGEMENT.

The Johnston patent, No. 1,044,533 for forms for openings in buildings *held* valid and infringed.

In Equity. Suit by David S. Johnston against the Davenport Brick & Tile Company. On final hearing. Decree for complainant.

Orwig & Bair, of Des Moines, Iowa, for complainant.

C. C. Bulkley, of Chicago, Ill., and R. B. Cook and Walter M. Balluff, both of Davenport, Iowa, for respondent.

WADE, District Judge. There can be no serious question that the patent issued to the plaintiff is valid. It is the contention of the defendant that it is extremely limited in its effect, because (a) of the language used, and because (b) of the proceedings in the Patent Office. So far as the proceedings in the Patent Office are concerned, I do not think that the plaintiff is estopped from claiming the full benefit of all language used in his claims.

[1] The effect of rejection of claims and amendment thereof is fully discussed in the cases cited by counsel for the defendant, and especially in the recent case of New York Scaffolding Co. v. Whitney, 224 Fed. 452, 140 C. C. A. 138, in which Judge Sanborn again emphasizes and amplifies the rule that:

"While a patentee who acquiesces in the rejection of his claim, and abandons it on references cited in the Patent Office, and accepts a patent on an amended claim, is thereby estopped from maintaining that the latter claim covers the combination shown in the references, and that it has the breadth of the abandoned claim that was rejected, that is the limit of the estoppel. One who does not abandon, but insists upon and sustains, his first claim, is not estopped, and one who acquiesces in the rejection of his claim, because it is said to be anticipated by other patents or references, is not thereby estopped from claiming and securing by an amended claim every novel and useful improvement that is not described in those references."

Under this rule, and under the language used in amending the claim, I do not think there is any estoppel against a construction which gives to the language used the full meaning thereof.

Now, as to the language used: It is strenuously insisted that because in the claims it is said, "Said rods being designed to rest adjacent to the frame of a building, and to hold the same spaced apart from the central portion of the channel bar," that the plaintiff's patent only covers the use of the rod when the end of the wall is built up against the rod; and it is contended that the defendant, by directing such construction as will end the wall within the channel bar at a point where the wall will not touch the rod, avoids infringement.

[2] To hold that the language of the claims in patent in suit limits the use of the device to a construction in which the tile or brick comes in contact with the rod, places too narrow a meaning upon the word "adjacent."

"We realize that the word 'adjacent' does not at all times mean adjoining or abutting; but it is many times so used, and the purpose of its use is to be known from the context. Synonyms of the word are 'abutting,' 'adjoining,' 'attached,' 'beside,' 'bordering,' 'close,' 'contiguous,' 'neighboring,' 'next,' and 'nigh.'" Wormley v. Board of Supervisors, 108 Iowa, 232, 78 N. W. 824.

"The word 'adjacent' is not inconsistent with something intervening. The word 'adjoining' implies a closer relation; its primary meaning, to 'lie next to,' 'to be in contact with,' excluding the idea of any intervening space. Yard

v. Ocean Beach Ass'n, 49 N. J. Eq. (4 Dick) 306, 24 Atl. 729, 731; Peverelly v. People, 3 Parker, Cr. R. (N. Y.) 59, 69." 1 Words and Phrases, 185, 186.

"That which is 'adjacent' may be separated by some intervening object; that which is 'adjoining' must touch in some part, while that which is 'contiguous' must touch entirely on one side. Baxter v. York Realty Co., 128 App. Div. 79, 112 N. Y. Supp. 455, 456 (quoting and adopting the definition in Crabb's English Synonyms)." 1 Words and Phrases (Second Series) p. 111.

"The word 'adjacent' is at least somewhat indefinite. It means 'to lie near, close, or contiguous.' Webster." Dunker v. City of Des Moines, 156 Iowa, 292, 136 N. W. 536.

Taking the entire proceedings in the Patent Office and the language used in the claims, I do not believe that it was intended to provide for a use and construction which required the end of the wall to be fitted up "snug" against the spacing rod.

It is true that its function is described "to hold the same spaced apart from the central portion of the channel bar," but I think this should be construed to mean that the rod serves as a barrier to extending the ends of the tile or brick into the web of the channel bar. If a wall were to be carefully constructed with reference to a definite termination, at a point one inch within the space between the flanges, the rod would serve no purpose except for anchorage. But as a spacing rod it serves a definite purpose. Workmen might be careless in cutting or breaking tile or brick, but, no matter how careless one might be, the spacing rod prevents any of the tile or brick from being inserted so as to form an obstruction to the proper filling of the space with cement when the wall is finished. Time in adjustment can be saved by this guard against improper extension. There is nothing in the language of the patent, fairly construed, which requires the wall to be built with a uniform ending, or upon exact measurements, because this rod stands as a safeguard so far as the required space is concerned.

Much value is attributed to the solid column or post, with the cement surrounding the rod, which is produced by the construction described by the defendant. The only difference between such column or post, and the column or post produced under the patent of the plaintiff, would be that the rod is more fully and uniformly surrounded by cement; but in either construction the rod to a large extent, if not wholly, would be surrounded by cement, because the evidence shows that, when this wet cement is thrown into the opening, it extends out into the tile, as one of the witnesses explained it, the distance of a foot. So that I cannot hold that, because of the language of the patent, the same structure can be used by an unlicensed person, and infringement avoided, simply by direction to purchasers to insert the brick or tile in such position that they will not touch the rod.

But defendant contends that, under the language of the patent, the rods, in order to infringe, must be "secured to the central portion of the channel bars" direct, as in the plaintiff's construction. With this I cannot agree. The construction used by the defendant, where, instead of having the rod directly fastened to the web of the channel bar, it is fastened to the flanges by a plate riveted to each flange with a rod inserted through a hole in the plate, is to my mind a

mechanical equivalent of the structure described in the patent. Any mechanic who was asked to find a method of fastening different from that used by the plaintiff would readily provide the very thing the defendant is using.

But it is contended that the construction used by the defendant strengthens the flanges. If the flanges needed strengthening, any mechanic would adopt the means employed for that purpose. It is also claimed that the flanges in the defendant's construction are wider than in the plaintiff's construction, but these are details which are not limited by the plaintiff's patent.

[3] It is finally contended that, even if the defendant is using a construction covered by the plaintiff's patent, its direction to purchasers and persons building silos that "all blocks are to be pushed into frame for a distance of one inch only" protects against infringement. I cannot agree that any directions with reference to the use of a patented article which is sold, can evade infringement.

"Infringement is the unauthorized making, using, or selling for practical use, or for profit, of an invention covered by a valid claim of a patent during the life of the patent. It may involve any one or all of the acts of making, using, and selling. It is therefore an infringement for an unauthorized person to make a patented machine for use or for sale, though in fact it is neither used nor sold." 1 Rogers on Patents, 137.

[4] There will be a decree in favor of the plaintiff, enjoining the defendant from infringing as prayed, and, unless the parties can agree upon the matter of damages, the same will be referred to a master by order hereafter made. Counsel for plaintiff will prepare decree and submit it to counsel for defendant, who may file objections to the form thereof, and the same will be submitted for signature; such decree to preserve all proper exceptions.

BAYLEY & SONS, Inc., v. BRAUNSTEIN BROS. CO.

(District Court, S. D. New York. December 6, 1916.)

PATENTS ⊂=310(1)—SUIT FOR INFRINGEMENT—REQUISITES OF BILL.

New equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), providing that a bill shall contain "a short and simple statement of the ultimate facts upon which the plaintiff asks relief," has not changed the former rules of pleading in infringement suits, which require the plaintiff to allege, not only that he was the first original and sole inventor of the invention of the patent, but also a compliance with the negative requirements of the statute to entitle him to a patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 507–514, 519; Dec. Dig. ⊂=310(1).]

In Equity. Suit by Bayley & Sons, Incorporated, against the Braunstein Brothers Company. On motion to dismiss. Motion sustained.

This is a motion to dismiss a bill in equity for infringement of a patent. The relevant allegations are that George W. Bayley was "the first, original, and sole inventor of the new and useful improvement in electric light fixtures, and was entitled to a patent therefor under the provisions of the statutes in such case made and provided, and on the 4th day of June, 1915, made an appli-

cation in due form of law to the Commissioner of Patents of the United States and complied with the requirements of the laws in such cases"; that later the applicant assigned his application to the plaintiff, and "on the 12th day of October, 1915, letters patent of the United States No. 1,156,454 were granted on the said application" to the plaintiff. The purpose of the motion is to test the question whether the new equity rules have changed the former requirements of pleading in patent causes.

C. A. Weed, of New York City, for the motion.
Walter H. Pumphrey, of Chicago, Ill., opposed.

LEARNED HAND, District Judge (after stating the facts as above). Every one concedes that the patent itself is only prima facie proof of the patentee's right to his monopoly. To allege the patent alone, therefore, is to allege evidence, and not the "ultimate facts" required by rule 25 (198 Fed. xxv, 115 C. C. A. xxv). The only question that can arise is, what portions of the statute which define his right shall be regarded as provisos and what exceptions. It was well settled before the rules went into effect that the plaintiff must allege, not only that he was the first, original, and sole inventor, but also compliance with the negative requirements of the statute. Blessing v. Copper Works (C. C.) 34 Fed. 753; Coop v. Institute (C. C.) 47 Fed. 899; Consolidated Brake-Shoe Co. v. Detroit Steel & Spring Co. (C. C.) 47 Fed. 894; Goebel v. Supply Co. (C. C.) 55 Fed. 827; Hanlon v. Primrose (C. C.) 56 Fed. 601; Ross v. City of Ft. Wayne (C. C.) 58 Fed. 404; Hutton v. Seat Co. (C. C.) 60 Fed. 747; Diamond Match Co. v. Ohio Match Co. (C. C.) 80 Fed. 118; Rubber-Tire Wheel Co. v. Davie (C. C.) 100 Fed. 85; Elliott & Hatch Book-Typewriter Co. v. Fisher Typewriter Co. (C. C.) 109 Fed. 330. Since the new rules went into effect, some difference of opinion has arisen. Judge Ray has held, in Maxwell Steel Vault Co. v. National Casket Co. (D. C.) 205 Fed. 515, that the old rule applies. But Judge Tuttle held the contrary, in Zenith Carbureter Co. v. Stromberg Motor Devices Co. (D. C.) 205 Fed. 158.

I cannot see that the new rules can have changed the pleading at all. They only incorporate what was the practice of every good pleader before. The equity bar got into verbose habits, but those habits were never proper, except for the fact that, by loading the bill with "proper charges," the discovery could be made more specific. It therefore was necessary to put much evidence in the bill. That requirement has been eliminated by the rule, so that the bill is now, what it always ought to have been, a mere pleading, and not a "charge" of evidence to be answered. But the rules did not and could not change the necessity of a statement by the party having the affirmative of the "ultimate facts" on which his right depends. Nevertheless, I hope we shall not return to the old idle verbiage, which incumbered a bill for infringement. Whether we do or not depends upon the instinct of workmanship of the bar.

PACIFIC COAST PIPE CO. v. CONRAD CITY WATER CO. et al.

(District Court, D. Montana. October 19, 1916.)

No. 55.

1. COURTS ⊜280—JURISDICTIONAL QUESTIONS—PRESENTATION.

In a suit in the federal District Court, alleging that an attachment against a water company sued out in such court was fruitless, and seeking to have such attachment adjudged to be prior to a mechanic's lien, suit to foreclose which was brought by one of the defendants in a state court, in which suit a receiver was appointed, who took possession of the attached property, questions as to whether the jurisdiction of the state court excluded that of the federal District Court should have been presented to the latter court in limine.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⊜280.]

2. COURTS ⊜280—JURISDICTION—WAIVER.

In such suit, questions as to whether the proceeding in the state court precluded the jurisdiction of the federal court could not be waived, since, even if the parties consented, the court would not knowingly invade the jurisdiction of another court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 816–818; Dec. Dig. ⊜280.]

3. CORPORATIONS ⊜469—ATTACHMENT—PRIORITY—INVALID BONDS.

In such suit, plaintiff's attachment and judgment were entitled to priority over the defendant company's bonds, invalid because issued to secure pre-existing debts, in violation of the provision of Const. Mont. art. 15, § 10, that no corporate bonds shall issue, except for labor done, services performed, or money or property actually received.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1832; Dec. Dig. ⊜469.]

4. COURTS ⊜500—JURISDICTION OF STATE COURT—POSSESSION OF RECEIVER.

Although a mechanic's lien against a water company was a fiction, and the foreclosure thereof and of a trust deed and a receivership were for ulterior purposes, the suit was within the state court's equity jurisdiction, and it might lawfully, though improvidently, appoint a receiver; but if the receivership was void, and the receiver was appointed without jurisdiction, his possession would not be that of the state court, and would not affect the jurisdiction of the federal court in a suit involving the property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⊜500.]

5. COURTS ⊜509—JURISDICTION OF STATE COURT—REVIEW.

The sufficiency of the complaint and the evidence before the state court, in a proceeding to foreclose a mechanic's lien and a trust deed to secure bonds and for a receivership, cannot be questioned in the federal court in a suit involving priorities against the same property, but only in the court empowered to review the state court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364–1371; Dec. Dig. ⊜509.]

6. COURTS ⊜501—JURISDICTION OF FEDERAL COURT—SUIT AGAINST STATE RECEIVER.

Where the state court's appointment of a receiver was valid, a suit in the federal court against the receiver, without leave of the state court, is a trespass against that court, upon which no right can be founded, and will not be entertained by the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1409; Dec. Dig. ⊜501.]

7. COURTS ⇐500—CONFLICTING JURISDICTION—POSSESSION OF PROPERTY—RECEIVERSHIP.

Where a receivership in a suit against a water company to foreclose a mechanic's lien merged in a foreclosure suit by the trustee in a trust deed to secure the company's bonds and for a receivership, without interregnum in the state court's possession of the property, in which a pending suit in the federal court could attach, the state court was vested with optional exclusive jurisdiction to hear and determine all matters affecting title, possession, and control of the property.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⇐500.]

8. COURTS ⇐497—CONFLICTING JURISDICTION—POSSESSION OF PROPERTY—EFFECT OF ATTACHMENT.

An attachment of a water company's realty by filing notice thereof with the recorder of the county of the realty's situs created but a lien for security to pay the judgment, and did not draw the realty into the federal court's custody, and was no barrier to other liens and to an actual seizure by the state court in a subsequent receivership proceeding therein.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1386, 1397, 1398, 1404–1406; Dec. Dig. ⇐497.]

In Equity. Suit by the Pacific Coast Pipe Company against the Conrad City Water Company and others. Decree for defendants.

Day & Mapes, of Helena, Mont., for plaintiff.

O. W. McConnell, of Helena, Mont., and J. A. McDonough, of Great Falls, Mont., for defendants.

BOURQUIN, District Judge. In this court in a law action in personam plaintiff procured an attachment of the defendant water company's realty, and recovered judgment against said defendant for $9,000. It brings this suit, alleging that execution upon said judgment was fruitless, in that, intermediate judgment and execution, a suit against said defendant was brought in a court of this state to foreclose a mechanic's lien for $54.70, wherein allegations of insolvency, chaos, and probable damage to the lien claimant were made, resulting in the appointment of a receiver of all said defendants' property; the receiver then and at all times hitherto being in possession thereof. Other allegations are that the mechanic's lien is invalid or inferior to plaintiff's attachment, that the complaint therein was not sufficient to confer jurisdiction upon the state court to appoint a receiver, that the foreclosure suit was of a scheme to hinder and delay satisfaction of plaintiff's judgment, and that plaintiff's attachment and judgment are entitled to priority over a pre-existing $80,000 bond issue of said defendant, security for its debts. The plaintiff in the foreclosure suit, the receiver, the trustee in the trust deed securing the bonds, a trustee holding the bonds, and the latter's beneficiaries are joined as defendants herein. The prayer is a decree establishing priority of said attachment and judgment, a receiver, and further relief.

Defendants deny lack of jurisdiction in the state court, deny invalidity and inferiority of the mechanic's lien, deny the alleged scheme, deny priority of plaintiff's attachment and judgment over the bond issue, and allege that subsequent to this suit the trustee in the trust deed

in that behalf intervened in the mechanic's lien suit, and at the same time, in the same court, sued to foreclose the trust deed, joining this plaintiff as defendant, wherein the court extended the existing receivership to the latter suit, that by reason thereof the state court has "exclusive jurisdiction of all the affairs and assets" of the water company, and that the instant suit should abate for that it was instituted against the receiver without leave of the state court.

[1, 2] These jurisdictional questions should have been presented to the court in limine, but were not, and the suit has been tried on the merits. They have not been and could not be waived, in that, even if parties consent, a court will not knowingly invade the jurisdiction of another court. As these issues of jurisdiction are determined against plaintiff, the merits will be noticed no further than they ought to be under the circumstances and for possible review.

[3] Briefly, the aforesaid allegations of the complaint are found to be true, and plaintiff's attachment and judgment are entitled to priority over the bonds for that the latter are invalid, having been issued and now and at all times held to secure pre-existing debts, in violation of the Constitution of this state (article 15, § 10), wherein the water company is incorporated, that no corporate bonds shall issue "except for labor done, services performed, or money, and property, actually received." See Chavelle v. Trust Co., 226 Fed. 408, 141 C. C. A. 230; In re Paper Corp., 229 Fed. 489, 143 C. C. A. 557.

[4] If this state court receivership is void, if the receiver was appointed without jurisdiction, his possession would not be that of the state court and would not affect jurisdiction herein. See Hammock v. Trust Co., 105 U. S. 86, 26 L. Ed. 1111.

But, although the mechanic's lien appears a fiction, and the foreclosure and receivership for ulterior purposes, the suit was within the state court's equity jurisdiction, and wherein a receiver could be lawfully, even if improvidently, appointed.

[5] The otherwise sufficiency of the complaint and the evidence before the state court cannot be questioned here, but only in a court having power to review the state court, which this court has not. See Shields v. Coleman, 157 U. S. 168, 15 Sup. Ct. 570, 39 L. Ed. 660; McKinney v. Landon, 209 Fed. 303, 126 C. C. A. 226.

[6] The appointment was valid, and since a suit against the receiver, without leave of the state court, is a trespass against said court, upon which no right can be founded, this court will not entertain it. See Porter v. Sabin, 149 U. S. 480, 13 Sup. Ct. 1008, 37 L. Ed. 815.

[7] The receivership in the lien suit merged in that of the bond suit, and if the former suit is questionable in scope or jurisdiction, the latter is not; and the merger was without interregnum in the state court's possession of the property in which the instant suit could attach. It is settled beyond controversy that for obvious reasons, when property is in custodia legis, the court in possession is vested with optional exclusive jurisdiction to hear and determine all controversies affecting title, possession, and control of the property. Unless it consents to exercise of like jurisdiction by other courts, they are without such jurisdiction. Palmer v. Texas, 212 U. S. 129, 29 Sup. Ct. 230,

53 L. Ed. 435; Murphy v. Company, 211 U. S. 569, 29 Sup. Ct. 154, 53 L. Ed. 327; Wabash Ry. v. College, 208 U. S. 54, 28 Sup. Ct. 182, 52 L. Ed. 379; Id., 208 U. S. 611, 28 Sup. Ct. 425, 52 L. Ed. 642.

[8] Plaintiff's attachment of the water company's realty, by filing notice thereof with the recorder of the county of the realty's situs, created but a lien for security to pay the judgment. See Rounds v. Foundry, 237 U. S. 308, 35 Sup. Ct. 596, 59 L. Ed. 966. It did not draw the realty into this court's custody and was no barrier to other liens and actual seizure by other courts. It is no more potent than a judgment lien, and even levy of execution upon land, without possession, does not bring the land in custodia legis, does not disable another court from subsequent receivership over it; and, such receivership had, a sale upon such levy is void. Wiswall v. Sampson, 14 How. 52, 14 L. Ed. 322; Heidritter v. Elizabeth Co., 112 U. S. 303, 5 Sup. Ct. 135, 28 L. Ed. 729. Hence said attachment did not disable the state court to appoint, and possess the property by, a receiver.

This court is without jurisdiction, and decree for defendants.

In re EMPRESS PHARMACY et al.

In re DES MOINES DRUG CO.

(District Court, S. D. Iowa, C. D. January 18, 1916.)

No. 2415.

BANKRUPTCY ⊜189—PARTNERSHIP—EXISTING CREDITORS—CHATTEL MORTGAGE BY PARTNER—RECORD—NOTICE.

The trustee, who under Bankr. Act July 1, 1898, c. 541, § 47a (2), 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), on his appointment becomes vested with all the rights of a creditor holding a lien, takes the stock of the bankrupt, a partnership composed of N. and A., and doing business under the name of E. P. drug store, free of the lien of a mortgage given thereon in the individual name of N., though with knowledge of the other partner, and so valid between the mortgagee and firm; Code Iowa, § 2906, declaring a mortgage of personalty remaining in the mortgagor's possession void against "existing creditors," meaning creditors who, without notice of an unrecorded lien, have acquired a lien upon the property, and the statute requiring that a mortgage must not only be recorded, but indexed in the name of the mortgagor, in order to constitute constructive notice.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291–295; Dec. Dig. ⊜189.]

In Bankruptcy. In the matter of the Empress Pharmacy and others, bankrupts. On claim of the Des Moines Drug Company, adjudged by the referee a preferred claim. Reversed.

John B. Sullivan, of Des Moines, Iowa, for Drug Co.

C. H. Miller, of Des Moines, Iowa, for trustee.

Parker & Riley, of Des Moines, Iowa, for landlord.

WADE, District Judge. Upon a hearing before the referee it was adjudged that the claim of the Des Moines Drug Company should be allowed as a preferred claim against the estate under a chattel mortgage

covering substantially all the assets of the estate. The chattel mortgage was executed on the 10th day of February, 1914, and was signed by H. H. Nabers and Mrs. H. H. Nabers, and recorded February 24, 1914. The chattel mortgage was given to secure a note for $2,594.85, which note was signed by H. H. Nabers, W. J. Allen, Mrs. Emma May Allen, and Mrs. H. H. Nabers. The note was given for drug supplies and fixtures, which were purchased before the Empress Pharmacy Drug store was opened. These goods were partially paid for in cash, and the balance secured by the aforesaid mortgage, and formed the principal, if not the full, stock with which the drug store was opened.

The trustee in his objections, contends that the Empress Pharmacy, bankrupt herein, was a partnership, composed of H. H. Nabers and W. J. Allen, and that the mortgage executed by Nabers and his wife, being upon property purchased for the partnership, is invalid; and it is further contended that, even if valid as between the parties, it is void as to the trustee, because the record thereof gave no notice to subsequent creditors that there was a mortgage upon the assets of the partnership.

That the Empress Pharmacy was a partnership there can be no question. The petition in bankruptcy was filed by the Empress Pharmacy as a copartnership, and by the partners therein, H. H. Nabers and W. J. Allen. To the allegation of partnership, no objection is made by claimant, or any one else, so far as the record discloses. Claimant called as a witness upon the hearing of this claim W. J. Allen, who testified to the existence of the partnership as follows:

"Q. What was the idea in starting that store there in the Empress Building? A. Put him [Nabers] as a partner and authorized to do anything that he seen right to run the store and manage it, and take care of it." "I gave him authority as general manager to manage the store, and anything he did was satisfactory to me in reference to the business." "Q. Isn't it a fact, Mr. Allen, that you were simply what is known as a silent partner in that firm? A. I don't know how the court will take it. I didn't care for the fact to be known, on account of being in the whisky business. Q. It is a fact, though, isn't it, Mr. Allen, that you and Mr. Nabers were partners in the business there? A. Yes, sir. Q. What name did you operate your partnership under? A. Empress Pharmacy; that is what we call the store. Q. And Mr. Nabers knew you were in partnership with him? A. Yes, sir. Q. In other words, you put the money in, and your son-in-law put the brains in? A. Yes, sir; as a partner I gave him a half interest in the business, if he took good care of it. Q. Now, Mr. Allen, I understood you said the copartnership went under the name of the Empress Pharmacy; did you go under any other name, as Nabers & Allen, or Allen & Nabers? A. No; just Empress Pharmacy."

Under this and other evidence, there can be no question about the partnership in this case.

Counsel refer to cases involving the question as to what constitutes a partnership. Those cases generally involve controversies between the partners, or as to the property of an individual claimed to be a partner; but in this case upon the trial there seemed to be no question about the partnership. No issue was raised as to the partnership. Every one seemed to recognize the existence of a partnership at the time of the trial.

No definite time is given as to the date when the partnership was organized; but, under the evidence, no other conclusion can be reached

than that the partnership arrangement was made before the goods were purchased. Allen and Nabers both conferred with claimant in regard to the purchase of the goods, and Allen furnished money to apply in part payment for the goods purchased from the claimant. The mortgage "covered the unpaid portion of the purchase price."

It is apparent from the evidence that the partnership was not disclosed to the claimant, and that the mortgage was accepted in good faith by the claimant, in the belief that the goods were sold to Nabers and that he was to run the store. No specific inquiry upon this point, however, was made; but, under all of the evidence, there is no question but that the mortgage, being executed with full knowledge of Allen, and for partnership goods, is a valid lien upon the partnership assets as between the claimant and the partners.

But by section 47a (2) of the Bankruptcy Act, as amended by the act of June 25, 1910, the trustee herein, upon his appointment, became "vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings."

Under Code Iowa, § 2906, a mortgage of personal property, where the mortgagor retains actual possession thereof, is void as against existing creditors, and "existing creditors" means "creditors who, without notice of an unrecorded lien or title, have acquired a lien by attachment, or levy, or otherwise, upon the property involved." Orr v. Kenworthy, 143 Iowa, 6, 121 N. W. 539, 136 Am. St. Rep. 728.

So that it is necessary to determine whether or not the record of the mortgage signed by Nabers and his wife was notice of a mortgage upon the property of the partnership. The statute not only requires the recording of the mortgage, but it requires that it shall be indexed in the name of the mortgagor, and the notice given by the record is only such notice as the index discloses. A person interested need not examine the records beyond the index.

Now, of course, the index to mortgages in this case disclosed a mortgage given by H. H. Nabers and Mrs. H. H. Nabers. The apparent title of the partnership was the Empress Pharmacy; but, whether it be the Empress Pharmacy, or Allen & Nabers, or Nabers & Allen, the index would in no manner indicate to a person searching the records that the partnership had given a mortgage upon its property, nor would the index indicate that one of the partners had given a mortgage upon the property, because there was nothing in the title of the partnership to indicate the initials of Nabers, who was one of the partners.

The cases relied upon by counsel for claimant do not sustain the proposition that the record of a mortgage given by one partner in his individual name to secure a partnership debt is notice to creditors of a lien upon the partnership assets. They do hold, and properly hold, that one partner may execute a mortgage upon the partnership assets to secure a partnership debt; but they do not really involve the question as to the effect of the record of such a mortgage, if executed in the name of the partner, instead of the partnership name.

In Fromme v. Jones, 13 Iowa, 474, it was held (and this is an extreme case) that the omission by the recorder of the words "& Co." from the firm name "Samuel Altheimer & Co." did not destroy the

effect of the record as notice; it appearing that Samuel Altheimer was the sole partner.

In Citizens' Bank v. Johnson, 79 Iowa, 290, 44 N. W. 551, the question was not involved, the court saying:

"The evidence shows quite satisfactorily that the appellees had actual notice of all that is now claimed for these mortgages before their attachments were levied upon the property."

Davis v. Turner, 120 Fed. 605, 56 C. C. A. 669, does not involve the question, because the case is from the state of North Carolina, in which there is no statute requiring recording and indexing. It is the law of that state that a mortgage "is good against creditors from the time of its delivery to the register."

I have made careful examination, and I find no case which holds that under the Iowa statute, or a statute similar thereto, the record of a mortgage given by one partner in his individual name constitutes notice to partnership creditors. It is true that the mortgage described the building in which the drug store was located, but the question involved is not what notice the mortgage itself would give; it is a question as to what notice the index of the mortgage would give.

"The purchaser (and likewise a creditor) is not bound to look beyond the proper index for information as to conveyances, and, if the index shows none, there is no constructive notice of any." Koch v. West, 118 Iowa, 468, 92 N. W. 663, 96 Am. St. Rep. 394.

In view of the foregoing, it is my duty to reverse the adjudication by the referee; and it is so ordered.

STEIN et al. v. FLEISCHMANN CO. et al.

(District Court, S. D. New York. December 7, 1916.)

1. DOMICILE ⊜4(1)—LOSS OF DOMICILE—RESIDENCE ABROAD.
A domicile acquired in a state by a naturalized citizen does not persist after the citizen has given it up and is permanently residing abroad.
[Ed. Note.—For other cases, see Domicile, Cent. Dig. §§ 5-8, 10-23; Dec. Dig. ⊜4(1).]

2. COURTS ⊜307(1)—JURISDICTION—DIVERSITY OF CITIZENSHIP—CITIZENS RESIDING ABROAD.
A naturalized citizen of the United States, who has abandoned his domicile in any state in which he resided, is not a citizen of that state under the Fourteenth Amendment, and therefore cannot sue in the federal courts on the ground of diversity of citizenship.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 850, 851, 854; Dec. Dig. ⊜307(1).]

3. COURTS ⊜321—JURISDICTION—ALIENATION—REPATRIATION.
Act March 2, 1907, c. 2534, § 2, 34 Stat. 1228 (Comp. St. 1913, § 3959), providing that, whenever any naturalized citizen shall have resided for two years in the country from which he came, or for five years in any other country, it shall be presumed that he has ceased to be a citizen, but that this presumption may be overcome on the presentation of satisfactory evidence to a diplomatic or consular officer, does not make the presumption of repatriation conclusive, in the absence of a showing before the dip-

lomatic or consular officer, in the case of a naturalized Austrian, in view of article 4 of the treaty with Austria (17 Stat. 836), which provides that an emigrant shall not, on his return to his original country, be constrained to resume his former citizenship, but if he shall of his own accord reacquire it, and renounce the citizenship obtained by naturalization, renunciation is allowable, and therefore such naturalized citizen cannot sue as an alien in the federal courts, where it is shown that he has not reacquired his Austrian citizenship, though he has resided in Austria more than two years, and has not satisfied a diplomatic or consular officer that he retained his American citizenship.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 845, 847–849; Dec. Dig. ⟸321.]

In Equity. Suit by Theodore G. Stein and others against the Fleischmann Company and others. On motion for injunction. Bill dismissed sua sponte, for lack of jurisdiction over the subject-matter.

This is a motion for an injunction against the defendants' disclosing certain trade secrets alleged to have come into their possession confidentially. The three plaintiffs are alleged to be the joint owners of the secrets, which concern the manufacture of yeast, and the jurisdiction of this court depends upon diverse citizenship. The plaintiffs Cukr and Goldschmidt are alleged to be subjects of the emperor of Austria residing at Taikowitz, in the province of Moravia, and the plaintiff Stein to be a citizen of the United States residing in Vienna. Of the defendants, the Fleischmann Company is alleged to be an Ohio corporation, and the individual defendants, Fleischmann and Zeckendorf, are alleged to be citizens of New York. On return of the order to show cause the defendants submitted a special answer raising certain points of jurisdiction. The first was that the court had no jurisdiction, because there were insufficient allegations of the diversity of citizenship; second, that the value of the matter in controversy did not appear in the complaint; third, that the Fleischmann Company, being an Ohio corporation, was not a resident of New York, and that the court was without jurisdiction; fourth, that Fleischmann was in fact a citizen of the state of Ohio, and that the court was without jurisdiction over his person; fifth, that the plaintiff Stein is a citizen of New York, and that the court was therefore without jurisdiction against the defendant Zeckendorf. In support of the jurisdiction, Stein filed an affidavit saying that on April 29, 1891, he was naturalized as an American citizen in the New York Supreme Court, and lived in the city continuously until June, 1909, after which time he resided for one year in Paris, and for over five years in Germany, until September, 1915. At that time he went to Vienna, where he has since resided and is now in business; that he intends definitely and permanently to live abroad and conduct his business there, and has never had a residence in New York since leaving here in 1909. Stein's domicile of origin is Austria.

James J. Kennedy, of New York City, for the motion.
Claude A. Thompson, of New York City, opposed.

LEARNED HAND, District Judge (after stating the facts as above). [1, 2] It is clear that Stein is not a citizen of New York, as the defendants assert, as he has given up his domicile, which being acquired, and not a domicile of origin, does not persist. Though he may be a naturalized citizen of the United States, he is not domiciled in any state, and he is not a citizen of any state, under the Fourteenth Amendment. To sue in a federal District Court, it is not enough to be a citizen of the United States. One must be a citizen of a state. New Orleans v. Winter, 1 Wheat. 91, 4 L. Ed. 44; Hoe v. Jamieson, 166

U. S. 395, 17 Sup. Ct. 596, 41 L. Ed. 1049; Bankers Trust Co. v. Texas & Pac. Ry., 241 U. S. 295, 309, 36 Sup. Ct. 569, 60 L. Ed. 1010.

[3] To meet this difficulty Stein in his brief urges, despite the allegations to the contrary in the bill, that he is no longer a citizen of the United States, because he has resided for more than five years abroad. Section 2 of chapter 2534 of 1907, 34 Stat. 1228, provides that, when a naturalized American citizen shall have resided for five years in any foreign state, or two years in the state from which he came, he shall be presumed to have ceased to be an American citizen. This, however, is only a presumption, and it may be met by satisfactory evidence given to a diplomatic or consular officer of the United States.

This act was considered in United States ex rel. Anderson v. Howe (D. C.) 231 Fed. 546, a case, however, in which the treaty with the relator's country of origin, Sweden, was such that a renewal of residence in Sweden of itself repatriated the naturalized American citizen. As the case came before the court, the relator's residence in Sweden had to be accepted as a fact. Any language regarding the act of 1907 was therefore obiter. In the case at bar, however, article 4 of the treaty with Austria is as follows:

"The emigrant from the one state, who, according to article 1 is to be held as a citizen of the other state, shall not, on his return to his original country, be constrained to resume his former citizenship; yet if he shall of his own accord reacquire it, and renounce the citizenship obtained by naturalization, such a renunciation is allowable, and no fixed period of residence shall be required for the recognition of his recovery of citizenship in his original country."

This treaty secures to a naturalized American of Austrian birth the right to return to Austria without resuming his Austrian citizenship, which he can resume only by "reacquiring" it under the laws of Austria. It is true that, if he wishes the protection of the United States after two years in Austria or five years elsewhere, he must satisfy the diplomatic or consular officer of the United States before whom he goes that he has not reacquired his citizenship; but the provision of 1907, so construed, would not affect his status itself. The plaintiff goes further, and insists that for all purposes he must be taken to have renounced his American citizenship unless he satisfies a diplomatic or consular officer that he has not. Since the proviso only refers to such officers, it is quite clear that no court could under that construction examine the facts, and the necessary result would be to repatriate all such citizens unless they obtain a decision from such an officer. Of course, that may have been the intention of the statute; but it seems to me that one should not assume so when the result is to modify existing treaties.

There are, in general, two types of such treaties, one in which a naturalized citizen of the United States, if he returns and takes up residence in his country of origin, animo manendi repatriates himself. In these it is common to provide a presumptive period of two years from which domiciliary intent will be presumed. Such are the treaties with the North German Union, Sweden, Denmark, Ecquador, Hesse, Honduras, Portugal, and perhaps others. On the other side are those powers

which provide, as Austria, that a citizen must renounce by form of law his acquired citizenship. Such are the treaties with Baden, Bavaria by protocol, Württemberg by protocol, and perhaps others. The first form is the more common, and it is obvious why the act of 1907 was passed, when we see that the test which our own diplomatic officers were to apply corresponded with the test in the treaty. They were to determine pro hac vice whether the presumed intent not to return to America created under the treaties by two years' residence was in fact rebutted. Yet I can hardly think that Congress meant their decision to be conclusive upon the putative citizen for all times and at all places.

In the case of the second class of cases, domiciliary intent has nothing to do with it, but the citizen can repatriate himself by form of law. See especially the protocols of Bavaria and Württemberg. It would be even more remarkable if Congress meant by a general statute like the act of 1907 to abrogate pro tanto such treaties as these by providing for repatriation if the putative citizen could not satisfy the officer that he had not so reacquired his citizenship. In such cases we should have, not only the singular fact that the decisions of such officers were conclusive elsewhere, but their decisions would rest upon matters of record, and might deprive a citizen of treaty rights. While all this may be within the power of Congress, it seems to me most unlikely to have been within its intent.

Mackenzie v. Hare, 239 U. S. 299, 36 Sup. Ct. 106, 60 L. Ed. 297, is not in point, I think. There were no provisions in the act which operated unreasonably if the words were given their usual meaning. On the contrary, the first sentence of the section, which was the only part there in question, was declaratory of the common law.

I think that there is therefore no jurisdiction, since on the record Stein is a citizen of the United States, as he alleges. The bill will be dismissed, but the point will be certified to the Supreme Court, if the parties wish. The record should in that case be supplemented by a concession that Stein's country of origin was Austria, which, though the fact, does not appear in the record as it stands.

Bill dismissed sua sponte, for lack of jurisdiction over the subject-matter.

In re KEAN.

(District Court, E. D. New York. November 25, 1916.)

1. BANKRUPTCY ⇐163—PREFERENCE—CONVEYANCE IN PERFORMANCE OF IMPLIED TRUSTS—CREDITORS.

Where a husband, with money belonging to his wife, purchased real estate, taking title in his own name, and agreeing at any time to convey the land to her, a breach of the obligation might leave the wife a creditor, though the trust was not one provided for by the lex fori, and in such sense a conveyance back of the property in derogation of the rights of the husband's other creditors would only operate as a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 247, 248; Dec. Dig. ⇐163.]

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2. BANKRUPTCY ⊂⊃407(3)—DISCHARGE—GROUNDS FOR.
While a preference given within four months of bankruptcy is subject to attack, it is no ground for opposition to a discharge.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 740, 742–749; Dec. Dig. ⊂⊃407(3).]

3. BANKRUPTCY ⊂⊃408(3)—DISCHARGE—CONCEALMENT OF ASSETS.
Where a bankrupt did not intentionally conceal his assets from his trustee, a conveyance of land to secure an equitable claim belonging to his wife, though it rendered him insolvent, would not necessarily involve fraudulent concealment of assets, warranting denial of discharge.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 735, 736; Dec. Dig. ⊂⊃408(3).]

4. BANKRUPTCY ⊂⊃415(3)—REFERENCE ON OPPOSITION TO DISCHARGE—FINDINGS OF SPECIAL COMMISSIONER.
A finding of fact by a special commissioner in bankruptcy on opposition to the discharge of the bankrupt should be upheld, if there is any evidence to support it.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 698–701, 704, 707; Dec. Dig. ⊂⊃415(3).]

5. BANKRUPTCY ⊂⊃407(5)—DISCHARGE—OBTAINING CREDIT BY FALSE REPRESENTATIONS.
A bankrupt's discharge will not be denied on the ground that he made false representations for the purpose of securing credit, because one who extended credit relied on an incorrect statement made two years before by the bankrupt to a commercial agent; the statement not having been made in contemplation of securing credit, and the creditor having failed to make additional inquiry.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 760, 761; Dec. Dig. ⊂⊃407(5).]

In Bankruptcy. In the matter of the bankruptcy of Abraham Kean. On opposition to discharge. Report of special commissioner, overruling objections, confirmed.

Otto B. Schmidt, of New York City, for objecting creditor.
Caldwell & Holmes, of Brooklyn, N. Y., for bankrupt.

CHATFIELD, District Judge. Discharge is opposed because of a transfer of real estate in 1914 to the wife of the bankrupt at a date subsequent to the extension of credit by the judgment creditor who is urging that the discharge be denied.

[1, 2] It appears that in 1912 the bankrupt's wife inherited some money with which this real estate was purchased. It was taken in the husband's name, and as late as the fall of 1914 he obtained an extension of mortgage upon an application signed by himself as owner. He also told the representative of Dun & Co. that there was real estate in his name as owner. The particular debt of this objecting creditor was reduced to judgment in May, 1915, and after examination in supplementary proceedings the bankrupt filed a voluntary petition scheduling this debt. This was considerably more than four months subsequent to the transfer of the real estate by the bankrupt to his wife. His explanation of the transfer is that he recognized an obligation to deed the property back to his wife at any time when she requested it.

Even though such a trust is not one provided for by the laws of New York (Laws 1909, c. 52 [Consol. Laws, c. 50] art. 4), a breach of the obligation might leave the wife a creditor, and in this sense the deeding back of the property was the giving of a preference. It could not be attacked unless done within four months of bankruptcy, and would not of itself be a ground for opposition to the discharge. The special commissioner has reported that as to this transaction the evidence does not show an intent to conceal property from the trustee, even though the concealment was continued within four months of bankruptcy.

[3] If the payment merely constituted a preference, the discharge should be granted, and if the bankrupt did not intentionally conceal his assets from his creditors, but sought to secure an equitable claim belonging to his wife, even though it might make him insolvent, it would not legally of necessity involve fraudulent concealment of assets. In re Dauchy, 130 Fed. 532, 65 C. C. A. 78, distinguishing Hudson v. Natl. Bank, 119 Fed. 346, 56 C. C. A. 250.

[4] The finding of the special commissioner as to the actual intent of the bankrupt should not be disregarded, if there is any evidence to support it, and it does not seem that the objecting creditor has made out a case where there is no evidence to justify the finding that the bankrupt's intent was either to pay a debt or to recognize an equitable claim which was not conceived in fraud.

[5] As to the other objection, that the bankrupt had procured goods by means of false representations, it appears that, some two years before incurring the debt in question, he had given a statement to a commercial agency which was relied upon by the creditor. This statement was at once admitted by the bankrupt to be incorrect, but some testimony indicates that it was in fact substantially true, and that the bankrupt had forgotten the matter. In any event, even if false, it was not a statement made in contemplation of the securing of credit, which could be relied upon by the creditor *without additional inquiry.*

There is not sufficient upon which to base opposition to the discharge. The report will be confirmed.

BALFE et al. v. TILTON.

(District Court, New Hampshire. November 16, 1916.)

No. 373.

EQUITY ⊂=414—FINDINGS OF MASTER—CONCLUSIVENESS.

To justify setting aside findings of a master appointed through consent of the parties, it must clearly appear that there is a mistake or error.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 931; Dec. Dig. ⊂=414.]

In Equity. Suit by Mary A. Balfe, administratrix of the estate of Myra Tilton, and another, against Genieve E. Tilton, executrix of Charles E. Tilton. On motions to confirm and set aside the report of the master. Report confirmed, and bill dismissed.

A. H. Holmes, of New York City, for plaintiffs.
Foster & Lake, of Concord, N. H., for defendant.

ALDRICH, District Judge. In view of the opinion handed down in this case August 14, 1916, 235 Fed. 448, counsel have asked for a hearing, and they have been heard; the defendant orally through counsel, and the plaintiffs submitting their views through counsel upon brief.

Since the opinion of August 14th one of the plaintiffs has deceased, and a motion for revivor of the cause has been filed. For present purposes the case may well enough be treated as though the interests of the deceased party were represented by an executor or administrator.

I think the contention of counsel for the defendant in respect to the Colorado and New York real estate, and the items in the account charging the defendant with $1,800 for land in New York City, and $11,500 for one-half of unsold lands in Colorado, as supplemented by the finding that the unsold Colorado and New York real estate are charged with respect to values as of that date, must be accepted as sound to the extent that the situation in this respect should be accepted as one in which the master intended to find that the defendant was charged according to actual values, and therefore that he was not acquiring any advantages in respect to values of unsold properties.

There is a query in the opinion of August 14th in respect to whether, in an accounting like this, the defendant should be credited upon the equitable reckoning with the monthly installments, or advancements, running through many years and amounting to $42,000; but as the plaintiff does not urge that equitable considerations should under the circumstances exclude these items, I do not feel called upon to consider the question further.

With respect to the remaining question as to the $20,000 legacy in Alfred's will, in which Louise Tilton was named as the beneficiary, the defendant's contention now is that, as the plaintiff Louise and the administratrix of the child instituted this equitable proceeding, which touched and called for an equitable accounting in respect to the entire estate, the provision of the will in respect to the legacy was waived, and furthermore that there is nothing in respect to Alfred's estate left to be operated upon by the will. If the accounting based upon findings in respect to the entire estate is to be sustained, I should have to accept this view as a controlling one.

Now, in conclusion, and in finally disposing of this case, I feel bound to say that the relations of the parties, character of the correspondence, and the nature of the transactions, viewed as a whole, raise doubts in my mind as to the justice of the findings and accounting. But in view of the familiar rule of law, which obtains in equity as well, and by which I must be governed, that it must clearly appear to the court that there is mistake or error in order to justify setting aside findings of a master created through consent of the parties, I can find no warrant for interposing to that end under the circumstances of this case. Report of Master Allen confirmed.

Bill dismissed.

GOODNO et al. v. HOTCHKISS et al.

(District Court, D. Connecticut. October 23, 1916.)

No. 1437.

1. REFORMATION OF INSTRUMENTS ⊂=18—GROUNDS—MISTAKE OF LAW.
A court of equity cannot reform or cancel an executed written family agreement for the distribution of an estate on the ground that the parties acted under a mistake as to the legal effect of such agreement.
[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 72, 73; Dec. Dig. ⊂=18.]

2. CANCELLATION OF INSTRUMENTS ⊂=47—REFORMATION OF INSTRUMENTS ⊂=45(1)—ACTIONS—RIGHT AND SUFFICIENCY OF EVIDENCE.
To authorize a court to reform or cancel a written instrument on the ground of mistake, the proof must be clear, unequivocal, and convincing.
[Ed. Note.—For other cases, see Cancellation of Instruments, Cent. Dig. §§ 102, 103; Dec. Dig. ⊂=47; Reformation of Instruments, Cent. Dig. §§ 157, 171, 177, 182, 189, 191; Dec. Dig. ⊂=45(1).]

3. EVIDENCE ⊂=272—DECLARATIONS AGAINST INTEREST—WHEN ADMISSIBLE.
The rule which admits as evidence declarations against interest of parties to the record does not extend to cases when such admission would prejudice a coplaintiff or codefendant of the party making the declarations.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1105-1107; Dec. Dig. ⊂=272.]

4. JUDGMENT ⊂=475, 640—CONCLUSIVENESS OF ADJUDICATION—DECREE OF PROBATE COURT.
Under the law of Connecticut, a decree of a court of probate, determining who were the heirs of a decedent and what property they were to take, not appealed from, is conclusive, and is not subject to collateral attack, except for fraud.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1154; Dec. Dig. ⊂=475, 640.]

5. PARTITION ⊂=9(1)—DISTRIBUTION OF ESTATE—FAMILY SETTLEMENT.
A family agreement for the distribution of an estate creates a property status, and a distribution in accordance therewith is binding on the parties and any claiming under them.
[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 26-31; Dec. Dig. ⊂=9(1).]

6. JUDGMENT ⊂=592—RES JUDICATA—SECOND SUIT ON SAME CAUSE OF ACTION.
A plaintiff cannot litigate part of a cause of action, and assert claims arising out of that cause of action in one proceeding, and, having been defeated therein, bring a second suit setting up the same cause of action, by introducing other evidence and making other claims.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1107; Dec. Dig. ⊂=592.]

7. JUDGMENT ⊂=675(2)—PERSONS CONCLUDED—PERSONS PARTICIPATING BY COUNSEL.
One interested in a litigation, who, although not a party to the record, was represented therein by counsel, with the knowledge of the parties, is bound by the judgment, and as fully entitled to the benefit of it as an adjudication as though a formal party.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1191; Dec. Dig. ⊂=675(2).]

8. LIMITATION OF ACTIONS ⟸103(1)—CAUSES OF ACTION WITHIN STATUTE—SUIT TO ENFORCE EXPRESS TRUST.
The general rule that express trusts are not within the statute of limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the cestui que trust, and the statute begins to run from the time of the disavowal, and applies in favor of persons who become trustees by construction of law.
[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 500, 506, 509; Dec. Dig. ⟸103(1); Trusts, Cent. Dig. § 570.]

9. COURTS ⟸366(13)—FEDERAL COURTS—AUTHORITY OF STATE STATUTES.
Federal courts, in enforcing claims against estates of decedents and executors and administrators, are bound by the same statutes and rules that govern the local tribunals, including the statute limiting the time for filing claims.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 957, 960; Dec. Dig. ⟸366(13).]

10. EXECUTORS AND ADMINISTRATORS ⟸232—TIME FOR PRESENTATION OF CLAIMS.
The failure to present a claim against an estate within the time limited by statute operates as a complete bar to the enforcement of the demand, which cannot be avoided by any plea of ignorance or mistake.
[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 830; Dec. Dig. ⟸232.]

11. COURTS ⟸367—FEDERAL COURTS—AUTHORITY OF STATE STATUTES.
A state statute limiting the time for presentation of claims against an estate is a rule of property, and as such binding on a federal court sitting in equity.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 958, 959; Dec. Dig. ⟸367.]

12. WILLS ⟸697(3)—SUIT TO CONSTRUE WILL—RIGHT OF ACTION.
Under the law of Connecticut, no one but an executor or some fiduciary under the will can ask for its judicial construction, and this must be done before the estate is distributed.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 1673; Dec. Dig. ⟸697(3).]

In Equity. Suit by Louise T. Goodno, executrix of the will of Nathaniel S. Hotchkiss, deceased, and individually, and William Goodno, against Marie O. Hotchkiss, individually, as executrix of the will of Mary A. F. Hotchkiss, deceased, and as administratrix of the estate of William H. Hotchkiss, deceased, and Yale University. Decree for defendants.
See, also, 230 Fed. 514.

Prentice W. Chase and A. Heaton Robertson, both of New Haven, Conn., for plaintiffs.
George D. Watrous and Thomas M. Steele, both of New Haven, Conn., for defendant Marie O. Hotchkiss.
Henry Stoddard, of New Haven, Conn., for defendant Yale University.

THOMAS, District Judge. This case arises on final hearing on pleadings and proofs in a bill in equity. The plaintiffs are Louise T. Goodno and her husband, William C. Goodno, both residing in Pasadena, Cal. Mrs. Goodno brings this suit individually in her own right,

and as executrix of the last will and testament of her father, Nathaniel S. Hotchkiss, deceased. The defendants are Marie O. Hotchkiss, individually and as executrix of the last will and testament of her mother, Mary A. F. Hotchkiss, widow of Henry O. Hotchkiss, and as administratrix of the estate of her brother, William H. Hotchkiss, deceased, and Yale University, both legal residents of New Haven, Conn.

Henry O. Hotchkiss died domiciled in New Haven on the 4th day of December, 1883. He left a widow, Mary A. F. Hotchkiss, and three children, Nathaniel S., William H., and Marie O. Mary A. F. Hotchkiss, Nathaniel S., and William H. have since died. The plaintiff Louise T. Goodno is a daughter of Nathaniel. Mary A. F. Hotchkiss left a will, and her daughter Marie, one of the defendants, is the executrix of said will, and is also the administratrix of the estate of her brother William, who died intestate.

The bill of complaint charges in substance that said Henry O. Hotchkiss, deceased, left an unsigned will, and that, following his death, the widow, Mary A. F. Hotchkiss, and his three children surviving him, to wit, Marie O. Hotchkiss, William H. Hotchkiss, and Nathaniel S. Hotchkiss (father of the plaintiff Louise T. Goodno) mutually agreed in writing to divide the estate of said Henry O. Hotchkiss among themselves in the proportions indicated by him in his unsigned will, and that thereafter a division was effected in accordance with the terms of the so-called "family agreement." It is further alleged in the bill that this division did not carry out and effect the actual intention manifested in the unsigned will; that after this division was made said Mary A. F. Hotchkiss settled her account as administratrix; that thereafter said Mary A. F. Hotchkiss drafted a will in her own handwriting, which was duly executed, and which, with subsequent codicils, was admitted to probate June 8, 1912; that the estate of said Mary A. F. Hotchkiss consisted in part of property which she had obtained from her husband under the division made according to the terms of the family agreement and in violation of the provisions of the unsigned will, and also in part of property which she had obtained from the estate of her son, William H. Hotchkiss, who had predeceased her, and which was given to him in violation of the provisions of the unsigned will and the family agreement, and that all of said property so obtained by said Mary A. F. Hotchkiss was subject to a trust arising from the actual agreement and the terms of the unsigned will; that the defendant Marie O. Hotchkiss was the executrix of said will and codicils of her mother, Mary A. F. Hotchkiss, and was also the administratrix of her brother's estate; that Yale University is a legatee named in said will of Mary A. F. Hotchkiss; and that certain parts of said will are vague and indefinite.

The bill of complaint then prays that the family agreement be given its true effect by this court, and also demands its enforcement pursuant to the provisions of the unsigned will as construed by the plaintiff; that the amount of the share belonging to the estate of Nathaniel S. Hotchkiss, deceased, or due his heir at law, Louise T. Goodno, be ascertained, and that judgment be rendered for said amount against the defendants, who now hold or claim said property; that the mutual dis-

tribution of January 9, 1884, be set aside on the ground that it was made by mistake, and is unjust, inequitable, and without consideration; that it be corrected to conform to the true intent and meaning of the parties; a construction of the will of Mary A. F. Hotchkiss; an accounting from Marie O. Hotchkiss as executrix of all the property coming to her formerly belonging to the estate of Henry O. Hotchkiss, deceased; its earnings and increase from the date of the division; an accounting from said Marie O. Hotchkiss individually for all moneys she has received from the principal of the estate of Henry O. Hotchkiss from the date of the family agreement; a judgment that she be directed to pay said moneys into court for the purpose of apportioning the same under the plaintiff's construction of the family agreement; an accounting from said Marie O. Hotchkiss, as administratrix of the estate of her brother, William H. Hotchkiss, deceased, for all moneys and properties received by William H. Hotchkiss during his life, or by her as administratrix since his decease, and to pay into this court such sums as may be found to have been received by said William H. Hotchkiss over and above his lawful share in the estate of his father, Henry O. Hotchkiss.

Separate answers have been filed to this bill of complaint by the daughter Marie, as administratrix, executrix, and individually, and by Yale University. In addition to a general denial, which has been filed by each defendant, their answers set up several special defenses, which are as follows:

(1) The mistake in the execution of the family agreement and the proceedings thereunder, if any was one of law, pure and simple, for which equity can grant no relief.

(2) Res adjudicata arising, first, from a decree of the court of probate for the district of New Haven, dated October 23, 1913, finally and completely distributing the estate of Henry O. Hotchkiss, from which decree an appeal has never been taken; and, second, the judgments of the state courts of Connecticut in the appeal from the probate of the will of Mary A. F. Hotchkiss on the ground of mental incapacity and undue influence, and the appeal from the orders of the court of probate, disallowing the supplementary account of the daughter Marie, as executrix of the estate of her mother on the intestate estate of Henry O. Hotchkiss, and appointing an administrator de bonis non of the estate of Henry O. Hotchkiss.

(3) That all of the claims relied upon by the plaintiff have been barred by statutes of limitation and nonclaim.

The facts upon which the case hinges are substantially as follows:

The estate of Henry O. Hotchkiss amounted to approximately $265,000. After his death there was found among his papers a holographic draft of a will drawn in 1873, which was never executed, by which he intended to give $10,000 to each of his three children, Nathaniel, William, and Marie, and $5,000 additional to his daughter, Marie, because, as stated in this draft, Marie had not had the same advantages or opportunities for providing for her comfort as the boys, thus making the total gift to his daughter $15,000. It then provided that all the rest and residue of his estate be given to his wife, Mary, and to her heirs

forever. In this draft he referred to his wife as one "who had so long and faithfully aided me to acquire my estate," and then added:

"Having the fullest confidence in her good judgment that any reasonable requirements of our children will receive her approval and assistance, and furthermore, I hope and believe our children will be satisfied with the provision made for their mother and do all in their power to aid and assist her."

Following Mr. Hotchkiss' death, and on January 9, 1884, letters of administration were granted to his widow as administratrix of his intestate estate, and on the same day his widow and the three children entered into a family agreement in writing, which was signed, executed, witnessed, and acknowledged as a deed of real estate, and which follows the provisions of the Connecticut statute—Revision of 1902, § 395—providing for a mutual distribution of the estate of a deceased person, and which has the same effect as a distribution made by distributors and is a substitute for it (Mathews' Appeal, 72 Conn. 555, 559, 45 Atl. 170; Seymour v. Seymour, 22 Conn. 272), which family agreement is as follows:

"Whereas, Henry O. Hotchkiss, late of New Haven, Connecticut, deceased, left an instrument purporting to be his last will and testament, but said instrument was not signed and executed by him as a will;

"And whereas, we, Mary A. F. Hotchkiss, the widow, and Nathaniel S. Hotchkiss, William H. Hotchkiss, and Marie O. Hotchkiss, the three and only children of said Henry O. Hotchkiss, deceased, being the only persons interested in said estate of Henry O. Hotchkiss, and believing that said unexecuted will discloses the real intention of said deceased as to the disposition of his property, and we being desirous of carrying that intention into full effect:

"Therefore we have entered into the following mutual agreement:

"We do hereby mutually agree, in consideration of the promises and agreements of the other parties to this instrument, that when the estate of said Henry O. Hotchkiss is ready for distribution that we will divide the same between ourselves in the manner and in the proportion indicated in said instrument purporting to be the unexecuted will of said deceased, which instrument is hereto annexed and made part of this agreement.

"And we, the said Nathaniel S. Hotchkiss, William H. Hotchkiss, and Marie O. Hotchkiss, the children of said deceased, for the consideration aforesaid, do hereby bargain, sell, and convey to our mother, said Mary A. F. Hotchkiss, her heirs and assigns, all our interest in the estate of Henry O. Hotchkiss, deceased, both real and personal estate, except said sum of $35,000 mentioned in said instrument purporting to be a will, which sum of $35,000 we reserve to ourselves, in the sums and proportions named in said instrument.

"And I, the said Mary A. F. Hotchkiss, in consideration of the agreements and conveyances of my said three children above named to me, do hereby agree to transfer to my said three children from said estate the sum of $35,000, as follows, viz.: To said Nathaniel S. Hotchkiss, $10,000; to said William H. Hotchkiss, $10,000; and to said Marie O. Hotchkiss, $15,000—such transfer of said sums to my said children from said estate to be made as soon as said estate is ready for distribution.

"And we, the said parties to this instrument, do hereby mutually agree each with the other, for the consideration aforesaid, that we will execute, each to the other, such other instruments of conveyance as may be deemed necessary either in law or equity to carry this agreement into full effect, and we do hereby bind ourselves, our respective heirs, executors, and administrators, to the full and complete performance of this agreement."

At the time said agreement was executed Nathaniel was 41 years of age, William was 36, and Marie was 33.

In full compliance with and in pursuance of the agreement the widow paid over and transferred to Nathaniel $10,000, to William $10,000,

and to Marie $15,000, and took receipts from each therefor. Later, and on July 22, 1884, all of the three children executed a quitclaim deed of all real estate owned by Henry O. Hotchkiss at his decease to their mother, and on or about the 24th of December, 1899, they executed a warranty deed to their mother of the family homestead on Church street in New Haven, which she later sold for about $85,000.

Mrs. Hotchkiss died on May 17, 1912, and during her life no claim was made by any person that this family agreement did not contain the express wishes and desires of the father and mother and each and all of the children. Mrs. Hotchkiss left a will with three codicils. The original will was dated January 5, 1895, in which she made certain provisions for the three children, Nathaniel, William, and Marie. The first codicil was dated May 1, 1900, in which she made different provisions, in view of the fact that the homestead had been sold and the avails of the sale had been given to Marie; the second codicil was dated July 31, 1905, shortly after the death of her son Nathaniel, by which she revoked the provisions made in his favor; and the third codicil, dated August 7, 1907, shortly after the death of her son William, by which the provisions she had formerly made in his favor were revoked. In the will and in the codicils Mrs. Hotchkiss regarded and treated, as she had done after the execution of the family agreement, the property coming from her husband as her own, excepting the $35,000 transferred to the children, and at various times subsequent to the execution of the family agreement, and prior to 1895, Mrs. Hotchkiss transferred to herself all of her husband's property excepting the $35,000 above mentioned. These transfers to herself by herself were completed in 1895. They were openly made, with no attempt at secrecy or concealment. Mrs. Hotchkiss was, at all times after the family agreement was executed and prior to her death, in the open and notorious possession of the property which she had thus acquired. Her will was admitted to probate on June 8, 1912, by the court of probate for the district of Madison, in New Haven county, in which district she was domiciled at her death. An appeal was taken from this decision by Mrs. Goodno to the superior court for New Haven county, on the ground that Mrs. Hotchkiss was incompetent, and that the will was procured through fraud and undue influence. The trial of this appeal resulted in a verdict of the jury sustaining the will, and the judgment entered on this verdict was subsequently sustained by the Supreme Court of Errors on appeal. Goodno v. Hotchkiss, 88 Conn. 655, 92 Atl. 419.

On September 29, 1913, Mrs. Goodno applied to the court of probate for the district of New Haven for a distribution of the estate of Henry O. Hotchkiss, alleging in her application that said estate had never been distributed. Hearings were had on this application, and in the progress of one of the hearings, the family agreement was produced and presented to the court as a mutual distribution pursuant to the Connecticut statute (General Statutes, Revision of 1902, § 395), and was examined by Mrs. Goodno's counsel, who was then present, and by Mrs. Goodno herself. This agreement was thereupon, at the request of counsel for Mrs. Goodno, filed in and received by said court of probate and recorded on October 23, 1913, and no appeal was taken

from the order of court directing the agreement to be recorded. This application of Mrs. Goodno for the distribution of her grandfather's estate was denied and dismissed by the court of probate on October 23, 1913. On October 29, 1913, Mrs. Goodno, as executrix of the estate of her father, Nathaniel S. Hotchkiss, made another application to the court of probate for the district of New Haven, in which she alleged that said Marie O. Hotchkiss, executor of the will of her grandmother, the widow of Henry O. Hotchkiss, had returned to the probate court for the district of New Haven a paper claiming the same to be in the nature of a mutual distribution of the estate of her grandfather, and annexed to that application was a copy thereof. Mrs. Goodno further alleged in this application that "said paper was not a mutual distribution of said estate, but was and is in the nature of an executory contract, contemplating, in effect, a mutual distribution of said estate, and was not a mutual distribution in fact, nor was the same received as such by the said court of probate," and that "no distribution as contemplated by the family had been made," and thereupon prayed for the appointment of an administrator de bonis non to complete the settlement of her grandfather's estate, and asked the probate court to take such action "that the estate may be distributed according to law and equity and in accordance with the executory contract entered into by all parties of interest." A hearing on this application was had, and an order passed, dated November 13, 1913, appointing an administrator de bonis non of said estate.

On December 8, 1913, Marie O. Hotchkiss, as executrix of her mother's estate, who was administratrix of the intestate estate of Henry O. Hotchkiss, gave to the court of probate for the district of New Haven a statement and final account of the estate of her father, Henry O. Hotchkiss, which showed the payment of $10,000 each to Nathaniel and William and of $15,000 to herself, and the payment and transfer of the balance of the personal estate to Mary A. F. Hotchkiss under the family agreement of distribution, said balance amounting to $178,000, asking in her application for the allowance of her account, and stating that Mrs. Hotchkiss and the three children had entered into said agreement of distribution, which was made, executed, and acknowledged like deeds of land, reciting that this distribution was now on file in the probate court and duly recorded. A hearing was had on the allowance of this account, and all the parties in interest, including all the parties of this suit, appeared and were heard; Mrs. Goodno objecting to its allowance. Her objection was sustained, and an order was entered bearing date of December 30, 1913, disallowing the account, and a further order was entered, ascertaining the widow and heirs of Henry O. Hotchkiss, and appointing distributors, and ordering a distribution according to law. From this order, and from the order appointing an administrator de bonis non on the estate of Henry O. Hotchkiss, appeals were taken by Marie O. Hotchkiss to the superior court for New Haven county.

In both appeals the plaintiff, Mrs. Goodno, demurred to the reasons of appeal filed by Marie O. Hotchkiss, and assigned the following grounds:

"Because it appears from the records of the probate court for the district of New Haven in the estate of Henry O. Hotchkiss, deceased, that at the time said application was made for the appointment of an administrator de bonis non that said estate was not fully settled according to law, and that no distributors had ever been appointed by the court, and no return had ever been made to said court of a valid mutual distribution.

"(2) In so far as the reasons of appeal purport to state as a reason that a mutual distribution in accordance with section 395 had been entered into by the persons interested in the estate of Henry O. Hotchkiss, as set forth in Exhibit A, attached to said reasons of appeal, the appellee demurs, because it appears in said Exhibit A that it is not a mutual distribution of said estate.

"(3) In so far as the reasons of appeal purport to state as a reason that both Nathaniel S. Hotchkiss, deceased, during his lifetime was, and Louise T. Goodno at the present time is, estopped from disputing that said Exhibit A is a mutual distribution as required by law, the appellee demurs, because these are questions to be raised in a court of equity, and cannot be raised in this court sitting as a court of probate as a reason against granting the petition of the appellee for the appointment of an administrator de bonis non in this case.

"(4) So far as the reasons of appeal purport to state as a reason that Mrs. Mary A. F. Hotchkiss, administratrix of the estate of Henry O. Hotchkiss, or as an individual, acquired title to all of said estate during her lifetime by adverse possession, the appellee demurs, because said subject-matter cannot legally be set up as a reason against the granting of the petition of the appellee for the appointment of an administrator de bonis non in this appeal from probate.

"(5) In so far as the reasons of appeal purport to state as a reason that Nathaniel S. Hotchkiss, deceased, was during his lifetime estopped from disputing the claim of said Mary A. F. Hotchkiss to a title by adverse possession, the appellee demurs, because said subject-matter is not a proper or legal ground of objection to the granting of the petition of the appellee for the appointment of an administrator de bonis non in this case.

"(6) In so far as the reasons of appeal purport to state as a reason that there is a conclusive presumption that said estate has been settled according to law, arising from the long lapse of time between the appointment of said Mary A. F. Hotchkiss as administratrix and the time of her death, the appellee demurs, because said subject-matter is not a valid objection to the granting of the petition of the appellee for the appointment of an administrator de bonis non, and because there is no such presumption existing as a matter of law.

"(7) In so far as the reasons of appeal purport to state as a reason that Louise T. Goodno has no interest either as an individual or in a representative capacity sufficient to ask for the appointment of an administrator de bonis non, the appellee demurs, because it does appear that she claims an interest in the estate of Henry O. Hotchkiss.

"(8) The appellee demurs to said reasons of appeal, because it appears from the records of the probate court in said estate of Henry O. Hotchkiss that an essential matter relating to the orderly settlement of said estate remained neglected and unattended to.

"(9) The appellee demurs to said reasons of appeal, because it appears in said reasons of appeal and the records of the probate court in said estate of Henry O. Hotchkiss that recourse to a court having jurisdiction of equitable matters will be necessary in order to adjudicate the claims raised in the said reasons of appeal, and therefore an administrator de bonis non is necessary to care for the interests of said estate in said litigation."

These demurrers were overruled. Thereupon answers were filed in which Mrs. Goodno expressly alleged that the family agreement was made by the widow and children, all of them being legally entitled to act, and that it was made, executed, and acknowledged like deeds of land, and that it was filed and recorded in the probate court prior to the time of the filing of the supplementary administratrix's account

and is recorded in the records of the probate court. Mrs. Goodno also expressly alleged in this answer that the family agreement was not offered for record, was not received for record, and neither is it now on record or recorded in said probate court for the mutual distribution or division of said property, which allegations Marie O. Hotchkiss explicitly denied in her reply, fully alleging that the family agreement was recorded in the records of the probate court by order of said court and was a valid distribution of said estate. To this reply filed by said Marie O. Hotchkiss, the plaintiff Louise T. Goodno filed a rejoinder, in which she denied that there was a division made by all of the parties interested in the estate, and that it was made, executed, and acknowledged like deeds of land, and that it was filed in the court of probate and in the records of said court by order of said court, and was a valid distribution of said estate.

These two appeals were tried together in the superior court, and judgments were therein entered on November 20, 1914, reversing and disaffirming the orders appealed from, and adjudging and declaring that "the estate of Henry O. Hotchkiss had been divided and distributed by mutual division and distribution of the same according to law." The learned trial judge who presided at the trial of these appeals filed a memorandum holding that the recording of the family agreement by the court of probate implied, not only the ascertainment of heirs and distributees, but that there was also implied the equally incidental finding by the court of probate that the instrument voiced the intention of all the parties interested in the estate, and they were all legally capable to act, and that the court of probate would be without authority to enter upon the record an instrument purporting to make a distribution until satisfied that all of its requirements had been complied with, and that the recording of such paper is as conclusive of the existence of its prerequisites as an order of distribution is that the heirs and distributees had been ascertained by the court of probate. These judgments were supplemented by a finding of the superior court —the same finding being filed in each of the appeals—that Henry O. Hotchkiss' widow and his three children, Nathaniel, William, and Marie, were all the heirs at law of said Henry O. Hotchkiss, were all of full age and legally capable to act, and that the family agreement dividing said estate was in the form of a written instrument made, executed, and acknowledged like deeds of land, and that it was recorded in the court of probate, and that the several payments made by Mary A. F. Hotchkiss to each of the three children were received pursuant to and in execution and satisfaction of the written agreement, and in full settlement of all claims which any of said children had to and against the estate of Henry O. Hotchkiss, or against Mary A. F. Hotchkiss, individually or as administratrix of the estate, on account of said relation as heirs and next of kin, and that the instrument itself expressed the intention and wishes of the heirs at the time the instrument was made, that these intentions were not later altered by any of the parties, that from and after the execution of this instrument all of the parties regarded it as a final distribution of said estate and all of the interest of all the parties therein, and no one of them during his or her life ever questioned its validity, and all promises and conditions of said

instrument have been fully complied with by all of the parties thereto, and that this family agreement was delivered to the court of probate, and was received and ordered put on record by the court of probate, and ever since has been in the custody of the court. On appeal these findings of fact and conclusions of law were sustained in full by the Supreme Court of Errors. Hotchkiss' Appeal, 89 Conn. 420, 95 Atl. 26.

Upon all the evidence I find the following facts:

(1) There was no misapprehension or mistake in fact by Mary A. F. Hotchkiss, or any one of her three children, in executing the family agreement. The sole and exclusive purpose of the children in signing the document was to fulfill the desires of their father, and the agreement as executed fully expressed the intentions of all the parties to it, and all of the parties knew its contents when they signed and executed it. By this family agreement, Henry O. Hotchkiss' three children, Nathaniel, William, and Marie, knew that they gave to their mother whatever part of their father's property they were entitled to receive, the same to be hers absolutely and in fee simple, retaining to themselves $35,000, as set forth in the agreement. They did this because their father's unsigned will showed that he wished his property to be thus divided, and because they desired to carry out the wishes of their father, whom they loved and respected, feeling that in honor they were so bound.

(2) Immediately after the settlement by Mary A. F. Hotchkiss of her account as administratrix of the estate of her husband, the division was made as prescribed in the instrument and immediately after its execution.

(3) The estate of Henry O. Hotchkiss was finally and completely distributed by the decree of the court of probate on October 23, 1913, and this decree stands unappealed from upon the records of the court of probate, and all of the children of Henry O. Hotchkiss had actual knowledge and legal notice of this decree.

(4) It was clearly decided in the two appeals that the estate of Henry O. Hotchkiss had been completely and validly distributed among the widow and the three children in accordance with the family agreement, and that at the time of the application for the appointment of an administrator de bonis non no assets remained to be distributed, and that therefore there could be no portion of the estate to which the plaintiff Louise T. Goodno was entitled; that Mary A. F. Hotchkiss was entitled to the absolute title to all of the property, with the exception of the $35,000, since this was the basis upon which the supplemental account had been drawn up; that Mary A. F. Hotchkiss turned over to herself the balance of the property upon the understanding by and with intention of all the parties that the portion received was received pursuant to and in execution and satisfaction of the family agreement, and in full settlement of all claims which any of the children had to or against the estate, or against Mary A. F. Hotchkiss, individually or as administratrix.

[5] No claim was made or presented by the plaintiffs, or either of them, to or against the estate of Mary A. F. Hotchkiss, or the estate of William H. Hotchkiss, within the time in which claims must be presented and suits brought against the estates of deceased persons by

the Connecticut statutes, and all of the necessary proceedings, notices, etc., as prescribed by the Connecticut statutes were complied with.

I find the following conclusions of law:

[1] Irrespective of the other defenses, the plaintiffs have not proved such conditions as will entitle them to relief in a court of equity by way of reformation or cancellation. There was clearly no mistake of fact; the mistake, if any, was at the most a mistake as to the legal effect of the family agreement, without the addition of any circumstances of fraud or misrepresentation, for which there is no relief in the federal equity courts. Rogers v. Ingham, 3 Ch. Div. 351; Chandler v. Pomeroy, 143 U. S. 318, 337, 12 Sup. Ct. 410, 36 L. Ed. 169; Utermehle v. Norment, 197 U. S. 40, 56, 25 Sup. Ct. 291, 49 L. Ed. 655, 3 Ann. Cas. 520, and cases there cited; Bank of the U. S. v. Daniel, 12 Pet. 32, 57, 9 L. Ed. 989; Hunt v. Rousmaniere's Adm'r, 1 Pet. 1, 7 L. Ed. 27; Allen v. Galloway (C. C.) 30 Fed. 466; Hamblin v. Bishop (C. C.) 41 Fed. 74.

[2] Moreover, there is not the amount of evidence which is required for the purpose of setting aside a mistake and canceling or reforming a written instrument. Such evidence must be clear, unequivocal, and convincing. Maxwell Land-Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Atlantic Delaine Co. v. James, 94 U. S. 207, 214, 24 L. Ed. 112; Baltzer v. Raleigh & Augusta Railroad, 115 U. S. 634, 6 Sup. Ct. 216, 29 L. Ed. 505; Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 35 L. Ed. 1063; Campbell v. Northwest Eckington Improvement Co., 229 U. S. 561, 584, 33 Sup. Ct. 796, 57 L. Ed. 1330; Bispham's Equity (9th Ed.) § 469.

[3] The evidence to support the claim of the plaintiffs is, to say the least, meager, vague, and unsatisfactory, even if it is admissible. It consists substantially of declarations made by William H. Hotchkiss and Nathaniel S. Hofchkiss as to their understanding of the legal effect of the family agreement, and that the property of the estate after its conveyance to Mary A. F. Hotchkiss was subject to a trust in favor of the children, and the state of mind of Mary A. F. Hotchkiss and her daughter Marie prior and subsequent to the time of the signing of the family agreement. These are not declarations against interest, nor within the rule which permits declarations of a party to the record, for the reason that this rule has not been extended to include declarations of one coplaintiff or codefendant against another merely by virtue of his position as a coparty in the litigation (2 Wigmore on Evidence, § 1076), and the rule excludes such admissions, even against the party making them, whenever by so doing the other coparty would be prejudiced (Dale's Appeal, 57 Conn. 127, 140, 17 Atl. 757; Livingston's Appeal, 63 Conn. 68, 76, 26 Atl. 470). The only ground upon which these admissions can possibly be received is by virtue of the Connecticut statute—General Statutes, Revision of 1902, § 705, covering the declarations and memoranda of deceased persons in suits by or against their representatives—but this statute applies only in favor of those who sue or defend in the interest of the estate, either as personal representative, heir, distributee, or purchaser by will, so as to prevent unwarranted inroads upon estates of deceased persons in favor of the living, whose mouths are not closed. But, even if they are admis-

sible, they have not the sufficient probative value to bring the case within the standard required by the authorities cited.

[4] The decree of the court of probate of October 23, 1913, having *not* been appealed from, conclusively determines who were the heirs and what property they were to take, and is *not* subject to collateral attack. Kellogg v. Johnson, 38 Conn. 269; Ward, Adm'r, v. Ives et al., 75 Conn. 598, 54 Atl. 730; Hall v. Pierson, 63 Conn. 332, 28 Atl. 544; Leake v. Watson, 58 Conn. 332, 20 Atl. 343, 8 L. R. A. 666, 18 Am. St. Rep. 270; Bissell v. Bissell, 24 Conn. 241; Hotchkiss' Appeal, 89 Conn. 420, 95 Atl. 26; Pierce v. Prescott, 128 Mass. 140.

The Connecticut statute—Revision of 1902, § 194—containing the provision that "no order made by a court of probate upon any matter within its jurisdiction shall be attacked, collaterally, except for fraud, or set aside save by appeal," simply recites the pre-existing law as administered by the courts of Connecticut. Mallory's Appeal, 62 Conn. 218, 25 Atl. 109.

Under the decisions of the Connecticut courts, collateral attacks upon decrees of courts of probate have been limited to cases of fraud or want of jurisdiction; but in all other cases, including cases of distribution, such decrees have been uniformly and consistently treated as judgments of courts of competent jurisdiction and in the nature of judgments in rem, and conclusively bind the subject-matter in controversy against all persons or their privies who have any interest in the subject-matter. Johnes v. Jackson, 67 Conn. 81, 90, 34 Atl. 709; State of Conn. v. Blake, Trustee, 69 Conn. 64, 78, 36 Atl. 1019; Delehanty v. Pitkin, 76 Conn. 412, 416, 56 Atl. 881; Dickinson v. Hayes, 31 Conn. 417; Mix's Appeal, 35 Conn. 121, 122, 95 Am. Dec. 222; Shelton v. Hadlock, 62 Conn. 143, 153, 25 Atl. 483; Bissell v. Bissell, 24 Conn. 241, 246; Fortune v. Buck, 23 Conn. 1; Gates v. Treat, 17 Conn. 388, 392; Judson v. Lake, 3 Day (Conn.) 318.

The decisions of the Connecticut courts in the cases cited are in direct accordance with the rule recognized by the Supreme Court in Tilt v. Kelsey, 207 U. S. 43, 57, 28 Sup. Ct. 1, 52 L. Ed. 95, where it was said that the extent to which an order of distribution is open to attack in a collateral proceeding by those who were not parties to it is a matter to be determined by each state according to its own views of public policy, and that in Connecticut such a decree is binding upon all, whether they were parties or not.

[5] The court of probate had jurisdiction to make this decree, as was distinctly held in Hotchkiss' Appeal, 89 Conn. 420, 95 Atl. 26, supra; but, if it did not have, the family agreement created a property status to which all the parties elected to conform, was binding, and cannot now be disturbed. Ward, Adm'r, v. Ives et al., 75 Conn. 598, 603, 54 Atl. 730; Chandler v. Pomeroy, 143 U. S. 318, 12 Sup. Ct. 410, 36 L. Ed. 169, supra; Utermehle v. Norment, 197 U. S. 56, 25 Sup. Ct. 291, 49 L. Ed. 655, supra; Bispham's Equity (9th Ed.) § 189; Burnes v. Burnes (C. C.) 132 Fed. 485, 494.

"Compromises, where doubts with respect to individual rights, especially among members of the same family, have arisen, and where all the parties, instead of ascertaining and enforcing their mutual rights and obligations, which are yet undetermined and uncertain, intentionally put an end to all

controversy by a voluntary transaction in the way of a compromise, are highly favored by courts of equity. They will not be disturbed for any ordinary mistake either of law or of fact, in the absence of conduct otherwise inequitable, since their very object is to settle all such possible errors without a judicial controversy." Pomeroy's Equity Jurisprudence, vol. 2 (3d Ed.) § 850.

[6] The transactions involved in this suit were the subject of litigation in the state courts of Connecticut, and their consideration and decisions were essential to the judgments rendered therein, so that the case falls clearly within the rule of res adjudicata.

"A matter of fact, or generally speaking of law, once adjudicated by a court of competent jurisdiction, concurrent or exclusive, however erroneous the adjudication, may be relied upon as an estoppel in any subsequent collateral suit in the same or any other court, at law, in chancery, in probate, or in admiralty, when either party, or the privies of either party, allege anything inconsistent with it; and this, too, whether the subsequent suit is upon the same or a different cause of action." Bigelow on Estoppel (6th Ed.) 110, 111.

An estoppel by judgment grows out of matter of substance, and not of form, and the authorities put beyond all question the proposition that the plaintiff cannot litigate a part of the cause of action and assert claims arising out of that cause of action in one proceeding, and, having been defeated therein, bring a second suit setting up the same cause of action, by introducing other evidence and making other claims. Huntley v. Holt, 59 Conn. 102, 22 Atl. 34, 21 Am. St. Rep. 71; Mosman v. Sanford, 52 Conn. 23; Supples v. Cannon, 44 Conn. 431; Munson v. Munson, 30 Conn. 425; Sargent & Co. v. N. H. Steamboat Co., 65 Conn. 116, 126, 31 Atl. 543; Brennan v. Berlin Iron Bridge Co., 71 Conn. 479, 490, 42 Atl. 625; Freeman's Appeal, 71 Conn. 708, 717, 43 Atl. 185; Wildman v. Wildman, 70 Conn. 700, 41 Atl. 1; Wilson v. Cheshire Brass Co., 88 Conn. 118, 89 Atl. 903; Cromwell v. County of Sac, 94 U. S. 351, 24 L. Ed. 195; Southern Pacific R. R. v. United States, 168 U. S. 1, 48, 18 Sup. Ct. 18, 42 L. Ed. 355 (in which there is an extended examination of the adjudged cases); Northern Pacific Railway v. Slaght, 205 U. S. 122, 27 Sup. Ct. 442, 51 L. Ed. 738; Mitchell v. First National Bank of Chicago, 180 U. S. 471, 21 Sup. Ct. 418, 45 L. Ed. 627; Doran v. Kennedy, 237 U. S. 362, 35 Sup. Ct. 615, 59 L. Ed. 996.

"It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision, is for the purpose of the estoppel deemed to have been actually decided." Pray et al. v. Hegeman et al., 98 N. Y. 351, 358.

"It is the fact that the same point has been once tried, and not the manner of proving it, that precludes the parties from again contesting it. The mode of proving it cannot affect the quality or legal effect of a fact." Walker v. Chase, 53 Me. 258, 261.

In Mitchell v. First National Bank of Chicago, 180 U. S. 471, 481, 21 Sup. Ct. 418, 422 (45 L. Ed. 627), which involved a collateral attack upon a judgment of the Supreme Court of Errors of Connecticut, it was said by Mr. Justice Harlan, delivering the judgment of the Supreme Court, in answer to the contention that the question there pre-

sented was one of general jurisprudence involving the rights of citizens of different states, and the Circuit Court was not bound to accept the views of the state court, but was at liberty, indeed under a duty, to follow its own independent judgment as to the legal rights of the parties, that:

"If it were true that the question was in whole or in part one of general law, the thing adjudged by the state court when properly brought to the attention of the Circuit Court would still be conclusive between the same parties or their privies. Whatever may be the nature of a question presented for judicial determination—whether depending on federal, general, or local law—if it be embraced by the issues made, its determination by a court having jurisdiction of the parties and of the subject-matter binds the parties and their privies so long as the judgment remains unmodified or unreversed."

There is, moreover, such identity of parties as to make the former judgment of the Connecticut courts binding in this suit. Mrs. Goodno was a party to the appeal involving the validity of Mrs. Hotchkiss' will, and the daughter Marie was named as a respondent therein, individually and as executrix and administratrix. From the order appointing an administrator de bonis non and the order disallowing the supplemental account, notice was given to Mrs. Goodno, and she appeared and was fully heard. Although Mrs. Goodno's husband, who is joined as a party plaintiff in this action, was not a party to either of the appeals, he, as her husband, is nevertheless in privity with his wife, and is bound by the judgment for the reason that whatever interest he may have in the suit arises from his marriage to her and is derived from her relationship as the granddaughter of Henry O. Hotchkiss.

[7] And while Yale University was not a party of record to any of the appeals, it did employ counsel, who appeared for it with the knowledge of opposing counsel engaged in the conduct and management of the litigation. It is therefore bound by the judgments, and is as fully entitled now to take advantage of them as though it had been a party to the record. Eagle Mfg. Co. v. Miller (C. C.) 41 Fed. 351; Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129; Robbins v. Chicago City, 4 Wall. 657, 18 L. Ed. 427; Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. 564, 40 L. Ed. 712; Souffront v. Compagnie Des Sucreries, 217 U. S. 475, 487, 30 Sup. Ct. 608, 54 L. Ed. 846; Waterbury v. Waterbury Traction Co., 74 Conn. 152, 162, 50 Atl. 3.

All claims of the plaintiffs against the defendant Marie O. Hotchkiss, as executrix of the will of Mary A. F. Hotchkiss and as administratrix of the estate of William H. Hotchkiss, and the respective estates, are barred by the statutes of limitation. These statutes are section 1109 of the General Statutes of Connecticut, Revision of 1902, setting the limit for the recovery of real estate at 15 years, and section 1111, Revision of 1902, fixing the limit at 6 years within which an action founded on an express or implied contract must be brought. All of the real estate owned by Henry O. Hotchkiss was conveyed to Mary A. F. Hotchkiss by all of the children, including Nathaniel S. Hotchkiss, father of Mrs. Goodno, on July 22, 1884, and from that date till her death in 1912 she held the legal title of the real estate, claiming to be the absolute owner thereof, and not recognizing or admitting rights of any other person in or to any part of it. The plaintiffs

are therefore barred from asserting any right or title to any of the real estate of which Henry O. Hotchkiss died possessed.

[8] Furthermore, Mary A. F. Hotchkiss denied at all times from 1885, or shortly thereafter, down to her death, any trust relation in any part of the real estate or personal property which she got from her husband's estate, and if, as the plaintiffs insist, there was ever a time when Mrs. Goodno's father could have claimed a trust relation with respect of the property of Henry O. Hotchkiss, Mrs. Hotchkiss denied such relation certainly as early as 1885, so that the statute of limitations then began to run. The general rule that express trusts are not within the statute of limitations does not apply to a trust openly disavowed by the trustee with the knowledge of the cestui que trust, and the statute begins to run from the time of the disavowal, and applies in favor of persons who become trustees by construction of law—as where a person is construed into a trustee of property which he has fraudulently obtained, or where a trust estate is traced into his hands, or where a resulting trust arises. Speidel v. Henrici, 120 U. S. 377, 7 Sup. Ct. 610, 30 L. Ed. 718; Cone v. Dunham, 59 Conn. 145, 20 Atl. 311, 8 L. R. A. 647; Wilmerding v. Russ, 33 Conn. 67, 76, 77; Currier v. Studley, 159 Mass. 17, 33 N. E. 709.

The opinion of the Supreme Court in Philippi v. Philippe, 115 U. S. 151, 157, 5 Sup. Ct. 1181, 29 L. Ed. 336, is directly in point and adverse to the plaintiffs' contention. On page 156 of 115 U. S. (5 Sup. Ct. 1184) Mr. Justice Woods says:

"Conceding what is contended for by the counsel for plaintiff that the statute of limitations does not run against an express trust, it must be borne in mind that this rule is subject to the qualification that when the trust is repudiated by clear and unequivocal words and acts of the trustee who claims to hold the trust property as his own, and such repudiation and claim are brought to the notice of the beneficiary in such manner that he is called upon to assert his equitable rights, the statute of limitations will begin to run from the time such repudiation and claim came to the knowledge of the beneficiary. Prevost v. Gratz, 6 Wheat. 481 [5 L. Ed. 311]; Oliver v. Piatt, 3 How. 333 [11 L. Ed. 622]; Badger v. Badger, 2 Wall. 87 [17 L. Ed. 836]; Kane v. Bloodgood, 7 Johns. Ch. [N. Y.] 90 [11 Am. Dec. 417]; Bright v. Legerton, 2 De G., F. & J. 606; Wedderburn v. Wedderburn, 4 Myl. & Cr. 41, 52; Merriam v. Hassam, 14 Allen [Mass.] 516, 522 [92 Am. Dec. 795]; Attorney General v. Federal Street Meeting House, 3 Gray [Mass.] 1; Williams v. First Presbyterian Society, 1 Ohio St. 478; Turner v. Smith, 11 Tex. 620."

All claims of the plaintiffs against the estates of Mary A. F. Hotchkiss and William H. Hotchkiss, both deceased, and against Marie O. Hotchkiss, as executrix of the will of Mary A. F. Hotchkiss, and as administratrix of the estate of William H. Hotchkiss, are barred by the Connecticut statutes of nonclaim, limiting the time within which claims must be presented against the estates of decedents. These statutes of limitations relating to claims against the estates of deceased persons are as follows: Section 301 of the Revision of 1902, as amended by Public Laws of 1905, c. 123; section 326 of the Revision of 1902, as amended by the Public Laws of 1905, c. 136; sections 327, 329, 406, 407, 408, 381, 384, 207, and 208 of the Revision of 1902; chapter 37 of the Public Laws of 1907; chapter 75 of the Public Laws of 1911; chapter 224 of the Public Laws of 1913,

amending section 408 of the Revision of 1902, as amended by chapter 215 of the Public Laws of 1909.

[9] Federal courts, in enforcing claims against estates of decedents and executors and administrators thereof, are administering the laws of the state of the domicile, and are bound by the same statutes and rules that govern the local tribunals. Security Trust Co. v. Black River Nat. Bank, 187 U. S. 211, 227, 23 Sup. Ct. 52, 47 L. Ed. 147; Walker v. Walker's Ex., 9 Wall. 743, 754, 19 L. Ed. 814; Aspden v. Nixon, 4 How. 467, 498, 11 L. Ed. 1059; Pulliam v. Pulliam (C. C.) 10 Fed. 53, 76.

[10] The failure of the plaintiffs to exhibit their claim against the estate of Mary A. F. Hotchkiss or William H. Hotchkiss operates as a complete bar to the enforcement of their demand, and no plea of ignorance or mistake can now be of any avail. The law on this subject is forcibly stated by Mr. Justice Seymour in delivering the judgment of the Supreme Court of Errors of Connecticut in Cone v. Dunham, 59 Conn. 145, 161, 20 Atl. 311, 314 (8 L. R. A. 647), supra, as follows:

"The failure to exhibit a claim within the time limited by the court of probate for the presentation of claims against a deceased person's estate forever debars the demand. There is no provision for suspension during the disability of the claimant. It is a statutory bar, which, to quote the language of Lewin in his work on Trusts, p. 866, affords a substantial, insuperable obstacle to the plaintiff's claim, and no plea of poverty, ignorance, or mistake can be of any avail. However clear and indisputable the title, could the merits be inquired into, the limited time has elapsed, and the door of justice has closed. The language of Judge Story, quoted in the defendants' brief, suggests a reason for the strict application of the statute. He says this statute of limitations as to executors and administrators is not created for their own security or benefit, but for the security and benefit of the estates which they represent; it is a wholesome provision, designed to produce a speedy settlement of estates and the repose of titles derived under persons who are dead. If it appears to work harshly in this case, the law is nevertheless so that, whenever this statute comes in, it applies regardless of any hardships which it may work, and we must regard this claim as barred by the failure to present it * * * within the time limited by the court of probate."

[11] Moreover, such a statute is a rule of property, which the Legislature of a state can alone make, and as such is binding on the federal courts sitting in equity. Pulliam v. Pulliam (C. C.) 10 Fed. 76, supra.

There is no ambiguity in the will of Mary A. F. Hotchkiss, and a claim for the construction of the will cannot now be sustained. This contention of the plaintiffs is made with respect of the third paragraph of Mrs. Hotchkiss' will, which provides that:

"The rest and residue of my estate of every kind and description, whether real or personal and including that which I received from the estate of my dear husband, Henry O. Hotchkiss, I direct to be divided into three equal parts, and to be disposed of" as there provided.

The plaintiffs' contention is that it is uncertain whether the testatrix's intention was thereby to include the property in her hands as life tenant, or whether she intended to include only the portion of the income which remained unexpended. It does not seem to me that

the will is susceptible of the construction which the plaintiffs claim for it, as there is no evidence to indicate that Mrs. Hotchkiss at any time after these transfers of property of her husband's estate into her own name made any attempt to keep this portion of the estate separate from what belonged to her in her own right, or that she had any idea of so doing.

[12] But, be that as it may, I am clear that the plaintiffs have no right in this suit to ask for a construction of the will. This court is bound to follow the law of the state in matters necessarily involving property, as well as in the adjustment of claims against estates of decedents, and it is the settled law of the Supreme Court of Errors that no one but an executor or some fiduciary under the will can ask for its judicial construction. Belfield v. Booth, 63 Conn. 299, 309, 27 Atl. 585; Security Co. v. Pratt (C. C.) 64 Fed. 405.

Even the daughter, Marie, as executrix, could not now maintain a suit for a construction of the will, for the reason that the proceedings are entirely at a close, unless some property should be discovered which should be included in the division of the estate. Miles v. Strong, 60 Conn. 393, 397, 22 Atl. 959; Miles v. Strong, 62 Conn. 95, 103, 25 Atl. 459; Foote v. Brown, 78 Conn. 369, 372, 62 Atl. 667; Ackerman v. Union & N. H. Trust Co., 90 Conn. 63, 70, 96 Atl. 149.

If, in the account filed by the daughter, Marie, she has erroneously included in the estate of her mother property which belonged to the estate of her father, and which should have been treated separately, the remedy is an adjudication in the state courts as to these accounts, or an appeal from their allowace or disallowance; but this course has never been taken.

To sustain any of the contentions so earnestly urged, and so elaborately, skillfully, and efficiently presented, by the plaintiffs, would be in the very teeth of the authorities cited at length. However much one may either agree or disagree with the policy adopted by the various members of the Henry O. Hotchkiss household, it seems to me clear and conclusive that a decree should be entered dismissing the bill of complaint, with costs to abide the event; and it is so ordered.

Decree accordingly.

UNITED STATES v. ONE BLUE TAFFETA EVENING COAT, TRIMMED LACE, AND OTHER WOMEN'S CLOTHING.

(District Court, S. D. New York. December 1, 1916.)

No. 60–219.

1. CUSTOMS DUTIES ⊂=133—COLLECTION—LIBEL FOR FORFEITURE—INCONSISTENT COUNTS.

It is permissible to plead contradictory versions of the same transaction in different counts of a libel for the forfeiture of goods for the nonpayment of customs duties thereon, and therefore a count charging that the goods were part of claimant's baggage is not bad, because other counts charged that part of the goods belonged to others.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⊂=133.]

2. PLEADING ⊂=8(2)—LIBEL FOR FORFEITURE—LEGAL CONCLUSION—"MENTIONED."

In a count of a libel for forfeiture of goods, which charged that the goods were part of the baggage of the claimant and were not "mentioned" to the collector before whom the entry of the articles was made, contrary to Rev. St. § 2802 (Comp. St. 1913, § 5499), the word "mentioned" does not involve a legal conclusion, since the term is not used as a legal term, but embraces any form of mentioning included in its broader colloquial meaning.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 13; Dec. Dig. ⊂=8(2).

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

3. CUSTOMS DUTIES ⊂=133—LIBEL FOR FORFEITURE—EXCEPTION—LIBEL GOOD IN PART.

An exception cannot be sustained to a libel for the forfeiture of goods for nonpayment of customs duties, which is insufficient as to part of the goods described therein, but good as to the rest.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⊂=133.]

4. CUSTOMS DUTIES ⊂=133—LIBEL FOR FORFEITURE—SMUGGLING.

A libel for forfeiture of goods, which charged that the claimant smuggled and clandestinely introduced the merchandise into the United States with intent to defraud the revenue and without paying and accounting for the duty thereon, contrary to Rev. St. § 2865 (Comp. St. 1913, § 5548), is sufficient.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⊂=133.]

5. CUSTOMS DUTIES ⊂=133—LIBEL FOR FORFEITURE—"IMPORTATION."

A count in a libel for the forfeiture of goods, which charged that they were imported without the production of a duly certified invoice, and without an affidavit excusing failure to produce the invoice and a sworn statement of the costs, contrary to Tariff Act Oct. 3, 1913, c. 16, § III, E, 38 Stat. 182 (Comp. St. 1913, § 5522), is fatally defective, since the importation is complete as soon as the goods enter the port, at which time there could be no evasion of the duty, so that there can be no illegal importation, except of goods illegally packed or absolutely forbidden.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⊂=133.

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

6. CUSTOMS DUTIES ⊂=121—STATUTE—CONSTRUCTION—ILLEGAL IMPORTATION.
Rev. St. § 3082 (Comp. St. 1913, § 5785), forbidding the importation of goods contrary to law, applies only to the importation of goods illegally packed or absolutely forbidden, and is not redundant or a reduplication of the smuggling section of Customs Administrative Act June 10, 1890, c. 407, 26 Stat. 131, as amended by Act Oct. 3, 1913, c. 16, § 3, 38 Stat. 181.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 261; Dec. Dig. ⊂=121.]

7. CUSTOMS DUTIES ⊂=133—LIBEL FOR FORFEITURE—DUTIES OF EXAMINER.
A libel for forfeiture of goods, which charges that false oral statements were made to the examiner, but which does not properly plead article 1124 of the Customs Regulations, making it the duty of the examiner to ascertain and report the foreign market value of such merchandise as the collector designates for examination, nor allege that the collector had designated the merchandise in question for examination, does not show that the examiner had any powers with reference to the merchandise, and is therefore insufficient.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 316–331; Dec. Dig. ⊂=133.]

8. CUSTOMS DUTIES ⊂=130—FORFEITURE OF GOODS—FALSE STATEMENTS.
Only the goods about which false statements are made are forfeited, unless they are boxed or baled with others, and a libel for the forfeiture of all the goods for false statements concerning some matters should allege that they were all packed together.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⊂=130.]

9. CUSTOMS DUTIES ⊂=130—FORFEITURE OF GOODS—COMMERCIAL GOODS DISGUISED AS BAGGAGE.
Goods which, disguised as personal baggage, are attempted to be introduced into the commerce of the country by means of a false baggage declaration, are subject to forfeiture.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. §§ 296–315; Dec. Dig. ⊂=130.]

Libel by the United States to forfeit One Blue Taffeta Evening Coat, Trimmed Lace, and Other Women's Clothing. On exceptions by the claimants for insufficiency of the libel. Exceptions sustained in part, and overruled in part.

This is a libel of information to forfeit certain clothing brought into the port of New York on December 10, 1915, from the republic of France, by the claimant, Charlotte A. Warren, and seized by the collector. The clothing is divided into six groups, marked respectively, "A," "B," "C," "D," "E," and "F," and is charged to be subject to forfeiture by virtue of five counts, which are as follows:

First Count. That said articles, to wit, said wearing apparel, hereinbefore designated as groups C, D, E, and F, imported and brought into the United States from a foreign country as aforesaid, were subject to duty by law, and were found as part of the baggage of said Charlotte A. Warren upon her arrival within the United States as a passenger on the steamship Espagne, on or about the 15th day of November, 1915, and were not, at the time of making entry of such baggage, mentioned to the collector or any other officer of the customs before whom entry of such articles was made, by the person making such entry, to wit, Charlotte A. Warren, contrary to the provisions of section 2802 of the Revised Statutes of the United States [Comp. St. 1913, § 5499].

Second Count. That the said Charlotte A. Warren, acting for and on behalf of one Evelyn Byrd Burden, and being the importer aforesaid of the merchan-

dise herein before designated as groups B, E, and F, on or about the 15th day of November, 1915, falsely and knowingly did import and bring into the United States the said merchandise designated as groups B, E, and F, contrary to law, in that—

(a) Said merchandise which should have been invoiced was, by said Charlotte A. Warren, smuggled and clandestinely introduced into the United States with intent to defraud the revenue of the United States and without paying and accounting for the duty thereon, contrary to the provisions of section 2865 of the Revised Statutes of the United States [Comp. St. 1913, § 5548].

(b) Said merchandise was not personal effects accompanying a passenger, and exceeded $100 in value, and was imported by said Charlotte A. Warren without the production of a duly certified invoice thereof, as required by law, and without the production of an affidavit showing why it was impracticable to produce such invoice, and without a sworn statement in the form of an invoice showing the actual cost of said merchandise, or the actual market value or wholesale price thereof at the time of exportation to the United States in the principal markets of the country from which same was imported, contrary to the provisions of § III, subdivision E, of the Tariff Act of October 3, 1913.

Third Count. That the said Charlotte A. Warren, being the importer aforesaid of the said merchandise designated as groups A, B, C, D, E, and F, on or about the 15th day of November, 1915, did enter and introduce the said merchandise imported as aforesaid from said foreign country into the commerce of the United States at the port and Southern district of New York, by means of a certain false and fraudulent written statement and declaration, to wit, a certain baggage declaration and entry, in which, on or about the 15th day of November, 1915, the said Charlotte A. Warren did declare before a certain inspector of customs at the port and collection district of New York, falsely and fraudulently, among other things, that all the articles, either used or unused, in her baggage, or on her person, or on the persons of those accompanying her which had been obtained abroad, together with the cost price of each item purchased, and the actual market value, if obtained by gift, or other than by purchase, were fully set forth and described in said baggage declaration and entry, and that all of said articles were intended for the personal use of herself or of those accompanying her, except as indicated in said baggage declaration and entry; whereas, in truth and in fact, the merchandise aforesaid was not fully stated and declared by her, the said Charlotte A. Warren, and the said baggage declaration and entry was false and fraudulent, in that it did not contain a statement of all the said merchandise, together with the cost price of each item thereof, or make reference to all of said merchandise, as the said Charlotte A. Warren then and there well knew; that the said Charlotte A. Warren, was, on the 15th day of November, 1915, guilty of certain willful acts and omissions whereby the United States was deprived of a part of the duties legally due and accruing on said merchandise hereinbefore described as groups A, B, C, D, E, and F, to wit, in knowingly and willfully neglecting to set forth in said baggage declaration and entry all the said merchandise purchased or acquired by her abroad. All with intent to defraud the revenue of the United States and contrary to the provisions of section III, par. H, of the Tariff Act of October 3, 1913 [Comp. St. 1913, § 5526].

Fourth Count. That the said Charlotte A. Warren, being the importer of the said merchandise designated as groups A, B, C, D, E, and F, on or about the 15th day of November, 1915, did enter and introduce, and attempt to enter and introduce, the merchandise aforesaid, imported as aforesaid, from said foreign country into the commerce of the United States, at the port and Southern district of New York, by means of certain false verbal statements made to one Charles T. Riotte, who then and there was an examiner of merchandise at the port of New York, in and by which said false verbal statements the said Charlotte A. Warren stated that of the articles hereinbefore referred to, one black and metal thread evening costume, trimmed with lace, one flame-colored evening gown, beaded, and one flame-colored evening costume, had theretofore been purchased in France and imported into the

United States, and that theretofore duty had been paid upon said gowns; whereas, in truth and in fact, as said Charlotte A. Warren then and there well knew, the said three gowns had never been imported into the United States prior to the 15th day of November, 1915, and no duty had ever theretofore been paid thereon. All with intent to defraud the revenue of the United States, and contrary to the provisions of section III, par. H, of the Tariff Act of October 3, 1913.

Fifth Count. That the said Charlotte A. Warren, being the importer aforesaid of the said merchandise designated as groups A, B, C, D, E, and F, on or about the 15th day of November, 1915, did attempt to introduce into the commerce of the United States the merchandise aforesaid, which was then and there subject to duty by law, by means of a certain false and fraudulent declaration and written statement by her then made, to wit, a certain baggage declaration and entry, in which, on or about the date aforesaid, the said Charlotte A. Warren did declare before a certain inspector of customs at the port and collection district of New York, falsely and fraudulently, among other things, that the foreign cost or actual foreign market value of the said merchandise was the sum of $1,500; whereas, in truth and in fact, the actual cost price or the actual foreign market value of the said merchandise, as the said Charlotte A. Warren then and there well new, was largely in excess of the sum of $1,500. All with intent to defraud the revenue of the United States, and contrary to the provisions of section III, par. H, of the Tariff Act of October 3, 1913.

After seizure, Charlotte A. Warren intervened as claimant to groups A, C, and D, Evelyn Byrd Burden intervened as claimant to groups B and F, and certain articles in group E, and Gwendolyn Dows intervened as claimant to certain articles in group E. All the claimants have filed exceptions for insufficiency to all counts of the libel.

Frank E. Carstarphen and John E. Walker, both of New York City, for the United States.

William L. Wemple, of New York City, for claimant Warren.

Alfred A. Wheat, of New York City, for claimants Burden and Dows.

LEARNED HAND, District Judge (after stating the facts as above). [1] *First Count.* If groups C, D, E, and F were a part of the claimant Warren's baggage, and were subject to duty, and were not mentioned to the collector when entered, they were, of course, forfeit. The first criticism is that in other counts it appears that groups E and F were imported for the claimants Burden and Dows. If groups E and F could not be at once in fact personal baggage and goods imported for the use of another (One Pearl Chain v. U. S., 123 Fed. 371, 374, 59 C. C. A. 499), still it is permissible to plead contradictory versions of the same transaction in the alternative, so as to be safe, whichever way the proof develops (Bishop, Crim. Proc. §§ 453 [2], 492). The count, standing alone, is good.

[2] A second criticism is that the word "mentioned" involves a legal conclusion, and is bad for that reason. I think not. It may be true, since One Pearl Chain v. U. S., 123 Fed. 371, 59 C. C. A. 499, that it is enough generally to state upon a baggage declaration that one has wearing apparel, without the particularity of R. S. § 2799;[1] but that does not make the word "mention," as used in section 2802, a legal term. Rather it embraces within the term any form of "mentioning" to the collector, including its broader colloquial meaning.

[1] Comp. St. 1913, § 5496.

Words like "subject to duty" are good, even in indictments. Dunbar v. U. S., 156 U. S. 185, 15 Sup. Ct. 325, 39 L. Ed. 390.

[3] Finally, even if the groups E and F were to be excluded from the count, it would still be good as to C and D, and an exception, like a demurrer, is bad, if any part of the pleading be good. The exception to the first count is overruled.

[4] *Second Count.* (a) The smuggling count is challenged because in other counts the United States has alleged that the goods were disclosed to the authorities, but the objection amounts to no more than a charge of inconsistency between counts. The terms of the charge are valid. Keck v. U. S., 172 U. S. 434, 19 Sup. Ct. 254, 43 L. Ed. 505. And since that case they have become the accepted form.

[5, 6] (b) R. S. § 3082 (Comp. St. 1913, § 5785), only forbids importation, and section III, E, affects only entry, and the claimants argue that entry succeeds, and is not a part of, importation. "Importation" is complete, certainly for purposes of the incidence of duties, as soon as the goods enter the port. Arnold v. United States, 9 Cranch, 104, 3 L. Ed. 671; The Boston, Fed. Cas. No. 1,670; United States v. Lindsey, Fed. Cas. No. 15,603, 1 Gall. 365. In United States v. Thomas, Fed. Cas. No. 16,473, 4 Ben. 370, Judge Hall applied this definition so far as to hold bad an indictment under section 3082, which charged that the goods were imported without payment of the legal duties. His theory was that, since the importation was complete when the goods reached the port, and no duties could be evaded till entry, there could be no illegal importation, except the goods were illegally packed or absolutely forbidden. The case was followed by Judge Deady in United States v. Kee Ho (D. C.) 33 Fed. 333, and by Judge Benedict in United States v. Claflin, Fed. Cas. No. 14,798, 13 Blatchf. 178, 186, but it was criticized by Judge Longyear, obiter, in United States v. Merriam, Fed. Cas. No. 15,759. As there have been three decisions upon the point, I scarcely think I ought to disregard them as mere matter of authority.

Besides, I do not see how the word "import" can mean different things in the same connection. If the importation of goods illegally packed or absolutely forbidden is complete when they enter the precincts of the port, it must be complete when they enter under a scheme to defraud the revenues. Section 3082 is not redundant, and does not reduplicate the smuggling section, or the elaborate provisions of the Customs Administrative Act. It is directed against introducing goods into the precincts of the port. The exception is overruled to count 2 (a), and is sustained to count 2 (b).

Third Count. The third count is said to be bad, because it does not appear that the goods were entered and introduced into the commerce of the United States. This the claimants urge follows from the character of the goods, women's clothes, and from the fact that they were imported either for the claimant Warren herself, or for her friends, the claimant Burden, or the claimant Dows. Nothing of the sort appears in the count itself, which only alleges that the claimant Warren imported the goods into the commerce of the United States. Each count may stand alone, as I have said, and nothing contradicts the allegation that they were so imported.

Another question is whether the allegation is good in law. The phrase "enter and introduce" is no more contaminated by legal implications than the allegations in the indictments in Dunbar v. United States, supra, and Keck v. United States, supra. As to "enter," I think it may stand, because it signifies the complete series of acts necessary to get a permit to pass the goods (United States v. Cargo of Sugar, Fed. Cas. No. 14,722, 3 Sawyer, 46), and they are defined by the statute, which is accessible to all. While it is true that this single legal term includes a number of acts, that is not necessarily a fatal defect. The word "introduce" comprehends fewer acts than "enter" (United States v. 25 Packages of Hats, 231 U. S. 358, 34 Sup. Ct. 63, 58 L. Ed. 267), and it is at least uncertain just how far an importer must go to "introduce" goods into the United States. We know from the case cited that to unload and place them in general order is enough, but to make them arrive merely at the port is only an attempt to introduce. While it may be unsafe, therefore, for the United States to go to trial upon that word, without further specification, the exception will not lie, because "entry" is enough, and has been alleged. As the greater, it includes "introduction," which is the less. How the United States would fare if it failed to prove complete entry, but did prove acts sufficient for introduction, without specifying those acts in the libel, is another question.

The exception is overruled, as well as the exception on the same ground to counts 4 and 5.

[7] *Fourth Count.* The specific objection to this count is that false verbal (sic) statements made to an examiner were irrelevant. The goods are not alleged to be passengers' baggage, but imported merchandise, and I will not look beyond the count. A false statement to the examiner was relevant, if examiners had any authority in respect of admitting imported merchandise. Article 1124 of the Customs Regulations makes it the duty of examiners to ascertain and report the foreign market value of such imported merchandise as the collector designates for examination, and to describe it, so that the collector might determine the duty upon it. But the regulation is not pleaded as it should be, nor is it alleged that the collector had designated the merchandise for examination. As the count stands, the examiner had no duties and no powers, and the exception is sustained.

[8] A further point is raised that only the clothes about which the false oral statements were made are forfeit. This is so, unless it were alleged that they were baled or boxed with others; if the United States means to forfeit the other articles, it must allege that they were packed with those about which the false statements were made, since that is a part of the necessary allegations to forfeit those articles. However, part of the count is good without such an allegation, since the articles mentioned could in any case be forfeited, and an exception will not lie while any part of the count is good.

[9] *Fifth Count.* This count raises the point, which is in fact also raised by the third count, though not argued, whether in entering and introducing into the commerce of the United States certain mer-

chandise, not passengers' personal baggage, the goods are forfeit, if the importer uses a false baggage declaration. Certainly to attempt to introduce goods into the commerce of the United States by such a false paper is not safer than by a false invoice. The count does not present the question whether to introduce personal baggage as such by a false baggage declaration violates section III, H, of the Customs Administration Act (Comp. St. 1913, § 5526). The count would be satisfied, if the claimant, seeking to introduce goods for sale, disguised as personal baggage, used a false baggage declaration. In this regard it is precisely like count 3, which is not challenged on that score. It may turn out at the trial that personal baggage was introduced by a false baggage declaration, and then that point will be raised; but this pleading does not raise it, and the pleader is entitled to be taken at his word. Or it might turn out that some of the goods designed for import into the commerce of the United States were packed with personal baggage and entered by a false invoice. That would raise the question of the contamination of the personal baggage, and of whether it was sufficiently pleaded; but that, also, is not raised by this pleading. The exception is therefore overruled.

A decree may therefore pass sustaining the exception to count 2 (b) and to count 4, and overruling the other exceptions. The libelant has leave to plead over generally, except as to count 2 (b), which, if I am right, is incurable.

CHICAGO, M. & ST. P. RY. CO. v. INCORPORATED TOWN OF LOST NATION et al.

(District Court, S. D. Iowa, Davenport Division. February 19, 1916.)

1. COURTS ⟸329—JURISDICTION OF FEDERAL COURTS—AMOUNT IN CONTROVERSY.

In a suit to enjoin the taking of railroad station property for street purposes, an allegation in the bill that the value of the matter in controversy exceeds $3,000 is sufficient to give a federal court jurisdiction, where, if the theory of complainant as to the measure of damages for the taking of the property should be sustained, the damage would exceed that sum.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 897; Dec. Dig. ⟸329.]

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

A construction placed upon a state statute by the highest court of the state is binding upon a federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⟸366(1).]

3. EMINENT DOMAIN ⟸47(5)—DELEGATION OF POWER TO MUNICIPALITIES—PROPERTY PREVIOUSLY DEVOTED TO PUBLIC USE.

Under the law of Iowa as settled by decision, while property devoted to one public use may be taken by another, where the two uses can coexist, a town or city cannot condemn for street purposes property already devoted to a public use by a railway company, when such taking

would require the destruction or removal of a depot building already located thereon.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 108–110, 115–120; Dec. Dig. ⇐47(5).]

In Equity. Suit by the Chicago, Milwaukee & St. Paul Railway Company against the Incorporated Town of Lost Nation, Edward Christiansen, Mayor, and L. Balster, R. E. Cressey, J. E. Gilroy, and W. J. Schultz, Councilmen of said town, and William E. Dougherty, Sheriff of Clinton County, Iowa.

J. C. Cook, J. N. Hughes, and C. R. Sutherland, all of Cedar Rapids, Iowa, for complainant.

Wolfe & Wolfe, of Clinton, Iowa, for respondents.

WADE, District Judge. The plaintiff seeks to enjoin the taking of a portion of its right of way and depot grounds for street purposes. The validity of the ordinance establishing the street in controversy is disputed, and it is contended that, even if the ordinance is valid, the power of eminent domain granted to cities and towns by section 880 of the Code of Iowa does not enable the defendants to condemn for a public street the property of the plaintiff which is already owned and used for other inconsistent public purposes. Upon the property sought to be condemned is located the depot of plaintiff; also tracks, permanent concrete platform, etc. The defendants insist that the ordinance is valid, and that under the circumstances the town has the power to condemn the property, and they also insist that this court has no jurisdiction, because it is claimed that the amount in controversy does not exceed the sum of $3,000.

[1] 1. Has the court jurisdiction? The exact amount, which in case condemnation of the property were made, might be assessed by a jury, cannot, of course, be determined in this action, and, if it could be determined, would not be decisive upon the question of jurisdiction. The amount in dispute, so far as it relates to the jurisdiction of the court, cannot be measured by the exact amount which is ultimately found due from one party to another. If it were, then the court would never have jurisdiction in a case where upon final hearing the court or jury finds that the plaintiff is not entitled to recover anything. It is the amount "in dispute, and not the amount actually due, as subsequently may be determined, which fixes the jurisdiction." Smith v. Adams, 130 U. S. 167, 9 Sup. Ct. 566, 32 L. Ed. 895; Holden v. Machinery Co. (C. C.) 82 Fed. 209; Armstrong v. Walters (D. C.) 219 Fed. 321; Barry v. Edmunds, 116 U. S. 550, 6 Sup. Ct. 501, 29 L. Ed. 729.

In a recent opinion announced by the Supreme Court of the United States, November 15, 1915, in the case of Glenwood Light & Water Co. v. Mutual Light, Heat & Power Co., 239 U. S. 121, 36 Sup. Ct. 30, 60 L. Ed. 174, Justice Pitney says:

"We are unable to discern any sufficient ground for taking this case out of the rule applicable generally to suits for injunction to restrain a nuisance, a continuing trespass, or the like, viz. that the jurisdictional amount is to be tested by the value of the object to be gained by complainant. The object of the present suit is not only the abatement of the nuisance, but (under the

prayer for general relief) the prevention of any recurrence of the like nuisance in the future. In Mississippi & Missouri Railroad Co. v. Ward, 2 Black, 485, 492 [19 L. Ed. 311], it was said: 'The want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction will not defeat the remedy, as the removal of the obstruction is the matter of controversy, and the value of the object must govern.' The same rule has been applied in numerous cases, and under varying circumstances. Scott v. Donald, 165 U. S. 107, 115 [17 Sup. Ct. 262, 41 L. Ed. 648]; McNeill v. Southern Railway Co., 202 U. S. 543, 558 [26 Sup. Ct. 722, 50 L. Ed. 1142]; Hunt v. N. Y. Cotton Exchange, 205 U. S. 322, 336 [27 Sup. Ct. 529, 51 L. Ed. 821]; Bittermann v. Louisville & Nashville R. R., 207 U. S. 205, 225 [28 Sup. Ct. 91, 52 L. Ed. 171, 12 Ann. Cas. 693]; Berryman v. Whitman College, 222 U. S. 334, 345 [32 Sup. Ct. 147, 56 L. Ed. 225]."

In determining the amount which must be ultimately paid if condemnation be permitted, a number of important questions will be involved with reference to the measure of recovery. It will have to be determined whether the value of the property shall be fixed, as contended for by the defendants, at the time the ordinance was passed, or, as contended by the plaintiff, at the time the property is ultimately subjected to use for a street. It will also have to be determined whether the recovery shall be the expense of removal of buildings, or the actual value of the improvements condemned. It will also involve the question as to whether the plaintiff is entitled to recover anything for the depreciated use of the right of way at this point, based upon the additional burdens which the crossing would impose with reference to speed, and guarding against accidents, and practicability of stopping trains without obstructing the streets, etc. These matters cannot be determined by this court in this case.

Under the evidence, and the theory advanced by counsel for the plaintiff, it cannot be denied that there is a dispute between the parties which exceeds the jurisdictional amount. Whether the theory of counsel for the plaintiff can be ultimately sustained is a question for some other court in a proper proceeding.

2. Is the ordinance valid? I have grave doubts about the validity of the ordinance. None of the provisions of the statute with reference to the passage, the signing, publication, and record of the ordinance, have been literally complied with. Examination of the cases in Iowa and in other states, however, discloses that the courts have almost uniformly upheld ordinances, even though no attempt was made to comply with the statutory requirements, and inasmuch as the defendants contend that this ordinance is valid, and I am disposing of the case upon another point, I will not review the objections to the ordinance or the authorities relating thereto.

[2, 3] 3. Has the incorporated town the power to condemn the property in controversy? This simply involves a construction of the statute of the state of Iowa. This statute, however, is in effect the same as statutes of many other states, and the question involved has been before the courts of Iowa, and numerous other states. Being a question of statutory construction, this court is bound by the decisions of the highest court of the state of Iowa as correctly interpreting the legislative will. Hamilton Gaslight Co. v. City of Hamilton, 146 U. S. 258, 13 Sup. Ct. 90, 36 L. Ed. 963; Louisville Co. v. Mississippi,

133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784; Detroit v. Osborne, 135 U. S. 492, 10 Sup. Ct. 1012, 34 L. Ed. 260.

The construction of this statute, as applied to the question in controversy, was considered by the court in C., M. & St. P. Ry. Co. v. Starkweather, 97 Iowa, 159, 66 N. E. 87, 31 L. R. A. 183, 59 Am. St. Rep. 404, and in Chicago Great Western Railway Co. v. Mason City, 155 Iowa, 99, 135 N. W. 9. In the Starkweather Case it is said:

"It is claimed by the appellant that depot grounds are essentially public property; that they may be acquired by the exercise of * * * eminent domain, when they cannot be otherwise obtained; and that for these reasons they cannot be taken by means of that right. It is undoubtedly true that the railway and station grounds are operated and used in part for public purposes. The right of eminent domain rests upon the theory that property taken by virtue of it is to be used for the benefit of the public, and it cannot be exercised for any other than a public object. Stewart v. Board, 30 Iowa, 19 [1 Am. Rep. 238]; 1 Redf. R. R. 228; 6 Am. & Eng. Enc. Law, 515. But it is not true that property devoted to one public use cannot be subjected to any other. It is within the power of the General Assembly to make the same property subservient to different public uses, or even to take it from one public use and devote it to another. Thus the streets of a town or city may be used for the purposes to which streets are ordinarily devoted, and also for railway purposes. Milburn v. Cedar Rapids, 12 Iowa, 256; Cook v. City of Burlington, 30 Iowa, 105 [6 Am. Rep. 649]. It was said in Evergreen Cemetery Ass'n v. City of New Haven, 43 Conn. 234 [21 Am. Rep. 643], to be unquestionable 'that the Legislature has the power to authorize the taking of land, already applied to one public use, and devote it to another.'"

After citing numerous authorities in support of the foregoing, the court further says:

"The doctrine is subject to the modification, however, that the power to take the property for the second public use, when such an appropriation would supersede or defeat the first one, must be given expressly or by necessary implication; and stress is placed on that modification by most of the authorities to which we have referred. The use of the strip of ground in question for railway depot purposes is in part for the public benefit, and therefore public. The use for which the town of Boyden appropriated it is also public; but the plaintiff has occupied and used it for railway purposes for many years, and its rights are prior, in point of time, to any which the town has acquired. It is true the grounds were not obtained for the plaintiff through the exercise of the right of eminent domain, but by a conveyance from its owner; but it may be conceded, for the purposes of this case, that the method by which title was acquired is immaterial, so long as the use made of the land is a public one. The question remains to be determined whether, under the statutes of this state, the town was authorized to extend its street in the manner attempted, against the will of the plaintiff. It is said in Suth. St. Const. § 388, that 'there is a broad distinction between acts which subvert or essentially impair a prior franchise or appropriation to a public use, and acts which permit a taking for a new public use, not involving an entire deprivation or diversion from the first use, but a joint use, so that after the second taking the same property serves still the original purpose, as well as the new, and the two uses are consistent. Under a general power to lay out and establish a railroad or highway, other railroads or highways may be crossed.'"

In Chicago G. W. Railway Co. v. Mason City, it is said, sustaining the reasoning in the Starkweather Case:

"The general rule seems to be that, if the use of the proposed street is not inconsistent with the * * * use by the railway company of its depot grounds for proper purposes, the power of the city to condemn a right of way

for street purposes is not excluded (Minneapolis & St. L. R. Co. v. Hartland, 85 Minn. 76, 88 N. W. 423; Battle Creek & S. R. Co. v. Tiffany, 99 Mich. 471, 58 N. W. 617), even though it may be necessary for the railway company to make slight changes in its tracks or other appurtenances. Fohl v. Sleepy Eye Lake, 80 Minn. 67, 82 N. W. 1097; Chicago & N. W. R. Co. v. City of Morrison, 195 Ill. 271, 63 N. E. 96. In Cincinnati, W. & M. R. Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285, it was held that a street could not be thus located through the railroad company's yards, so as to destroy roundhouses, water tanks, and similar buildings, and necessitate their location elsewhere. The conclusion thus announced is without doubt sound, but it has no necessary application to the case before us."

It will be observed that the Supreme Court of Iowa has thus approved of the rule announced in Cincinnati Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285, in the following language:

"It was held that a street could not be thus located through the railroad company's yards, so as to destroy roundhouses, water tanks, and similar buildings, and necessitate their location elsewhere. The conclusion thus announced is without doubt sound."

This expression of the Supreme Court seems to be decisive of this case. The depot is partly upon the portion of the depot grounds which the defendants seek to condemn for a street. The depot does not extend clear across the proposed street, but there is no claim that the street can be established and used without destroying or removing the depot.

An important distinction is urged by counsel for defendants, between the case at bar and other cases, because the depot had only been removed to its present location a short time prior to the passage of the ordinance, and because, as they express it, it was "purely a race between the town and the railway company to establish a street on one part, and to forestall the establishment on the other." If this case involved a question of equities between the parties, we might well consider the conduct of the railway after knowledge of the purpose or intent to pass the ordinance establishing the street. But it is not a question of equities; it is a question of legal rights.

The passage of the ordinance was not a taking of this property. "Private property shall not be taken for public use without just compensation first being made or secured to be made to the owner thereof." Const. Iowa, art. 1, § 18. Property cannot be taken until the damages have been assessed and the money paid. Code Iowa, § 2010. Even after the condemnation and assessment of damages, the town would be under no obligation to take the property; so that legally, at least, there was no duty resting upon the railway company to suspend work upon the depot or other improvements upon the passage of the ordinance.

It is a conceded fact that the depot was in its present location prior to the passage of the ordinance—a permanent foundation was not completed, but there is no question but what it was put in its present location with a view of permanency, and that it was legally speaking, permanently established, so far as location is concerned. So that the case really involves the question as to whether a town or city can condemn for street purposes property already devoted to a public use

by a railway company, when such taking would require the destruction or removal of a depot building already located thereon. The town has no power to compel the removal of the building; its only power is to condemn the property, building and all, and, except by mutual arrangement, the city, in order to acquire possession, would be compelled to destroy or remove that portion of the depot which would obstruct the establishment of the street. As above stated, the Supreme Court of Iowa has aligned itself with those cases which hold that a street cannot be "located through the railway company's yards so as to destroy roundhouses, water tanks, and similar buildings, and necessitate their location elsewhere," and by this construction of the Iowa statute this court is bound.

Much might be said about the equities of the parties. Counsel for defendants contend that the removal of the depot to its present location was with a view of preventing the establishment of the street; but, even if this were true, the company was exercising a legal right, and the intention with which a legal right is exercised, is not material. On the other hand the town council is the judge of the public necessity for the establishment of the street. As was held in N. Y. & Harlem Railway Co. v. Kip, 46 N. Y. 546, 7 Am. Rep. 385, quoted in Cincinnati Co. v. City of Anderson, 139 Ind. 490, 38 N. E. 167, 47 Am. St. Rep. 285:

"The location of the buildings of the company is within the discretion of the managers, and courts cannot supervise it."

And in Eldridge v. Smith, 34 Vt. 484, it is said:

"When land is taken for legitimate railroad use by the railroad company, the judgment of the officers of the road, unless clearly beyond any just necessity, is regarded as conclusive."

The theory of counsel for defendants in this case is well expressed by the Supreme Court of Indiana in Cincinnati v. City, supra, in the following language:

"The theory of the appellee, and that adopted by the circuit court, is that such buildings and structures are not indispensable, for the reason that they may be conveniently located elsewhere, and after relocation the uses of the street and railway may coexist."

But the court says in answer:

"This theory is not new, but, if adopted by any of the adjudged cases, the fact has not been discovered by us."

It is not a qeustion of equities. It is not a question of what the company might do to accommodate themselves to this public improvement; it is a question of subjection to prior public use—a use which cannot coexist with the use by the town for the proposed street. That portion of the proposed street upon which the depot stands can be used only for one of two purposes, the depot or the street; and I find no justification in the authorities for holding that the prior use by the railway must yield. Where the right of way could be used for both purposes, even though it involved some readjustment of tracks or walks, the courts sustain the right to establish the street; but this is as far as the courts have gone in construing similar statutes, with

one or two possible exceptions, which have not been adopted by the Supreme Court of Iowa as a rule under the statutes of this state.

But, if the equities could be considered, the court could not overlook the fact that there is a public street extending to the railway right of way at a point 250 feet east of Main street (the street which by the ordinance is extended), and a street 250 feet west of Main street, either one of which could probably be extended across the depot grounds without serious impairment of the rights of the plaintiff, certainly with much less effect upon the plaintiff's right to the use of the depot grounds than the extension of Main street.

In St. Louis Co. v. City of Tulsa (D. C.) 213 Fed. 87, Campbell, District Judge, in denying the power to extend a street, which would not affect a permanent building, but which would affect tracks and switch stands, says:

"It will, of course, not be contended that the switch stands, or the lead or ladder track, can be successfully operated in the street. So far as they are concerned, it is manifest that if the street is opened up across the right of way, as desired by the city, they will have to be removed to another location, and to that extent, at least, the existence of the street will be inconsistent with the uses to which the railroad company is now devoting this property. No question is made, nor can be made, that this ladder track and the switch stands are necessary adjuncts to the railroad facilities for the handling of its business. The railroad company had a perfect right to place them where they are now; the matter of determining their location within the limits of the right of way is within the province of the proper officers of the company, in the exercise of their judgment as to where they will best serve the interest of the company in handling the business of its patrons, and presumably they were so located in the exercise of such judgment."

In this case the authorities are fully reviewed, and while the law under consideration was not in the exact language of the statute of Iowa, the principle discussed and the authorities quoted are directly in point under the Iowa statute as construed by the Supreme Court of this state. The opinion of Judge Pollock in C., R. I. & P. Railway Co. v. Williams (C. C.) 148 Fed. 442, also contains a valuable discussion of the leading cases upon the questions involved.

In my view, an injuction should issue herein as prayed.

OKLAHOMA CITY MILL & ELEVATOR CO. v. PAMPA GRAIN CO.

(District Court, N. D. Texas, at Amarillo. September 30, 1916.)

No. 111.

SALES ⊂=200(3)—CONTRACT FOR SALE OF GRAIN—DELIVERY.

Plaintiff contracted with defendant for the purchase of several carloads of wheat, which were shipped by defendant, consigned to itself, and bills of lading, indorsed by defendant, with drafts attached, were forwarded to plaintiff, which accepted and paid the drafts. Before reaching plaintiff's elevator, some of the carloads were destroyed in the great Galveston storm. Both parties were members of the Texas Grain Dealers' Association, whose rules required an exchange of confirmations of sales in writing expressing the terms of the sale, and provided that, where one party only confirmed, that confirmation should be binding on both,

unless objected to at the time of receipt. Plaintiff sent a confirmation to defendant, containing the provision, "Delivery of grain not perfected until grain reaches destination specified and has been inspected and weighed." This confirmation was not objected to, but was returned initialed by defendant. *Held*, that such confirmation governed the rights of the parties, and that, as the carloads destroyed had not reached destination, nor been inspected and weighed, the loss must fall on defendant.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 527; Dec. Dig. ⇐ 200(3).]

At Law. Action by the Oklahoma City Mill & Elevator Company against the Pampa Grain Company. On motion by plaintiff for instructed verdict. Motion granted.

Keaton, Wells & Johnston, of Oklahoma City, Okl., for plaintiff.

Kimbrough, Underwood & Jackson, of Amarillo, Tex., for defendant.

MEEK, District Judge. To reach and express a conclusion on the issues before the court is not a pleasant task. No matter what the conclusion, one of the parties, without being guilty of fault or neglect in the premises, will have to suffer a substantial loss.

The evidence shows that one Tom Connally, acting as agent and broker for the Oklahoma City Mill & Elevator Company, purchased from the Pampa Grain Company, at Pampa, Tex., several carloads of wheat; that the contracts covering such purchases were oral; that notice of the purchase of the respective cars was telephoned to the Oklahoma City Mill & Elevator Company, at Oklahoma City; that the Pampa Grain Company, the seller, made invoices of the sales, or shipments, and, having secured bills of lading covering them from the local agent of the Pan Handle & Santa Fé Railroad Company, at Pampa, Tex., inclosed the bills of lading and invoices to the Oklahoma City Mill & Elevator Company, and draft covering the price agreed upon, less the freight on the shipment from Pampa to Galveston, and perhaps in some instances less a certain small margin for expenses. I believe expenses were not mentioned in the oral contract of purchase; they are, however, in the contract of confirmation—leaving a certain margin for differences in grades of the wheat, which differences were to be ascertained at the elevator in the city of Galveston. The bills of lading thus inclosed with the invoices, together with the drafts, revealed that the grain was delivered to the railroad company, consigned to the "order of Pampa Grain Company, destination Galveston, Texas, notify Oklahoma City Mill & Elevator Company, at Galveston, Texas." The indorsement on the bills of lading (one of which I use for illustration) was: "Pampa Grain Company, by A. C. Matthews, Manager." The testimony reveals this indorsement was placed upon the bills of lading before they were forwarded to the Oklahoma City Mill & Elevator Company with drafts attached. Upon receipt of the respective enumerated inclosures the Oklahoma Company honored the draft or drafts presented it, covering the shipments; the amounts called for by the drafts being placed in the bank to the credit of the Pampa Grain Company. Unquestionably these amounts were advanced and placed to the credit of the Pampa Grain Company to liquidate and

pay the obligation of the Oklahoma City Mill & Elevator Company in the purchase of the respective shipments of grain. Had not the great Galveston storm intervened, there would have been no unpleasant future to the transaction.

Immediately upon receipt of the telephonic communication from its agent, Tom Connally, to the effect that a purchase or purchases of grain had been made on oral contract, Oklahoma Company forthwith mailed to the Pampa Grain Company, at Pampa, Tex., a formal instrument, styled "Confirmation of Purchase." The substance of the "confirmation of purchase" incorporates and expresses the "custom of the trade," as such custom has been testified to exist and obtain here before the court. The provisions of the instrument, "confirmation of purchase," are also in accord and conformity with the trade rules adopted by and controlling transactions between the members of the Texas Grain Dealers' Association.

It is in evidence that Oklahoma City Mill & Elevator Company was, at the time of these transactions, a member of the Texas Grain Dealers' Association; also that Pampa Grain Company, the seller of the grain, was a member of that association. The letter heads used by Pampa Grain Company advertised it as "Member Texas Grain Dealers' Association." The rules of that association here relevant and pertinent are the following:

"Rule 1.—*Trade.* It shall be the duty of both buyer and seller to include in their original articles of trade, whether conducted by wire or mail, the following specifications (for exceptions to this rule see rule 2): Number of bushels or cars; kind and grade of grain; price; point of shipment or delivery, or rate point; time of shipment or delivery; route; terms.

"Rule 2.—*Usual Terms.* (a) The specifications of rule 1 shall apply, except in cases where the buyer and seller have been trading on agreed terms and conditions, in which event it shall be sufficient for the words 'usual terms' to be used in the telegram, or even to omit any reference to terms. In such cases it shall be implied that such terms and conditions as governed previous trades of a like character shall obtain.

"(b) *Terms.* The word 'terms' shall mean that the weights and grades of a shipment shall be determined in the market agreed upon, or understood, at time of sale, it being further understood, in addition, that whenever applied to a terminal market the word 'terms' shall be construed to mean that all the rules governing such market shall obtain."

"Rule 4.—*Confirmation.* It shall be the duty of both buyer and seller, on day of trade, to mail each to the other a confirmation in writing (the buyer a confirmation of purchase, and the seller a confirmation of sale), setting forth the specifications as agreed upon in the original articles of trade. Upon receipt of said confirmation the parties thereto shall carefully check all specifications named therein and upon finding any differences shall immediately notify the other party to the contract, by wire, except in case of manifest errors and differences of minor character, in which event, notice by return mail will suffice.

"Rule 5.—*One Confirmation.* Where only one party to a trade confirms, this confirmation shall be binding upon both parties, unless objected to at the time of receipt of same."

So far as the evidence shows, a confirmatory contract, such as is provided by the rules, was forwarded by the purchaser alone. These contracts of confirmation of sale are the only contracts made in reference to these transactions which incorporate the requisites embodied and set forth in rule 4, above quoted.

The invoices which were sent by the Pampa Grain Company to the Oklahoma Company, while incorporating in part, do not incorporate all of the provisions and terms required by the formal confirmation of purchase. In any event a "confirmation of purchase," so designated, was sent by the Oklahoma Company to the Pampa Company, at Pampa, Tex. This was received by the manager of the Pampa Company there, and, after being retained by him for a period of time, the length of which was not definitely stated by the manager while he was on the witness stand, he placed upon this confirmation of purchase in his own handwriting the words, or abbreviations, "Pampa Gr. Co.," and with such indorsement thereon inclosed it in an envelope addressed to the Oklahoma City Mill & Elevator Company, Oklahoma City, and deposited it in the mails for transmission and delivery to that company. The Oklahoma Company produces this instrument on the trial of this case. The Pampa Grain Company, being an advertised member of the Texas Grain Dealers' Association, it seems to me should be held to know the rules of that association, to know the provisions thereof pertaining to the purchase and sale of grain, and should be bound thereby.

Notwithstanding the manager testified that he was not certain as to the contents of these rules, he indorsed the name of "Pampa Grain Company" on this confirmation of purchase, which act is in conformity with the custom and usage obtaining among grain men in making confirmation of purchases when there are no objections, exceptions, or errors to be noted or urged as to the contents of such confirmation. The signing and returning of this confirmation of purchase by the Pampa Grain Company to the Oklahoma Company has the effect of conveying to the mind that Pampa Company found no objection to the provisions of this confirmation of purchase, no manifest errors nor differences of minor character therein. If it had found such errors or differences, it would have been called upon either to wire the Oklahoma Company of such differences, or, in event they were of minor character, to give notice by letter. Instead of giving any such notice, it placed its signature on the contract of confirmation, indicating its acquiescence therein, and then returned it by mail to the purchaser. Rule 5 provides that, where only one party to a trade confirms, this confirmation shall be binding upon both parties, "unless objected to at time of receipt of same." As I have stated, the evidence shows there was no objection.

Among the provisions contained in this contract of confirmation is one reserving the right to change the destination of shipment in transit. It reads:

"We reserve the right to change destination of shipments in transit. Draw on us at Oklahoma City, with shipper's order bill of lading attached, leaving sufficient margin to guarantee weights and grades. Shipper pays weighing, inspection, trackage, and exchange, if any. Delivery of grain not perfected until grain reaches destination specified and has been inspected and weighed."

This provision to my mind is entirely consistent with the form in which the bills of lading were requested by and issued to the shipper. The shipment was consigned to the order of "Pampa Grain Company, destination Galveston." The right reserved to change destination was

not exercised. Now, what was to be done, under this contract, when the shipment reached Galveston? Oklahoma Mill & Elevator Company was to be notified, at Galveston. This was in conformity with the confirmation of purchase, and also in accord with the rules controlling transactions between members of the Texas Grain Dealers' Association.

Whilst the possession of the bill of lading covering a shipment, either indorsed or unindorsed, betokens ownership, general or special, in any event such possession evidences the right in the holder to direct and control the disposition of the shipment (Missouri Pacific Railway Co. v. McFadden, 154 U. S. 155, 14 Sup. Ct. 990, 38 L. Ed. 944), yet the basis of such possession is open to inquiry, and as between the parties to a purchase and sale—as the buyer and seller of the carloads of wheat in the instant case—the custom or course of dealing should control, and, in any event, a specific provision in "confirmation of purchase" as to when delivery of shipment of grain shall be held perfected or completed should control.

Before these carload shipments of wheat had reached destination and been received in the elevator at Galveston, there to be inspected and the grade thereof determined, they were in part totally destroyed and in part substantially damaged by fire and water. "Under a contract of sale which provides for delivery at a specified place, a delivery at such place must be made to fix the liability of the buyer, and it is not sufficient that the goods are ready for delivery at another place near by." 35 Cyc. 171, and authorities there cited. These shipments were purchased for export, and the buyer reserved "the right to unload off grades grain without first notifying you."

As the delivery of the grain in the respective shipments had not been perfected (or completed) at the time the loss and damage overtook them, I am constrained to and will hold that the burden of such loss and damage must fall upon the party contracting to perfect delivery at the point of destination in the manner and for the purposes above set forth.

I will therefore charge the jury to return its verdict in favor of the plaintiff for the amounts which are agreed by the parties to be due in event the court finds the law covering and controlling the issues for the plaintiff.

Mr. Kimbrough: The defendant excepts to the ruling of the court.

In re BIEHL.

(District Court, E. D. Pennsylvania. December 11, 1916.)

No. 5594.

1. BANKRUPTCY ⟹309—PROVABLE CLAIMS—PARTNERSHIP AND INDIVIDUAL ESTATES.

One having a claim against a bankrupt firm, evidenced by notes, and also a claim against one of the partners individually for breach of contract, the damages being measured by the same debt, may prove his claim against the firm estate, and, after crediting the dividend thereon, may prove the balance due as a claim against the estate of the partner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⟹309.]

2. BANKRUPTCY ⟹228—FINDINGS OF REFEREE—REVIEW.

Findings of fact made by a referee will not be disturbed by a reviewing court, except upon a strong showing that they are erroneous.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 387; Dec. Dig. ⟹228.]

In Bankruptcy. In the matter of B. Frank Biehl, bankrupt. On petition for review of order of referee. Affirmed.

W. K. Stevens, of Reading, Pa., for trustee.
Thomas I. Snyder, of Reading, Pa., for claimant.

DICKINSON, District Judge. [1] The legal principle upon which the referee based his ruling is embraced in this proposition: Where a creditor has a claim of debt against a firm, evidenced by an absolute obligation in writing for its payment, and also an optional claim in tort for misappropriation of money or property (the damages in which are measured by the same debt), and also has a claim against an individual upon a separate and independent contract of bailment (damages flowing from the breach of which are measured by the same debt), he may prove his claim of debt against the bankrupt estate of the firm, and (after allowing credit for the dividend received) prove a claim for the balance due him against the bankrupt estate of the individual, notwithstanding the fact that the individual is a member of the firm and liable as a partner for the firm debt.

As the soundness of this legal principle is not denied, the appellate question involved resolves itself into an inquiry into the facts, and we might well rest a dismissal of the petition for a review upon the well-recognized rule of noninterference with findings of facts, leaving their vindication to the able and well-considered opinion of the referee. The ability and earnestness, however, with which the argument in support of the petition has been pressed, merits a consideration of certain features of the case, and a review of the adjudged cases which would otherwise be unwarranted.

The evidentiary facts upon which the referee based his findings are not in dispute, although perhaps open to different characterizations. There are three parties involved. They are the Maxwell Motor Sales Corporation, B. & C. Motor Car Co. (a partnership), and B. Frank Biehl. The latter was a member of the B. & C. firm.

The partnership and Biehl has each been adjudged a bankrupt and each has assets insufficient to pay the debts in full. The Maxwell Company was permitted to prove its claim (representing the same debt) in each proceeding. Its right to do this is the sole question involved in the present inquiry. It proved its claim against the bankrupt estate of the firm and was allowed a dividend. The question suggested is raised by objections to a subsequent proof of the balance of its claim against the bankrupt estate of Biehl.

The claim arises out of the following state of facts and transactions: The Maxwell Company manufactured automobiles. The B. & C. firm sold automobiles as a dealer. Biehl was in the iron business, and was also a member of the above firm, and its financial backer. The Maxwell Company shipped to the firm cars of different types, to be delivered, upon payment of sight drafts accompanying bills of lading. The original arrangement was that, upon shipment of cars consigned by the Maxwell Company to themselves, the bills of lading, with the sight drafts, were forwarded to a bank at the place of consignment. The firm was to take up the drafts, receive the bills of lading, and through them get the cars. This arrangement was departed from, presumably because it was not always convenient for the firm to take up the drafts. What was then done was this: The bank was instructed to deliver the bills of lading upon receiving part cash, the note of the firm for the balance, with the automobiles pledged as collateral, and the agreement of Biehl to take and hold possession of the cars for the Maxwell Company as pledgee, and not to deliver them to the firm until and except as the notes were paid. A separate note was given and separate pledge was made of each car, which was fully described. The agreement between the company and Biehl contained a recital of the fiction (substantially true in fact) that the company had loaned to the firm the amount involved (being the unpaid part of the price of the car), and that for this loan the firm had given its collateral note, pledging the car as security, and as an inducement to this arrangement Biehl had undertaken to retain possession of the car so pledged, and not deliver it until and unless the note was paid, and set forth the further undertaking of Biehl to so hold the cars and to transmit the moneys to the company if and when the notes were paid.

The claim against Biehl (aside from his partnership liability on the note) arises out of the fact that he parted with the pledge without receiving payment of the note, and loss resulted to the company to a sum measured by the sum due on the note. Some question would appear to have existed of whether Biehl ever received payment of any of the notes, but the allowance of a claim against the firm for the aggregate of all the notes is a finding that none of them were paid. There was also in the transaction the feature or fiction of a retention of title in the Maxwell Company until payment through the usual device of a formal bailment. If the transaction is viewed with Biehl disassociated from the firm, the rights of the company will more clearly appear. Its entire claim was restricted to the amount of the notes. It possessed the clear right to demand from

the makers of the notes payment thereof. If this demand was not met, and nothing was recovered from the makers, it was as clearly entitled to sell the pledge and receive payment from the proceeds of such sale. If the pledge was lost through the culpable act of the agent, he would be answerable for the value of the pledge up to the sum due on the note, which latter sum measured the damage of the pledgee.

The referee has found such loss and allowed the claim of the pledgee for the balance due them as the consequent damages against the estate of Biehl. There was no suggestion at the argument of any excessive allowance in amount to the pledgees, and because of this we have not inquired into the correctness of the amount allowed. The learned referee bases his conclusion upon the findings that the firm had a title to the automobiles which they could pledge, that they had pledged them for their debt, that Biehl as an individual received and agreed to hold for the Maxwell Company the cars until the notes were paid, and that he culpably failed so to do to pledgee's hurt in that a part of the debt for which the pledge was given was thereby lost.

The views of the referee may be thus presented: Stated negatively, the claimant was not seeking to recover one judgment against Biehl through a claim against the firm of which Biehl was a member (all the members of which were joint tort-feasors), and to recover another judgment against Biehl individually for the same tort through the simple device of pursuing the firm ex contractu on an implied assumpsit and pursuing Biehl individually, thereby securing two judgments against Biehl for the same cause of action. Stated affirmatively, the claimant was presenting a claim against the firm on a liability wholly ex contractu, based upon an express promise, and another altogether distinct, separate, and different claim against Biehl individually, based upon what he, as an individual, had undertaken and failed to do. The facts were clearly within the province of the referee to find, and the correctness of the findings made are well vindicated in the opinion returned. The specific conclusion reached, that when two persons are severally and independently, each individually, liable for a debt, the creditor may look to either or each for payment, is supported both by reason and abundant authority, and we do not understand to be questioned. Bowen v. Chapman, 150 Fed. 106, 80 C. C. A. 60, affirmed in 207 U. S. 89, 28 Sup. Ct. 32, 52 L. Ed. 116.

The case of Reynolds v. N. Y. Trust Co., 188 Fed. 611, 110 C. C. A. 409, 39 L. R. A. (N. S.) 391, 26 Am. Bankr. Rep. 698, is in no sense in conflict with this conclusion. All that was there held was that recovery might be had for a firm tort either against the firm or against an individual member of the firm, but there could not be two recoveries, and that, although the plaintiff might waive the tort and sue on the implied assumpsit, the principle still held good that he could not recover on the obligation of the firm against an individual partner, both as a member of the firm and as an individual. The District Court in the Coe Case, 169 Fed. 1002, 22 Am. Bankr.

Rep. 384, ruled that where a firm was liable on a draft and had misappropriated moneys representing the same debt, the party injured could prove a claim against the bankrupt estate of the partnership, and (after allowing a credit for the dividend received) could prove a claim for the balance against the bankrupt estate of an individual partner. This ruling was affirmed on appeal. In re Coe, 183 Fed. 745, 106 C. C. A. 181, 26 Am. Bankr. Rep. 352.

The real ground of the ruling made might be overlooked upon a cursory reading, and perhaps is not disclosed by the case as reported. The referee had rejected the claim. We do not know on what ground. The fact does appear, however, that there had been a composition of the firm debts. It also appeared that an indebtedness of the firm arose out of its acceptances on drafts. The opinion of the judge of the District Court informs us that the trustee claimed the composition to have extinguished the obligation. The opinion delivering the judgment of the Circuit Court of Appeals states that the ruling of the referee was so based. We do not know whether the individual debts of the partner exhausted his individual assets. All therefore, which was ruled by the Coe Case, as reported, is that where a firm is indebted on a draft, and has also misappropriated funds or property of the same creditor, the party defrauded may prove a claim against the estate in bankruptcy of an individual partner, notwithstanding that the indebtedness, evidenced by the draft, is for the same moneys which were misappropriated, and notwithstanding the further fact that the firm had made a composition with its creditors. It it be the fact that there was a surplus of individual assets over individual debts, then all the case rules is that the composition of the firm debts did not extinguish the claim against the individual partner for the wrongful conversion of moneys by the firm. It is to be noted that the opinion was expressed that the doctrine of election, as applied to the right of the injured party to waive the tort and sue in assumpsit on the implied contract, was not involved in the ruling.

The language quoted and discussed in Reynolds v. Trust Co. may have been used to express the thought that the liability of the individual members of a firm is the liability of joint tort-feasors, and not the liability of partners, and that the existence of the partnership merely imputes the tort to each member of the firm, so that the action may be against all or some, and that, if against all, each is responsible in solido. It seems to us this is the thought expressed, and that it is not said, nor meant to be said, that the party injured may secure a judgment against the partners as a firm, and then secure another and separate individual judgment against any one individual partner. The latter is the doctrine repudiated in the Reynolds Case.

Whatever defenses to this claim might be suggested by an analysis of the situation presented, the ability of counsel and thoroughness of the argument presented on behalf of the petitioner justify us in restricting our attention to the grounds of defense set forth. The paper books submitted in this case afford an illustration of the

truth that it is often more difficult to determine what is the question involved in a case than to answer the question when stated. The learned counsel for petitioner differs with the referee, not upon the soundness of the principle of law upon which the ruling was based, but upon what principle the case should be ruled. The argument on behalf of the trustee is, when analyzed, found to be based upon a proposition of fact, and is therefore addressed to its support.

A feature, and indeed a leading one, is insistence upon the fact that the transaction was the shipment of automobiles by the claimant to the firm, which, if paid for on delivery, became a sale pure and simple, and security for which, if not paid for, was attempted to be secured through the ancient device of retaining title by means of a fictitious bailment. The claimant had therefore a claim against the firm and against the partners only as members of the firm, whether it chose to treat its claim as based upon a debt or a tort.

The secondary agreement, by which Biehl as an individual was interposed, as the claimant's custodian of the automobiles, between the real vendor and real vendee, or, if you please, the real bailor and real bailee, was a mere myth and a nullity, and existed only on paper, and was never acted upon in fact. If the transaction is treated as a sale, it was a sale by the claimant to the firm. If it is treated as a bailment, it was a bailment by the claimant to the firm. More than that, even if the secondary agreement be regarded as a real thing, and Biehl as the agent of the claimant, all liability and responsibility was confined to two things—for the moneys paid to him, or the automobiles delivered to him as such agent, and in point of fact he never received either money or cars.

This first stated fact is admitted, and the second is argued to be shown by the other fact, that the claimant ignored Biehl as an individual and as an agent, and dealt directly and wholly with the firm. In the averments of fact thus made is summed up the whole argument upon this phase for the petitioner, because the most which can, in the face of such a state of facts, be said for the secondary agreement is that by it Biehl agreed to act as agent for the claimant in and under a bailment contract with the firm, but never in fact so acted.

[2] Unfortunately for the petitioner, the fact has been found against him by the referee. It may be that the evidence would have justified a different finding. There has nothing, however, been brought to our notice which takes this case out of the general rule applicable to findings by triers of fact. The rule, among its other sanctions, has that of being a rule of policy. Courts vested with appellate powers will not lightly exercise them in disturbance of fact findings, because to do so is merely to substitute one trial court for another, and to multiply the time, trouble, and expense involved in litigation. The rule voices a wise policy, because it casts upon the trial court full responsibility, and encourages more careful decisions than would obtain if the case was to be retried before another and higher court. The law of a case must be reviewed, because the law should be uniform, and legal principles are of general application. Without appellate supervision, the law would vary in every subordinate jurisdiction. Fact findings

affect only the particular case tried, and justice to one is a right which must yield to a general policy from which flows public good. Fact findings are most likely to be just when the trial tribunal assumes full responsibility.

Under the facts as found, the legal principles applied by the referee properly apply, and they are admittedly sound. Under those facts the principle advanced by the petitioner has no application. In reality, all that the referee has ruled is that the maker of a note may be held liable to the holder for the amount thereof, and that the bailee for safe custody of property may be held responsible to the bailor for the value thereof, if lost, and that actions may be brought against each, notwithstanding the fact that the property lost by the bailee may have been pledged for the payment of the note, and in this sense the respective claims are the same. The question of double satisfaction is not raised.

The objection to the claim as not one provable in bankruptcy, based upon the statement that it is unliquidated, we do not think well taken. The claim is within the express language of the act defining claims which are provable, because it is based upon the written contract of the bankrupt. The Rubel Case (D. C.) 166 Fed. 131, is clearly not in point. We content ourselves with the mere statement of the conclusion reached, without entering into a discussion of the question, because its adequate consideration would add to the length of an opinion already unduly long.

The findings of the referee are approved, the order made affirmed, and the petition for review dismissed.

NAYLOR & CO. et al. v. TERMINAL SHIPPING CO. et al.

(District Court, D. Maryland. November 16, 1916.)

1. SHIPPING ⊂=121(2)—CHARTER—LOSS OF CARGO BY LIGHTER—UNSEAWORTHINESS.

The owner of a scow chartered to lighter a cargo of ore from a ship, and which sank while being loaded alongside the ship, *held* liable for the loss of her cargo, on evidence which tended to show that she was not overloaded, and that her cargo was properly trimmed, and that the cause of sinking was a leak, which rendered her unseaworthy.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 450, 451; Dec. Dig. ⊂=121(2).]

2. SHIPPING ⊂=42—CHARTER—IMPROPER EQUIPMENT.

The charterer of a scow to lighter a ship is entitled to assume that she is ordinarily fitted for the purpose for which the owner chartered her, and is under no obligation to equip her with a pump, when she is not so equipped.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 80; Dec. Dig. ⊂=42.]

In Admiralty. Suit by Naylor & Co. and the Davidson Chemical Company against the Terminal Shipping Company, the Arundel Sand & Gravel Company, and the London Gate Steamship Company, Lim-

ited. Decree for libelants against the Arundel Sand & Gravel Company.

Whitelock, Deming & Kemp, of Baltimore, Md., for libelants.

George Forbes, of Baltimore, Md., for respondents Terminal Shipping Co., and London Gate S. S. Co.

Knapp, Ulman & Tucker, of Baltimore, Md., for respondent Arundel Sand & Gravel Co.

ROSE, District Judge. The libelants are the owners of a cargo of pyrites, brought in by the steamship Kingsgate. It was to be delivered at the works of the Davidson Chemical Company, hereafter called the Chemical Company. To make such delivery lighters were required. The Chemical Company chartered scow No. 63 from the Arundel Sand & Gravel Company, referred to hereafter as the Sand Company. The last-named company furnished the lighter and nothing else. The Terminal Shipping Company, which will be styled the Terminal Company, was employed to discharge the cargo.

[1] Somewhere between 6 and 6:30 on the morning of the 2d of February last, the scow sank, carrying down with it more than 400 tons of ore. The latter became a total loss, although the scow was subsequently raised and repaired. There was nothing unusual about the weather conditions. The scow sank, either because it was improperly loaded, or because it was unseaworthy. A number of persons who were on the scow or the ship, and who were eyewitnesses of what happened, have testified. None of them say anything to suggest a lack of care or skill in the stevedoring. Most of them testified that the loading was well and properly done. It is true that those who so say are employés of the Terminal Company, and are in a sense interested witnesses. Nevertheless, there is no contradiction of their story, and it is confirmed by what two United States custom house officers say, and by certain undisputed facts.

That the scow was in trouble was known on the ship more than two hours before it sank. It was then said that she was leaking. The fact that there was such a rumor does not prove it true, but it does show that the explanation now given by the eyewitnesses is not an afterthought. It also appears that the scow did not go down suddenly. The ship used its whistle for an hour or more in a vain attempt to summon assistance. Men went ashore and tried over the telephone to get in touch with a tug before the scow sank. The master of the steamship caused it to be moved from alongside the ship to the stern of it, so as to make sure when she sank she could not damage the ship. The assistant foreman of the stevedores swears that he noticed one corner of the scow going down in the water more rapidly than it should. He opened the hatch, and with his torch he made out that there was a good deal of water in the hold. He jumped down and found it two or three feet deep. He heard the water running in, and, going toward the sound, saw a stream coming in at a point some two or three feet below the deck. His description of what he saw indicates that a seam had opened. He went on deck, and started to lighten the scow by taking some of the ore back on the ship; but

the workmen became fearful for their lives, and the captain of the steamship for the safety of his vessel. Some other witnesses corroborate some part or other of this story. It is possible it is not true, but there was nothing in the tale itself, or in the appearance or manner of the man who told it, to suggest its falsity. It is entirely consistent with everything else that happened that night. It is true it is established that the scow had been in constant use before the accident, and had then not leaked. Perhaps because she had given no trouble, no thought had been given to her condition. At all events she had not been surveyed or recaulked since she came new from the builder's yard over 2½ years before. The superintendent of the shipyard at which, after the accident, she was repaired, testified that the bill for so doing amounted to over $1,900. In these charges were items for labor in caulking, amounting to between 19 and 20 days' work for one man. The witness said that so far as he knew the only caulking done was that required by the repairing of the damage occasioned by the sinking of the scow, and that no caulking was done at any point which was as much as two feet below the deck. Since she was repaired, she has been in continuous service and has not leaked.

I do not feel that this testimony, when given all the weight that should be accorded to it, will justify me in holding that the man who swears he saw the stream of water coming in through the scow's side has perjured himself, for honestly mistaken he could scarcely have been. All the circumstances point to a leak as the cause of the sinking. The scow was not overloaded. If the trouble had been due to improper placing or trimming of the ore, she would have sunk, if at all, much more quickly than she did. Scows are frequently, perhaps usually, though by no means universally, equipped with pumps. If this one had been, its sinking would have been prevented, or at least postponed until, with the return of daylight, a tug could have been found to beach her. The Sand Company does not put pumps on board its scows. When they are in its service, they are usually accompanied by tugs, which can pump them out, if need be.

[2] It was suggested at the hearing that perhaps the Chemical Company, when it hired the scow, was under obligation to put a pump upon her, or to keep a tug alongside of her, or, at all events, assumed all the risks of the absence of pumps and tugs. This suggestion assumes that to common knowledge a scow may spring a leak at any moment, and that one who charters a scow not equipped to control a leak cannot complain if it sinks on his hands. There is nothing in the testimony to show that there is any usage or custom imposing upon the charterer of such a scow a duty so to equip her. Under ordinary circumstances the charterer may assume that the vessel is reasonably fitted for the purpose for which her owner hired her. When the suggestion that another rule was here applicable was made, counsel for the Sand Company were told that they might consider whether they wished to be heard or to submit authorities to that effect. After some days they notified me that they did not.

Shortly after the accident the Sand Company wrote the Chemical Company that by the terms of the charter it was bound to pay $12 a

day for every day until the scow was returned in good order. Thereupon the Chemical Company had the scow raised and sent to a shipyard to be repaired. When the repairs were finished, the scow was turned over to the Sand Company, to which company the Chemical Company paid $12 for every day which had elapsed from the original delivery of the scow to the Chemical Company to its return to the Sand Company. At the time of the hearing the shipyard bill was still unpaid.

These facts, unexplained, might well throw doubt upon the libelant's own belief in the truth of the story upon which its right of recovery depends. It appears, however, that the agents of the Chemical Company in immediate charge of this department of its work had had little experience in maritime affairs, and that they were at the time very busy and in urgent need of lighters. They did not question the position of the Sand Company, and did not even inquire into the facts, nor apparently did the Sand Company. Not long after the accident the ship sailed for foreign ports, carrying her company with her. Their departure left in this country the employés of the Terminal Company as the only persons who knew the facts. They do not appear to have volunteered any information concerning them. Nothing that the Chemical Company did or left undone caused the Sand Company to change its position for the worse. There is nothing to raise an estoppel.

It follows that the Sand Company must be held solely in fault.

UNITED STATES v. GAAG.

(District Court, D. Montana. October 26, 1916. Demurrer Overruled December 8, 1916.)

(No. 514.)

1. POISONS ⊜4—SALE OF OPIUM—CRIMINAL PROSECUTIONS.
   The offense of giving an order for opium and failing to preserve a duplicate thereof in such a way as to be readily accessible, in violation of Anti-Drug Act Dec. 17, 1914, c. 1, 38 Stat. 785, is committed when ready accessibility first fails after the order's acceptance, and is capable of continuity.

   [Ed. Note.—For other cases, see Poisons, Cent. Dig. § 2; Dec. Dig. ⊜4.]

2. INDICTMENT AND INFORMATION ⊜87(7)—ALLEGATION OF OFFENSE AS OF DAY CERTAIN—PROOF.
   The general rule is that, even though a grand jury has not evidence of the exact date of an offense, and though its oath is to true presentment make, and though time be not of the essence, the indictment must allege the offense as of a day certain; but, at trial, the day alleged may be disregarded, and the offense proven as of any day prior to indictment and within limitations.

   [Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 251–253; Dec. Dig. ⊜87(7).]

3. INDICTMENT AND INFORMATION ⊜87(7)—DEFECT OF FORM—STATUTE.
   Where time is not of the essence of the offense, the allegation of the indictment of the commission of the offense on a day certain is so far

of form, rather than of substance, as to be within Rev. St. § 1025 (Comp. St. 1913, § 1691), excusing defects of form.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 251–253; Dec. Dig. ⟸87(7).]

4. Poisons ⟸4—Sale of Opium—Criminal Prosecution—Time as of Essence of Offense—Statute.

Time is of the essence of the offense of giving an order for opium and failing to preserve a duplicate in such a way as to be readily accessible, in violation of the Anti-Drug Act, which can be committed only within two years after acceptance of the order.

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

5. Indictment and Information ⟸87(4)—Sale of Opium—Statute—Time.

Indictment for such offense must allege it was committed within the essential period, or it fails to allege an offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 247; Dec. Dig. ⟸87(4).]

6. Indictment and Information ⟸176—Offense Committable Only on Sunday—Allegation of Date—Proof.

In the case of offenses committable only on Sunday, if the indictment alleges a definite Sunday, another or different date may be proved.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. § 548; Dec. Dig. ⟸176.]

7. Indictment and Information ⟸87(7)—Sale of Opium—Time of Offense—Statute.

Under Rev. St. § 1025 (Comp. St. 1913, § 1691), excusing defects of form, indictment charging that defendant violated the Anti-Drug Act by giving an order for opium, and, after acceptance, failing to preserve a duplicate so as to be readily accessible, was sufficient, though alleging the date of the offense no more definitely than some unknown date within the essential two-year period, which did not tend to defendant's prejudice.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 251–253; Dec. Dig. ⟸87(7).]

8. Indictment and Information ⟸87(7)—Allegation of Day Certain—Misdemeanor—Offense of Omission.

To the requirement that an indictment must allege a day certain, there are two fairly recognized exceptions: Misdemeanors, and offenses of omission, rather than of commission.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 251–253; Dec. Dig. ⟸87(7).]

9. Poisons ⟸4—Sale of Opium—Criminal Prosecutions—Character of Offense—Statute.

Violation of the Anti-Drug Act by giving an order for opium, and, after acceptance, failing to preserve a duplicate so as to be readily accessible, is an offense in nature but a misdemeanor, failure to obey an administrative regulation, a mere statutory infraction, and not a true crime, though made a felony by Penal Code (Act March 4, 1909, c. 321) § 335, 35 Stat. 1152 (Comp. St. 1913, § 10509).

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

10. Indictment and Information ⟸87(7)—Sale of Opium—Allegation of Offense as of Day Certain—Statute.

An indictment charging violation of the Anti-Drug Act, in that defendant gave an order for opium and failed to preserve a duplicate after acceptance so as to be readily accessible, need not allege the offense as

of a day certain; the charge being an omission to perform a statutory duty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 251–253; Dec. Dig. ⊂=87(7).]

Edward W. Gaag was indicted for violation of the Anti-Drug Act, and he demurs to the indictment. Demurrer overruled.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

Binnard & Rodger, of Butte, Mont., for defendant.

BOURQUIN, District Judge. [1] Indictment presented October 26, 1916. Charge, violation of Anti-Drug Act (38 Stat. 785), in that defendant, on May 13, 1916, gave an order for opium, which "was thereafter accepted," and "after the acceptance" he failed to preserve a duplicate thereof "in such a way as to be readily accessible," contrary to law. General demurrer; the objection being the offense not alleged of a day certain. The offense would be committed when ready accessibility first failed after the order's acceptance and is capable of continuity. It might have been committed prior to discovery of the fact and of a date not determinable. The indictment refers to things past and an offense completed, and at least of date between acceptance of the order and indictment.

[2] The general rule is that, even though a grand jury has not evidence of the exact date of an offense, and though its oath is to true presentment make, and though time be not of the essence, it must in the indictment allege the offense of a day certain. To escape the sometime difficulty thus created is another and necessary rule that at trial the day alleged may be disregarded, and the offense proven as of any day prior to indictment and within limitations. See Ledbetter v. U. S., 170 U. S. 606, 18 Sup. Ct. 774, 42 L. Ed. 1162.

[3] Perhaps the interests of both accuser and accused and good pleading require the indictment shall definitely allege the date of the offense when known. But to compel it to be alleged when unknown often defeats the objects of the requirement, is illogical, falsified by the proof, and works to the prejudice of both parties and to the impairment of justice. At any rate the first rule is emasculated, "weaseled," by the second, and in the main is but a technicality of time-honored precedent. So in England and elsewhere are statutes that no indictment shall be holden insufficient for failure to allege the time, or for erroneous allegation thereof, when time is not of the essence. And under such circumstances the allegation is so far of form, rather than of substance, that it is believed to be within section 1025, R. S. (Comp. St. 1913, § 1691), nullifying defects of form and accomplishing the same statutory end.

[4-6] Herein, however, time is of the essence; that is, the offense can be committed only within two years after acceptance of the order. The indictment must allege the offense was committed within the essential period, or it fails to allege an offense. Yet to such cases the rules may have a qualified application—the offense to be alleged of a day certain within the period wherein it can alone be committed,

and the proof to be of any day within such period. So is it of offenses committable only on Sunday. A definite Sunday is alleged, but another or of different date may be the proof. See 1 Bishop, Cr. Pro. § 399.

[7] Save to the extent indicated, the allegation of time, even where of the essence, is formal, rather than of substance; and so section 1025, R. S., saves the indictment from insufficiency, when the allegation is, as here, no more definite than that of some unnamed date within the essential period, and when, as here, it is believed such allegation does not tend to the prejudice of defendant.

[8, 9] Furthermore, to the requirement that a day certain be alleged are two fairly recognized exceptions: Misdemeanors, and offenses of omission rather than of commission. See U. S. v. Smith, Fed. Cas. No. 16338; 1 Bishop, Cr. Pro. § 398. The second, perhaps, because no one save the accused may know when the omission first occurred, though any day it continued would serve as a day certain. In its nature the offense herein is but a misdemeanor—failure to obey an administrative regulation, a mere statutory infraction, and not a true crime, though by the arbitrary classification of section 335, Penal Code, made a felony, as are too many trivial violations of federal law. The said section harks back to barbaric days, and ought to be repealed.

[10] Whether or not the first exception applies, the second does; the charge being omission to perform a statutory duty, failure to preserve with ready accessibility, a duplicate of the order accepted.

Demurrer overruled.

THE CARLOS.

(District Court, N. D. California, First Division. November 25, 1916.)

No. 15898.

1. SHIPPING ⊂=53—CHARTER OF DECK OF VESSEL—CONSTRUCTION.
   The use, in a charter by the owner of the deck of a ship for the carriage of a deck load of piling, of the words "all other usual terms and conditions," *held* not to import into such charter a provision of the form of charter adopted by the Shipowners' Association, for use where the entire vessel is chartered, that "vessel to be permitted to carry her usual deck load, but at shipper's risk"; such provision being neither necessary nor appropriate in a charter of the deck space alone.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 214–218, 225; Dec. Dig. ⊂=53.]

2. SHIPPING ⊂=123—LOSS OF CARGO—INSUFFICIENT STOWAGE.
   The loss of part of a deck load of creosoted piles, which broke the stanchions and lashings by which they were secured when the ship listed, owing to heavy swells and cross-seas, but which were no worse than were to be expected, *held* not due to a peril of the sea, but to insufficient stowage, for which the ship was liable.
   [Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 225, 454, 455, 466; Dec. Dig. ⊂=123.]

In Admiralty. Suit by the J. M. Colman Company against the steamship Carlos; Olson & Mahony, a corporation, and others, claimants. Decree for libelant.

McClanahan & Derby, of San Francisco, Cal., for libelant.
Ira S. Lillick, of San Francisco, Cal., for claimants.

DOOLING, District Judge. The deck of the Carlos was chartered for the carriage of creosoted piles from Puget Sound to San Pedro, and 560 piles were taken on board. Of these only 228 were delivered, the others having been lost overboard. This action is to recover the value of 332 piles not delivered.

[1] Claimants' first contention is that the piles were carried at the owner's risk. It is claimed in this connection that the provisions of a charter adopted by the Shipowners' Association are imported into the present one by the use in the latter of the words "all other usual terms and conditions." The provision of the Shipowners' Association charter contended for is the following:

"Vessel to be permitted to carry her usual deck load, but at shipper's risk."

This provision is manifestly one for the protection of the owners where the whole ship is chartered to a third party, and is a limitation upon the right of such third party to carry a deck load, except at the shipper's risk. The present charter is directly from the owner to the shipper of the deck space alone, and the provision in the Shipowners' Association charter, "vessel to be permitted to carry her usual deck load," is neither necessary nor appropriate to give effect to the present one, which is in the following form:

"We confirm having this day chartered to you from Messrs. Olson & Mahony, the entire deck of the steamer Carlos to load a full deck load of creosoted piling and/or lumber, your option, from usual safe loading places on Puget Sound."

As it was not necessary to import the words "vessel to be permitted to carry her usual deck load," in order to render effective the present charter, so we cannot import the other words, "but at shipper's risk," which are but a limitation upon the permission granted by the preceding words; that is to say, as we cannot import into the present charter the permission to use the deck, so we cannot import the words which are but a limitation upon that particular permission. The contention, therefore, that under the present charter the deck load was carried at the owner's risk, has not been sustained.

[2] But it is further urged that claimant is not liable, because the loss of the piles was due to a peril of the sea. The piles were stowed lengthwise on the deck and supported by stanchions on either side. They were also held in place by lashings. The vessel encountered no severe storms, but did meet heavy swells and cross-seas. When the vessel listed in one of these swells and cross-seas, the stanchions and lashings gave way, and the piles slid overboard. There was no special jar, and no strain other than that due to the weight of the piles, so that I think it is fairly evident that the piles were lost because the stanchions were not sufficiently strong to support their weight when the vessel listed, or because such weight was not properly distributed.

While a heavy swell which causes a vessel to list may be a peril of the sea, yet in the present instance the loss in question was not due to this cause alone, but to the listing of the vessel plus the fact that

the stanchions could not support the weight to which, in the very nature of things, it must have been foreseen they would be subjected. In such case the loss cannot be attributed to the sea peril, but to the fact that such an ordinary experience as the listing of the vessel by a heavy swell was not sufficiently provided against. This was a load of creosoted piles, which have a tendency to slip, and the necessities in stowage of piles of this kind cannot be determined by a consideration of what has been done with other loads of a different kind. And if it be granted, as claimed, that these piles were lighter than ordinary piles, then there would seem to be less reason for the stanchions to give way, and more reason to believe that they were insufficient. As in my opinion the piles were not properly stowed to meet the ordinary incidents of a voyage at that season, the claimant is not entitled to the immunity claimed under Harter Act Feb. 13, 1893, c. 105, 27 Stat. 445 (Comp. St. 1913, §§ 8029–8035).

I cannot but find that the loss of the piles in question was not due to any peril of the sea that should not have been provided against, and for that reason a decree will be entered establishing the liability of the Carlos, and referring the cause to the commissioner to ascertain and report the amount of damage.

FIRST TRUST & SAVINGS BANK et al. v. BITTER ROOT VALLEY IRR. CO. et al.

(District Court, Montana. October 16, 1916.)

No. 71

BANKRUPTCY ⊂=296—RETENTION OF JURISDICTION BY FEDERAL COURT.

Defendant irrigation company was adjudicated a voluntary bankrupt, and bondholders' trustees, by leave, commenced suit in the District Court to foreclose the security on certain of its property in the possession of its trustee, making defendants the bankrupt, the trustee, and certain persons alleged to assert claims inferior to plaintiffs'. Such persons answered that more than four months prior to initiation of bankruptcy proceedings they had commenced suit in a state court, and alleged that by virtue of contracts, in which the bankrupt was vendor and they were vendees, all the property was impressed with a trust and lien in their behalf superior to plaintiffs', and that a receiver was necessary to take possession to effectuate the trust and lien, further answering that plaintiffs and the bankrupt were made defendants and appeared in the suit, and praying that the District Court, in recognition of comity, suspend proceedings until the state court should determine the suit, and, if and when the state court should appoint a receiver, that the District Court surrender the property to him. *Held*, that plaintiffs' motion to strike the defense will be granted, since where jurisdictions are not concurrent and co-ordinate, where that of one is exclusive, the court first obtaining actual possession of the res is entitled to proceed, while the situation was unaffected by the foreclosure proceedings and appointment of the trustee as receiver, since the court was the same, its possession unchanged, and the foreclosure ancillary and dependent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 414; Dec. Dig. ⊂=296.]

In Equity. Suit by the First Trust & Savings Bank and others against the Bitter Root Valley Irrigation Company and others. On plaintiffs' motion to strike a defense. Motion granted.

Garrard B. Winston and Winston, Payne, Strawn & Shaw, all of Chicago, Ill., and Henry C. Stiff, of Missoula, Mont., for appellant.

D. S. Wegg, of Chicago, Ill., Geo. T. Baggs, of Stevensville, Mont., and R. F. Gaines, of Butte, Mont., for defendants Knudsen.

BOURQUIN, District Judge. Defendant company in this court was adjudicated a voluntary bankrupt, and the appointed trustee took possession of its property. Plaintiffs, bondholders' trustees, by leave commenced this suit to foreclose the security on certain of said property, making defendants the bankrupt, the trustee, and certain persons alleged to assert claims, but inferior to plaintiffs', to the property.

Herein the bankrupt's trustee was appointed receiver, and as such possesses the property. Said certain persons answered that more than four months prior to initiation of bankruptcy proceedings they had commenced suit in a court of this state, wherein they allege that, by virtue of land and water contracts in which the bankrupt was vendor and they were vendees, all said property is impressed with a trust and lien in their behalf and superior to that of plaintiffs, and that a receiver is necessary to take possession of said property to effectuate the trust and lien. They further answer that the plaintiffs and bankrupt were made defendants and appeared in said suit. The prayer is that this court, in recognition of comity, suspend proceedings until the state court has determined said suit, and, if and when the state court appoints a receiver, that this court surrender the property to him. Plaintiffs move to strike the aforesaid defense. Granted.

The suit in the state court is to determine rights asserted by some creditors of the bankrupt in and to some of the latter's property. The proceedings in this court in their entirety are to determine the rights of all creditors of the bankrupt in and to all the latter's property. Of some of the matters involved herein the state court has no jurisdiction, exclusive jurisdiction thereof being in this court, finding origin in the constitutional provision for bankruptcy. These latter cannot be fully adjusted without adjustment of those asserted in the state court, and it makes for convenience, speed, and justice to have the whole dealt with by one court. The rule of comity yields thereto. It is believed the rule of Moran v. Sturges, 154 U. S. 284, 14 Sup. Ct. 1019, 38 L. Ed. 981, applies, viz. that where the jurisdictions are not concurrent and co-ordinate, where that of one is exclusive, the court first obtaining actual possession of the res is entitled to proceed. And, having possession and jurisdiction, the property is withdrawn from the jurisdiction of all other courts, this court to hear and determine all questions relating to title, possession, and control of the property. See Murphy v. John Hofman Co., 211 U. S. 568, 29 Sup. Ct. 154, 53 L. Ed. 327; Wabash Ry. Co. v. College, 208 U. S. 38, 611, 28 Sup. Ct. 425, 52 L. Ed. 642.

It will be noted that in the first case cited herein the state court had appointed a receiver before the federal court took possession of the

property, and in the last case cited the suit in the former court to foreclose a claim of lien had been commenced before the suit in the latter court was instituted and possession taken of the property. And in both it was held the federal jurisdiction prevailed.

Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122, is the reverse of the instant case. The situation herein is not affected for that foreclosure proceedings are permitted by the court in bankruptcy and a receiver appointed. The court is the same, its possession is unchanged, and the foreclosure is but ancillary and dependent—more for convenience than aught else. See Bear Gulch, etc., Co. v. Walsh (D. C.) 198 Fed. 352, and cases therein cited.

NOTE.—The trial judge denied appeal, holding that an order correcting pleadings is not a "final decision" and so can be reviewed on appeal after final decree, though more than six months after the order. Justice Hunt, being of contrary view, allowed appeal, now pending.

In re HOLLAND.

(District Court, E. D. Pennsylvania. November 7, 1916.)

1. ALIENS ⟸69—NATURALIZATION—AMENDMENT OF RECORD—CHANGE OF NAME.

Where an alien, who was a native of Norway, as permitted by the custom of that country, adopted and used as his surname a name derived from the first name of his father, and not including the family name, and was naturalized under that name, the court has no power to subsequently amend its record by adding such family name.

[Ed. Note.—For other cases, see Aliens, Cent. Dig.. §§ 147–153; Dec. Dig. ⟸69.]

2. NAMES ⟸20—CHANGE OF NAMES—AUTHORITY OF FEDERAL COURTS.

While, under Naturalization Act June 29, 1906, c. 3592, § 6, 34 Stat. 598 (Comp. St. 1913, § 4354), a federal District Court has power, as a part of the naturalization of an alien, upon his petition, to change his name, it is without power to change the name of a naturalized citizen.

[Ed. Note.—For other cases, see Names, Cent. Dig. § 18; Dec. Dig. ⟸20.]

In the matter of the naturalization of Olaf Johansen Holland. On petition for amendment of record. Denied.

Robert S. Shaw, of Philadelphia, Pa., for petitioner.

Thomas B. Shoemaker, Naturalization Examiner, of Philadelphia, Pa., opposed.

THOMPSON, District Judge. From the testimony taken in support of the petition, it appears that the petitioner was born in Norway, in 1867. His father's name was Johan Holland. In accordance with the custom in Norway, the petitioner was there known as Olaf Johansen. He came from Chile to the United States in July, 1887, arriving at the port of San Francisco, Cal., upon the vessel James Allen, upon which he had shipped as a sailor under the name of Olaf Johansen. In 1892 he declared his intention of citizenship in the criminal district

court of New Orleans, La., under the name of Olaf Johansen. On September 20, 1909, he filed his petition for naturalization, stating his name to be Olaf Johansen, and on January 12, 1910, was admitted to become a citizen of the United States under that name. The family name of the petitioner is Holland. His brother and sister in this country are known by that name. The petitioner was married in Philadelphia, September 28, 1912, under the name of Olaf Johansen Holland, and on April 12, 1916, real estate was conveyed to his wife as Marie Holland, wife of Olaf Holland.

The petitioner avers that, when he made his declaration of intention and filed his petition for naturalization, he inadvertently omitted his surname "Holland," and prays that the record may be amended, so that the surname "Holland" may be added to his name, so that it shall appear as "Olaf Johansen Holland," and that a new certificate of naturalization be issued to him upon his old certificate being surrendered for cancellation.

[1] It does not appear that the omission of the family name "Holland" in the declaration of intention or in the petition of naturalization was through accident or mistake. It is apparent that the petitioner might have been known in Norway, in accordance with the Norwegian custom, either as Olaf Johansen or as Olaf Holland, but that he actually adopted the name of Olaf Johansen, without adding the family name "Holland." By so doing he deliberately abandoned the surname "Holland," and adopted Olaf Johansen as his name, and used that name in this country from 1887 until after his admission to citizenship, and it did not occur to him to use the surname "Holland" until his marriage in 1912.

[2] It therefore appears that what the petitioner is asking for now is, not a correction of a mistake in the record, but a change of his name to that which he might have adopted in Norway, or after leaving Norway. Section 6 of the Naturalization Act of June 29, 1906, 34 Stat. pt. 1, p. 596 (Comp. St. 1913, § 4354), provides:

"It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith."

The court is not given the discretion to change at any time the name of a naturalized citizen, where either inadvertently or deliberately he failed to make the application at the time and as a part of his naturalization. The court is without power to make the change upon this belated application. The inconvenience to the applicant may perhaps be overcome by an application to the court of common pleas under the act of April 9, 1852 (P. L. 301), and a certificate of a decree, accompanied by the petitioner's certificate of naturalization, would no doubt be sufficient thereafter as proof of identity.

The prayer of the petition is refused.

ROGER et al. v. J. B. LEVERT CO., Limited, et al.

In re JOHN T. MOORE PLANTING CO., Limited.

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

No. 2920.

1. MORTGAGES ⟸529(8)—FORECLOSURE—SETTING ASIDE—PERSONAL ACTION.
Respondents, who held a mortgage on the property of the bankrupts, caused the same to be sold under executory process pursuant to the Louisiana practice, whereupon the bankrupt sued to annul and set aside the foreclosure on the ground of nullities therein, and respondents set up a reconventional demand on notes praying that, should the property be declared to belong to the bankrupt, respondents should have judgment for the full amount of the indebtedness due them and secured by the mortgage with recognition of full mortgage rights. *Held*, that under Code Prac. La. art. 12, declaring that actions pending to recover an immovable or a real right such as an inheritance are considered as real, while actions for the recovery of a movable or a sum of money, though accompanied with a mortgage, are not real actions, the action by reason of the reconventional demand was a personal one, and could only have semblance to a real action after issuance of a fieri facias and seizure of the property on which lien was claimed.

[Ed. Note.—For other cases, see Mortgages, Cent. Dig. § 1541; Dec. Dig. ⟸529(8).]

2. EXECUTION ⟸75—ISSUANCE—RIGHT TO ISSUANCE.
A writ of fieri facias may be taken out at the pleasure of the party recovering a judgment at any time within 10 years after rendition.

[Ed. Note.—For other cases, see Execution, Cent. Dig. §§ 164–170; Dec. Dig. ⟸75.]

3. ESTOPPEL ⟸68(4)—ADMISSIONS.
Where, at the time the bankrupt filed its petition, it was in full and undisturbed possession of all property scheduled, an application by respondents for the appointment of one of their number as co-receiver is a judicial recognition of such facts.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 168; Dec. Dig. ⟸68(4).]

4. BANKRUPTCY ⟸20(1)—PROCEEDINGS—JURISDICTION OF BANKRUPTCY COURT.
Under Bankr. Act July 1, 1898, c. 541, § 11, 30 Stat. 549 (Comp. St. 1913, § 9595), giving authority to a court of bankruptcy to stay proceedings in actions against the bankrupt pending in other courts, the bankruptcy courts are vested with exclusive jurisdiction in the administration of the estate of the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸20(1); Courts, Cent. Dig. § 1331.]

5. BANKRUPTCY ⟸188(1)—JURISDICTION OF COURT OF BANKRUPTCY—SURRENDER OF BANKRUPT'S PROPERTY.
A court of bankruptcy will release from its administration only that property of a bankrupt in which by reason of conceded and absorbing superior liens and privileges the trustees have no equity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⟸188(1).]

6. BANKRUPTCY ⟸326—CLAIMS OF BANKRUPT—SET-OFF.
Under Bankr. Act, § 68 (Comp. St. 1913, § 9652), providing that in all cases of mutual debts or mutual credits between the estate of the bankrupt and the creditor the account shall be stated and the balance only shall be allowed and paid, claims due the bankrupt against mortgagees

who took possession of its property under an invalid foreclosure may be set off against the claims of the mortgagees.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 514; Dec. Dig. ⊂⊃326.]

7. BANKRUPTCY ⊂⊃20(1)—JURISDICTION OF COURT OF BANKRUPTCY—CONCURRENT JURISDICTION.

Mortgagees, pursuant to the Louisiana practice known as executory process, foreclosed their mortgage, whereupon the mortgagor sued to annul the foreclosure, the mortgagees setting up a reconventional demand on notes praying that, should the mortgaged property be declared to again belong to the mortgagor, they should be given judgment against the mortgagor for the full amount of the indebtedness secured by the mortgage with recognition of their mortgage rights. The foreclosure was adjudged illegal, and the mortgagees had judgment on their reconventional demand, whereupon the mortgagor filed a petition in bankruptcy surrendering possession of the mortgaged property to the bankruptcy court. The mortgagees, after praying the appointment of one of their number as a receiver, filed a petition alleging that, by virtue of the judgment in the state court, such tribunal should under the rules of comity be permitted to execute its judgment by the issuance of a writ of fieri facias. *Held* that, as the mortgagors asserted claims which could only be set off under Bankr. Act, § 68, thus making a showing of a substantial equity, and as the court of bankruptcy, under section 11, has exclusive jurisdiction, the state court should not be given control over the property under the rules of comity, for its judgment was a personal one, and the rules of comity apply only between courts of concurrent jurisdiction, and not where one tribunal has exclusive jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃20(1); Courts, Cent. Dig. § 1331.]

Petition to Superintend and Revise from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of the John T. Moore Planting Company, Limited, bankrupts. Petition by Thomas H. Roger and others trustees in bankruptcy against the J. B. Levert Company, Limited, in liquidation, and others, to superintend and revise an order of the District Court granting the petition of J. B. Levert Company, Limited. Petition to superintend granted, and order vacated.

The John T. Moore Planting Company, Ltd. (hereinafter called the Moore Company), the bankrupts, were the owners of three large improved sugar plantations, situated in the parishes of Terrebonne and Lafourche, and of a sugar factory and all the buildings and improvements, mules, implements, and other appurtenances of a going business. On March 11, 1911, they mortgaged their property to the J. B. Levert Company, Ltd., and in June, 1914, the Levert Company caused the mortgaged property to be sold in foreclosure proceedings, by what is called, in Louisiana law, "executory process."

In July, 1914, shortly after the foreclosure sale, the Moore Company instituted a suit against the Levert Company and its liquidators (it having previous to that time gone into voluntary liquidation), for the purpose of annulling and setting aside the foreclosure sale, on the ground of nullities therein. The Levert Company, in their answer in this suit, set up a counterclaim, or, as it is called in Louisiana law, a "reconventional demand," on promissory notes, praying that if the foreclosure sale should be annulled, and the mortgaged property should be declared to again belong to the Moore Company, then, in that event, that they (the Levert Company) should be given judgment against the Moore Company for the full amount of the original indebtedness due by the Moore Company to them and secured by the aforesaid mortgage, with

recognition of full mortgage rights. This converted the suit into an ordinary suit in the state court of Louisiana, and judgment was rendered in same in February, 1916, adjudging that the foreclosure sale was illegal and null, and that the mortgaged property therefore belonged still to the Moore Company. In the same judgment and on the reconventional demand of the defendant based on the promissory notes, it was adjudged that the Levert Company should have judgment against the Moore Company for the amount still found to be due on the original mortgage indebtedness, including interest from the last day of payment of interest until paid. Judgment was also rendered in favor of the Levert Company for additional amounts of taxes paid by the Levert Company on the mortgaged property during the time they were in illegal possession thereof. And further:

"It is further ordered, adjudged and decreed that the aforesaid mortgages of the J. B. Levert Company, Ltd., in Liq., and its liquidators as security and for the payment of the said sum of one hundred thousand, one hundred and twenty-two and $^{7}/_{100}$ dollars with interest, attorney's fees and costs, as hereinafter set forth, be and the same are hereby recognized to operate, exist and bear upon the following described property, to wit: (Description of property omitted.) * * *

"It is further ordered, adjudged and decreed that in accordance with law, the said properties be seized and sold at public auction to the highest bidder for cash, without appraisement, as provided in said act of mortgage before Edgar Grima, of date March 9, 1911, with which said notes are identified, and that out of the proceeds of said sale J. B. Levert Company, Ltd., in Liq., and its said liquidators, be paid by privilege, preference and priority over all other parties, the said sum of one hundred thousand one hundred and twenty-two and $^{7}/_{100}$ dollars, with interest and attorney's fees as hereinabove set forth.

"It is further ordered, adjudged and decreed that there be judgment in favor of J. B. Levert Company, in Liq., and its said liquidators, plaintiffs in reconvention, and against said John T. Moore Planting Company, Ltd., defendants in reconvention, in the full sum of six thousand and sixty-one and $^{86}/_{100}$ dollars, with interest at the rate of eight per cent. per annum from May 12, 1913, on three thousand, two hundred and thirty-two and $^{86}/_{100}$ dollars thereof, and with like interest from March 26, 1914, on three thousand, eight hundred eighteen and $^{21}/_{100}$ dollars thereof, being the amount of state, parish and levee district taxes for the years 1912 and 1913, respectively, assessed against said mortgaged premises, situated in the parish of Terrebonne and paid by J. B. Levert Company, Ltd., recognizing the said J. B. Levert Company, Ltd., in Liq., and its liquidators, as the subrogees to the rights, liens and privileges of the state of Louisiana, the parish of Terrebonne and the board of commissioners of the Atchafalaya Basin levee district for said taxes against the property herein above described; and for the further sum of one hundred and ten dollars and 79 cents, with interest from July 27, 1914, for state, parish and levee district taxes, for the year 1913, assessed against that portion of the said mortgaged premises lying in the parish of Lafourche, state of Louisiana, and paid by the J. B. Levert Company, Ltd., in liquidation, recognizing the said J. B. Levert Company, Ltd., in Liq., and its liquidators, as the subrogees to the rights, liens and privileges of the state of Louisiana, the parish of Lafourche and the board of commissioners of the Atchafalaya Basin levee district for said taxes against that portion of the said property lying in the parish of Lafourche.

"It is further ordered, adjudged and decreed that all rights of the J. B. Levert Company, Ltd., in Liq., and its said liquidators, for expenses and disbursements incurred, and made in preservation, maintenance and operation of the said mortgaged premises, and their claims for taxes for the years 1914 and 1915, paid by them be and the same are hereby reserved, to be asserted by them hereafter in appropriate proceedings as occasion may arise.

"It is further ordered, adjudged and decreed that all costs of the main suit be borne by the defendants, J. B. Levert Company, Ltd., in Liq., and its said liquidators, and the costs of the reconventional demand be borne by the said John T. Moore Planting Company, Ltd., and be paid by preference and priority out of the proceeds of the sale of the mortgaged premises."

After the rendition of this judgment, the Moore Company filed in the United States District Court for the Eastern District of Louisiana their voluntary petition in bankruptcy on March 28, 1916. On this same day, they were adjudged bankrupt, and a temporary receiver was appointed to take immediate possession of all the property and to operate same until a trustee in bankruptcy could be elected in due course. The receiver qualified by taking oath and giving bond on March 30th, and went into actual physical possession of the three plantations and appurtenances, and continued to cultivate and operate them—employing laborers and doing other things necessary.

On the next day after the receiver qualified, to wit, on March 31, 1916, the Levert Company filed in the United States District Court a petition praying "that Daniel M. Steele also be appointed as co-receiver with J. R. McNaghten, and given custody and control of the assets surrendered by John T. Moore Planting Company, Ltd."

On the same day the Levert Company also filed in the bankruptcy court a petition referring to the suit and judgment above mentioned in the state court, and alleging that by virtue of that judgment the state court should be permitted by the bankruptcy court to execute the judgment by the issuance of a writ of fi. fa. and seizing and selling the property of the Moore Company. The prayer of this petition was: "That an order may be made and entered in this cause, either permitting plaintiff to proceed in the state court, and in the suit hereinabove set out, with the execution of the judgment wherein its mortgage rights were recognized and ordered enforced; or, in the alternative, that an order may be made by this court forthwith directing the sale of the mortgaged premises to satisfy petitioner's claims hereinabove set forth."

To this petition the receiver filed an exception and protest, alleging that the bankruptcy court was without jurisdiction and authority to issue an order directing the sale until the election of a trustee, and further alleging that, even if the bankruptcy court had authority to grant such an order, the receiver was, under the bankruptcy law, a mere custodian and caretaker of the property, and did not represent the creditors, and was without authority to stand in judgment, and the creditors should be given the opportunity by themselves, or through the trustee to be later elected, of presenting reasons why the sale should not be ordered.

This exception having been overruled, and the receiver having been ordered to answer, filed his answer, setting forth at length the reasons why the prayer of the Levert Company petition could not and should not be granted.

After hearing, the United States District Judge caused to be entered on April 14, 1916, an opinion and order as follows:

"In the Matter of John T. Moore Planting Company, Limited, Bankrupt. No. 2134, In Bankruptcy. On Petition of the J. B. Levert Company, Limited, for an Order of Sale of Property of the Bankrupt. Considering the prolonged and as yet unfinished litigation regarding the real estate surrendered by the bankrupt, it would in my opinion be a violation of that comity always existing between the state and federal courts to attempt to oust the jurisdiction of the Twentieth judicial district court for the parish of Terrebonne over the said property. Petitioner will therefore be permitted and authorized to apply to that court for such relief as he may be entitled to in the premises. And further, Messrs. Thomas H. Roger, K. J. Braud and J. R. McNaghten, trustees, of whose election I take notice, will be authorized to make themselves parties to the said litigation for all purposes pertinent thereto."

Immediately upon granting the aforesaid order, the trustees of the John T. Moore Planting Company, Ltd., bankrupt, filed in this court a petition to superintend and review under section 24b of the Bankruptcy Law (Comp. St. 1913, § 9608), said petition alleging many other things, complained and sought a review of the above order for the following reasons, to wit:

"Petitioners allege that the order of the United States District Court for the Eastern District of Louisiana, hereinabove quoted in paragraph 6, is erroneous in matter of law, in that:

"(1) By the filing of the petition and the adjudication in bankruptcy the above-mentioned plantations belonging to the said bankrupt company, and not claimed to be then under seizure or in the actual possession of any court or

officer, vested absolutely and fully in the bankruptcy court, which thus through itself and through its receiver and the trustees came into the actual physical possession thereof, and the above-mentioned order, permitting its seizure and sale by the state court, illegally, divests the trustees, and the creditors they represent, of their legal vested right to have said property administered and operated and sold by the United States court sitting as a court of bankruptcy, and receiving its supreme powers both from the Constitution and the laws of the United States.

"(2) The appearance of the J. B. Levert Company, Ltd., and its liquidators, in the bankruptcy court, asking that one of its liquidators be appointed co-receiver and that he be given custody and control over the plantations in question, was an admission of and a submission to the jurisdiction of said bankruptcy court, and it was error of law to thereafter permit them to cause to be seized the said plantations under process of the state court thereafter issued. * * *

"(5) The bankruptcy court erred in not holding as a matter of law that, in the absence of any seizure of the issuance of any writ by the state court, the bankruptcy court was vested with exclusive jurisdiction over the res surrendered, and into the actual physical possession of which it went by the effect of the adjudication and by the actual taking of corporeal possession by its receiver and later by its trustees of the res. All before the order complained of.

"(6) The bankruptcy court erred in not holding as a matter of law that the judgment claimed by the J. B. Levert Company and its liquidators, and rendered in a personal action at law, was no different from any other judgment in personam, which in itself would operate as a mortgage on the debtor's personal property, and therefore said judgment without a prior issuance and execution of a writ carried no jurisdiction over the res to the state court at or before the adjudication in bankruptcy.

"(7) That the bankruptcy court erred in granting said order for the further reason that it deprives the creditors of the right to cause the said J. B. Levert Company, Ltd., and its liquidators, to set off the rents, profits, revenues, and damages due as a result of their illegal seizure and sale and taking possession of said property, and for the further reason that said order permits said property to be offered for sale to satisfy an amount in excess of that actually due after said set-off is allowed, and relegates the creditors to a long, independent suit to recover said damages, rents, revenues, and profits against a corporation in liquidation and which when a judgment is obtained will be without assets to pay same.

"(8) That the bankruptcy court erred in granting said order for the additional reason that, if the said J. B. Levert Company, Ltd., and its liquidators, were required to set off the amount due by them and preserve the property for their benefit (the said other creditors being to the extent of over $90,000 second mortgage creditors on the same property), thereby preventing the property being sacrificed at this time and getting the benefit of the large profits promised for this year, the making of which can be completed in accordance with precedent in the said bankruptcy court and without prejudice or lessening in any manner or degree the security of the said J. B. Levert Company, Ltd., in liquidation, or its liquidators."

Charlton R. Beattie, of New Orleans, La., for petitioners.

D. B. H. Chaffe, Wm. C. Dufour, and H. Generes Dufour, all of New Orleans, La., opposed.

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

PARDEE, Circuit Judge (after stating the facts as above). [1-3] The order complained of in this case is said to be justified as against the position of the trustees on the ground of comity owing by the bankruptcy court to the state court.

The action pending in the state court between the Levert Company and the Moore Planting Company, at the time the latter filed its petition in bankruptcy, was a personal action, although mortgage rights were involved. See article 12, La. Code of Prac.; Rogers v. Binyon, 124 La. 95, 49 South. 991; also, Ker v. Evershed, 41 La. Ann. 15, 6 South. 566. Such action could only have a semblance to a real action after an issuance of a writ of fieri facias and the seizure of the property on which the lien was claimed, and no writ of fieri facias had been issued, and of course no seizure thereunder. And it may be noticed that in the state of the litigation between the parties no writ of fieri facias could be taken out except at the pleasure and convenience of the Levert Company at any indefinite time within ten years after the rendition of the judgment.

At the time the Moore Company filed its petition in bankruptcy, said company was in full, undisturbed possession of all the plantations and property scheduled as assets in the bankruptcy; and, when the receivers were appointed, they took possession of all the property for the bankruptcy court, and they were in possession and control at the time the order complained of was entered.

The application of the Levert Company to the bankruptcy court for the appointment of one of their number as a co-receiver is a judicial admission of these facts, and it cannot be said that the bankruptcy court has seized and taken possession of property at the time in the possession and custody of the state court.

It seems therefore clear that, if we should concede that comity should prevail between the bankruptcy court and the state court, the case presented does not show a proper and necessary case for the exercise of the same.

[4-7] But this is not a case for the application of the doctrine of comity between courts. Such comity only prevails as between courts of concurrent jurisdiction, and in this case there is no such concurrent jurisdiction. Moran v. Sturges, 154 U. S. 256–283, 14 Sup. Ct. 1019, 38 L. Ed. 981; Pugh v. Loisel, 219 F. 417–423, 135 C. C. A. 221, L. R. A. 1915F, 945.

It is well settled that, under the Constitution and laws of the United States, bankruptcy courts are vested with superior and exclusive jurisdiction in the administration of the estate of the bankrupt. Section 11 of the Bankruptcy Law gives authority to the bankruptcy court to stay proceedings in actions against the bankrupt pending in other courts.

Any property surrendered by the bankrupt which could or should be released by the court from such administration can only be property in which, by reason of conceded and absorbing superior liens and privileges, the trustees in bankruptcy have no equity.

In the present case, the record fully shows that by reason of the set-off and counterclaim of Moore Company against the Levert Company, provided for in section 68, Bankruptcy Law, and which could not be allowed in the state court, as well as by reason of the situation and prospects for the successful prosecution of the plantations in making

and harvesting the crops of the present year, a very decided equity is shown in favor of the bankrupt's estate.

It follows that the order complained of cannot be sustained on the ground of comity, nor on the facts of the case as to the want of equity on the part of the trustees.

The petition to superintend is granted, and it is ordered and adjudged that the order of April 14, 1916, permitting the Levert Company to proceed in the state court, and practically turning over the property of the bankrupt to be administered in the state court, be, and the same is, vacated.

CREEKMORE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. October 17, 1916.)

No. 4591.

1. CONTEMPT ⊜54(3)—CRIMINAL CONTEMPT—INFORMATION—VERIFICATION.
An information for a constructive criminal contempt, filed by a district attorney and praying that the defendant, etc., is not insufficient because verified on information and belief.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 145; Dec. Dig. ⊜54(3).]

2. CONTEMPT ⊜54(2)—CRIMINAL CONTEMPT—INFORMATION.
Under Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (Comp. St. 1913, § 1245), which provides that the federal courts "shall have power * * * to punish by fine or imprisonment, at the discretion of the court, contempts of their authority," it is not necessary that an information for criminal contempt should pray for any specific punishment.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. § 144; Dec. Dig. ⊜54(2).]

3. CONTEMPT ⊜72—CRIMINAL CONTEMPT—PUNISHMENT—FEDERAL COURTS.
Under such statutes, where imprisonment is imposed as a punishment for contempt, the length of term and place of confinement are within the discretion of the court.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249–256, 273; Dec. Dig. ⊜72.]

4. CONTEMPT ⊜72—CRIMINAL CONTEMPT—NATURE OF OFFENSE.
With certain exceptions, a criminal contempt is a crime, and a criminal contempt proceeding is a criminal proceeding for all purposes, and one adjudged guilty of a criminal contempt may be properly characterized as a convict.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249–256, 273; Dec. Dig. ⊜72.]

5. CONTEMPT ⊜72—CRIMINAL CONTEMPT—PUNISHMENT—"OFFENSE."
A criminal contempt is an "offense," within the meaning of Rev. St. § 5541 (Comp. St. 1913, § 10527), and, where the sentence imposed exceeds a year imprisonment, may be in a penitentiary.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 249–256, 273; Dec. Dig. ⊜72.

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

In Error to the District Court of the United States for the Eastern District of Oklahoma; Ralph E. Campbell, Judge.

Proceeding for criminal contempt against William J. Creekmore. Conviction and sentence, and defendant brings error. Affirmed.

James C. Denton, of Muskogee, Okl., and Norman R. Haskell, of Oklahoma City, Okl. (Frank Lee, of Muskogee, Okl., and E. G. McAdams, of Oklahoma City, Okl., on the brief), for plaintiff in error.

Paul Pinson and W. P. McGinnis, Sp. Asst. U. S. Attys., of Muskogee, Okl. (D. H. Linebaugh, U. S. Atty., of Muskogee, Okl., on the brief), for the United States.

Before HOOK and SMITH, Circuit Judges, and AMIDON, District Judge.

SMITH, Circuit Judge. The plaintiff in error was adjudged guilty of contempt by the District Court and sentenced to be confined a year and a day in the Leavenworth Penitentiary, and he sued out a writ of error in this case. He will be hereafter styled the defendant.

The information for contempt was against William J. Creekmore, Ben Green, J. O. Ammerman, W. B. Robinson, and J. D. Lane. The petition or information for contempt particularly and specifically charged in detail the facts constituting the alleged contempt, of which the defendant was subsequently adjudged guilty. It was verified by the United States attorney for the district to the effect that the facts stated were true and correct upon information and belief. There was no warrant of arrest issued, but the court ordered that the charge be investigated by the court, and issued a rule to the defendants to show cause. The defendant Creekmore appeared, and without waiting for the investigation ordered demurred to the petition and affidavit, because the latter was made upon information and belief. This was overruled. He then made an oral motion to quash the petition and affidavit on the same ground, which was likewise overruled. He objected to the introduction of any evidence upon the same ground, and this was also overruled, and to each of these rulings he at the time excepted.

[1] In Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 Fed. 20, 120 C. C. A. 582, we somewhat extensively considered the numerous points on which it has been held that criminal contempt cases are not crimes under the Fifth Amendment, and are not criminal proceedings under the Sixth Amendment, to the federal Constitution. It will not be necessary for us to review the decision in that case. In England, in cases of this kind, the charge could be made by the King in his courts, without any evidence and against all evidence. It is true the Fourth Amendment to the federal Constitution provides that no warrant shall issue, but upon probable cause supported by oath or affirmation. Conceding for the purposes of this case, and for it alone, that the Fourth Amendment applies to contempt cases, there never was any warrant issued, but simply a rule to show cause until after the taking of all the testimony, which was an ample compliance with the provision of the Fourth Amendment. The court specially found:

"The defendant Creekmore sought to influence the juror Seymour in his action, conduct, and vote as a juror in said cause in his (Creekmore's) favor,

and that this conduct on the part of defendant Creekmore amounts to misbehavior, if not in the very presence of the court, so near thereto as to obstruct the administration of justice."

It is therefore gravely doubtful whether the court found that this was anything but a direct contempt. Let us assume, however, as most favorable to the contention of the defendant Creekmore, that, if the defendant was guilty at all, it was of a constructive contempt, rather than a direct one. It is said:

"Although statements or affidavits made on information and belief have been held sufficient, the better practice requires the material allegations to be made of personal knowledge." 9 Cyc. 39.

And again:

"While an instance is given where an accusation was deemed sufficient, though only on information and belief, it is a rule in most jurisdictions that such an affidavit is wholly insufficient upon which to base constructive contempt proceedings, and that no jurisdiction can be acquired by the court thereunder." 6 Ruling Case Law, 532.

In support of the first of these propositions Cyc. cites, in the original note and the subsequent ones, In re Acock, 84 Cal. 50, 23 Pac. 1029; Jordan v. Wapello County Circuit Court, 69 Iowa, 177, 28 N. W. 548; Hughes v. Territory, 10 Ariz. 119, 85 Pac. 1058, 6 L. R. A. (N. S.) 572; State v. District Court, 37 Mont. 590, 97 Pac. 1032. To the same effect, as applied to an information by a public prosecutor, is Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124.

It thus appears that California, Iowa, Nebraska, Montana, and Arizona are all committed to the theory of the sufficiency of the information in this case. It will appear that substantially all of these decisions upon this subject have been decisions in the state courts. Many of them have been governed by state statutes. Many state laws provide that the affidavits shall be evidence, and of course they cannot perform that office, if made upon information and belief; but we will now proceed to consider the cases cited in Cyc. and Ruling Case Law to sustain the converse of the last proposition considered.

The first case cited is In re Wood, 82 Mich. 75, 45 N. W. 1113. This case does not at all sustain the text. It did not involve a question as to the effect of an affidavit upon information and belief, for in that case there was no affidavit filed at all, and one was explicitly held to be necessary under two sections of the Michigan statutes. The same is true of Russell v. Mandell, Circuit Judge, 136 Mich. 624, 99 N. W. 864.

In Ludden v. State, 31 Neb. 429, 48 N. W. 61, the text is sustained, where the affidavit was filed by one not a public prosecutor; and the same is true of Herdman v. State, 54 Neb. 626, 74 N. W. 1097. The same is true of Belangee v. State, 97 Neb. 184, 149 N. W. 415, but in the last case three judges out of seven dissented, and, as already indicated, it was held by a unanimous court in Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124, that, where the charge of contempt of court is set forth in an information in positive and direct terms, the statement by the public prosecutor in his verification

thereto "that the allegations and charges in the within information are true, as he verily believes," does not render such information void.

The case of State v. Conn, 37 Or. 596, 62 Pac. 289, did not involve the question now under consideration at all, but was a question of the construction of the Oregon statute.

In State v. Newton, 16 N. D. 151, 112 N. W. 52, 14 Ann. Cas. 1039, by a vote of two to one the Supreme Court of that state sustained the text. In State v. Heiser, 20 N. D. 357, 127 N. W. 72, the court distinguished the case of State v. Newton.

The case of Freeman v. City of Huron, 8 S. D. 435, 66 N. W. 928, measurably sustains the text, the court saying:

"Persons should not be required to answer an essentially criminal charge based merely upon the belief of a *private* prosecutor."

In Ex parte Landry, 65 Tex. Cr. R. 440, 144 S. W. 962, in the Texas Court of Criminal Appeals, in the opinion may be found an expression that the affidavit should be positive, and not on information and belief. This was clearly dictum, as there was no affidavit at all filed in that case.

In Davidson v. Munsey, 29 Utah, 181, 186, 80 Pac. 743, 744, the court expressly refused to pass upon the question, saying:

"Therefore the question as to whether the affidavit made by Davidson upon information and belief was sufficient to give the court authority to act in the matter becomes unimportant."

The only two Federal cases cited are In re Judson, 3 Blatchf. 148, Fed. Cas. No. 7,563, and Parkhurst v. Kinsman, 2 Blatchf. 76, Fed. Cas. No. 10,759. Neither of these cases tends in any degree to support the text.

The plaintiff in error cites, as to the same effect, Snyder v. State, 151 Ind. 553, 52 N. E. 152; Early v. People, 117 Ill. App. 608; State v. Root, 5 N. D. 487, 67 N. W. 590, 57 Am. St. Rep. 568; In re Nickell, 47 Kan. 734, 28 Pac. 1076, 27 Am. St. Rep. 315; In re McKenna, 47 Kan. 738, 28 Pac. 1078; Thomas v. People, 14 Colo. 254, 23 Pac. 326, 9 L. R. A. 569; State v. Nathans, 49 S. C. 199, 27 S. E. 52, 57. None of said cases tend in any manner to sustain the proposition that informations charging criminal contempt must be verified, not upon information and belief, but absolutely.

It thus appears that, while the statement in Cyc. that "the better practice requires the material allegations to be made of personal knowledge" may be true, it is only sustained by North and South Dakota, and possibly Texas and Nebraska, though Nebraska has squarely held that where the information is filed by the public prosecutor the form used in this case is sufficient.

The statement in Ruling Case Law that "it is a rule in most jurisdictions that such an affidavit is wholly insufficient upon which to base constructive contempt proceedings, and that no jurisdiction can be acquired by the court thereunder," is not sustained either by the authorities cited or by any that have been called to our attention.

There are no federal statutes on the procedure in contempt cases, except, in relation to the Court of Claims (Judicial Code, § 157 [Comp.

St. 1913, § 1148]) that "it may punish for contempt in the manner prescribed by the common law." All other contempt cases in the federal courts are under section 268 of the Judicial Code and its predecessors. The people in this country succeeded to the sovereignty of the king, and it would perhaps be difficult to make clear, where no warrant is sought for the arrest of the defendant until after trial, why any different rule should, in the absence of statute, prevail from that which prevailed in England. See the very interesting and able opinion by Rogers, Circuit Judge, in Weeks v. United States, 132 C. C. A. 436, 216 Fed. 292, L. R. A. 1915B, 651.

Assuming, however, the necessity of an affidavit, or information supported by affidavit, as the basis of the proceeding, even if filed by a private prosecutor, there seems no ground to hold, in the absence of a statute, that a verification of the information upon information and belief is not sufficient. It is not our purpose to discuss these questions, interesting as they may be when they arise.

The only American case that we have been able to find on the very question here before us, namely, how must an information by a public prosecutor be verified, is Emery v. State, 78 Neb. 547, 111 N. W. 374, 9 L. R. A. (N. S.) 1124. The defendant was charged with influencing a juror in a criminal case in which he was a party by agreeing to pay and subsequently paying him cash. Manifestly the public prosecutor would have no personal knowledge of the truth of such a charge. It is doubtful if he could accumulate affidavits that would positively state the facts showing such guilt. Many states have laws providing for compulsory affidavits, but our attention has not been called to any such federal statute. To say that voluntary affidavits must be obtained before the public prosecutor can start such proceedings is to say that one of the most heinous offenses known to the law, that of "jury fixing," shall go wholly unpunished. Confronted by such a danger, we have no hesitancy in holding that the public prosecutor can file an information for contempt, positive and specific in its charges, and verify it upon information and belief, and, while such information may not justify the issuance of a warrant of arrest, it is not void, and where a rule is issued upon such information that defendant show cause, and upon the hearing, upon the testimony of sworn witnesses, the evidence shows the defendant guilty, he may be so adjudged, and that a warrant of arrest issued upon the conclusion of the case is upon "oath or affirmation," as provided in the Fourth Amendment to the Constitution. See Sona v. Aluminum Castings Co., 214 Fed. 936, 131 C. C. A. 232.

[2] The prayer to the information is that the defendants be required "to show cause, if any they have, why they or either of them should not be punished as for contempt of this court for and on account of the matters and things as above set forth." The case made in the information was clearly one of criminal contempt. One of the chief functions of a prayer in such informations is to show whether it is sought to convict the defendant of a civil or criminal contempt, but it was wholly unnecessary for that purpose here. Section 268 of the Judicial Code provides:

"The said courts shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority."

With the statute thus vesting almost unlimited discretion in the court as to the character and extent of punishment, no benefit would be derived from requiring the prosecutor to specially pray for a given kind of punishment, or attempt to limit the degree of such punishment. The prayer was sufficient under all the circumstances of this case.

The defendant next contends the information was duplicitous, and the court erred for that reason in overruling the demurrer and in overruling a motion to require the government to elect. It has been said:

"The court will never be keen to hold an indictment bad for duplicity." 5 Ruling Case Law, 1031.

The same with at least equal certainty may be said of an information for contempt.

Subsequently the court sustained the motion of the defendant, made at the close of the government's case, to strike all the evidence bearing on other contempts than the bribery of the juror Seymour, and on final hearing adjudged this defendant not guilty of all the specifications of contempt, save upon that particular charge. This was in all respects equivalent to sustaining his motion to require the government to elect, and if it should be conceded that the information was duplicitous, and we only concede it for the purposes of this question in this case, and the demurrer and motion to require an election should have been sustained, there was no prejudice.

We shall now turn to the evidence, as the other questions will be better understood and more readily disposed of with the facts in mind.

An indictment was returned in the District Court of the United States for the Eastern District of Oklahoma against the defendant Creekmore and 27 others, charging them with having conspired to violate the law of the United States prohibiting the introduction of intoxicating liquors from without the state into what was formerly Indian Territory. Act March 1, 1895, c. 145, 28 Stat. 693. This case was numbered 1507. Moses E. Miller, one of the defendants, secured a continuance; but that case, as against this defendant and others, was set down for trial at Muskogee on February 8, 1915. That case was, of course, triable to a jury, and the jury was ordered kept together in the charge of two bailiffs from the time it was impaneled until it was finally discharged. During this period, however, Mr. John H. Seymour was permitted night and morning to call his wife up by telephone from the hotel where the jury were stopping primarily at least to inquire as to the condition of their baby. At and for some time prior to the time of that trial Mr. Creekmore lived at Joplin, Mo., which was 130 miles northeast of Muskogee upon the line of the Missouri, Oklahoma & Gulf Railroad. Between the two, and some 39 miles from Muskogee on the same railroad, was Locust Grove. It inferentially appears from the evidence that at one time Mr. Creekmore lived in Oklahoma, that his wife's people lived at Locust Grove,

and Peter Bagby also at one time lived at Locust Grove and was a friend of Creekmore. Just where Creekmore lived, aside from this, would be purely a matter of speculation. E. H. Braley and his wife, Mrs. E. H. Braley, lived at 716 Capitol Place, in Muskogee. Mrs. Braley was not acquainted with Mr. Creekmore, and probably not acquainted with Mr. Creekmore's wife, Mrs. Creekmore, until Mr. Peter Bagby obtained, in December, 1914, an invitation to the two daughters of the Braleys, one married and the other single, to spend the week-end of Christmas week as the guests of the Creekmores. During this visit Peter Bagby gave a list of the regular panel of trial jurors at the January term, 1915, to one of the daughters of the Braleys, and told her to give it to her father. Mr. Creekmore, on a visit to Muskogee, also gave Mr. Braley a list of those jurors. During this visit the Braley girls invited Mr. and Mrs. Creekmore to come to their home at the time of the trial of the case 1507, and they did so. They remained at the Braley house about five days, when Mrs. Creekmore was called away, probably on Friday, by the illness of her mother, and it was then arranged that Mrs. Braley would go up to Joplin and take some things that Mrs. Creekmore had bought at an auction at Muskogee. Mrs. Braley first met Mr. Creekmore when he thus came to her house the first day of the trial. About the second day of the trial Mr. Creekmore and Mr. Braley came into the Braley diningroom, and Mr. Creekmore said, "One of your good friends is on my jury," and Mrs. Braley said, "Who is it?" and Mr. Creekmore said, "What's his name?" and Mr. Braley said, "John Seymour." On the first day of the trial Mrs. Creekmore and Mrs. Braley went down to the auction at one Miesch's jewelry store. They there met a Mrs. Blodgett, who inquired of Mrs. Creekmore what she was doing there, and Mrs. Creekmore said, "Don't you know that Creekmore is having his trial?" She expressed her worry over the matter, and Mrs. Blodgett said to Mrs. Braley, "Mr. Seymour is on that jury, why can't you do something?" About noon one day Mr. Creekmore suggested that his wife and Mrs. Braley go up to the courtroom together, so that John Seymour would see them in company. In the afternoon of the first day of the trial Mrs. Braley and Mrs. Creekmore met Mrs. Seymour on the street with another lady. Mrs. Braley introduced Mrs. Creekmore to Mrs. Seymour. Mrs. Braley said to Mrs Seymour, "I want to speak to you a minute," and they stepped to the edge of the sidewalk, and Mrs. Braley said to Mrs. Seymour, "I would give $500 to whisper in your husband's ear." Mrs. Seymour said, "I will do it for a whole lot less." Mrs. Braley said, "Do you talk to him?" and Mrs. Seymour said, "I talk to him every evening; what do you want me to tell him?" Mrs. Braley said, "Tell him that Creekmore is a friend of ours, and to stick with the Creekmore interests, and you can have anything you want." Mrs. Braley testified they left Mrs Seymour, and she immediately told Mrs. Creekmore and said, "I might have to spend some money for you on that," and Mrs. Creekmore said, "That was all right, you go ahead, and Mr. Creek he will back any financial obligations that you have to make." Mrs. Braley and Mrs. Creekmore arranged to call on Mrs. Seymour after she had conferred with her

husband, but that evening Mrs. Creekmore got a telephone call from her father at Locust Grove, and while she was waiting for the connection she could not leave, and Mrs. Braley and her husband went down to see Mrs. Seymour, who was to talk with her husband at 7:30 and tell Mrs. Braley what he had to say. After their return Mrs. Braley told Mrs. Creekmore what Mrs. Seymour had told her. That night Mr. Creekmore and Mrs. Creekmore both occupied the same room in the Braley house as they did every night while they were there. After Mrs. Creekmore was called away from the Braley house, or probably on Friday night, Mrs. Seymour telephoned to Mrs. Braley that everything was going all right. Mr. Creekmore called up the Braley house about an overcoat he had lost, and Mrs. Braley said, "I have got some good news for you," and he wanted to know what it was, and she told him that she could not tell him over the phone, to come out, and he came out in a taxicab, and Mrs. Braley then told him that Mrs. Seymour said everything was all right. Thereupon Mr. Creekmore simply shrugged his shoulders and laughed as though he were highly pleased over the way things were going. About one or two weeks after the trial, some one, who gave his name as Creekmore, invited Mrs. Braley by phone to come for a visit to Joplin and to bring Mrs. Seymour with her; that he wanted to make Mrs. Seymour a present. Mr. Braley testified that he was at the Seymours with his wife, and that he was out of town the most of the week, and returned the last day of the trial. This was after Mrs. Creekmore had been called away by her mother's illness, and Mr. Creekmore had left the Braley home, and Mr. Creekmore phoned to Mr. Braley at his house to come down to his lawyer's office, as he wanted to see him there, and Mr. Braley went down, and Mr. Creekmore told him he would like for Mrs. Braley and Mrs. Seymour to come up to Joplin, as he wanted to make Mrs. Seymour a present; that she had been very nice to him during the trial. About two weeks after this time Mr. Creekmore called Mr. Braley up by long-distance telephone, and said, "This is Creek," and that he and his wife had been out of town, and they wanted to be at home when Mrs. Braley and Mrs. Seymour came up. Mr. Braley told him that Mr. Seymour said he did not think Mrs. Seymour could go. Mr. Creekmore said he wanted to make Mrs. Seymour a present, and Mr. Braley said, "What do you want to give her?" and Mr. Creekmore said, "$200;" and Mr. Braley said, "All right, how do you want to give it to her?" Mr. Creekmore said, "Well, I will send you a check;" but Mr. Braley said, "No, give that to me when I am at Joplin again some time;" and that was the end of that conversation. About two weeks after that Mr. and Mrs. Braley were going down the street one afternoon and met Mrs. Seymour, and Mrs. Braley said to Mr. Braley, "She did not speak to me, and I feel like Mrs. Seymour is expecting something, and I think that we have done her wrong;" and Mr. Braley said, "Well, if she feels that way, I would rather pay it out of my own pocket, if I never get it back." Mr. Braley then, on March 15th, gave his personal check to Mrs. Braley for $200. It appears that Mrs. Braley cashed this and took $150 in currency into the store where Mr. Seymour was working

and handed it to him. About two or three weeks later Mr. Braley received a long-distance call, and the party said, "This is Creek" (which was a name frequently applied to Creekmore), and the person talking said he was going to be away again, and wanted to know what had been done about the Seymour Case, and Mr. Braley said, "I have paid it;" and the party talking said, "I will send you a check down." About April 7th Mr. Braley received a draft drawn by the First National Bank of Tulsa on the Southwest National Bank of Commerce of Kansas City payable to Mr. Braley. It was received by mail and was unaccompanied by any letter. Mr. Braley states that no one else owed him just $200 except Mr. Creekmore, and the money was accepted in payment of the amount he had advanced to his wife.

The records of the bank at Tulsa show that this draft was issued for Moses E. Miller, who was one of the defendants in the case 1507; but the case was continued as to him on account of his illness, of which he subsequently died, and he was not at Tulsa when this draft was drawn, and was unable to transact any business at that time. Mr. and Mrs. Seymour were both witnesses, and in all substantial respects testified to the same state of facts as the Braleys, so far as the facts were within their knowledge. Mrs. Seymour testified that after her first talk with Mrs. Braley, and in her talk that evening with Mr. Seymour, she told him that she had been approached, and he told her to keep still, to be very careful about what she said; that later that night the Braleys came to her house, and Mrs. Braley told her, "You just tell him for us that we have been here, and it will be worth his while if he will hang the jury;" that Mrs. Braley insisted, and Mrs. Seymour was talked into it, and she spoke to her husband the next morning, and he said, "Nothing doing," that one day her husband came home and gave her $150, said Mrs. Braley came into the store and handed him this bundle of money, and she deposited it to her credit in the First National Bank of Muskogee. Mr. Seymour testified that at the time he was manager of the Varsity Clothes Shop. He testified that his wife telephoned him that their friends on Capitol Hill had suggested to her that she say to him that they would make it worth his while if he would hang the jury in the Creekmore case; that he told her to keep still, and the next morning she advised him that their friends had been to their home, and had talked to her as they had in the afternoon, and that they would make it worth his while to vote for acquittal or hang the Creekmore jury; that he then told her there was nothing doing; that subsequently, when he was in the store where he was employed, Mrs. Braley came into the store to make some purchases, actually or ostensibly, and she handed him a roll of money containing $150 without any remarks whatever; that the next morning, March 16th, he deposited the money in his wife's name; that Mrs. Braley did not owe him anything at the time she made this payment, and no one else owed him that sum. The Braleys and the Seymours had never exchanged calls prior to this event, but Mr. Braley was a customer of the Varsity Store.

From the evidence, of which we have given but a brief synopsis, we think it was shown beyond all reasonable doubt that a success-

ful effort was made to corrupt the juror Seymour; that this was well known to Mrs. Creekmore, and that her husband must, by his whole course of conduct, have been deemed to have knowledge of it; that he was informed by Mrs. Braley that things were going all right with Seymour before the trial ended; that he sent for Mr. Braley for the sole purpose of arranging to have Mrs. Seymour go up to Joplin, that he might there make her a present; that the invitation was extended indirectly to Mrs. Seymour to go to Joplin for that purpose; that he subsequently decided that $200 was the amount he wanted to pay her; that twice or three times he called up the Braleys 130 miles away by telephone; that finally, when Braley had paid the money, he promised to send a check for it; that the draft for $200, which was sent from Tulsa, was sent by him; that this was a gross contempt of court, and one which, if tolerated, would bring more of disgrace upon it than was brought upon the English courts by the corruption of Lord Bacon.

Numerous objections were made and overruled to the evidence to which we have referred, and a demurrer was filed to the evidence at the close of all of it but none of them were in our judgment well taken.

Error is assigned upon the findings of the court, but we think they were well sustained by the evidence.

[3] It is insisted that the court exceeded its power in sentencing the defendant to imprisonment in the penitentiary for the term of a year and a day. We have seen that the Judicial Code authorized the federal courts to punish by fine or imprisonment, at the discretion of the court, for contempt of their authority. There is nothing in the statute which limits where the imprisonment shall take place, except the discretion of the court. While it is true that this statute limited the power to punish for contempt, it is either declaratory of the common law or broadened it as to punishment in contempt cases. It expressly declared that the length of imprisonment and its place should be in the discretion of the court.

This court having in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, 201 Fed. 20, 120 C. C. A. 582, with some elaboration set forth some seven or eight matters in which the authorities settle that a criminal contempt proceeding is not a criminal case or a criminal proceeding, it now becomes necessary to turn to the question as to in what respects such a criminal contempt proceeding may be said to be a criminal case or a criminal proceeding.

In Durant v. Washington County, 1 Woolw. 377, 8 Fed. Cas. No. 128, Mr. Justice Miller, delivering the opinion for the District Court of the United States for the District of Iowa, said:

"We are satisfied, however, upon consideration, that a prosecution for contempt of court is a criminal proceeding, in which the government is interested as plaintiff, and that, whenever it becomes necessary for the government's attorney to appear to vindicate its authority as represented in the courts, it is his duty to do so."

In Gompers v. United States, 233 U. S. 604, 610, 34 Sup. Ct. 693, 695 (58 L. Ed. 1115, Ann. Cas. 1915D, 1044), the court, by Mr. Justice Holmes, said:

"It is urged in the first place that contempts cannot be crimes, because, although punishable by imprisonment and therefore, if crimes, infamous, they are not within the protection of the Constitution and the amendments giving a right to trial by jury, etc., to persons charged with such crimes. But the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal; it is to be gathered, not simply by taking the words and a dictionary, but by considering their origin and the line of their growth. Robertson v. Baldwin, 165 U. S. 275, 281, 282 [17 Sup. Ct. 326, 41 L. Ed. 715.] It does not follow that contempts of the class under consideration are not crimes, or rather, in the language of the statute, offenses, because trial by jury, as it has been gradually worked out and fought out, has been thought not to extend to them as a matter of constitutional right. These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes, as that word has been understood in English speech. So truly are they crimes that it seems to be proved that in the early law they were punished only by the usual criminal procedure (3 Transactions of the Royal Historical Society [N. S.] p. 147 [1885]), and that at least in England it seems that they still may be and preferably are tried in that way. See 7 Halsbury, Laws of England, 280, sub. v. Contempt of Court (604); Clements v. Erlanger, 46 L. J. (N. S.) 375, 383; Matter of Macleod, 6 Jur. 461; Schreiber v. Lateward, 2 Dick. 592; Wellesley's Case, 2 Russ. & M. 639, 667; In re Pollard, L. R. 2 P. C. 106, 120; Ex parte Kearney, 7 Wheat. 38, 43 [5 L. Ed. 391]; Bessette v. W. B. Conkey Co., 194 U. S. 324, 328, 331, 332 [25 Sup. Ct. 793, 49 L. Ed. 630]; Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 441 [31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874]."

In that case the court held that the statute of limitations with reference to ordinary crimes (Revised Statutes, § 1044 [Comp. St. 1913, § 1708]):

"No person shall be prosecuted, tried or punished for any offense not capital * * * unless the indictment is found or the information is instituted within three years next after such offenses shall have been committed"

—applies to criminal contempt cases.

[4] With the exceptions noted in our opinion in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, supra, and perhaps some others, a criminal contempt is a crime, and a criminal contempt proceeding is a criminal proceeding, for all purposes, and one adjudged guilty of a criminal contempt may be properly characterized as a convict. Webster's New International Dictionary defines "convict" as:

"A person proved guilty, by a competent tribunal, of a criminal offense; esp., a person convicted of and under sentence for a felony or a serious crime."

There is no doubt that the defendant has been "proved guilty of a criminal offense," and, if we turn to the more restricted definition, the bribery of a juror is a "serious crime." It is provided in section 335 of the Criminal Code that:

"All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors." Act March 4, 1909, c. 321 (35 Stat. 1152 [Comp. St. 1913, § 10509]).

Assuming that criminal contempts are offenses in the meaning of this statute, as they are in the holding of the Supreme Court in

the Gompers Case, supra, under Revised Statutes, § 1044, we must either assume that a defendant may be sentenced to prison for more than a year or that a statute which provides that the defendant may be punished by imprisonment at the discretion of the court in some mysterious way means that the discretion is limited to one year, without that thought being expressed. It will be observed that section 335, in defining felonies, said nothing about penitentiaries. It is the length of possible imprisonment that fixes whether the offense is a felony or a misdemeanor. It must be borne in mind that, while nearly all of the states have both penitentiaries and jails, the United States has no prisons except its penitentiaries, save as it has the use of state institutions. We see no reason why, under Judicial Code, § 268, the court could not sentence a guilty party for a year and a day, and, if it had this power, then section 335 of the Criminal Code made it a felony. With this conclusion, substantially the entire argument against his sentence to the penitentiary falls to the ground.

[5] It seems to be conceded that if the court could sentence a defendant in a criminal contempt case for more than a year, and if his guilt was an offense under Rev. St. § 5541, then under that section as amended he could be sentenced to the penitentiary. The Supreme Court has held that a criminal contempt is an offense under R. S. § 1044, and we see no reason for holding that it is not an "offense" under Criminal Code, § 335, and under R. S. § 5541. In Re Savin, 131 U. S. 267, 9 Sup. Ct. 699, 33 L. Ed. 150, for an unaccepted offer to bribe a witness Savin was sentenced to a year in jail, and the judgment was affirmed.

The question therefore at once arises: Is an order that a defendant in a criminal contempt case be imprisoned a year within the "discretion of the court" but a sentence for a year and a day beyond it? We have neither seen nor heard any argument which so convinces us, and if a sentence of a year and a day is within the discretion of the court, we find that it is an offense within section 5541 and the various amendments thereof, and the sentence could and must be in the penitentiary. Even under state laws many persons are confined in the penitentiary for safe-keeping and the like who have never been convicted of any offense and may never be.

Under the act on contempt the defendant might be sentenced according to the period of the sentence to imprisonment in the custody of the marshal, or in jail, or in the penitentiary. Substantially none but state court decisions are cited to the contrary, and of course they are not binding upon the federal courts. Notable among the cases thus cited are Rogers Manufacturing Co. v. Rogers, 38 Conn. 121, 123, a contempt case; Cheaney v. State, 36 Ark. 74; State v. McNeill, 75 N. C. 15; Horner v. State, 1 Or. 267; Brooks v. People, 14 Colo. 413, 24 Pac. 553, and Ex parte Cain, 20 Okl. 125, 93 Pac. 974, misdemeanors. Nor are we oblivious of the fact that the Supreme Court of Iowa rendered a somewhat similar decision in Flannagan v. Jepson, Judge, 158 N. W. 641, in a contempt case.

While we could, if we saw fit, point out many reasons why these cases are either unsound or inapplicable, suffice it to say that they

do not attempt to pass upon the question of the power of a federal court to sentence to the penitentiary for contempt.

The defendant has argued that, if a contempt be a felony and the defendant a convict, the provisions of the various amendments to the Constitution of the United States will protect him against a summary trial; but we have already pointed out in Merchants' Stock & Grain Co. v. Board of Trade of Chicago, supra, that this is not true. If there seems to be any conflict between declaring a criminal contempt a felony and then declaring that the defendant is not entitled to the protection of the amendments to the Constitution, the explanation is to be found in the announcement first made by Chief Justice Fuller in O'Neal v. United States, 190 U. S. 36, 23 Sup. Ct. 776, 47 L. Ed. 945, and repeated in Bessette v. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997, that "proceedings in contempt may be said to be sui generis." In passing, attention may be called to the fact that in this case of O'Neal v. United States, supra, it was held that contempt cases were criminal cases within the law with reference to writs of error.

A most careful and elaborate argument has been filed for the purpose of establishing that Act March 1, 1895, 28 Stat. 693, was repealed in toto by the admission of Oklahoma into the Union, and there being no crime known to the law, such as the defendant and others were indicted for, the court had no jurisdiction, and therefore it was not a contempt of court to influence one of the jurors in that case. While this argument is very interesting, it cannot be accepted by us. The Supreme Court has at least three times held the statute in question was not repealed, except in part, by the admission of Oklahoma. Ex parte Webb, 225 U. S. 663, 32 Sup. Ct. 769, 56 L. Ed. 1248; United States v. Wright, 229 U. S. 226, 33 Sup. Ct. 630, 57 L. Ed. 1160; Joplin Mercantile Co. v. United States, 236 U. S. 531, 35 Sup. Ct. 291, 59 L. Ed. 705. And until the Supreme Court shall modify that holding, if ever, its decisions are conclusive upon us.

If we have failed to note in this opinion any of the points raised in the 350 printed pages of brief and argument, it is not because they have not been considered, as they have been gone over with all the care possible.

The judgment of the District Court is affirmed.

BLUE RIDGE ELECTRIC CO. v. AMERICAN BANK NOTE CO.

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

No. 2969.

1. EQUITY ⊂=3—JURISDICTION—INCIDENTAL JURISDICTION.
A court of equity may administer a bare common-law remedy when, and only when, it is incidental to the enforcement of some equity which gives the court jurisdiction.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 7–12; Dec. Dig. ⊂=3.]

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

2. EQUITY ⊜43—JURISDICTION—REMEDY AT LAW.
A court of equity *held*, on the evidence, without jurisdiction to render a money decree against a defendant corporation, based on the claim that defendant had assumed the indebtedness of another corporation, the liability in such case being purely a legal one, and where it further appeared that complainant's claim had never been adjudicated, was disputed by defendant, and that the alleged original debtor was not a party to the suit.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 121–140, 164–166; Dec. Dig. ⊜43.]

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

Suit in equity by the American Bank Note Company against the Blue Ridge Electric Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 230 Fed. 911.

R. C. & P. H. Alston, of Atlanta, Ga., and H. H. Dean, of Gainesville, Ga., for appellant.

Henry A. Alexander, of Atlanta, Ga., for appellee.

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

CALL, District Judge. The theory upon which the original bill was filed in this case was that the defendant had acquired all the property of the North Georgia Electric Company from S. Fahs Smith, who had bought it under a foreclosure decree, acting as the agent of the secured and unsecured creditors of said last-named company, of which unsecured creditors the complainant was one; that all the unsecured creditors, except complainant, had been satisfied, and that the defendant had then subject to its control certain of the securities issued by it for the purchase of the property; that the stockholders of the debtor company had also received a certain proportion of stock in the Georgia Power Company in exchange for stock held in the debtor company; that this was a fraud upon its rights—and prayed that the transaction be decreed illegal and void against it, that its claim be established as a first lien on the assets and properties of the North Georgia Electric Company, and that the enforcement of the same be provided for by foreclosure and sale. To this bill a demurrer was interposed by the defendant on July 31, 1912.

The pleadings remained in this condition until April 19, 1913, when the complainant amended its bill, by alleging the subscription contract by S. Fahs Smith with the defendant to take its full issue of stock and bonds and stock of the Georgia Power Company, for which he was to convey to the defendant all the assets and properties of the North Georgia Electric Company and the Etowah Power Company, bought by him at the foreclosure sale, and have the defendant execute a lease of such portion of the properties to the Georgia Power Company as it should desire, with the contract to sell when desired, and the lease made pursuant to such subscription contract. Such amendment also

set up transactions between the Georgia Power Company and the Georgia Railway & Power Company, whereby the properties were conveyed by the last-named company, and prayed that the Georgia Railway & Power Company be made a party defendant, and that a lien be set up and established in favor of the complainant upon said properties in the ownership of said Georgia Railway & Power Company. And it further amends by adding the following passages: That in addition to the relief hereinbefore prayed, and in addition to the liens against the property and assets of the North Georgia Electric Company, that a general judgment be rendered in its favor against the original defendant, the Georgia Power Company, and the Georgia Railway & Power Company.

This amendment was allowed by the trial judge on May 1, 1913. On the same day the demurrer theretofore interposed was overruled, without prejudice to the defendant's right to set up any insufficiency in the bill by way of answer. Thereupon, on the 16th of May, 1913, the Blue Ridge Electric Company filed answers to both the original bill and the amendment. On September 23, 1913, in response to certain motions by complainant, it filed an amended answer, setting up, in addition to matters theretofore pleaded in defense, that the complainant intervened in the original foreclosure suit, and propounded its claim, and had same allowed. Whereupon, on October 1, 1913, the complainant again amended its bill, and alleged that it neither by itself nor by any authorized agent intervened in said suit, nor received or retained any payment pursuant to said decree of foreclosure, and that in any event other unsecured creditors intervened and were allowed their claims, received payments thereunder, and received first mortgage bonds of the Blue Ridge Electric Company for their claims.

Thereupon, on October 2, 1913, the Blue Ridge Electric Company filed its motion to dismiss the bill, because not proper parties, the North Georgia Electric Company not being a party; the claim never having been reduced to judgment the complainant cannot proceed in equity against this defendant; and because, under the allegations of the bill as amended, it shows that S. Fahs Smith was its trustee and received the contract price in the securities of the defendant.

Thereupon, on October 3d, the complainant again amended its bill, alleging that upon the appointment of the receiver the North Georgia Electric Company was stripped of its properties and ceased to do business, and so notified the Secretary of State of Georgia, ex officio corporation commissioner, abandoned its office in Gainesville, Ga., and ceased making reports. Whereupon, on October 8, 1913, the Blue Ridge Electric Company renewed its motion to dismiss theretofore filed, and moved further to dismiss because:

(1) The petition as amended shows complainant has never recovered judgment against the North Georgia Electric Company.

(2) The alleged account is not recognized as valid by the defendant in this cause.

(3) The plaintiff must first obtain a common-law judgment against the debtor and have execution issued and returned.

(4) The North Georgia Electric Company is not a party and the claim asserted is a breach of a simple contract with said company.

(5) There is no equity in the bill as amended.

(6) The court of equity has no jurisdiction to entertain plaintiff's suit under the allegations of the bill.

(7) The North Georgia Electric Company has a right to a jury trial under the Constitution, and this suit violates the Seventh Amendment.

(8) That the bill as amended shows that the assets and property formerly belonging to the North Georgia Electric Company have been sold and transferred to the Georgia Power Company.

(9) That the bill shows the defendant has no property or proceeds thereof impressed with a trust in favor of complainant.

(10) The allegations of the last amendment are insufficient to show the nonexistence of the North Georgia Electric Company, as required by sections of the Georgia Code.

On October 31, 1913, the complainant again amended its bill by leave of court, setting up the sale under foreclosure decree, the confirmation of same, the conveyance by S. Fahs Smith to the Blue Ridge Electric Company, and the conveyance by the last-named company to the Georgia Power Company, as well as the entire stock of the company; the conveyance from the Georgia Power Company to the Georgia Railway & Power Company, the last-named company assuming all the debts and liabilities of the Georgia Power Company; pleading section 2609 of the Georgia Code; that the Georgia Railway & Power Company at the date of the suit owned all the stock of the Blue Ridge Electric Company and the Georgia Power Company; that C. Elmer Smith and Eugene Ashley took active part in the organization of said Georgia Railway & Power Company, and said C. Elmer Smith is and has been since the organization a director in said company. Again the defendant filed a motion to dismiss, insisting upon all the grounds set out in motions to dismiss theretofore filed. The motion to dismiss the bill was on the 3d day of January, 1914, denied. Following the order denying the motion to dismiss, the court says:

"I have determined already that the Georgia Railway & Power Company should be stricken as a party defendant, because the complainant has no lien, which would be necessary to a proceeding against it."

At any rate the Georgia Railway & Power Company has never, so far as the record shows, been made a party defendant, and the only defendant ever appearing on the record is the Blue Ridge Electric Company. Motions were made by complainant for better answer in certain particulars, and, the court having granted the motion as to certain particulars, answer was made as to those particulars. The case was tried by the judge, and a decree rendered on June 16th in favor of the complainant and against the defendant for $10,283.62 and costs of court.

From this decree defendant appeals to this court. There are some 20 errors assigned. It will not be necessary to notice each of said assignments in detail. The judge below clearly indicated in his opinions appearing in the record that the case was decided on the view that the defendant had assumed the payment of this debt to the complainant.

As before stated, the theory of the complainant when it filed its bill was that the defendant took the property subject to the trust that an insolvent corporation's property must be first applied to the pay-

ment of its debts before the stockholders can receive any benefit therefrom; and had the cause continued in this view and the evidence supported the allegations, there was equity in the bill. Evidently the lower court found the evidence did not support this contention, and the appellee in his brief does not so contend. By the first amendment to the bill, made on April 19, 1913, whereby it was sought to make the Georgia Railway & Power Company a party defendant, the complainant incorporated an additional prayer for a money judgment against the original defendant, as well as against the Georgia Power Company and the Georgia Railway & Power Company, and it was in pursuance of this last prayer that the decree was rendered in this case.

[1] It is a principle of equity too well settled to require citation that, in a case where an equity exists, this equity will draw to itself all questions in the case necessary to be decided, and the chancery court will by its decree settle all questions arising in the case, although as to some of the questions, if raised independently, equity would have no jurisdiction, and a common-law court could afford a full and adequate relief. It is equally well established, however, that if this equity, upon which depends the jurisdiction of the chancery court, fails, that court may not proceed and administer a bare common-law remedy.

The facts of the case, as gathered from the pleadings and the evidence germane to the issues, may be stated as follows:

In 1907, the North Georgia Electric Company, a Georgia corporation, was in financial difficulties, if not insolvent. It had issued three series of bonds—the first in 1902, for $200,000; the second in 1904, for $250,000; and the third in 1906, for $491,000. The Knickerbocker Trust Company was the trustee in each case. In September, 1907, the Knickerbocker Trust Company filed its bill in the United States Circuit Court for the Northern District of Georgia to foreclose the mortgage given in 1906 to secure the last issue of bonds. In this condition of affairs, W. A. Carlisle, the president of the North Georgia Electric Company, sought to interest certain parties in the reorganization of the company, and C. Elmer Smith and Eugene Ashley took an interest in the matter. The plan evolved to do this was by the issue of additional stock and new bonds, the new bonds to be exchanged for the secured and unsecured indebtedness; and in pursuance of this plan the complainant entered into an agreement with C. Elmer Smith as manager on July 1, 1908, subscribing for $8,976.60, of the bonds, to be paid for by assigning claim for $7,405.70, difference, if any, to be adjusted by cash payment. This plan failed of consummation, and the agreement was returned to the complainant.

In May, 1909, the Georgia Power Company entered into an agreement with the Atlanta Power Company to purchase the assets and properties of said Atlanta Company, and wherein the Atlanta Company undertook to acquire the properties and assets of the Etowah Power Company and the North Georgia Electric Company and convey same to the Georgia Power Company, all of such property to be as far as possible free from all incumbrances and liens, and ac-

cept in payment therefor $1,550,000, par value of the common capital stock of the Georgia Company, and $1,550,000, par value, of the first mortgage bonds of said company; the securities to be apportioned as follows; $550,000 of the capital stock and $1,000,000 of the bonds in payment for the properties of the North Georgia Electric Company. Thereafter, in June, 1909, the Atlanta Power Company and various stockholders of the North Georgia Electric Company entered into an agreement to deposit their stock with the Carnegie Trust Company, and the Atlanta Power Company would exchange with the subscribers, holders of unsecured notes and open accounts, referred to in schedule attached (the complainant being therein mentioned, but for no specific amount), first mortgage bonds of the Georgia Power Company at par for said notes and open accounts, plus interest to date of exchange. In May, 1909, C. Elmer Smith and Eugene Ashley were appointed a committee to open negotiations with the stockholders pursuant to the agreement between the Atlanta Power Company and the Georgia Power Company, and the contract of June, 1909, above mentioned was presumably the result of this appointment. Outside capital having been interested in the Georgia Power Company's affairs, authority was obtained from the Georgia Railroad Commission by said company to issue $10,000,000 of stock and $10,000,000 of bonds to provide for certain improvements.

The cause of Knickerbocker Trust Company v. North Georgia Electric Company was pushed, and resulted in the appointment of a receiver for all its properties, and a final decree of foreclosure and sale thereunder was had in May, 1910, subject to the first and second issue of bonds heretofore mentioned. At this sale S. Fahs Smith purchased the property of the North Georgia Electric Company, bidding therefor the sum of $400,000. Previous to this purchase the said S. Fahs Smith, the Georgia Power Company, and the holders of the bonds secured by the deed of trust, being foreclosed, entered into an agreement wherein the bondholders agreed to deposit with S. Fahs Smith, as trustee, the bonds held by each, to be used in the purchase of the property at the sale under foreclosure, and the trustee agreed that, if he purchased said property at such sale, he would hold the title to same for the benefit of each of said subscribers in proportion that the subscribers' bonds bear to the whole issue, and convey same to the Georgia Power Company upon certain terms therein contained, to wit, on receipt of certain bonds of the Georgia Power Company to be delivered by the said trustee to the subscribers therefor. The agreement contains provisions not necessary to notice in this connection. It having been decided, on account of arrangements made for additional capital, that the Georgia Power Company could not receive title to the properties purchased at the foreclosure sale, S. Fahs Smith organized the Blue Ridge Electric Company in November, and subscribed for the entire issue of stock of $50,000 and $1,370,000 of bonds, to be paid for by conveying to it the properties of the North Georgia Electric Company and the Etowah Power Company purchased by him. This subscription provided that certain of the properties should be leased to the Georgia

Power Company. The subscription also provides that he is to receive $1,550,000 of the capital stock of the Georgia Power Company.

After the organization of the Blue Ridge Electric Company, the Georgia Power Company transferred or assigned to it the contract theretofore made with the Atlanta Power Company. The assent of the Atlanta Power Company may be presumed, as it held the capital stock of the Georgia Power Company. On January 10, 1911, S. Fahs Smith conveyed all the properties acquired by him at said sale to the Blue Ridge Electric Company; and the Blue Ridge Company in September following conveyed all its property to the Georgia Power Company. This last-named company received a transfer of all the stock of the Blue Ridge Electric Company. On March 16, 1912, before this bill was filed, the Georgia Power Company conveyed all its property to the Georgia Railway & Power Company. By a payment in cash for certain of the properties the Blue Ridge Electric Company retired $235,000 of its bonds, thus leaving outstanding $1,135,000 of bonds. The proofs show that the stockholders of the North Georgia Electric Company received from the Atlanta Power Company shares of stock of the Georgia Power Company, in the proportion of 1 to 4 of their holdings in the Georgia Electric Company, and that the bondholders of said last-named company received the bonds of the Blue Ridge Electric Company for bonds held by them, as well as the persons holding unsecured claims, and that the complainant did not. The proofs further show that C. Elmer Smith and Carlisle, the president of the North Georgia Electric Company, after the failure of the plan first attempted, each wrote a letter to the complainant that its claim would be protected.

[2] The decree in this case can be sustained only on the ground that there was a direct assumption of the payment of this claim by the defendant; and this contention seems to be based upon the letters of C. Elmer Smith and W. A. Carlisle, following upon the first plan of reorganization consented to by the complainant, but which was afterwards abandoned. The bill as first filed, and the contention maintained throughout the pleadings, was that S. Fahs Smith, the brother of C. Elmer Smith, in the purchase of the corporation properties under the foreclosure sale, was acting as trustee, not only for the secured creditors, but also for the unsecured. This contention, in the light of the testimony, is not supported. His duties and responsibilities are to be measured by the written instrument contained in the record, and this shows that he was trustee for the bondholders of the two corporations. The other contention in the original bill filed, which gave the court of chancery jurisdiction, and this contention had great weight with the trial court in overruling the demurrer, was that there were securities under the control of the defendant to be applied to the payment of the claim of defendant. On the rule of law contended for, and which is supported by the authorities, that a reorganization of a corporation in failing circumstances by the formation of a new corporation, which takes over the property of the first, the stockholders retaining an interest in the second, will not prevent the unsecured creditors of the first corporation from pro-

ceeding against the second to collect their debts. This contention also falls in the light of the evidence adduced at the trial, and seems to have been abandoned by the complainant, when it added a prayer to its amended bill for a general judgment.

As the court now understands the contention of the complainant, it is that the complainant assented to the transfer of the corporate property to Smith, and from Smith to the defendant, understanding that it would receive bonds for its claim, and that the defendant assumed the payment of the same in that method. Granting for the moment that this contention is correct, then the defendant is a debtor of the complainant on a bare legal liability, and a court of equity would be without jurisdiction to grant the decree made in this case. But did the defendant assume the payment? Great reliance was placed by the lower court, as evidenced in its opinion, upon the letters of Smith and Carlisle, before referred to, and upon the fact that this Smith, Ashley, and Carlisle were largely instrumental in the formation of the different corporations taking part in the transactions that culminated in the acquisition of the properties of three corporations by the Georgia Railway & Power Company, and that this last-named corporation acquired all the capital stock of the defendant. The proofs in the case do not show, in our judgment, that the defendant ever assumed the payment of this claim.

We are not unmindful of the principles announced in Northern Pacific Railway Co. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931, and the many cases therein cited, and the case of Central of Ga. Ry. v. Paul, 93 Fed. 878, 35 C. C. A. 639; but the facts of these cases bear no resemblance to the facts of the instant case, and the relief sought is entirely different. In the Paul Case the property and the rights were in process of settlement by the court, and the claim of the intervener had been adjudicated, and the amount fixed. In the instant case the claim of complainant has never been adjudicated, except it be on the intervention filed in the foreclosure proceeding, and that adjudication was repudiated, and the repudiation acquiesced in by all parties, apparently. Now, if the defendant assumed the payment of this claim (leaving out of consideration the jurisdiction of equity to grant the relief), then probably the presence of the original debtor might not have been necessary; or if the property of the corporation was received by the defendant, subject to the express trust to pay complainant, the presence of the original debtor would probably not have been necessary. But, in the absence of one or the other of these facts, it does seem that the presence of that debtor is necessary to litigate a disputed claim, and the existence of this claim as a binding debt was disputed. True, it had been recognized by others; but it was being asserted against this defendant, and was disputed by it, and, however clearly its genuineness may have been established by the testimony admitted, the debtor was not before the court, and the question of its indebtedness vel non could not be litigated without the presence of the debtor.

It does not answer this position to say the debtor was virtually before the court, because Ashley, Smith, and Carlisle were all in-

strumental in forming the corporations, and one corporation owned the stock of others, and that the defendant was the alter ego of the debtor corporation. There was no such consolidation or merger as made the defendant the alter ego of the two corporations, whose properties it received as a conduit to pass title to the Georgia Power Company.

We have not attempted to discuss seratim the assignments of error, but have reached the conclusion that the decree of the trial court should have dismissed the bill.

The case will therefore be reversed and remanded, with instructions to dismiss the suit.

JOHNSON-BAILLIE SHOE CO. et al. v. BARDSLEY, ELMER & NICHOLS.

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

No. 4670.

1. COURTS ⊕359—PRECEDENCE—FEDERAL COURT.
   In determining whether a chattel mortgage is a conveyance working a fraud on creditors, the state law governs.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 939–949; Dec. Dig. ⊕359.]

2. BANKRUPTCY ⊕57—FRAUDULENT CONVEYANCES—"ACT OF BANKRUPTCY"—CHATTEL MORTGAGES.
   A chattel mortgage provided that the mortgagors, who were engaged in the mercantile business and the total of whose debts amounted to about $8,000, might remain in possession of their property, which was worth about $12,000, disposing of it in the ordinary course of the business, applying the proceeds first to the payment of the expenses of the business, next to the payment for property pprchased to replenish the mortgaged property, and last to the reduction of the mortgage debt. The mortgagee was the largest creditor. When the mortgage was made, one of the mortgagors expected to obtain a loan on real property, which would be used to discharge the debt, and for that reason, until the loan was refused, the mortgage was withheld from record. *Held* that, under the Utah laws, the mortgage was not invalid as a conveyance intended to hinder, delay, or defraud creditors of the mortgagors, and so did not amount to an "act of bankruptcy," within Bankr. Act July 1, 1898, c. 541, § 3, subd. 1, 30 Stat. 546 (Comp. St. 1913, § 9587).
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69–79; Dec. Dig. ⊕57.
   For other definitions, see Words and Phrases, First and Second Series, Act of Bankruptcy.]

3. BANKRUPTCY ⊕57—ACTS OF BANKRUPTCY—"DELAY OF CREDITORS."
   As a debtor has the right until the commencement of bankruptcy proceedings to dispose of his property to secure and pay his debts with it, and to prefer one creditor over others, the giving of a chattel mortgage by a debtor to one of his creditors does not amount to a conveyance with intent to hinder, delay, or defraud creditors, made an act of bankruptcy by Bankr. Act, § 3, subd. 1, where the only intent to hinder, delay, or defraud creditors is to give the mortgagee priority; the subdivision having the same meaning as the statute of Elizabeth.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69–79; Dec. Dig. ⊕57.]

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4. BANKRUPTCY ⊜91(1)—ACTS OF BANKRUPTCY—BURDEN OF PROOF.
Creditors, contending that a debtor's execution of a chattel mortgage was an act of bankruptcy, being a conveyance to hinder, delay, or defraud creditors, have the burden of proof.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 137; Dec. Dig. ⊜91(1).]

5. BANKRUPTCY ⊜57—ACTS OF BANKRUPTCY—EVIDENCE—SUFFICIENCY.
A debtor's execution of a chattel mortgage in favor of his largest creditor *held*, under the evidence, not to be a conveyance intended to hinder, delay, or defraud creditors, which act constitutes an act of bankruptcy, within Bankr. Act, § 3, subd. 1.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 57, 66, 69–79; Dec. Dig. ⊜57.]

6. CHATTEL MORTGAGES ⊜60—EXECUTION—VALIDITY.
The Utah laws require the attestation of a chattel mortgage by a subscribing witness to qualify it for record. The assistant credit manager of the mortgagee, who secured the mortgage for his principal, is, there being no statutory prohibition, competent to attest the execution of the mortgage.
[Ed. Note.—For other cases, see Chattel Mortgages, Cent. Dig. § 115; Dec. Dig. ⊜60.]

Appeal from the District Court of the United States for the District of Utah; Tillman D. Johnson, Judge.

Petition by the Johnson-Baillie Shoe Company, a corporation, and others, against Bardsley, Elmer & Nichols, a partnership, for adjudication of defendants in bankruptcy. From a decree dismissing the petition, petitioners appeal. Affirmed.

J. D. Skeen, of Salt Lake City, Utah (D. A. Skeen, of Salt Lake City, Utah, on the brief), for appellants.

A. E. Pratt, of Ogden, Utah, for appellees.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

SANBORN, Circuit Judge. The appellants, petitioners below, filed their petition in the District Court for an adjudication of bankruptcy of the defendants below, Bardsley, Elmer & Nichols a partnership. The defendants answered, the issues were tried on their merits, and the court found for the defendants and dismissed the petition. The appellants insist that the decree was erroneous for three reasons: (1) That the chattel mortgage made by the defendants to one of their creditors, John Scowcroft & Sons Company, a corporation, in itself constituted the act of bankruptcy denounced by section 3, subd. 1, of the Bankruptcy Law, 30. Stat 544, 546, c. 541 (U. S. Comp. St. 1901, pp. 3418, 3422; 4 U. S. Comp. St. 1913, p. 4364, § 9587, subd. 1), that is to say, a conveyance of their property with intent to hinder, delay, or defraud their creditors; (2) that the chattel mortgage and the other evidence in the case proved that the defendants made the mortgage with that evil intent; and (3) that the fact that the only witness to the mortgage was the agent of the mortgagee disqualified the mortgage for record, and rendered it a

conveyance with the intent of the defendants to hinder, delay, and defraud their creditors.

[1, 2] The defendants were conducting the business of retail merchants with a general stock of merchandise in the town of Milford in the state of Utah. They were indebted to the Scowcroft Company, which was selling goods to them, in the sum of $3,000 and to other creditors to the amount of $4,000 or $5,000. The value of their property was about $12,000. One of the defendants had applied to a loan company for a loan of $3,000 on his individual real estate, which the defendants and the Scowcroft Company hoped and expected he would obtain in a few days, and that with it the defendants would reduce their indebtedness. The defendants had been indebted to the Scowcroft Company on their promissory notes for six months or more in the sum of $3,554.91; they had paid $554.91 of this debt in January, 1915, and on March 27, 1915, they made the chattel mortgage in question of their stock of goods and other personal property to secure the payment of the remainder of this indebtedness to the Scowcroft Company which was then past due. The application for the loan of $3,000 was pending, and the mortgagee agreed not to record the mortgage until it was informed whether or not the application for the loan was granted. It was not granted, and on April 29, 1914, the mortgage was recorded. The petition for adjudication of bankruptcy was filed on August 24, 1915. The statutes of Utah provided that no mortgage of personal property without the delivery of such property to the mortgagee should be valid unless the mortgage, duly witnessed by at least one person, provided that the property might remain in the possession of the mortgagor and was filed in the office of the proper recorder. This mortgage provided that the mortgagors might remain in possession of the property, that they might dispose of it in the ordinary course of their business as then conducted that the proceeds of the sale should be applied first to the payment of the costs and expenses of the operation of the business, second to payment for property purchased to replenish the mortgaged property, and that the property so purchased should become subject to the mortgage, and third to the payment of the debt secured by the mortgage.

Did this mortgage in itself establish the intent of the mortgagors to hinder, delay, and defraud their creditors by its execution, and hence the act of bankruptcy specified in section 3, subdivision 1, of the Bankruptcy Law? That and all other questions as to the validity of this mortgage, on the ground of the defendants' intent to hinder, delay and defraud their creditors thereby, must be determined by the settled law of the state of Utah, where the property was situated and where the mortgage was made. Etheridge v. Sperry, 139 U. S. 266, 277, 11 Sup. Ct. 565, 35 L. Ed. 171. Counsel argue that this question must be answered in the affirmative, and cite in support of their position Robinson v. Elliott, 22 Wall. 513, 515, 22 L. Ed. 758; McKibbon v. Brigham, 18 Utah, 78, 55 Pac. 66; Nelden-Judson Drug Co. v. Bank, 27 Utah, 59, 74 Pac. 195.

In Robinson v. Elliott, 22 Wall. 513, 515 (22 L. Ed. 758), the chattel

mortgage was made in Indiana. It contained a provision that the mortgagors might retain the possession of the stock of goods, sell them as theretofore, and supply their places with other goods, which should become subject to the mortgage; but it contained no provision or condition that the proceeds of the sales, after paying expenses of operation and of the replenishment of the stock, should be paid to the mortgagees or applied to the payment of their claim. The Supreme Court of Indiana had not determined whether or not such a mortgage in itself established the intent of the mortgagors to hinder, delay, or defraud their creditors, and thereupon the Supreme Court of the United States held that it did establish that intent, because it allowed the mortgagors to sell the goods as their own and to appropriate the proceeds to their own purposes. But the court also said:

"We are not prepared to say that a mortgage under the Indiana statute would not be sustained which allows a stock of goods to be retained by the mortgagor, and sold by him at retail for the express purpose of applying the proceeds to the payment of the mortgage debt. Indeed, it would seem that such an arrangement, if honestly carried out, would be for the mutual advantage of the mortgagee and the unpreferred creditors."

And in Etheridge v. Sperry, 139 U. S. 266, 275, 11 Sup. Ct. 565, 35 L. Ed. 171, that court said that in that and other cases it had held that a chattel mortgage was valid, notwithstanding stipulations therein for possession of the property by the mortgagor, his sale of it in the usual course of business, his payment of the cost of operation and of replenishing the stock out of the proceeds of the sale, and the payment of the remainder of the proceeds on the claim of the mortgagee.

In McKibbon v. Brigham, 18 Utah, 78, 84, 55 Pac. 66, 68, the mortgagor and mortgagee at the time the chattel mortgage was made entered into an oral contract that the mortgagor should remain in possession of the mortgaged stock of goods, sell them in the usual course of business, pay the expenses of operation, and pay over the proceeds to the mortgagee to apply on her claim. But they also agreed that it was not expected that the mortgage debt should be paid when it became due, but that it should be extended from time to time, "in order that the said Wright [the mortgagor] should continue in business as before said mortgage was given." The Supreme Court of Utah held that the mortgage was invalid, on the ground that the verbal agreement had the same effect it would have had if it had been written into the mortgage, and that the last clause of that agreement, to the effect that "the mortgage debt was not expected to be paid when due, but the time of payment should be extended from time to time, in order that the said Wright should continue in business," affirmatively evidenced the fact that the mortgage was intended as a shield and protection to the mortgagor. But there was no such clause in the mortgage, or in any contract of the parties to the mortgage, in the case now in hand.

In Nelden-Judson Drug Co. v. Bank, 27 Utah, 59, 65, 74 Pac. 195, 197, which was decided on a demurrer to a complaint in a suit to set

aside a chattel mortgage on a stock of goods, the Supreme Court of Utah held that the facts set out in the complaint, which it is unnecessary to recite here, were sufficient to render the mortgage void, but that "an agreement, expressed upon the face of a chattel mortgage, that the mortgagor may remain in possession of the goods, and sell the same in payment of the debt, does not, under our statute, * * * render the mortgage fraudulent and void." The above quotation, so far as we can ascertain, remains the established rule of law in Utah. The mortgage under consideration, therefore, did not in itself evidence an intent on the part of the parties to it, or of any of them, to hinder, delay, or defraud any of the creditors of the mortgagors, or the commission of the act of bankruptcy specified in section 3, subdivision 1, of the Bankruptcy Law.

[3] Do the chattel mortgage and the other evidence in the case establish the fact that this mortgage was made with the intent to hinder, delay, or defraud creditors, within the meaning of section 3, subdivision 1, of the Bankruptcy Law? An intent to hinder, delay, or defraud creditors unlawfully, not a mere intent to hinder or delay or defraud them so far as necessary to enable the mortgagee to collect his claim from the mortgaged property, by means of his mortgage, is indispensable to this intent. Until the commencement of bankruptcy proceedings a debtor has the right to dispose of his property, the right to secure and pay his debts with it, and the right to secure and pay one of his creditors in preference to others, provided the payment or security is not violative of any act of Congress or law of the state. There is no proof in this case that the chattel mortgage here in question violated any other provision of law than the part of section 3 which describes the first act of bankruptcy there mentioned. Hence the mere fact that the mortgage had the effect to prefer one creditor to another, or to hinder or delay other creditors until the mortgagee's claim could be collected, or even that it might have the effect to deprive other creditors of a means of obtaining payment of their claims, was not sufficient to constitute the act of bankruptcy charged, if the mortgage was given in good faith to secure the payment of an honest debt. Section 3, subdivision 1, must have the same construction as the statute of Elizabeth. An actual intent to hinder, delay, and defraud other creditors more than is necessary to secure the preferential payment of the debt of the mortgagee is essential to the act of bankruptcy there described. Coder v. Arts, 152 Fed. 943, 947, 82 C. C. A. 91, 95; Coder v. Arts, 213 U. S. 223, 243, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008; Lansing Boiler & Engine Works v. J. T. Ryerson & Son, 128 Fed. 701, 703, 63 C. C. A. 253, 255; Githens v. Shiffler (D. C.) 112 Fed. 505, 506, 507; In re Bloch, 142 Fed. 674, 676, 74 C. C. A. 250; Merchants' National Bank v. Cole, 149 Fed. 708, 711, 79 C. C. A. 414; In re McLoon (D. C.) 162 Fed. 575, 577.

[4, 5] The question here is, therefore: Was this mortgage given in good faith to secure the payment of the actual debt of the mortgagors, or was it given for the purpose and with the intent to shield the debtors from other creditors, and enable them to continue in business free

from attempts of the latter lawfully to subject the mortgaged property to the collection of their claims? The burden was on the appellants to prove the bad faith and evil intent which they charged. The court below heard the evidence, and found that the mortgagors had no intent to hinder or delay or defraud their creditors, and the presumption is that its finding was correct. All the evidence has been read by this court. It has considered all the facts which the evidence discloses, and among them the facts that, when the mortgage was made on March 27, 1915, the mortgagors owed about $8,000 and had personal property worth $12,000; that they owed the mortgagee $3,000 of this $8,000; that the mortgagee was their largest creditor; that its claim was past due; that it was furnishing them goods; that one of the mortgagors had applied for a loan of $3,000 from the "Western Loan" on his individual property, which they and Mr. Meckes, the assistant credit man of the mortgagee, who procured the mortgage for it, expected the partner would get in a few days, and with the proceeds of which the mortgagors were intending to pay $3,000 of their debts; that Meckes promised to withhold the chattel mortgage from the record until he learned whether or not the application for the loan was granted; that he recorded the mortgage on April 29, 1915; that nothing was paid on the mortgage debt until July; that meanwhile the mortgagors used some of the moneys received from their sales to pay small amounts to other creditors; that in July more rapid sales were made, and from $900 to $1,000 were paid from the proceeds upon the debt to the mortgagee; that one of the mortgagors testified that the mortgage was made to secure their debt to the Scowcroft Company in the hope and belief that in a few days they would have the $3,000 which had been applied for; and that it was not made with any intent to shield the mortgagors from, or to defraud, their creditors. The foregoing are the more important facts disclosed by the evidence. But neither they, nor the minor facts, which have not been recited, have proved sufficient to convince the court that the mortgagors made this mortgage with any intent to hinder, delay, or defraud any of their creditors.

[6] The statutes of Utah require the attestation of a chattel mortgage by the subscribing witness to qualify it for record, and this mortgage was attested by the signature of Mr. Meckes, the assistant credit man of the Scowcroft Company, who, in the discharge of his duty to secure and collect the claims of that company, procured and recorded the mortgage. It is contended that the mortgage and its record were void as to creditors under this statute of Utah, because Meckes was the agent of the mortgagee, and on that account disqualified to act as a subscribing witness to the mortgage, and Donovan v. St. Anthony & Dakota Elevator Co., 8 N. D. 585, 80 N. W. 772, 46 L. R. A. 721, 73 Am. St. Rep. 779, in which the Supreme Court of North Dakota holds that under the statute of that state the mortgagee is not competent to be a subscribing witness to a mortgage, is cited. But in Fisher v. Porter, 11 S. D. 311, 77 N. W. 112, 113, the Supreme Court of South Dakota held under a like statute that a mortgagee was a proper subscribing witness to qualify a mortgage for

record. However that may be, the general rule is that all persons of proper age and sound mind, who are not proved to be disqualified, are competent subscribing witnesses to the execution of a written instrument. There is nothing in the statutes of Utah or in the general law of the land forbidding the assistant credit man, or any other like agent, of an employer from becoming a competent subscribing witness to a mortgage or other conveyance to his principal, which he has secured in the discharge of his duties, and the position of counsel upon this subject is untenable.

The decree below is affirmed.

OTIS ELEVATOR CO. v. PALMETTO CONST. CO.

(Circuit Court of Appeals, Fourth Circuit. October 5, 1916.)

No. 1428.

1. FIXTURES ⟸9—TROVER AND CONVERSION ⟸10—ACTS CONSTITUTING.

Plaintiff prepared a written offer to furnish and install elevators in a building to be erected by defendant, which was discussed as to the price between representatives of the parties. The proposed contract contained a clause reserving title to the elevators in plaintiff until paid for. The contract was never executed, but later a similar contract was made between plaintiff and the general contractor for the construction of the building. Defendant paid the contractor, and afterward sold the building. The contractor did not pay plaintiff in full for the elevators. *Held*, that defendant was not chargeable as matter of law with the reservation of title, and could not be held liable for conversion, except on a finding that it had actual knowledge of such reservation.

[Ed. Note.—For other cases, see Fixtures, Dec. Dig. ⟸9; Trover and Conversion, Cent. Dig. §§ 84–94; Dec. Dig. ⟸10.]

2. FIXTURES ⟸31—BETWEEN OWNER OF REALTY AND CLAIMANT OF CHATTELS —NECESSITY OF OWNER'S CONSENT.

When personal property is so affixed to the soil or the building on it that it cannot be removed without serious injury to the property to which it is attached, it becomes a part of the realty, and consent of the owner of the realty, express or implied, is necessary to any agreement for its removal.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 62; Dec. Dig. ⟸31.]

3. FIXTURES ⟸27(3)—BETWEEN OWNER OF LAND AND CLAIMANT OF CHATTELS—RIGHT OF REMOVAL.

While an owner of land, with actual knowledge that a contractor is using the personal property of another without his consent in a building thereon, is required by good faith to notify the owner of the personal property, on the other hand, knowledge by the seller of a chattel that the contractor intends to affix it to the property of another, so that it will become a part of the realty, imposes upon him the obligation to see that he has the consent of the owner of the property to any conditions attached to the sale.

[Ed. Note.—For other cases, see Fixtures, Cent. Dig. § 5; Dec. Dig. ⟸27(3).]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Action at law by the Otis Elevator Company against the Palmetto Construction Company. Judgment for defendant, and plaintiff brings error. Affirmed.

J. B. S. Lyles, of Columbia, S. C. (Lyles & Lyles, of Columbia, S. C., on the brief), for plaintiff in error.

W. T. Aycock, of Columbia, S. C. (Weston & Aycock, of Columbia, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

WOODS, Circuit Judge. The defendant, Palmetto Construction Company, made an agreement with John Cain, a contractor, for the erection of an office building on its lot in the city of Columbia, S. C. Afterward on July 1, 1912, the plaintiff, Otis Elevator Company, contracted in writing with Cain to sell and install the elevators in the building for $30,822.50. By this contract the Elevator Company stipulated that it should "retain title to and possession of all machinery, implements, and apparatus furnished by us under terms of this proposal until final payment shall have been made." Cain made payments as the work progressed, but at its completion he turned out to be insolvent, owing the Elevator Company a large balance, of which $5,171.46 is still unpaid. In this action the Elevator Company asserts the liability of the Palmetto Construction Company for this unpaid balance, notwithstanding full payment by it to Cain of the contract price of the building and its subsequent sale of the property, including the elevators. The basis of this claim is the averment that the Construction Company's sale to an innocent third party was a conversion. The verdict of the jury was in favor of the defendant, and the case comes up on exceptions to the charge of the presiding judge.

Attention was paid in the argument to some nice distinctions as to the nature and form of the action. These are of no consequence, since it was in effect conceded in the trial court and here that, if the Elevator Company would have had a right to subject the elevators to the payment of the balance of $5,171.46 before the Construction Company sold the property, then that company is liable in this action. Therefore only the merits of the controversy are involved.

[1] The first position taken by the Elevator Company on the merits is that by the undisputed evidence the Construction Company was chargeable with notice of the reservation of title, and that, therefore, the District Court erred in refusing to direct a verdict for the plaintiff. The material evidence in short is this:

On February 12, 1912, Seibels and Matthews, together with Harter, the architect of the Construction Company, in behalf of that company, entered into negotiations in New York with the Elevator Company, which resulted in an agreement for the sale and installment of the elevators at the price of $30,500. This agreement was in the form of a written proposal by the Elevator Company, to be accepted in writing by the Construction Company, setting out the specifications and the

price and stipulating for the reservation of the title to the elevators until payment of the price in full. The paper was before all the representatives of the Construction Company, but no feature of it was under discussion, except the price. The reduction of price from that first asked was noted on the margin by Matthews, initialed by Harter, the architect, and dated by Cartwright, the representative of the Elevator Company. Instead of signing the contract, however, the representatives of the Construction Company made known their desire that the contract should be signed by John J. Cain, the contractor for the entire office building, including the elevators. After delay, due to misunderstanding as to the price of the elevators and the height of the building, and to some dissatisfaction on the part of Cain, the contract was at last executed by Cain alone on July 1, 1912. This contract, except as to the price of the elevators and the height of the building, was the same that had been agreed on, but not signed, in February before by the representatives of the Construction Company and the Elevator Company, and contained the same reservation of title until payment of the contract price. The correspondence shows that the Construction Company interested itself in having Cain execute the contract. There was also evidence to the effect that Cain consulted Seibels, who represented the Construction Company, as to the propriety of signing; that Seibels looked over the contract just before it was executed, and that he advised Cain to sign; but, since this was denied by Seibels, it cannot be considered on a motion to direct the verdict. All the representatives of the Construction Company denied having any knowledge of the clause in the contract reserving the title to the elevators, and there is no evidence that it was called to the attention of any of them.

The Construction Company not having become a party to the contract, the knowledge of its representatives that the Elevator Company had agreed with Cain to furnish and install the elevators did not charge them with notice, nor put them on inquiry as to reservation of title, just as knowledge by a purchaser of a previous conveyance of land does not put him on inquiry for a purchase-money mortgage. Whether the discussion of the contract and such examination of it as the representatives of the Construction Company made gave them actual knowledge of the reservation, or such opportunity to know of it as would have put a reasonably discreet man on notice, was a question of fact for the jury, and not for the court. Up to the moment of execution there is no legal presumption that the parties thereto have examined and know the stipulations of a written instrument. And the court could not say in this case that there was conclusive proof of such knowledge by the negotiators for the Construction Company as a matter of fact. Discussion and consideration of the price did not prove conclusively that the stipulation for reservation of title was read by the representatives of the Construction Company; nor were they ever under any legal duty to read it. There was no ground, therefore, for a direction of a verdict, and the instruction was properly given that the plaintiff could not recover, unless the jury should conclude from the circumstances that the rep-

resentatives of the Construction Company actually knew, or that any average reasonable man must have known, that the contract provided for a reservation of title.

[2] The District Judge further charged the jury that for the plaintiff to recover it was necessary to show, not only notice to the Construction Company of the reservation of title until full payment by Cain, but assent of the Construction Company to the reservation. The decisions and reasonings of the courts of this country and of England on some phases of the law of fixtures are irreconcilable. But the authorities seem to agree on this rule, that when personal property is so affixed to the soil, or the building on it, that it cannot be removed without serious injury to the property to which it is attached, it becomes a part of the realty, and consent of the owner of the realty is necessary to any agreement for its removal.

In Detroit Steel Cooperage Co. v. Sistersville Brewing Co., 233 U. S. 712, 34 Sup. Ct. 753, 58 L. Ed. 1166, the whole property of the Brewing Company was subject to a mortgage. After the execution of the mortgage the Detroit Steel Cooperage Company sold tanks to the Brewing Company upon the written condition that they should remain the property of the seller until paid for. The tanks were essential to the working of the brewery, and after they were installed the opening of the recess in which they stood was bricked up. The damage that would have resulted to the property from removal was trifling, and the seller who held the contract of conditional sale offered to make it good. The contract of conditional sale was duly recorded, but there was no evidence of assent of the mortgagees to the conditional sale, or of actual notice to them. The court held that neither the attachment of the tanks to the soil, nor the fact that they were necessary to the brewery, nor the slight damage, which the seller agreed to make good, affected the validity of the conditional sale or the right of the seller to remove the tanks on default in payment of the purchase money. But the court was careful to distinguish the case from others like Porter v. Pittsburg B. S. Co., 122 U. S. 267, 7 Sup. Ct. 1206, 30 L. Ed. 1210, in which "the property claimed has become so intimately connected with or embodied in that which is the subject of the mortgage that to reclaim would more or less disintegrate the property held by the mortgage." The distinction is also recognized in Padgett v. Cleveland, 33 S. C. 339, 11 S. E. 1069.

The leading English case of Reynolds v. Ashby & Son (decided by the House of Lords, 1904) 73 L. J. K. B. (N. S.) 946, 1 B. R. C. 653, goes much further in favor of the rights of the owner or mortgagee in fixtures placed onto the land when subject to a contract of conditional sale. There the court said:

> "By unscrewing the nuts each machine, however heavy, could no doubt be raised and removed without injury to the building containing them and without injury to its concrete bed and bolts imbedded in it."

Yet the court held that the machines had ceased to be chattels and had become fixtures, which the seller holding the contract of conditional sale was not entitled to remove from the possession of the mort-

gagees. Stress was laid upon the fact that the seller of the machines knew that the purchaser intended to put them in his factory and use them, and that the factory was mortgaged, and so ran the risk of the machines being claimed as fixtures.

The apparent exception, of which Evans v. McLucas, 15 S. C. 67, is an example, that trade appliances and fixtures of a tenant for domestic purposes may be removed, although under the general rule above stated they would not be removable, has no application. Numerous cases illustrating the agreements and differences of the courts as to when personal property attached to the realty may be removed, and when it may not, will be found collated in note to Monti v. Barnes, 1 Brit. Rul. Cas. 966; Fuller-Warren Co. v. Harter, 110 Wis. 80, 85 N. W. 698, 53 L. R. A. 603, 84 Am. St. Rep. 877; 11 Ruling Case Law, 1061; 19 Cyc. 1048–1055; Allis-Chalmers Co. v. City of Atlantic, 164 Iowa, 8, 144 N. W. 346, 52 L. R. A. (N. S.) 561, Ann. Cas. 1916D, 910. But we think no case will be found at variance with the general rule above stated.

[3] Mere notice to the owner of land that another person intends to attach to it personal property subject to a mortgage or condition that it shall be taken and removed for nonpayment of the purchase money cannot take the place of consent and bind the owner of the land. He owes no duty to take the initiative and expressly prohibit the placing of fixtures on his property in such way that they cannot be removed without injury to him. It is true that consent of the owner of land may often be implied from the manner in which notice is received or treated, and the action or silence of the owner may estop him from denying consent; but there must be consent, either express or implied. The reason for holding consent of the owner to the condition that it may be removed necessary to the removal of property so attached applies with special force to property attached by an independent contractor. The owner of the property has no duty or right to question the terms upon which the contractor buys his materials or deals with his subcontractors; nor is he under any obligation, except such as may be imposed by statute law, to see that the contractor discharges his obligations to others. His contract is already made. He is not a purchaser, in the ordinary sense, of anything that goes into the building, and has no control of the contractor's dealings except to require the building completed in the manner stipulated. He is bound to allow the contractor to complete his contract and to pay him according to his own obligation. No doubt an owner of land, with actual knowledge that a contractor is using the personal property of another, or property subject to a lien in favor of another, in his building, without the consent of the owner of such personal property, or the holder of the lien, is required by good faith to notify the owner of the personal property or holder of the lien. With such knowledge that the personal property of another is about to be used for his benefit without the knowledge of its owner, the law imputes to the owner of the land a contract to pay for the property, or consent to be bound by the conditions upon which the contractor obtained it, unless he notifies the owner of the personal property so that he may reclaim it.

On the other hand, knowledge by the seller of the chattel that the contractor intends to affix it to the property of another, so that it will become a part of the realty, imposes upon the seller the obligation to see that he has the consent of the owner of the property to any conditions attached to the sale. Reynolds v. Ashby, supra; Allis-Chalmers Co. v. City of Atlantic, 164 Iowa, 8, 144 N. W. 346, 52 L. R. A. (N. S.) 561, Ann. Cas. 1916D, 910; Thompson v. Smith, 111 Iowa, 718, 83 N. W. 789, 50 L. R. A. 780, 82 Am. St. Rep. 541, and authorities cited.

The considerations in favor of the requirement that the plaintiff should show consent of the Construction Company to the installing of the elevators with the reservation of title by the Elevator Company may be thus summed up: The elevators are in their nature fixtures absolutely essential to the use of an office building and not removable without serious injury to it. It was the intention of all parties that the elevators should become permanent fixtures necessary to the use of the property. The Palmetto Company, the owner of the land, had no right to dictate the terms or conditions upon which Cain, the contractor, should procure the elevators or other materials, or the terms upon which he should deal with subcontractors. The Palmetto Company, as owner of the lot, occupied a higher position than that of an ordinary purchaser for valuable consideration, and mere notice to it gave it no power of control over the transactions of Cain with the Otis Elevator Company. The only duty it could have owed to the Elevator Company, upon receiving notice of Cain's conditional purchase, would have been to notify the Elevator Company that the property was about to be attached to its building, so that it could not be removed without injury, and this the Elevator Company already knew. We think all the circumstances of the case clearly support the view of the District Judge that consent, as well as notice, was necessary in order to bind the Palmetto Construction Company to the conditional contract of sale.

But it will not help the defendant to assume that notice to the Palmetto Company of the reservation in the contract of sale would have been sufficient. If assent of the Construction Company was not necessary, still we think there was no prejudice in the charge. The above statement of the evidence conclusively shows that there was no issue of assent, as distinguished from notice of the reservation of the title by the Elevator Company. It was proved beyond controversy that the defendant, by its representatives, encouraged and requested the Elevator Company to make the written contract with Cain. Hence, if the jury found that it had notice of the reservation of title, it was impossible that they should find that the defendant did not assent to the reservation. Looking at the matter in this practical way, there could have been no prejudicial error in charging the jury that, for the plaintiff to recover, they must find, not only that the defendant had notice of the reservation, but had assented to it, for the reason that notice under the circumstances necessarily implied assent. An incorrect charge that a particular finding is essential to recovery is not reversi-

ble error, when such finding is necessarily involved in another finding which is essential. 4 Corpus Juris, p. 1025.

We conclude there was no error in refusing to direct a verdict for the defendant, or in submitting to the jury the question of assent in connection with that of notice.

Affirmed.

WOOLDRIDGE v. UNITED STATES.

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

No. 2839.

CRIMINAL LAW ⊂⊃44—"ATTEMPT"—ELEMENTS OF OFFENSE.

To constitute an indictable offense under Comp. Laws Alaska 1913, § 2073, making it a punishable offense "if any person attempts to commit any crime and in such attempt does any act toward the commission of such crime but fails or is prevented or intercepted," there must have been an intent to commit the specific crime, and in addition an overt act toward its commission.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 51; Dec. Dig. ⊂⊃44.

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

In Error to the District Court of the United States for the Fourth Division of the Territory of Alaska; Charles E. Bunnell, Judge.

Criminal prosecution by the United States against W. H. Wooldridge. Judgment of conviction, and defendant brings error. Reversed.

James J. Crossley, of Portland, Or., and Bion A. Dodge and T. A. Marquam, both of Fairbanks, Alaska, for plaintiff in error.

R. F. Roth, U. S. Atty., of Fairbanks, Alaska, and John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

HUNT, Circuit Judge. W. H. Wooldridge, called defendant, was indicted in Alaska on February 18, 1916, on two counts: One for statutory rape, alleged to have been committed December 23, 1914; and another for an attempt to commit rape on February 14, 1916, upon Laura Herrington, a girl under 16 years of age. Wooldridge was acquitted on the first count, but convicted of an attempt to commit rape as charged in the second count. Writ of error brings the case to this court.

The particular charge against Wooldridge was that he procured Laura Herrington to consent to meet him in a certain place known as "Rose's Repair Shop," in Fairbanks, Alaska, for the purpose of having sexual intercourse, and that he met her at the shop pursuant to arrangement, and with the intent to carry out the plan to know her carnally, but that he was prevented and intercepted in the execution of his purpose.

Section 1894 of the Compiled Laws of Alaska provides that whoever has carnal knowledge of a female person forcibly and against her will, or, being 16 years of age, carnally knows and abuses a female person under 16 years of age, with her consent, is guilty of rape. Section 2073, Compiled Laws of Alaska, is as follows:

"That if any person attempts to commit any crime, and in such attempt does any act toward the commission of such crime, but fails, or is prevented or intercepted in the perpetration thereof, such person, when no other provision is made by law for the punishment of such attempt, upon conviction thereof, shall be punished as follows," etc.

The most important question presented by defendant is whether the evidence will sustain the verdict and judgment. It is not necessary to state more of the testimony than may serve to demonstrate the material point in the case. The direct evidence of the prosecutrix herself was that she made arrangements with the officials in the United States marshal's office whereby she was to make an appointment with the defendant; that she made such an appointment with him at the request of Miller, a deputy United States marshal; that she was encouraged in making this "date" with Wooldridge by her father, who told her, if she could make the "date" with Wooldridge, to make it; that she made an appointment to meet Wooldridge at Rose's Repair Shop in the evening; that she went into the repair shop and was greeted by a man named Rose; that Rose was in the back room lying on the bed, and Wooldridge was sitting by him; that Wooldridge got up, buttoned his coat, and went into another room; that she stayed in the back room; that in a little while Rose went into the other room, and, after whispering with Wooldridge, Wooldridge came back and told her to turn out the lights and to stay there until they came back; that Rose returned, and told her to go away, as somebody was watching; that she went into the other room and stayed there, because the officers came in, and that then they went up to the marshal's office; that Wooldridge did not touch her, or lay his hands upon her; that she had been instructed by some of the United States officials, or her father, to talk loud when she was in there, and that she asked Wooldridge why he wanted her to turn out the light. On cross-examination she said that, just before she went to Rose's shop, she talked with Marshal Miller, who instructed her to talk loud at the meeting to be had; that she understood some of the marshals would be around somewhere. She also said that she was alone in the back room with the light out, the men being in the other room; that, when Wooldridge told her to turn out the light, he said he did not wish people to see her in there; that she was going to the front door to go out when the marshals came in.

J. P. Rose, proprietor of the shop where the prosecutrix was at the time of the alleged attempted rape, was called by the government. He testified concerning Wooldridge's movements and conversations before the girl came in, and said that he did not remember everything that was said by Wooldridge when the girl came into the shop. He was asked if he had not made a sworn statement in the marshal's office upon the night of the occurrences testified to by the prosecuting

witness. He said he had. Witness was then asked concerning the statements made and incorporated in the statement, and also concerning testimony he had given before the grand jury. In part of this examination, really a cross-examination by the counsel for the government, Rose was asked if he had not stated that the girl had come into his place after Wooldridge had told him (Rose) that he desired to have sexual intercourse with her. The witness denied that he had made such a statement. The government then introduced a statement, made directly after the meeting at Rose's place, subscribed and sworn to by Rose, wherein Rose had said, among other things, that Wooldridge talked with the girl in the back room for a few seconds, and then came out of the back room, and that the girl then turned out the light; that Wooldridge had told him that he desired to have intercourse with the girl, and that Rose told him not to have anything to do with her until the grand jury got through; that it would not be safe, and that the girl would be taken up to the prosecuting attorney's office, and then back to the grand jury room, and that they would "sweat her until she would have to tell it." Rose also said in this statement that, when he went back into the house, he (Rose) told the girl to come out, as somebody was watching her; that he recognized the men who were watching, and that he went back and got the girl. On cross-examination, witness stated he had not written or dictated the statement; that he did not think he ever said Wooldridge spoke of having intercourse with the girl.

Defendant testified in substance that he often called at Rose's shop; that upon the evening in question he found a light burning in the front and back rooms; that Rose was lying on the bed in the back room reading; that at Rose's request he turned off the light in the front room; that he stayed at Rose's for a few minutes, and talked with Rose, who was lying down in the back room; that at about 8 o'clock Laura Herrington came in and told him that somebody was following her, and that she wanted to hide; that he got up at once and went to the front door, to see who was following the girl; that he turned the light on in the front room and walked out; that Rose followed him; that at Rose's direction he himself walked back to within 15 feet, where he could see the girl, and told her that Rose said to turn the light out if she wanted to hide; that she said she would walk farther back; that he stepped to the front door, Rose following, and that Rose put out the light in the front room as they passed out; that he saw two men near a corner, and that he went up the street to see who the men were; that he met two men he knew and went back to Rose's store with them; that Rose and others, some of whom were deputy marshals, were at the store; that they then went to the marshal's office, where he met Rose and the girl.

The evidence discloses that for the purpose of procuring evidence, if they could, against Wooldridge, the marshal and his deputies, after conference with the United States attorney, formed a plan to detect Wooldridge and the girl alone together. In the pursuit of this plan a number of deputy marshals were placed in and about Rose's premises, in order to see and hear what took place at the prearranged meeting referred to.

George Berg, a deputy marshal, was at Rose's shop. He saw Rose on the bed. He could not hear all that was said between Rose and Wooldridge, but heard conversation about a picture show. Witness said Wooldridge and Rose whispered, and that Wooldridge spoke of having intercourse with the girl; that Rose advised him not to, as the grand jury would make trouble; that the two men left the room, leaving the girl, who turned the light out; that he heard some one call the girl out; and that very soon after that they all went to the marshal's office.

J. H. Miller, chief deputy marshal for Alaska, said that he and his assistants had arranged to go down to Rose's to see the meeting and overhear the conversation between Laura Herrington and Woolridge. After describing the preliminary arrangements, the marshal said that he told the girl that, if anything happened that was not right, "or if he attempted to treat her wrong in any way," she was to say, "Now, you be careful," or "Be careful," or words to that effect, and then something would occur that would cause a stop. Witness, however, did not go into Rose's shop that night, and the next thing within his knowledge was when Wooldridge and Rose and the girl were told to come up to his office. On cross-examination the marshal said the initial purpose of going to Rose's shop was to prove by the conversation to be had between Wooldridge and the girl whether the crime she alleged against him "had actually happened up in that cabin." Witness explained that, if it developed that something would aid the prosecution, well and good, or if it developed that something would aid the defendant, well and good; that it made no difference to him.

Examination of the books shows that the word "attempt" generally means the trial or physical effort to do a particular thing. In 1 Bishop's Criminal Law, § 511, the author says:

"When we say that a man attempted to do a thing, we mean that he intended to do, specifically, it, and proceeded a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part."

In State v. Martin, 14 N. C. 329, the court said:

"Attempt is expressive rather of a moving towards doing the thing, than of the purpose itself. An attempt is an overt act itself." Rex v. Higgins, 2 East, 5.

In State v. Taylor, 47 Or. 455, 84 Pac. 82, 4 L. R. A. (N. S.) 417, 8 Ann. Cas. 627, the court considered the meaning of a statute in exactly the same language as the one under which this defendant was tried. The court quoted Bishop's New Criminal Law, § 728, which defines an attempt as an intent to do a particular criminal thing, with an act toward it falling short of the thing intended, and Wharton's Criminal Law (9th Ed.) § 173, which defines an attempt to be an intended apparent unfinished crime. The court deduced from the authorities the rule that an indictable attempt consists of an intent to commit a crime, and a direct, ineffectual act done toward its commission, and said:

"To constitute an attempt, there must be something more than a mere intention to commit the offense, and preparation for its commission is not sufficient. Some overt act must be done toward its commission, but which falls

short of the completed crime. It need not be the last proximate act before the consummation of the offense, but it must be some act directed toward the commission of the offense after the preparations are made."

To like effect are the following cases: Patrick v. People, 132 Ill. 529, 24 N. E. 619; State v. Lung, 21 Nev. 209, 28 Pac. 235, 37 Am. St. Rep. 505; Stabler v. Commonwealth, 95 Pa. 318; Hicks v. Commonwealth, 86 Va. 223, 9 S. E. 1024, 19 Am. St. Rep. 891; People v. Gardner, 144 N. Y. 119, 38 N. E. 1003, 28 L. R. A. 699, 43 Am. St. Rep. 741; People v. Sullivan, 173 N. Y. 122, 65 N. E. 989, 63 L. R. A. 353, 93 Am. St. Rep. 582; McDermott v. People, 5 Parker, Cr. R. (N. Y.) 102.

In State v. Charley Lung, 21 Nev. 210, 28 Pac. 235, 37 Am. St. Rep. 505, where defendant was charged with an attempt to commit rape, the court held that, not only was the intention to commit the rape necessary, but there must have been some act done in connection with such intent, constituting the attempt, and regarded it as essential that the act of endeavor should be intrinsically adapted to effect the purpose, and that the court and accused may see that it is so adapted, it should be specifically stated in the indictment.

In Stabler v. Commonwealth, 95 Pa. 318, 40 Am. Rep. 653, the court held that there must be some act committed as well as an intent to have carnal knowledge.

McDermott v. People, 5 Parker, Cr. R. (N. Y.) 102, was an indictment for an attempt to set fire to and burn a certain barn. The court held that two important and essential facts were intent to commit the offense, and some overt act consequent upon that intent toward its commission, and that so long as the act rests in bare intention, it is not punishable.

McClain on Criminal Law (1897) vol. 1, § 222, interprets the authorities as holding that, to constitute an attempt, there must be the intent to commit a crime and some act done toward its consummation, and that the term "attempt" signifies both an act and the intent with which it is done.

In the light of these and many other cases that might be cited, it must be held that there was a failure of proof with respect to the doing of an overt act toward the commission of the crime charged. The undisputed evidence of the occurrences at Rose's store is that no act was done by Wooldridge toward the commission of the crime, and although it may have been his intention when he went to the store to have intercourse with the girl, in the absence of evidence of an attempt to carry out such purpose, there could be no conviction of an attempted rape.

The judgment is reversed.

MOORE v. DUNCAN.

(Circuit Court of Appeals, Sixth Circuit. November 17, 1916.)

No. 2850.

1. CARRIERS ⟸158(1)—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.
A contract limiting the carrier's liability to an agreed valuation, in consideration of a lesser freight rate, is valid on the theory that by freely and deliberately electing to contract for carriage at a rate fixed on the agreed value the shipper is estopped to assert a higher value in case of loss or damage.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 663; Dec. Dig. ⟸158(1).]

2. CARRIERS ⟸30—CARRIAGE OF GOODS—TARIFFS—PUBLISHED TARIFFS.
A tariff for interstate transportation, duly published and filed with the Interstate Commerce Commission pursuant to law, is, so long as in force, binding on the carrier and shipper, having the effect of a statute.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 81; Dec. Dig. ⟸30.]

3. CARRIERS ⟸131—CARRIAGE OF GOODS—ACTIONS.
The petition of plaintiff, who sued for the loss of tin shipped over defendant's line, charged that, while the car containing the tin was in the custody of the defendant as a common carrier, a portion of the shipment was stolen by agents and employés of defendant while employed in connection with its transportation, and that such theft was committed by such agents and employés either alone or in conspiracy with other persons unknown to plaintiff. *Held*, that the petition charged a theft of goods in transit by employés of the carrier acting, not in the carrier's interest, but in their own, and against its interest.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 569–577, 593; Dec. Dig. ⟸131.]

4. CARRIERS ⟸158(1)—CARRIAGE OF GOODS—ACTIONS—LIABILITY.
A carrier published two rates for the transportation of tin, the lesser one being based upon a released valuation. A shipper, knowing of the two rates, paid the lesser and accepted a bill of lading declaring that the amount of loss or damage for which the carrier was liable should be ascertained on the basis of the released valuation, whether or not the loss occurred from negligence. The servants of the carrier, acting in their own interest and against that of the carrier and shipper, stole some of the tin while in transit. *Held*, that as the servants were not acting for the benefit of the carrier, so as to enable it to confiscate the tin, the carrier was liable only for the released valuation.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 698; Dec. Dig. ⟸158(1).]

5. CARRIERS ⟸149½—CARRIAGE OF GOODS—LIMITATION OF LIABILITY.
At common law, it is not against public policy for a carrier to stipulate against liability for loss due to causes beyond its control, and so the imposition, as a basis for a freight rate, of a condition that the shipper should assume the loss from such causes, is valid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 651–653, 660, 662; Dec. Dig. ⟸149½.]

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

Action by Laura Moore against William M. Duncan, as receiver of the Wheeling & Lake Erie Railroad Company. Defendant confessed

judgment for part of the amount claimed, and plaintiff brings error. Affirmed.

Harrington, Bigham & Englar, of New York City, and Hoyt, Dustin, Kelley, McKeehan & Andrews, of Cleveland, Ohio (Oscar R. Houston, of New York City, of counsel), for plaintiff in error.

Squire, Sanders & Dempsey, of Cleveland, Ohio (Robert F. Denison, of Cleveland, Ohio, of counsel), for defendant in error.

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

KNAPPEN, Circuit Judge. The plaintiff in error, as assignee of the consignee of three separate shipments of pig tin from New York and Philadelphia to Steubenville, Ohio, over railroads forming connecting lines between the respective places of shipment and the place of delivery, sued the receiver of the terminal carrier on account of the loss of a portion of each shipment, charging that while the car containing the tin was "in the custody and control of the defendant and in course of transportation over the Wheeling & Lake Erie Railroad as a common carrier within the state of Ohio, pursuant to the said shipment," a portion of each shipment was stolen from the car containing it "by the agents and employés of the defendant, while employed by the defendant in connection with the transportation of the said car of tin over the lines of the Wheeling & Lake Erie Railroad, as above stated; that said theft was committed by the defendant's said agents and employés, either alone or in conspiracy or collusion with other persons to the plaintiff unknown." Judgment was demanded for the aggregate of the full values of the stolen lots, with interest. The defendant, in addition to a notice which amounted to a general denial, pleaded as a second defense that with respect to each shipment the defendant railroad formed with its connecting carrier a through line from the place of shipment to Steubenville; that through rates were in effect and joint tariffs therefor duly and legally published and on file as required by law, which tariffs put in effect two rates upon pig tin shipped from the respective places of shipment to Steubenville, one based upon a released valuation of $100 per ton, the other a higher rate when the shipments were not so released; that the shippers, knowing the tariff provisions, presented to the initial carrier bills of lading in form approved by the Interstate Commerce Commission, made out and signed by the shippers, with indorsement calling for the released valuation; that the shipment was carried under the lower rate; that the bill of lading contained a provision that "the amount of any loss or damage for which any carrier is liable shall be computed on the basis of the value of the property at the place and time of shipment * * * unless a lower value has been represented in writing by the shipper or has been agreed upon or is determined by the classification or tariffs upon which the rate is based, in any of which events, such lower value shall be the maximum amount to govern such computation, whether or not such loss or damage occurs from negligence"; and that the consignee, knowing the terms of the bill of lading and the provisions of the tariffs, paid the freight at the lower of the two published rates after knowing of the loss in shipment.

A demurrer to the second defense was overruled, and on defendant's confession of judgment for the value of the stolen tin at the lower tariff rate, with interest, judgment was rendered therefor.

The writ of error rests on the sole proposition that the released valuation does not apply to the facts alleged in plaintiff's petition, and that the legal measure of recovery is the full value of the tin stolen.

Counsel for plaintiff in error properly concede it to be the settled rule that:

"Although it is against public policy to permit a common carrier to stipulate for exemption from liability for negligence, it is not against public policy for a carrier to stipulate as to the value of the goods carried, and that such a stipulation, whether made by express agreement between the carrier and the shipper, or embodied in the schedules filed with the Interstate Commerce Commission pursuant to law, will be enforced in the ordinary case of loss through the carriers' negligence." [1]

[1, 2] The validity of a contract limiting the carriers' liability to an agreed valuation does not depend upon the relation of that value to the actual value. It rests upon the proposition that, by freely and deliberately electing to contract for carriage at a rate of compensation based upon an agreed value, the shipper is estopped to claim a higher value in case the shipment is lost or damaged. Pierce v. Wells, Fargo & Co., 236 U. S. 278, 283, 35 Sup. Ct. 351, 59 L. Ed. 576, and cases there cited. A published tariff, so long as it is in force, has the effect of a statute and is binding on carrier and shipper. Pennsylvania Ry. Co. v. International Coal Min. Co., supra.

[3-5] It will be noticed that, by the express contract of the parties as contained in the bill of lading, "the amount of any loss or damage" for which the carriers are liable shall be ascertained on the basis of the valuation "whether or not such loss or damage occurs from negligence"—a stipulation broad enough in its terms to cover theft by an employé. But we assume that, if the carrier had in effect purposefully taken the goods or actually benefited by their confiscation or conversion, it would not be permitted, upon grounds of public policy, to limit its liability under the contract of carriage. Such, however, is not the case alleged. Actual conversion by the carrier to its own use is not charged. The allegation in the petition is not only consistent with but, naturally interpreted, we think charges a theft from a car in transit by employés of the carrier, presumably acting, not in the latter's interest and for its benefit, but against the carrier's interest and to its injury as well as that of the shipper; for by the employé's wrongful act the carrier, instead of being benefited, is directly injured through its liability to the shipper.

The controlling question thus is whether it is competent for the car-

[1] Hart v. Pennsylvania Co., 112 U. S. 331, 5 Sup. Ct. 151, 28 L. Ed. 717; Adams Exp. Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257; Kansas City So. Ry. Co. v. Carl, 227 U. S. 639, 33 Sup. Ct. 391, 57 L. Ed. 683; M., K. & T. R. Co. v. Harriman, 227 U. S. 657, 33 Sup. Ct. 397, 57 L. Ed. 690; Pennsylvania Co. v. International Coal Min. Co., 230 U. S. 184, 33 Sup. Ct. 184, 57 L. Ed. 1446, Ann. Cas. 1915A, 315; Boston & Maine R. R. Co. v. Hooker, 223 U. S. 97, 34 Sup. Ct. 526, 58 L. Ed. 868, L. R. A. 1915B, 450, Ann. Cas. 1915D, 593; A. T. & S. F. R. Co. v. Robinson, 233 U. S. 173, 34 Sup. Ct. 556, 58 L. Ed. 901.

rier and shipper to extend the limitation of the carrier's liability for loss in the course of transportation to a theft by an employé in his own sole interest and against the interest of his employer.

In Missouri, Kansas & Texas Ry. Co. v. Harriman, supra, 227 U. S. at page 672, 33 Sup. Ct. at page 401, 57 L. Ed. 690, it is said that:

"The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence."

It was not, at common law, against public policy for a carrier to stipulate against liability for loss due to causes beyond its control; and so a condition imposed as basis for a freight rate that the shipper assume the risk of loss due to such causes is valid. In re Released Rates, 13 I. C. C. Reports, 550, 551, 564; Kansas City So. Ry. Co. v. Carl, supra, 227 U. S. at page 656, 33 Sup. Ct. 391, 57 L. Ed. 683; Adams Exp. Co. v. Croninger, supra, 226 U. S. at page 509, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A. (N. S.) 257.

It is clear that, had the theft been committed by one not in the carrier's employ, the latter's liability would be limited to the released valuation. Indeed, plaintiff in error expressly concedes that, had the tin been lost in transit "by any other cause than theft by its own employés while acting within the scope of their authority, the valuation clause would be binding." Her contention, however, is that the released valuation has no application to a loss due to the "conversion by the carrier's own employés while employed by the carrier in the transportation of the goods"—the pith of the argument being that the theft of goods in the course of transportation by an employé of the carrier, although solely for the benefit of such thieving employé, amounts to a conversion by the carrier—and that it is not competent for the latter to contract for a limitation of its liability for conversion.

Unless with one exception, the authorities cited by plaintiff in error in support of this proposition do not fully sustain it. In Fein v. Weir, 129 App. Div. 299, 114 N. Y. Supp. 426, although theft by an employé was held a conversion by the carrier, in the appellate court the question of limitation of liability was not involved. In Shelton v. Canadian No. Ry. Co. (C. C.) 189 Fed. 153, the shipment was converted by the carrier to its own use. The reported decision contains no suggestion that theft by an employé would amount to an actual conversion by the carrier. In Georgia So. Ry. Co. v. Johnson, 121 Ga. 231, 48 S. E. 807, it was said by Justice Lamar that:

"In an action of trover or damages for conversion, the tort-feasor could not take advantage of his own wrong, nor lessen the measure of his liability, by invoking an agreed valuation which the plaintiff may have made for the purpose of reducing the freight rate or securing like collateral advantage."

But this was merely a statement of a general proposition. The case involved no question as to what made the carrier a tort-feasor so as to make the rule stated applicable.

In Central of Georgia R. Co. v. Chicago Portrait Co., 122 Ga. 11, 49 S. E. 727, 106 Am. St. Rep. 87, the rule stated by Justice Lamar

in the Georgia Southern Case was applied to a case of actual conversion by the railroad company, by selling merchandise as unclaimed freight after its transportation to destination in good order, and before such sale could lawfully be made.

The case presenting the possible exception referred to is Adams Exp. Co. v. Berry & Whitmore, 35 App. D. C. 208, 31 L. R. A. (N. S.) 309, where it was held, in substance, that an embezzlement of goods by an employé of the carrier amounted to a conversion entitling the shipper to recovery of full value, notwithstanding the limitation in the shipping receipt of liability to a specific sum, less than such value; the court saying that an agreement "that the company shall not be liable in any event for more than the value so stated" was intended to apply only to a loss "through the negligence of the carrier," and that an extension "to cover cases where the goods are converted or embezzled by it" would be invalid.

We are unable to agree with the holding in that case, as applied to the instant case. It overlooks the fact that it was entirely competent at common law, and no less so under the existing federal statutes, to limit liability for loss not within the carrier's control. Concededly, it would not be violative of public policy to contract for limited liability in case of theft by a stranger. We can see no valid ground for holding such contract invalid in case of theft by an employé for his own sole purposes and against the interests and without the connivance of the carrier. Theft of goods in transportation, and in the possession of the carrier for such purpose, is a theft from the carrier itself. Theft, under the circumstances stated, whether by a stranger or by an employé of the carrier, involves no misfeasance or lack of faithfulness on the part of the carrier. Such negligence of the carrier as may be involved in making theft possible is manifestly covered by the stipulation.

None of the decisions of the Supreme Court of the United States before cited, relating to limitation of liability for loss, involved cases of theft; but neither those nor any other decisions of that court, so far as we have found, in our opinion favor the doctrine asserted by plaintiff in error. On the contrary, we think the general propositions announced therein opposed to that doctrine. For example, in Kansas City So. Ry. Co. v. Carl, supra, 227 U. S. at page 651, 33 Sup. Ct. at page 394, 57 L. Ed. 683, the broad and unqualified statement is made that:

"When a shipper delivers a package for shipment and declares a value, either upon request or voluntarily, and the carrier makes a rate accordingly, the shipper is estopped upon plain principles of justice from recovering, in case of loss or damage, any greater amount."

We think the reasoning of the case of Georgia, etc., Ry. Co. v. Blish Milling Co., 241 U. S. 190, 36 Sup. Ct. 541, 60 L. Ed. 948, although not involving limitation of liability, is impliedly opposed to the proposition of constructive conversion here asserted, and holds that the effect of the stipulation of the bill of lading is not dependent on the form of action chosen in suing for the loss.

We think the contract in question which limited liability to the re-

leased valuation is just and reasonable; that it violates no rule of public policy and is valid and enforceable.

It follows that, in our opinion, the judgment of the District Court was right and should be affirmed.

THE C. S. HOLMES.*

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

No. 2698.

1. ADMIRALTY ⟸104—RIGHT OF APPEAL—ACCEPTANCE OF BENEFITS—SEVERABLE DECREE.

Where a decree in admiralty covered separate causes of action, some of which were determined in favor of libelant and some against him, acceptance of payment of that portion of the decree in his favor does not bar his right of appeal from the portion against him.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. § 711; Dec. Dig. ⟸104.]

2. SEAMEN ⟸11—INJURY IN SERVICE—LIABILITY OF VESSEL FOR FAILURE TO PROCURE PROPER TREATMENT.

When the vessel on which libelant was a seaman was 10 miles from Cape Flattery, he received a compound fracture of his right arm; the injury being very serious. He requested to be taken to the marine hospital at Port Townsend, but instead the vessel proceeded to Port Angeles, arriving in the night, and the next morning libelant was left in care of a physician who was not a marine surgeon. Owing to unskillful setting, his injury was greatly aggravated before he was sent to the hospital seven days later. Port Townsend was but 20 miles farther on, and the master could have placed libelant in the hospital at as early an hour as he did in charge of the doctor. *Held*, that the master was negligent in failing to do so, and that the vessel was liable for the resulting injury.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 39–44, 187; Dec. Dig. ⟸11.]

Appeal from the District Court of the United States for the Northern Division of the Western District of Washington; Jeremiah Neterer, Judge.

Suit in admiralty by Gust Fondahn against the schooner C. S. Holmes. Decree in part for respondent, and libelant appeals. Reversed

See, also, 209 Fed. 970; 212 Fed. 525.

At 6 o'clock in the afternoon of January 3, 1913, when the schooner C. S. Holmes was about 10 miles off Cape Flattery on her way to the sea, the appellant, a sailor on the schooner, received a compound fracture of his right arm. The injury was very serious, the periosteum was torn, and bones protruded from a ragged wound. The arm was dressed by the master and sailors, and the master put the vessel about and sailed back toward Port Angeles, and with the aid of a tug, which was procured on the way, arrived at Port Angeles at about 3 o'clock the next morning. Thereupon sail was lowered and all hands went to bed. Early in the morning the master inquired for a doctor and was referred to Dr. Taylor. The appellant was taken in charge by Dr. Taylor, and was taken to a hospital which the latter owned. About 8 o'clock that morning the appellant's arm was dressed. Seven days later the appellant went to the Port Townsend Marine Hospital. While in

charge of Dr. Taylor, the appellant's arm began to fester, and it later developed that the bones had not been in apposition and that they did not unite. At the Marine Hospital an operation was performed, and Lane plates were applied, but no cure was effected. The evidence was that a further operation would be necessary, and that a cure was doubtful, if not impossible.

It was the contention of the appellant that the master was negligent in taking him to a doctor at Port Angeles, and in not taking him to the doctor at the Marine Hospital at Port Townsend; that the master failed to make arrangements with Dr. Taylor for compensation, and for that reason the appellant did not receive the treatment which his case required; that he was compelled to pay Dr. Taylor the sum of $30 for treatment, which he contends was not proper, and by reason thereof his arm had been destroyed. It was the appellee's contention that the master's duty was to take the appellant to the nearest point where medical attention could be obtained, and that by so doing he discharged the vessel from further obligation.

The court below found upon the evidence that the master had fully performed his duty to the appellant when he selected a reasonably competent physician, and that the vessel was not responsible for the negligence, if there were negligence, of the physician who was employed.

Daniel Landon, of Seattle, Wash., for appellant.

R. A. Ballinger, Alfred Battle, R. A. Hulbert, and Bruce C. Shorts, all of Seattle, Wash., for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellee moves that the appeal be dismissed, for the reason that the appellant accepted the benefits of the decree appealed from, and thereby waived his right to review any portion thereof. The libel presented four causes of action. The first was to recover damages for the injury which the appellant received by reason of the accident; the second was to recover damages for the failure of the appellee to furnish proper medical and surgical treatment; the third was to recover the sum of $30, which the appellant paid for medical treatment; and the fourth was to recover the sum of $45, claimed to be due him for wages. The decree denied the appellant recovery upon the first and second causes of action, but awarded him payment of the sums claimed in the third and fourth causes of action. The decree was rendered on October 4, 1915, and on the same day the appellant served upon the appellee the following notice:

"Take notice that the libelant above named hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree, entered herein October 4, 1915."

Two days later the appellant filed his petition for allowance of his appeal, specifying that he appealed from the finding and decree that he take nothing by reason of the damages suffered by him, as set out in the second cause of action. Service of that petition was made upon the appellee on October 6, 1915, and the appeal was allowed on that day. By an affidavit it is shown, and it is not denied, that on December 21, 1915, the appellant acknowledged the receipt of the sum of $344.55 in full settlement, satisfaction, and discharge of the judgment rendered in his favor, including all costs in the District Court and on the former appeal to the Circuit Court of Appeals, as shown by

the cost bill filed, together with the principal judgment, amounting to $75.

In 3 Corpus Juris, p. 680, it is said that the general rule that a party who enforces or otherwise accepts the benefit of a judgment cannot afterward maintain an appeal does not apply "where the parts of the judgment or decree are separate and independent, and the receipt of a benefit from one part is not inconsistent with an appeal from another." That doctrine is sustained in Gilfillan v. McKee, 159 U. S. 303, 16 Sup. Ct. 6, 40 L. Ed. 161; Snow v. Hazlewood, 179 Fed. 182, 102 C. C. A. 448, and other cases. The judgment as to the second cause of action was clearly separate and independent of the other causes of action, and we hold that the receipt of the money adjudged to be due the appellant on the third and fourth causes is not inconsistent with his appeal. The motion to dismiss is denied.

[2] None of the evidence in the case was taken in open court, and this court has the same opportunity that the court below had to judge of the value of the testimony. We are unable to agree with the court below that the master of the Holmes was guilty of no negligence in his treatment of the appellant after the latter received the injury. We think it was the obvious duty of the master to take the appellant to the Marine Hospital at Port Townsend. That was the only Marine Hospital on Puget Sound. Although there were marine doctors at other points, there was none at Port Angeles; and we do not think that the master of the Holmes was candid in stating that he thought the doctor at Port Angeles was a marine doctor. His testimony, we think, was colored by his desire to make a better case for himself than the facts justified. The evidence discredits his statement that he inquired of the master of the tug whether there was a marine doctor at Port Angeles, or that he learned that there was a marine doctor at that place, or that Dr. Taylor told him that he was a marine doctor. The master's testimony is contradicted, not only by the appellant, but by Dr. Taylor, and by one of the seamen, a disinterested witness. The evidence convinces us also that the Holmes, in charge of the tug, arrived at Port Angeles about 3 o'clock in the morning, and that if the master had continued on his way to Port Townsend, which was but 20 miles away, he could have reached that port within three hours and before daylight, and he could have placed the appellant in the hands of the marine surgeon at that place at an hour as early as the time when he placed him in the charge of the doctor at Port Angeles. When the vessel was put about and headed in the direction of Port Angeles and Port Townsend, the appellant requested that he be taken to Port Townsend. The master denied the request on the ground that it would cost him $100 more. When testifying as a witness, he stated that the reason which he had assigned to the appellant was not the only reason for refusing to take him to Port Townsend, and that the controlling reason was that he conceived it to be his duty to get the appellant to the nearest place where he could get a doctor. We think, in view of all the circumstances, the true and only reason was that which was assigned at the time—that the master, owning an interest in the vessel, was controlled by his desire to reduce the expense as

far as possible, that his testimony in this respect is marked by the same uncandor that characterized certain other portions thereof, and that his motives are further indicated by the fact that he gave Dr. Taylor, at the time when he left the appellant in his charge, a permit authorizing the appellant to receive medical treatment at the hands of a marine doctor, he well knowing that Dr. Taylor was not a marine doctor, and that the permit was valueless to him for any purpose. In Peterson v. The Chandos (D. C.) 4 Fed. 645, Judge Deady said:

"In this matter I fear the master was actuated by a desire to save expense to the vessel, of which it appears from the answer he is a part owner. In a spirit of petty parsimony he appears to have denied the libelant a chance to have his fractured leg reset and made comparatively useful, rather than incur the trifling expense of sending him from Baker's Bay to the hospital at Portland."

In Whitney v. Olsen, 108 Fed. 292, 47 C. C. A. 331, a case in which a seaman was injured at sea when 500 miles distant from Port Townsend, this court said:

"There is a marine hospital at Port Townsend, and that is where the libelant could have received proper medical treatment, and where the master should have taken him. The ship's obligation to the libelant did not depend on the precise geographical location of the nearest port."

The testimony indicates that, if the appellant had been taken to Port Townsend, the treatment of his arm would have been different from and more appropriate than that which was given him at Port Angeles, and that there was failure at the latter place to treat the injury with the care and skill which its very serious nature demanded. It is impossible to ascertain from the evidence with any degree of certainty how much the injury to the appellant's arm was aggravated by the manner in which it was treated during the seven days of his stay at Port Angeles. We are convinced, however, that thereby the injury was aggravated, and his pain and suffering were greatly increased, and that for the negligence of the master the appellant should be awarded damages in the sum of at least $500.

The decree is reversed as to the second cause of action, and the cause is remanded to the court below, with instructions to enter a judgment for the appellant on that cause of action for the sum of $500.

NEWARK TRUST CO. et al. v. AGRICULTURAL INS. CO.

(Circuit Court of Appeals, Third Circuit. December 12, 1916.)

No. 2153.

INSURANCE ⊂=423—TORNADO INSURANCE—POLICIES—CONSTRUCTION.

A policy, insuring against all direct loss or damage by windstorms, tornadoes, cyclones, or hurricanes, declared that the insurer should not be liable for any loss or damage caused by hail, driven by wind or not, snowstorms, frost, or cold weather, nor for loss or damage occasioned by fire, explosion, tidal wave, lightning, high water, overflow, cloudburst, or consequential loss. The policy further declared that the insurer should

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

not be liable for any loss or damage caused by water or rain, whether driven by wind or not, unless the building insured shall first sustain an actual damage by the direct force of the wind, and the insurer should then be liable only for such damage to the interior of the building as might be caused by water or rain entering through openings made by the direct action of the wind. The building insured was a frame dwelling built on brick foundations, standing close to the ocean on a low bluff arising from the beach. A bulkhead was built in front of it and to the sides to protect it from the wash of the sea. A great storm, in which the wind grew to the force of a hurricane, drove water at high tide onto the beach, destroying the bulkhead and cutting away the sand which supported the foundation. The wind then blew so hard that it shook the house, and the front of the foundation broke, causing the house to go down, where it was caught by the succeeding tide, broken to pieces, and carried to sea. *Held*, that the injury was plainly excluded from the terms of the policy; it being caused by water, though driven by the wind, instead of by the direct force of the wind.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. § 1127; Dec. Dig. ⊂=423.]

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

Action by the Newark Trust Company and Alfred Yankauer, trustee in bankruptcy of George E. Mausert, bankrupt, against the Agricultural Insurance Company. There was a judgment for defendant, and plaintiffs bring error. Affirmed.

Raymond, Mountain, Van Blarcom & Marsh and T. McCurdy Marsh, all of Newark, N. J., for plaintiffs in error.

Fairlie & Vanderbilt, of Newark, N. J. (Leo Levy, of New York City, of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an action on a policy of tornado insurance. The jury rendered a verdict for the defendant upon the court's construction of the contract, which was embodied in the charge with the force of a binding instruction. The plaintiff sued out this writ, assigning as error so much of the charge as relates to the interpretation of the contract.

The insured property was situate at Monmouth Beach, New Jersey. It was a frame dwelling built upon brick foundations. It stood close to the ocean upon a low bluff arising from the beach. It was protected from the ocean by a bulkhead built fifty feet in front of it. This bulkhead was of timber, braced back into the land, and was about ten feet high. Connected with its two ends at right angles were "return bulkheads," running back from the ocean one hundred feet to a point inland about midway the house, built to protect the house from the side wash of the sea. The space within this built-up box like structure was filled with sand and was used as a lawn.

At midnight of January 2, 1914, a great storm began, increasing in intensity and lasting three days. The wind, blowing on shore, grew to the force of a hurricane. The storm was marked not only by wind of unusual velocity, but by unprecedented high tides. Ac-

cording to the testimony of the witness Lockwood, which was more favorable to the plaintiffs than any other, the storm increased with the first flood tide, and the wind "caused the sea to come in" and come up to and against the main bulkhead, forcing the planks off and knocking it out in front, and also caused the sea to reach around the south end of the bulkhead, cutting away the sand and washing it out. As this tide began to fall, "it left about eighteen inches of sand next to the house where the brick foundation was, but the wind blew so hard that it shook the house and the front of the foundation tumbled down and caused the house to go about 35 degrees angle down; then the tide fell, and it stayed there until the next tide." It was further testified that the second flood tide, being as high as the first, likewise swept around the bulkheads, further washed away the sand, and finding the house in its fallen position, broke it apart and carried it to sea.

At the time of its destruction, the house was insured by the defendant insurance company under what is commonly known as a Standard Tornado Policy. By this policy, the insurance company insured the owner against "all direct loss or damage by windstorms, tornadoes, cyclones or hurricanes, except as hereinafter provided." The risks excepted appear first in the following clause:

"This company shall not be liable for any loss or damage caused by hail, driven by wind or not, snowstorms, frost or cold weather; * * * nor for the loss or damage occasioned directly or indirectly by or through any fire, explosion, tidal wave, lightning, *high water*, overflow, cloudburst; * * * nor for any consequential loss of any kind."

The plaintiffs, in right of the insured, brought this action on the policy, upon the theory that the damage was occasioned by *wind* within the meaning of the general liability clause, and that the defendant is not saved by the clause exempting it from liability for damage caused by "high water," under a proper definition of that term, contending "that if there was high water (contributing to the damage to the building), the proximate cause of the damage was not such high water, but the wind which made the water high, and that the court should have charged the jury to that effect."

The court submitted to the jury the issue whether the damage was occasioned by wind or water, with appropriate instructions upon the law as to the defendant's liability upon either finding. The first instruction relates to the company's liability for damage caused by wind, under the issue fairly raised by the testimony of Lockwood as to whether the house was shaken down by the wind or was caused to fall by the action of the water washing away its foundations. This instruction is as follows:

"The plaintiff can only recover in this case after it has been established by the greater weight of the evidence * * * that the loss or damage to this house was the result of the direct action of this windstorm on the day in question."

No error, of course, is assigned to this instruction, for had the jury found that the damage had been done by wind, then the instruction fully covered the defendant's liability. But the verdict for the

defendant was a finding by the jury that water, and not wind, caused the house to fall, and with respect to the company's liability for damage caused by water, the court gave its second instruction, which appears in several places in the charge in different language, but always to the same effect, as follows:

"I have determined that a proper construction of the policy precludes the plaintiff from recovering if the damage to this house was due, directly or indirectly, to high water, irrespective of whether the high water was caused by wind or not."

The substance of the error charged to this instruction is, that under a proper construction of the contract of insurance, the defendant is liable for damage done by water when raised or driven by wind, and the jury should have been charged accordingly.

The plaintiffs' case rests upon their ability to take the cause of damage out of the clause of the policy exempting the company from liability, and place it in the clause imposing liability. To do this, they maintain that the words "high water," as used in the exempting clause, mean high tide in its commonly accepted sense, indicating only such high water as is reached by the tide in its normal and periodical flow, unaffected by winds and storms, Howard v. Ingersoll, 13 How. (54 U. S.) 381, 423, 14 L. Ed. 189; that in the instant case the water was made high, not by normal tidal influences, but by wind, the element insured against, and that in driving the water against the foundations of the house, the water was the passive and the wind the efficient force which proximately caused its destruction. They thus invoke the doctrine of proximate cause as applied in cases of insurance, Waters v. Merchants' Ins. Co., 11 Pet. 213, 9 L. Ed. 691; Ætna Ins. Co. v. Boon, 95 U. S. 117, 24 L. Ed. 395; The G. R. Booth, 171 U. S. 450, 19 Sup. Ct. 9, 43 L. Ed. 234; Louisiana Mutual Ins. Co. v. Tweed, 7 Wall. 44, 19 L. Ed. 65; Queen Ins. Co. v. Hudnut, 8 Ind. App. 22, 35 N. E. 397; Jordan v. Iowa Mutual Tornado Ins. Co., 151 Iowa, 73, 130 N. W. 177, Ann. Cas. 1913A, 266; Mitchell v. Potomac Ins. Co., 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74; and ask a construction of the words "high water" as employed in the policy and a determination of which force occasioned the damage.

If the liability clause and the quoted clause of exceptions constitute the whole of the company's undertaking, the inquiry as to the proximate cause of the damage, whether of wind or high tide, might be pertinent; but there is a second clause of exceptions, in which are included other elements with respect to which the company expressly refused to make itself liable. This clause is as follows:

"This company shall not be liable for any loss or damage *caused by water or rain, whether driven by wind or not*, unless the building insured * * * shall first sustain an actual damage to the roof or walls of the same by the direct force of the wind, and shall then be liable only for such damage as to the interior of the building * * * as may be caused by water or rain entering the building through the openings in the roofs or walls made by the direct action of the wind."

This clause, disclaiming liability, is as much a part of the contract as the clause assuming liability, and it must be considered in connection with all other expressions in seeking the sense and the scope of the contract. The insurance company states in the liability clause what it insures against, namely, "loss or damage by windstorms, tornadoes, cyclones or hurricanes." In order to make certain just what it insures against, it states by two other clauses what it does not insure against, first, "loss or damage occasioned directly or indirectly by * * * high water," and second, "loss or damage caused by water or rain, whether driven by wind or not," except in the one instance of damage caused by water entering an opening previously made by wind. The defendant's liability must be found within these three clauses. They are not ambiguous in their terms and are not fairly susceptible of two different constructions, and do not therefore call for interpretation under the familiar canons of construction, which incline to the insured and against the insurer. Insurance Co. v. Boon, 95 U. S. 117, 128, 24 L. Ed. 395; Thompson v. Insurance Co., 136 U. S. 287, 297, 10 Sup. Ct. 1019, 34 L. Ed. 408; Holmes v. Phœnix Ins. Co., 98 Fed. 240, 39 C. C. A. 45, 47 L. R. A. 308. They are related to one another not only in subject matter but by express terms of reference. They are in no sense inconsistent or conflicting, but are cumulative or rather explanatory of one another, and make clear what is insured against by reciting what is not insured against. Reserving any question of proximate cause, it is manifest from the terms of the contract, as well as from the enumerated elements, that the perils insured against are the perils of the air, and among those expressly excepted are perils of water; and that after disclaiming liability for damage caused by such specific water forces as tidal wave, high water, overflow and cloudburst, the insurance company broadly refuses to assume liability for any loss or damage caused generally by water, even when "driven by wind."

As the jury found that the house was destroyed by water and as the contract denies liability for damage "caused by water, whether driven by wind or not," the plaintiffs' case, based upon the theory of wind-driven water, comes within the second exempting clause and necessarily falls. We are of opinion that this clause dispenses with the consideration of the question of proximate cause as raised in this case, and that the court's construction of the contract as contained in the charge, was not erroneous.

The judgment below is affirmed.

In re L. & R. WISTER & CO.

SHIMER v. POWELL.

(Circuit Court of Appeals, Third Circuit. December 14, 1916.)

No. 2143.

BANKRUPTCY ⊂=342½—PROCEEDINGS—PETITION TO REVIEW.

While proceedings in bankruptcy generally are in the nature of proceedings in equity, and courts of bankruptcy have broad equity powers, including those of amendment under Bankr. Act July 1, 1898, c. 541, § 2, subsec. 6, 30 Stat. 545 (Comp. St. 1913, § 9586), one who filed no petition to review an order of the referee, relying on the petition of another, is not, the original petitioner desiring to dismiss, entitled to intervene for that reason; the time for the filing of a petition for review, provided for by section 2, subsec. 10, as prescribed by General Order No. 27 (89 Fed. xi, 32 C. C. A. xxvii), supplemented by the orders of the District Court, having expired.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 530; Dec. Dig. ⊂=342½.]

Petition to Review and Revise an Order of the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

In the matter of the bankruptcy of L. & R. Wister & Co.; Humbert B. Powell, trustee. The claim of Mrs. Sabine W. Wister was allowed, and Mrs. Betty Black Wister filed a petition for a review of the order. Thereafter she petitioned to dismiss, and J. N. M. Shimer petitioned to intervene. The petition to intervene being denied, and petition to review being dismissed by the District Court (In re Wister, 232 Fed. 898), J. N. M. Shimer petitions to review and revise the order. Affirmed.

J. S. Freeman, of Philadelphia, Pa., for petitioner.

Thomas Stokes and G. W. Pepper, both of Philadelphia, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The question in this case is, whether a person, who is not a party to proceedings upon petition to the District Court to review a referee's order, though equally interested with the petitioner in the subject matter, and who has not otherwise taken action of his own, has a right to intervene in those proceedings several months after they were begun, and, upon the withdrawal of the petitioner, be substituted as a party. Construing General Order No. 27 (89 Fed. xi, 32 C. C. A. xxvii), and applying its rule supplementing that order, the District Court found adversely to the petition to intervene.

The order of the court which we are asked to review and revise, concerns a dispute arising in the administration of two bankrupt estates.

The firm of L. & R. Wister & Company had been financial agents of the Dunbar Furnace Company. To aid their financing transactions,

Sabine W. Wister, wife of Jones Wister, one of the partners, loaned L. & R. Wister & Company $50,000 on the demand note of the Furnace Company, secured by its mortgage bonds to the amount of $54,000 pledged as collateral, and by the guaranty of L. & R. Wister & Company. She later loaned Wister & Company, for their accommodation, a number of the bonds so pledged, aggregating $17,000, which were never returned to her. Business difficulties of the Furnace Company followed, involving Wister & Company. Both concerns went into bankruptcy. Whereupon Sabine W. Wister resorted to the collateral, offered the remaining $37,000 bonds at public sale, and purchased them for $18,000. She credited the note with this sum, and proved a claim for the balance against the estate of Wister & Company.

After protracted negotiations the two bankrupt concerns reached an agreement of settlement with their creditors. This agreement contemplated the organization of a new corporation to take over the property and business of the Furnace Company, the issue of new securities equal in amount to the entire indebtedness of the Furnace Company, including its very considerable indebtedness to Wister & Company, and the acceptance of those securities by the creditors of the two bankrupts in discharge of the debts of both estates, with the understanding, however, that creditors who had claims against both, should, by reason of the primary obligation of one and the obligation of endorsement or guaranty of the other, receive but one payment and that from the primary debtor.

In applying the new securities to the discharge of the bankrupts' debts under this plan, the trustee of the Furnace Company gave Sabine W. Wister, through mistake, an amount of securities not sufficient to discharge her claim against the estate of Wister & Company. She credited this claim with the amount of the securities received, and held the claim for the balance against that estate. The trustee of Wister & Company, denying liability, moved to expunge her claim; the referee, however, allowed it, whereupon Betty Black Wister, in right of her husband, Rodman Wister, deceased, late a partner of the firm of Wister & Company, filed a petition to review the order of allowance. J. N. M. Shimer, another partner of Wister & Company, though equally interested with Betty Black Wister in the allowance or disallowance of the claim of Sabine W. Wister, did not join in this petition, nor did he file a petition of his own within ten days from the referee's order, or at any time. He was advised and was content to allow his rights in the partnership funds affected by the order be determined in the proceedings to review instituted by Betty Black Wister. But it turned out that Betty Black Wister concluded not to prosecute her proceeding to a determination. Eight months after beginning them, she decided to abandon them, and to that end joined in a petition by the trustee of Wister & Company, praying that the proceedings be dismissed and the order of the referee be affirmed. In this situation, Shimer was forced to act for himself, so he appeared and took his first step in opposition to the referee's order, by filing a petition, in which he prayed that the pending proceedings to review be not dismissed, or "at least (he be allowed) to intervene with the same force and effect as though he had

presented the petition to review or joined therein at the time the same was filed."

Why did Shimer resort to the proceedings of Betty Black Wister for the determination of his rights?

Having lost his right by lapse of time under the rule to institute proceedings of his own, and being manifestly without ground to appeal to the judge for an extension of the rule, he sought to avail himself of the only conceivable legal proceeding by which at that late day his objection to the order could be determined. While he does not seriously urge that Betty Black Wister shall continue her proceedings for herself against her wishes, he insists that, in order to do justice within the broad equity powers with which courts of bankruptcy are invested, which include those of amendment, Bankruptcy Act, section 2; section 2, subsection 6; Armstrong v. Fernandez, 208 U. S. 324, 28 Sup. Ct. 419, 52 L. Ed. 514; Hardin v. Boyd, 113 U. S. 756, 5 Sup. Ct. 771, 28 L. Ed. 1141; French v. Gapen, 105 U. S. 509, 26 L. Ed. 951; Neale v. Neale, 76 U. S. (9 Wall.) 1, 19 L. Ed. 590, the court should not dismiss the proceedings, but should admit him as a party and permit him to carry them along for himself.

It is not questioned that proceedings in bankruptcy generally are in the nature of proceedings in equity, Bardes v. National Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, or that courts of bankruptcy, in order that substantial justice be done, are liberal in allowing amendments, especially to meet situations not covered by law or by rules of procedure. But it is going rather far to hold, that a court of bankruptcy, in its orderly administration of justice, will reach into its general equity powers and find a means to restore to a person a right which is conferred upon him by statute and which he has lost by his own neglect.

The right to review a referee's order is conferred by statute. Bankruptcy Act, section 2, subsection 10. The method by which that right is exercised is prescribed by General Order No. 27, namely, "When a * * * person shall desire a review by the judge of any order made by the referee, he shall file with the referee his petition therefor, setting out the error complained of." Supplementing General Order No. 27, the District Court has promulgated a rule, that "a review of any * * * order of a referee must be asked for by petition presented to him before the expiration of the tenth day after such * * * order is made," unless the petition be afterwards allowed by a judge of the District Court. It thus appears that the statute confers the right to a review, the general order defines the procedure, and the rule of court prescribes the time within which the proceeding shall be commenced. The general order and the rule of court have the force of law. From the statute, the general order and the rule, a rule of law has developed to the effect, that unless a party objecting to an order shall himself prosecute a petition to review, setting forth the errors he complains of, within the time prescribed, he may not thereafter file on his own behalf a petition to review (except upon leave of the court), nor will he be heard to complain of a referee's order on petition to review filed by another party. In re Schiller (D. C.) 96 Fed. 400; In

re Scott (D. C.) 99 Fed. 404; In re Russell (D. C.) 105 Fed. 501; In re Hawley (D. C.) 116 Fed. 428; In re Home Discount Co. (D. C.) 147 Fed. 538; In re Greek Mfg. Co. (D. C.) 164 Fed. 211; In re Marks (D. C.) 171 Fed. 281; Re Jamison Bros., 209 Fed. 542, — C. C. A. —.

Shimer did none of the things required of him to preserve a right to review. By filing his petition, asking that he be allowed to intervene in the proceedings of Betty Black Wister with the same force as if he had himself instituted them, he prays, in effect, that he be substituted for her as a party, and that her rights, seasonably asserted, be substituted for his own, which by his neglect he had lost. The prayer of his petition is in direct opposition to the general order and rule of court. We are of opinion that the court's refusal to abrogate its own rules was not error.

The order is affirmed.

In re SAMUELS.

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

No. 35.

BANKRUPTCY ⊂⊃143(11)—RIGHTS OF TRUSTEE—INSURANCE.

A bankrupt procured policies of life insurance, payable to his niece and sister, one of which provided that, in the event of the death of the beneficiaries, the proceeds should be payable to the estate of the bankrupt, and all of which reserved in the bankrupt the authority to change the beneficiaries. Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654), declares that the trustee of the estate of a bankrupt shall be vested by operation of law with the title of the bankrupt to all property which, prior to the petition, he could by any means have transferred, or which might have been levied on or sold under judicial process against him, provided that, when a bankrupt shall have any insurance policy which has a cash surrender value payable to the insured, his estate, or personal representatives, he may, within 30 days after the 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 creditors; otherwise, the policy shall pass to the trustee as assets. *Held* that, as none of the policies were payable to the bankrupt or his estate, and as it would be necessary to compel the bankrupt to change the beneficiaries before the trustee could obtain the surrender value of the policies, the trustee is not entitled to the surrender value of the policies, or, in event of the bankrupt's failure to pay the same, to the policies themselves.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 201; Dec. Dig. ⊂⊃143(11).]

Hough, Circuit Judge, dissenting.

Petition to Revise Order of the District Court for the Southern District of New York.

In the matter of Elias W. Samuels, bankrupt. Petition by Samuel C. Cohen, as trustee, to revise order of the District Court refusing the petition of the trustee that the bankrupt be compelled to pay him the cash values of certain policies of life insurance, or surrender the policies. Orders affirmed.

Samuel Sturtz, of New York City, for bankrupt.
Lawrence B. Cohen, of New York City, for petitioner.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise three orders of the District Court refusing the petition of the trustee that the bankrupt be compelled either to pay him the cash values of certain policies of life insurance, or to surrender the policies to him. They were as follows:

One dated May 1, 1909, in the Penn Mutual Insurance Company, for $3,000, payable one-half to the bankrupt's sister and one-half to his niece, and in case they or either of them predecease him, their shares or her share to be payable to his executors, administrators, or assigns; he reserving full power to change the beneficiary at any time. After payment of three years' premiums, the company agrees to loan on its policies a sum equal to the full reserve to the end of the current policy year, or to pay the same sum as its surrender value upon surrender of the policy. December 17, 1912, the company made a loan on the policy to the bankrupt of $310.49, and is ready, on surrender of the policy, to cancel the loan and pay $193.85 in cash.

Another policy was in the Mutual Life Insurance Company of New York, dated June 24, 1905, for $3,000, payable originally to the bankrupt's estate, and afterwards changed so as to be payable to his sister as the beneficiary. December 30, 1912, the bankrupt borrowed $555 of the company on the policy. The company is willing, upon the consent of both the insured and the beneficiary, to pay its cash value, $753, subject to payment of the loan, or, in case the beneficiary do not consent, the insured may change the beneficiary to himself and collect the cash value. In this company the surrender value and the loan value are the same.

Another policy is in the Equitable Life Assurance Society for $1,000, dated December 28, 1899, payable to the bankrupt's sister; he reserving power to change the beneficiary. In case of lapse, after the payment of three years' premiums, the company agrees to pay on its policies a cash surrender value, which amounted in this case on December 28, 1915, to $396, or, if there be no lapse, to loan $429 on the policy.

The District Judge relied upon the decision of the Supreme Court in Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, and our decision in Re L. Hammel & Co., 221 Fed. 56, 137 C. C. A. 80.

Section 70(a) of the Bankruptcy Act reads:

"Sec. 70. *Title to Property.—a* The trustee of the estate of a bankrupt, upon his appointment and qualification, and his successor or successors, if he shall have one or more, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt, as of the date he was adjudged a bankrupt, except in so far as it is to property which is exempt, 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. * * *"

The argument for the trustee would be quite convincing, viz. that the policies passed to the trustee as property which prior to the filing of the petition the bankrupt could have transferred or which could have been levied upon and sold as his, but for the special proviso as to the policies of insurance. The question is one of the construction of this proviso in the statute. The Supreme Court, in Burlingham v. Crouse, pointed out that it had been construed by the courts in two different ways, viz.:

First, that all policies on the life of a bankrupt payable to him or his estate were to be treated as being property which the bankrupt could have transferred, or which could have been levied on and sold as his, except that the bankrupt might retain those having a surrender value on paying this value to the trustee. The theory of this construction was that Congress enacted the proviso as an exception out of special tenderness to the bankrupt. We took this view in Re Coleman, 136 Fed. 818, 69 C. C. A. 496; Matter of White, 174 Fed. 333, 98 C. C. A. 205, 26 L. R. A. (N. S.) 451; Matter of Hettling, 175 Fed. 65, 99 C. C. A. 87.

Second, that no policies payable to the bankrupt or his estate passed to the trustee, except such as have a surrender value and they only to the extent of the surrender value, if the bankrupt or his representatives or his assigns pay that amount to the trustee within the time prescribed. Subsequently, in Burlingham v. Crouse, 181 Fed. 479, 104 C. C. A. 227, and in Re Judson, 192 Fed. 834, 113 C. C. A. 158, we took the latter view. The Supreme Court affirmed these decisions (Burlingham v. Crouse, 228 U. S. 459, 33 Sup. Ct. 564, 57 L. Ed. 920, 46 L. R. A. [N. S.] 148; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. [N. S.] 154), proceeding upon the theory that in enacting the proviso Congress had in mind, not simply the bankrupt, but the nature of life insurance. It was thought Congress considered it questionable whether trustees ought to continue payment of premiums on policies which might run for years and so engage in a kind of speculation, delaying the winding up of estates, contrary to one of the fundamental objects of the Bankruptcy Act. On the other hand, if the trustee did not have the funds to pay premiums, the bankrupt might lose his insurance. The proviso was regarded, not as an exception in favor of the bankrupt, but as additional legislation, not limited to the bankrupt, but extending to his assigns. The creditors were thought to receive enough if they received the surrender value. None of the policies in question is payable to the bankrupt or his estate. In the Hammel Case we held that, though the bankrupt could have changed the beneficiary to himself and could then have borrowed the cash value of the policy from the company, he could not be compelled to do so.

This conclusion we think in line with the reasoning of the Supreme Court in Burlingham v. Crouse and in Everett v. Judson, and therefore the orders are affirmed.

HOUGH, Circuit Judge (dissenting). The rule on this subject is set forth in one sentence from Burlingham v. Crouse, 228 U. S. at page 473, 33 Sup. Ct. 568, 57 L. Ed. 920, 46 L. R. A. (N. S.) 148, viz.:

"As we have construed the statute, its purpose was to vest the surrender value in the trustee for the benefit of the creditors, and not otherwise to limit the bankrupt in dealing with his policy."

In that case there was at the time of bankruptcy no surrender value. Therefore there was nothing for the trustee to get. In Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154, there was a surrender value, and the trustee received it. In Re L. Hammel & Co., 221 Fed. 56, 57, 137 C. C. A. 80, 81, the policy possessed "no 'cash surrender value,' either provided for on its face, or established by concession and practice of the company." What we refused in that litigation was to compel the bankrupt to get the policy back from his wife and *borrow upon it* for the benefit of his estate. No other point was involved.

All of the policies in this case have a cash surrender value, and the only reason why that value is thought not to flow into the bankrupt's estate is the fact that the bankrupt prefers to keep the policies payable to beneficiaries chosen by himself, but whose rights he can cancel at will. This bankrupt is the assured; he is the only person who can obtain the surrender value; he can get it when he wants it, and no one else can. Samuel's property in these policies was transferable by him, was subject to be applied to the satisfaction of his debts under the laws of the state, and possessed (in the language of the Bankruptcy Act) "a cash surrender value payable to himself." It is so payable in equity, because he can get it—and bankruptcy is equity.

Therefore the order should be reversed, under the construction of the act as above quoted. For these reasons, I dissent from the judgment of the court.

PRDJUN v. UNITED STATES.

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

No. 2813.

1. PROSTITUTION ⇐2—WHITE SLAVES—OFFENSES.

Where defendant enticed a girl from one state to another for commercial immoral purposes, but the girl, though enticed to go, did not know of the purpose for which she was intended, defendant was guilty of a violation of White Slave Traffic Act June 25, 1910, c. 395, 36 Stat. 825 (Comp. St. 1913. §§ 8812–8819).

[Ed. Note.—For other cases, see Prostitution, Dec. Dig. ⇐2.]

2. CRIMINAL LAW ⇐663—TRIAL—INSPECTION OF DOCUMENTS.

Where it is proposed to introduce in evidence a letter, it should be tendered to the opposing side for inspection as soon as identified.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1602; Dec. Dig. ⇐663.]

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3. CRIMINAL LAW ⟸1166½(1)—TRIAL—INSPECTION OF DOCUMENTS.
On cross-examination, a letter written by the husband of the defendant in a foreign tongue, with which defendant's attorney was unfamiliar, was offered; but the attorney's request that the translation be read to him before being read in open court was denied. *Held* that, as the letter went only to the credibility of the witness under cross-examination, accused was in no way prejudiced in cross-examination, and so the denial of the request was not reversible error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 3119–3122; Dec. Dig. ⟸1166½(1).]

4. CRIMINAL LAW ⟸1170½(5)—APPEAL—HARMLESS ERROR.
In a prosecution for violating the White Slave Traffic Act, where a witness for the government on direct examination stated that defendant ran a disorderly house, the refusal of the court to require the witness to answer questions as to who had made complaints to him concerning the nature of the place was not reversible error, where the witness admitted that his statement was based on complaints made by others living in the locality.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3133; Dec. Dig. ⟸1170½(5).]

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Katherine Prdjun, alias Katherine Prodjan, was convicted of violating the White Slave Act, and she brings error. Affirmed.

I. J. Pettiford, of Detroit, Mich., for plaintiff in error.

John E. Kinnane, U. S. Atty., of Detroit, Mich.

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

McCALL, District Judge. This case was tried to a court and jury on an indictment charging the appellant with violating the fourth section of the Act of Congress of June 25, 1910, commonly referred to as the "White Slave Traffic Act." There was a verdict of guilty and judgment of the court thereon. The case is here on writ of error.

There were 26 errors assigned, but only 3 were discussed either in the brief or at the hearing, and we shall consider only those discussed.

[1] The twenty-sixth assignment is that the court erred in not directing a verdict in favor of the appellant, on the ground that the evidence does not support the charge in the indictment. Particularly is it urged that there is no evidence that the girl Zorka Adzics knew the purpose for which she was enticed to go from the city of Newark, Ohio, to the city of Detroit, Mich., and that such prior knowledge on her part must be shown before there could properly have been a conviction. A line of cases, which it is not necessary to state, is cited to support this contention. We think they are not applicable. The court below correctly charged the jury in substance: If the appellant put the girl in question in such a frame of mind that she wanted to go and did go, if coupled with it was the purpose on the part of the appellant

that the girl should engage in prostitution—sexual immorality—when she got to Detroit, then that is an offense against the statute; but without that purpose on the part of the appellant there would be no offense. An attentive examination of all the evidence presented in the record leads us to conclude that there is no merit in this assignment. The jury were well warranted in finding that the defendant brought the girl in question into the state for purposes of sexual immorality.

[2] The eighteenth assignment rests upon the ground that the court refused the request of appellant's counsel to have the interpreter read to him a certain letter, to enable counsel to see whether it was material, before it was openly read (in translation) upon the trial. The letter in question purported to have been written by Steve Prdjun, husband of the appellant and a witness for her, to Zorka Adzics, a witness for the government, the girl whom, it was alleged, the appellant enticed to go from the city of Newark, in the state of Ohio, to the city of Detroit, in the state of Michigan, for certain immoral purposes. The letter was written in the Croatian language, with which counsel for the appellant was not familiar. It was translated for the court and jury by an interpreter.

A letter so proposed to be introduced should be tendered to the other side for inspection as soon as it has been identified. Morris v. United States, 149 Fed. 123, 80 C. C. A. 112, 9 Ann. Cas. 558; United States v. Wong Quong Wong (D. C.) 94 Fed. 832; Boyd v. United States, 116 U. S. 616, 6 Sup. Ct. 524, 29 L. Ed. 746. In this way counsel is informed of the contents of the paper offered, and this is, as we think, the proper practice.

[3] In the case at bar, however, it would have been a mere formality to have passed the letter in question to appellant's counsel, since he could not have read it. It is conceded that the proceedings on the trial were stenographically reported, and, on the letter being read, defendant's counsel had complete right of access to the translation. We have examined the contents of the letter, as its translation appears in the record, and are persuaded that the letter should have been admitted, had objection thereto been made, and that appellant was in no way prejudiced in cross-examination by the refusal to permit counsel to hear it translated before it was read aloud, especially since the contents of the letter go only to the credibility of the witness under cross-examination. There was thus no reversible error in the action complained of.

[4] The eleventh assignment is to the effect that the court erred in excluding certain questions asked William Black, a government witness, on cross-examination. It appears that Black had charge of the supervision of the vice district in the city of Detroit, and, among other things, in reply to a question on direct examination, whether he knew anything "professionally" about defendant's house, said that it was a house of prostitution, giving, however, on direct examination, no testimony as to the source of such knowledge or information. On cross-examination he testified that he knew nothing about the character of the place previous to a "shooting" which occurred about December 19th; that once before the arrest (which was made February 25th) he

had been at the place on complaint of the neighbors that defendant was running a disorderly house; that he did not know who made the complaint, that he got it through the superintendent, and that was all he knew about it. Being further cross-examined, he said he talked with some of the people who made the complaint about the place. In reply to a question whether he knew who they were, he said that one was Zagarach (who had already testified); that another suggested by the cross-examiner was not one of those who had complained, adding:

"I have talked with several people, about whom I will not give information, because they are people of the neighborhood, and they would not care to have me do so."

In reply to a question whether he wished to say that the house was "a place of prostitution, because Mike Zagarach and somebody else came up to see you once and complained about it," he answered, "That is enough, isn't it? * * *. They go there for that purpose." He made it clear, however, that his only knowledge was based upon the fact that "they told him it was true." Complaint is made of the exclusion of the inquiry as to what other persons witness talked to except Zagarach, and how many times "these people" were "to see you about this place." We think that, in view of the entire examination, the exclusion of these questions worked no reversible error, if, indeed, it was not within the discretion of the trial court.

We find no reversible error. Affirmed.

NALITZKY et al. v. WILLIAMS.

(Circuit Court of Appeals, Third Circuit. December 6, 1916. Rehearing Denied January 8, 1917.)

No. 2145.

1. BILLS AND NOTES ⟸237—ACCOMMODATION INDORSER—LIABILITY.
One who indorsed, without consideration to himself, a note given in renewal of a one-name note, when the bank informed the maker that it could no longer accept a one-name note, made the indorsement for the accommodation of the maker, not of the bank, and is liable, though the bank knew that the indorser received no consideration for his indorsement, under section 24 of the Negotiable Instruments Act of New Jersey (3 Comp. St. N. J. 1910, p. 3732), creating a presumption of consideration for a negotiable instrument, section 25 defining value, and section 29 defining an accommodation maker as one who has signed the instrument, without receiving consideration therefor, for the purpose of lending credit to another party to the instrument.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 563, 564, 567–569; Dec. Dig. ⟸237.]

2. EVIDENCE ⟸441(11)—PAROL EVIDENCE—VARYING NOTE—PAYMENT IN INSTALLMENTS.
Parol evidence is not admissible to vary the unqualified terms of a note by proving an agreement that it might be paid off in installments.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1799–1812, 2043, 2044; Dec. Dig. ⟸441(11).]

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3. BILLS AND NOTES ⊂=140—LIABILITY OF INDORSER—DISCHARGE—EXTENSION OF TIME OF PAYMENT—CONSIDERATION.

An agreement by the bank that, if the maker of a past-due note would pay part of it, the bank would wait for the balance, is based on no consideration, and is not binding on the bank, and therefore does not relieve an accommodation indorser from his liability, even if he be considered only secondarily liable under Negotiable Instruments Act N. J. § 120, providing that a party secondarily liable shall be entitled to be discharged by any agreement binding on the holder to extend the time of payment.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 355–359; Dec. Dig. ⊂=140.]

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

Action by C. L. Williams, as receiver of the First National Bank of Bayonne, against Tudres Nalitzky and another. Judgment for plaintiff, and defendants bring error. Affirmed.

J. L. Weinberg, of New York City, for plaintiffs in error.

Barber, Watson & Gibboney, of New York City (George M. Burditt and Stuart G. Gibboney, both of New York City, of counsel), for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges

McPHERSON, Circuit Judge. This suit, brought on November 9, 1914, by Christopher L. Williams, receiver of the First National Bank of Bayonne, is against Tudres Nalitzky, the maker, and David I. Nalitt, the indorser, of a promissory note in the usual commercial form for $2,100, dated November 24, 1913, and payable in two months. Protest was waived at maturity, two payments were afterwards made by Nalitzky—one of $50 on January 26, 1914, and the other of $500 on February 26—and the receiver sues to recover the balance. The trial judge directed a verdict for the plaintiff, and this writ of error complains of his instruction, and also of certain rulings during the trial. The facts are few, and are not now in dispute:

On May 19, 1913, Nalitzky was in debt to the bank on several single-name notes, and on that date united all his obligations in one note for $2,300, upon which Nalitt became the accommodation indorser. Several renewals followed, $200 was paid on account, and the note now before us is the last of the series.

[1] The first defense is that the indorsement was an accommodation, not to the maker, but solely to the bank, which was obeying an official notice from a bank examiner that the single-name paper could no longer be permitted, and that Nalitzky must furnish an indorser. This defense has no merit, either in fact or in law. The accommodation was to Nalitzky, and not to the bank; and, although the bank knew that Nalitt received no consideration for his indorsement, this is a matter of no importance. New Jersey Negotiable Instruments Act (3 Comp. Stat. N. J. 1910, p. 3732) §§ 24, 25, 29; Israel v. Gale, 174 U. S. 395, 19 Sup. Ct. 768, 43 L. Ed. 1019.

[2] The second defense asserts that when the note was made the bank agreed that the debt might be paid off by small installments, $50 or $75—an agreement that would be violated if recovery were now permitted. Evidence to this effect was offered, but was correctly rejected; no authority need be cited for the proposition that the unqualified terms of the note cannot be thus varied by parol testimony.

[3] The remaining defense deserves a somewhat fuller consideration. Nalitzky testified that on February 26, 1914, the note being then overdue, he offered to pay, and did pay, $500 on account, but on the condition (which was agreed to, and was afterwards fulfilled, by the bank) that the time of payment should be extended for six months from the date of maturity. The argument is that the indorser was only a surety, and was discharged because he did not agree to the extension. The trial judge struck out the evidence, and the indorser complains of this ruling as erroneous. In our opinion the objection is not well founded. Precisely what position an accommodation indorser may occupy under the Negotiable Instruments Act, when the holder knows that he has received no consideration, we do not find it necessary to decide. But one thing is certain; he is either primarily liable, or secondarily liable (sections 60–69); and, whichever may be his true character, the methods by which he can be discharged are pointed out in sections 119 and 120. The most favorable aspect in which to regard him is as a person secondarily liable, and therefore entitled to be discharged under section 120:

"By any agreement binding upon the holder to extend the time of payment, or to postpone the holder's right to enforce the instrument, * * * unless the right of recourse against such party is expressly reserved."

Assuming, as we must, that the jury might have found the facts to be as Nalitzky testified, and assuming further—but solely for the purposes of this case—that Nalitt was only secondarily liable on the note, and was entitled to the protection of the clause quoted from section 120, the narrow question is presented: Did the bank make a binding agreement to extend the time? The fatal defect in the evidence is that no consideration for such a contract is shown, and therefore, although the agreement may have been formally entered into, it was a nudum pactum and tied the hands neither of the bank nor of the indorser. Nalitzky gave the bank no new consideration of any kind, pecuniary or other; he merely paid part of a debt that had matured, and, as all of it was then payable, he was doing no more, but, on the contrary, was doing less, than he was already bound to do. He neither undertook nor discharged any new obligation, and the bank gained no new legal advantage by accepting part of the debt when the whole of it was lawfully demandable. As the indorser could have paid what was due, either when the note matured or on any day thereafter, and could then have immediately pursued his own remedy against the maker, he suffered no injury and was not discharged. The general subject is considered in the notes and cases to be found in 8 Corp. Jur. 278, § 434; Crawford, Neg. Inst. (3d Ed.) 138; Cellers v. Lyons, 49 Or. 186, 89 Pac. 426, 10 L. R. A. (N. S.) 133, 13 Ann. Cas. 997; Rogers v. Detroit Savings Bank, 146 Mich. 639, 110 N. W. 74, 18 L. R.

A. (N. S.) 534; Richards v. Market Exchange Bank Co., 81 Ohio St. 348, 90 N. E. 1000, 26 L. R. A. (N. S.) 99; Northern State Bank of Grand Forks v. Bellamy, 19 N. D. 509, 125 N. W. 888, 31 L. R. A. (N. S.) 149; 3 Rul. Case Law, 1273, §§ 503–508.

The judgment is affirmed.

MEDINA VALLEY IRR. CO. v. SEEKATZ.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1916. Rehearing Denied January 9, 1917.)

No. 2588.

EMINENT DOMAIN ⊜134—CONDEMNATION—DAMAGES—EVIDENCE.

In a proceeding to condemn land to form part of a reservoir to impound water for irrigation purposes, the landowner, while entitled to damages for the value of his land for any purpose to which it could be devoted, is not, his particular tract being unavailable for a reservoir itself, entitled to recover damages on the basis of its value as reservoir property, after the exercise of the power of eminent domain by plaintiff, and so evidence of the value of the land for reservoir property was improperly received.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. § 356; Dec. Dig. ⊜134.]

In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Action by the Medina Valley Irrigation Company against F. P. Seekatz. There was a judgment for defendant for damages, and plaintiff brings error. Reversed.

William Aubrey and Duval West, both of San Antonio, Tex. (De Montel & Fly, of Hondo, Tex., on the brief), for plaintiff in error.

T. T. Vander Hoeven, E. P. Lipscomb, and C. L. Bass, all of San Antonio, Tex., for defendant in error.

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

WALKER, Circuit Judge. The plaintiff in error, the Medina Valley Irrigation Company, a corporation, claiming that it was lawfully authorized and empowered to establish, maintain, and operate an irrigation system by impounding the waters of the Medina river through the erection of dams and reservoirs, brought this suit against the defendant in error for the purpose of condemning for its use and as a part of its storage reservoir 573.44 acres of defendant's land in Medina county, Tex. The evidence adduced on the trial without contradiction showed that the land sought to be condemned in this suit consisted of several tracts, which were to be united with a large number of other tracts of land owned by various persons, all of which were required, and when united in one body were by the plaintiff to be applied to the construction and maintenance of an extensive reservoir to impound water to be used for the purposes of irrigation for the benefit of the public, and that the plaintiff was entitled to take said

land of the defendant by condemnation for said purposes and needed the same to complete said reservoir.

Over objections duly made by the plaintiff, several witnesses were permitted to testify as to the value of the land in question for reservoir purposes. The witness Dillon was asked by defendant's counsel to estimate the value of the land in controversy, and to state what, in his opinion, the land of the defendant to be submerged by plaintiff's reservoir was worth for agricultural purposes and grazing purposes, and for reservoir purposes. Thereupon the plaintiff objected to the witness embodying in his opinion of said value any value that said land possessed for reservoir purposes, for the reason that said evidence in that regard would be irrelevant, immaterial, and incompetent. This objection was overruled, the plaintiff duly excepting, and the witness, in reply to the question, testified that, considering all the uses he knew of that the land could be put to, both for agricultural purposes and for reservoir and grazing purposes, the tillable land to be submerged was worth $155 per acre, and the land that was not tillable $150 per acre. Defendant's counsel asked the witness Carpenter the following question:

"Assuming that below plaintiff's lower or diversion dam there is, approximately, 100,000 acres of land that could be put under irrigation by proper canals and ditches, that plaintiff's reservoir for impounding water contains 6,790 acres, that defendant's land sought in this case to be condemned forms part of said reservoir, that the water supply of said reservoir was sufficient to annually irrigate over 100,000 acres of land, that 58 acres of defendant's land was in actual cultivation, 192 acres was susceptible of cultivation, and the remainder grazing land, what, in your opinion, is the value of the entire tract of land sought in this case to be condemned?"

The plaintiff objected to all that part of the question having reference to the value of the land for reservoir purposes, for the reason that said evidence was irrelevant, immaterial, and incompetent, and excepted to the action of the court in overruling this objection. In response to the question the witness testified that said land, in his opinion, would be worth from $100 to $200 per acre, and that he based his estimate of said value upon the amount of returns to be obtained from the land, and upon the value of other reservoir sites with which he was acquainted, and the prices at which they had been held, and how they had been considered by the people connected with them on both sides, and in this particular case, from the fact that each acre in the reservoir site will hold sufficient water for about 15 or 16 acres of land, or as many times as 6,700 is contained in 100,000. Taking that value to be the lowest, $100, any company going in would probably expect to gain 1,500 per cent. increase outside of expenses for each acre of which they might get the use in the reservoir; that said valuation included its adaptability as a part of a reservoir site.

The defendant was entitled to be paid the value of his land as it was held and owned by him, but was not entitled to a proportion of an advance in value of a much larger tract due to a union of his land with the lands of a number of other proprietors. The contest in this case was enough to show that it was not to be assumed that it was reasonably practicable, without an exercise of the power of emi-

nent domain, to bring together into one ownership the sundry parcels of land required to constitute the reservoir site, the value of which was deposed to. The defendant was not entitled to share in an enhancement of value attributable to an expected exercise of that power. New York v. Sage, 239 U. S. 57, 36 Sup. Ct. 25, 60 L. Ed. 143; McGovern v. New York, 229 U. S. 363, 33 Sup. Ct. 876, 57 L. Ed. 1028, 46 L. R. A. (N. S.) 391; United States v. Chandler-Dunbar Company, 229 U. S. 53, 33 Sup. Ct. 667, 57 L. Ed. 1063. The Minnesota Rate Cases, 230 U. S. 352, 455, 33 Sup. Ct. 729, 57 L. Ed. 1511, 48 L. R. A. (N. S.) 1151, Ann. Cas. 1916A, 18; Boston Chamber of Commerce v. Boston, 217 U. S. 189, 30 Sup. Ct. 459, 54 L. Ed. 725.

It is not suggested that the defendant's land, standing by itself, was eligible as a water storage reservoir site. The fact that it was so situated as to be available for a union with other lands to make up a reservoir site may have had effect in adding to the amount obtainable for it by the owner from some one desiring to buy it. It was open to the defendant to prove the market value of his land, by whatever circumstances or influences that value may have been affected. But in the circumstances of the case the questions mentioned were calculated to elicit, and did elicit, estimates of value based, not upon a knowledge of what the land as the defendant owned it was worth, but upon opinions as to what it was or would be worth as a part of a reservoir site, whether the union of all the lands required for that purpose could or could not be brought about without an exercise of the power of eminent domain. The admission in evidence of such estimates of value involved the hypothesis that the defendant was entitled to the value which was added to his land by the condemnation of it, together with other lands, in behalf of another. Such estimates were based upon a consideration of contingencies which were too remote and speculative to have any legitimate effect upon the valuation of the land as it was owned by the defendant, and the admission of evidence of them involved the unwarranted assumption that the defendant was entitled to share in an enhancement of value resulting from an exercise of the power of eminent domain.

We are of opinion that the result of the rulings mentioned was to let in inadmissible evidence as to the value of the land sought to be condemned, and that those rulings, or at any rate the one last mentioned, constituted prejudicial error.

Because of that error, the judgment under review is reversed.

FUDICKAR v. GLENN et al.

In re ECONOMY MERCANTILE CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1916. Rehearing Denied January 10, 1917.)

No. 2962.

1. CORPORATIONS ⟸426(7)—ACTS OF OFFICERS—RATIFICATION.
Where a corporation, with full knowledge that one of its officers had undertaken to renew a lease in its name, continued to occupy the premises, paying rent, pursuant to the renewal agreement, and recognized that its occupancy was under a lease unexpired at the time its petition in bankruptcy was filed, by so stating in the schedules, the attempted renewal by the officer, if not authorized, was ratified by the corporation.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⟸426(7).]

2. BANKRUPTCY ⟸191(1)—LIENS—VALIDITY.
Under Bankr. Act July 1, 1898, c. 541, § 67d, 30 Stat. 564 (Comp. St. 1913, § 9651), declaring that liens given or accepted in good faith, and not in contemplation or in fraud of the act, shall not be affected, the lien of a lessor of premises used for mercantile purposes on the movables of the lessee to secure unpaid rent, as well as rent which may accrue during a term of a year after bankruptcy, given by Civ. Code La. art. 2705, and Act No. 128 of 1894, is not affected by the bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 290; Dec. Dig. ⟸191(1).]

3. BANKRUPTCY ⟸191(1)—LIENS—ENFORCEMENT.
The lien of a lessor of premises used for mercantile purposes for rent to accrue within a year after bankruptcy, conferred by Civ. Code La. art. 2705, may be enforced as against the lessee's movables, though the claim for the rent to accrue is not provable in bankruptcy, and the movables passed into possession of the bankruptcy court.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286, 290; Dec. Dig. ⟸191(1).]

Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge.

In the matter of bankruptcy of the Economy Mercantile Company, Limited. The claim of Ernest Fudickar, which was contested by Walker Glenn, trustee, having been allowed by the referee, was largely disallowed by the District Court, and claimant appeals. Decree reversed.

Allan Sholars, of Monroe, La. (Hudson, Potts, Bernstein & Sholars, of Monroe, La., on the brief), for appellant.

Adolph Wolff and Percy Sandel, both of Monroe, La., for appellee.

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

WALKER, Circuit Judge. At the time of the filing of the voluntary petition in bankruptcy by the Economy Mercantile Company on April 20, 1915, it occupied a building as the tenant of the appellant, Ernest Fudickar. The tenancy commenced under a written lease made in 1913 for a period of one year from June 15, 1913. By the terms

of that lease the lessee had the right to renew the lease for one or two years more at its option at the same rental, $200 per month. By a written communication, addressed to the lessor and signed with the name of the lessee corporation by one of its officers, the lessor was notified on May 23, 1914, that, in accordance with the provision of the original lease, the lessee accepted the leased premises for a period of two years at the rate of $200 per month. The lessee continued to occupy the premises, paid the stipulated rent to January 15, 1915, and its schedule, filed with its petition, of creditors to whom priority is secured by law, contained this item:

"Rent due E. Fudickar, earned rent, $600.00. Contract expires May 15, 1916, at $200 per month."

Fudickar filed a priority claim in the bankruptcy proceeding for the sum of $3,400, for rent at $200 per month from January 15, 1915, to June 15, 1916, asserting a lien upon the stock of goods, fixtures, and furniture in the leased premises. The referee allowed this claim to the extent of $3,126.70, being the stipulated rent to the date of the adjudication of bankruptcy, May 4, 1915, and for one year from that time. The District Court reversed this order to the extent of disallowing all rent accruing under the contract of lease after the filing of the petition in bankruptcy. The appeal is from the decree to this effect.

[1] We do not think that there is any merit in the contention that the bankrupt corporation did not bind itself by a renewal of the lease for two years. With full knowledge of the facts, it acquiesced in the act of its officer, who undertook to renew the lease in its name. It continued to occupy the premises, paid rent pursuant to the renewal agreement, and recognized that its occupation of the premises was under a lease which was unexpired at the time the petition in bankruptcy was filed. Assuming that the corporation did not authorize the making of the renewal contract, yet its adoption or ratification of that contract was sufficiently shown.

[2, 3] The Louisiana law gives to a lessor, for the payment of his rent, a lien or privilege and right of pledge on the movable effects of the lessee which are found on the property leased; but, in the case of the failure or death of a lessee of a building used wholly or in part for mercantile purposes, the right so given "shall not extend * * * in such a way as to secure rent for a term of more than one year after such failure or death." Merrick's Revised Civil Code of Louisiana, art. 2705; Acts of Louisiana, 1894, No. 128, p. 163. An effect of the lease, which had more than a year to run when the bankruptcy occurred, was to give the lessor a lien or privilege on the effects of the lessee found on the property leased for the unpaid rent already accrued at that time and for the rent for a term of one year after the bankruptcy. Trager Co. v. Cavaroc Co., Ltd., 124 La. 611, 50 South. 598. The lien so attaching under the state law as a result of the lease contract is one which the provision of section 67d of the Bankruptcy Act saves from being affected by that act.

Whether a claim for the rent accruing by the terms of the lease after the date of the bankruptcy does or does not constitute a provable and allowable claim against the estate in bankruptcy as a whole, so

much of that estate as is subject to the lien in favor of the lessor remains subject to that lien, notwithstanding the lessee's bankruptcy, and that lien is enforceable against the property subject to it, which comes into the possession of the bankruptcy court. Relief cannot properly be denied to one asserting a valid subsisting lien on property, or the proceeds of it, in the court's possession. The conclusion is that the appellant had a lien on so much of the bankrupt's estate as consisted of the stock of goods, fixtures, and furniture in the leased premises for the stipulated rent accrued at the date of the bankruptcy, and also for the rent for one year from that time. Martin v. Orgain, 174 Fed. 772, 98 C. C. A. 246; Henderson v. Mayer, 225 U. S. 631, 32 Sup. Ct. 699, 56 L. Ed. 1233; In re Southern Hardware & Supply Co. (D. C.) 210 Fed. 381.

The decree appealed from is reversed.

ROSEN et al. v. UNITED STATES.

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

No. 43.

WITNESSES ⊂=48(2)—COMPETENCY—PERSONS CONVICTED OF CRIME.

One convicted of forgery in the state court while a minor, and sentenced to the reformatory for indeterminate sentence, is a competent witness.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. § 111; Dec. Dig. ⊂=48(2).]

Ward, Circuit Judge, dissenting.

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

Theodore S. Rosen and Abraham Wagner were convicted of tampering with the United States mail, and they bring error. Affirmed.

Meier Steinbrink, of Brooklyn, N. Y., for plaintiff in error Rosen.
Bick & Freedman, of Brooklyn, N. Y., for plaintiff in error Wagner.
Melville J. France, U. S. Atty., of Brooklyn, N. Y.

Before COXE, WARD, and HOUGH, Circuit Judges.

COXE, Circuit Judge. On the trial of Rosen and Wagner, indicted for tampering with the United States mail, a witness named Broder was called by the government. He was jointly indicted with Rosen and Wagner and pleaded guilty. The record of his conviction in the General Sessions of New York of the crime of forgery in the second degree was offered in evidence. Objection was taken by defendants to Broder's competency as a witness but it was overruled. Was Broder a competent witness? He was at the time of his trial about 18 years of age and was sent to the Elmira Reformatory. No time limit was fixed by his sentence. The trial judge in the case at bar considered it the equivalent of a suspended sentence. We are unable to find an authority exactly in point but we think the decision in the

court below was in accordance with the trend of modern opinion. Broder was not of age at the time and was convicted of the crime of forgery. Sending him to Elmira was for the purpose of reforming him if possible and should not have the stigma of a prison sentence for a term of years. The theory upon which Elmira was founded and is operated was to reform and save young men who have, perhaps, thoughtlessly entered upon a career of wrongdoing. It is a school, and reformatory; it is not a prison. It would be a misfortune if it were held that proof of a sentence to Elmira alone disqaulifies a witness and stigmatizes him for all time a person unworthy of credence.

The raison d'etre of the reformatory is to bring about the direct opposite of this: It is to reform and not to punish; to uplift, encourage and help the young men sent there.

We know of no case where a commitment to Elmira has been held to disqualify a witness and see no reason why an exception should be made of the present case.

The tendency of modern thought is towards the abolition of the archaic rules which undertook to declare, arbitrarily, who were and who were not entitled to credence as witnesses and who should be absolutely debarred from taking the stand. All this is changed and now in most enlightened and progressive jurisdictions the tendency is to receive all the testimony bearing upon the issue, irrespective of the character of the witness who gives it. Proof of the commission of a crime discredits a witness but it does not absolutely exclude him from the witness stand.

The judgment is affirmed.

HOUGH, Circuit Judge, concurs in result.

WARD, Circuit Judge (dissenting). The question in this case is purely one of evidence, viz., Did the judgment of conviction of Broder in the courts of the state of New York of the crime of forgery on his own confession make him incompetent as a witness in a criminal action in the District Court of the United States sitting in the state of New York? It has been frequently decided by the Supreme Court that the laws of the state in which the action is tried as to evidence do no apply to criminal cases in the courts of the United States. There being no federal statute regulating the subject, it must be determined in the federal courts by the common law existing in the state of New York at the time of the enactment of the Judiciary Act in 1789. United States v. Reid, 12 How. 361, 13 L. Ed. 1023. See, also, Moore v. United States, 91 U. S. 271, 23 L. Ed. 346; Schreiber v. Sharpless, 110 U. S. 76, 3 Sup. Ct. 423, 28 L. Ed. 65; United Copper Securities Co. v. Amalgamated, 232 Fed. 574, 146 C. C. A. 532. By that common law witnesses who were infamous were incompetent, and those who had been convicted of treason, felony, or crimen falsi were infamous. Greenleaf on Evidence, § 373.

In Logan v. United States, 144 U. S. 263, 298–303, 12 Sup. Ct. 617, 36 L. Ed. 429, it was held that the competency of witnesses in a criminal case tried in the Circuit Court of the United States for the Northern District of Texas was governed, not by the law of Texas,

but by the common law. A witness who had been convicted of felonious homicide in the courts of North Carolina was held competent, apparently on the ground that any disqualification created by the laws of North Carolina could have no effect beyond the limits of that state. A witness who had been convicted of larceny in the courts of Texas was also held competent because he had received a full and unconditional pardon from the Governor. If the question of competency was to be decided by the common law, as the court held, it would seem as if both witnesses should have been held incompetent, because the judgment of conviction in each case showed that the witness had been convicted of an offense which was a felony at common law rendering him infamous. However this may be, it cannot be assumed that the court intended to depart from its prior decisions.

There is no question in this case of enforcing the judgment of the state court. It has been completely enforced. The question is as to its effect when offered in evidence. That a judgment of conviction in a state court should have one quality as evidence in the state courts and quite a different one in the federal courts is not illogical. When the sovereigns differ, one must yield; and the Supreme Court has persistently held that Congress did not intend the states to control in respect to evidence in criminal cases. Broder, the witness in this case, had been convicted in a court of the state of New York of what was at common law crimen falsi, viz., forgery. As the judgment had not been reversed and he had not been pardoned, his testimony should have been excluded. Such is the rule in the federal courts, though not in the courts of New York. If it is antiquated, and the judgment of conviction should go only to the credibility of a witness, Congress and not the courts should make the change. This was the view taken in a similar case by the Circuit Court of Appeals for the Eighth Circuit in Maxey v. United States, 207 Fed. 327, 125 C. C. A. 77.

STANKUS v. JAMISON.

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

No. 28.

SHIPPING ⟸84(1)—INJURIES TO STEVEDORE—LIABILITY OF MASTER.

A stevedore, employed to remove a cargo of sugar belonging to defendant from the ship of another, cannot recover from defendant for injuries received by reason of defects in the hatch of the ship; defendant having no control over the ship, and not being responsible for its faulty construction or dilapidated condition.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 349; Dec. Dig. ⟸84(1).]

Ward, Circuit Judge, dissenting.

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

Action by George Stankus against William A. Jamison. There was a judgment for defendant, and plaintiff brings error. Affirmed.

On writ of error by the plaintiff below to review a judgment which was entered after a decision dismissing the complaint at the close of the evidence. The action was brought to recover damages for injuries received by reason of the alleged negligence of the defendant, who is a member of the firm of Arbuckle Bros., which firm employed the plaintiff. The accident occurred by reason of the falling of a hatch cover on the steamship Paloma of the Munson Line while at the Arbuckle dock. The plaintiff asserts that the falling of the hatch was caused by the alleged negligence of the defendant.

Baltrus Yankaus, of New York City, for plaintiff in error.

E. A. Jones, of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The plaintiff sues a member of the firm of Arbuckle Bros. for injuries sustained by reason of their alleged negligence while he was engaged, as the Arbuckles' servant, in unloading a cargo of their sugar from the Munson Line steamship Paloma. It is alleged that while removing the hatch covers one of them gave way and the plaintiff was thrown into the hold and received the injuries complained of. It is not pretended that the defendant had any interest in the ship or authority over it or in the construction of the hatch or the removal of the cover. The plaintiff was there as the servant of Arbuckle Bros. to unload their sugar. The defendant had no authority over the ship and is not responsible for its alleged faulty construction or dilapidated condition. He had nothing to do with the ship, its construction or its management. If a traveler gives his baggage check to his coachman with instructions to secure the trunk and deliver it at the owner's home and the coachman is injured by reason of a faulty construction of the baggage car, it seems too plain for argument that the traveler cannot

be held liable. So in the present case Mr. Jamison is no more to blame for the injury than the bookkeeper in his office. If the defendant had been the charterer of the ship or charged with any duty regarding its construction, repairs or management, a different question might be presented. But we are unable to discover any duty which the defendant, as an individual or as a member of the firm of Arbuckle Bros., owed to the plaintiff or to any one else, to inspect the Munson Line's ships, their hatches, strongbacks or hatch cover.

The judgment is affirmed with costs.

WARD, Circuit Judge (dissenting). The notice under the New York Employers' Liability Act (Consol. Laws, c. 31, §§ 200–204) in this case was fatally defective in not charging any negligence against the defendant (Rodzborski v. American Sugar Refining Co., 210 N. Y. 262, 104 N. E. 616), so that the plaintiff was left to his common-law rights. The defendant's firm was acting as stevedores in unloading the vessel and the plaintiff was employed by them in this work. The common law imposed upon them the duty of exercising ordinary and reasonable care to furnish the plaintiff a safe place in which to do the work. The hatch and also the hatch cover which fell, resulting in injuries to the plaintiff, were in their custody and control for the purpose of the work they were doing. There was evidence that the place was unsafe and the employers were under the duty of exercising some care by inspection or otherwise in respect to it. Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 15 Sup. Ct. 491, 39 L. Ed. 624.

I think it was for the jury to say whether the defendant had exercised ordinary and reasonable care, and that therefore the judgment should be reversed.

FREEMAN v. UNITED STATES.

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

CRIMINAL LAW ⊜168—TRIAL—FORMER JEOPARDY.

During the trial of a criminal prosecution, the judge became ill and unable to proceed. Under an order providing that the trial might proceed before another judge, if defendant consented, the trial was continued; defendant consenting. *Held* that, as defendant's consent resulted in the continuation of the trial, and as the proceedings after substitution of judges were on appeal declared nullities, such proceedings did not constitute former jeopardy, entitling defendant to discharge.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 290–303; Dec. Dig. ⊜168.]

On motion for modification of mandate of reversal. Motion denied, and former opinion upheld.

For former opinion, see 227 Fed. 732, 142 C. C. A. 256.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. The defendant, whose conviction in this case we have heretofore reversed (227 Fed. 732, 142 C. C. A. 256), moves that the mandate of reversal be recalled and modified, so as to direct his discharge. His theory is that there should not be a new trial, because he has already been once in jeopardy, and to try him again would be a violation of the Fifth Amendment to the Constitution.

As we have already held that all proceedings before the judge substituted for the trial judge were nullities, the defendant has not been in jeopardy because of the verdict, judgment, or sentence. No doubt he was in jeopardy down to the time the trial judge withdrew from the case, but the jury in a criminal case may be discharged because of the judge's inability to proceed with the trial on account of illness, and in such event the defendant is not in jeopardy and may be tried again.

The grave illness of the trial judge and his inability to proceed were facts certified to by two physicians and found by the three remaining judges of the District Court in a formal order. The defendant asked for no further proof, offered none, and made no objection. His present contention that the proof was insufficient is wholly without merit.

The same order provided that the trial might proceed before another judge, if the defendants consented thereto. It was as fully implied in this order, as if it had been expressly stated, that the trial would be terminated in the usual way by the discharge of the jury, if the defendants did not consent.

The defendants did consent to proceed, and by his consent this defendant made it impossible to discharge the jury, waived his right to have them discharged, and cannot now claim to have been in jeopardy because they were not discharged.

For these reasons, the motion is denied.

DELAWARE, L. & W. R. CO. v. MEARES.

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

No. 23.

MASTER AND SERVANT ⊂=286(27)—INJURIES TO SERVANT—ACTIONS—JURY QUESTION.

The question of the negligence of defendant in allowing one of its ferryboats to strike a rack adjacent to a shed, from which a servant was thrown and killed, *held*, under the evidence, for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1032; Dec. Dig. ⊂=286(27).]

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

Action by Bridget Meares, as administratrix, etc., against the Delaware, Lackawanna & Western Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

W. S. Jenney and A. J. McMahon, both of New York City, for plaintiff in error.

George F. Hickey, of New York City, for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. The plaintiff's intestate was killed by being thrown from a shed belonging to the New York Central Railroad Company while he was engaged in repairing the roof. The negligence of the defendant and of the plaintiff's intestate were questions of fact for the jury and were submitted in a charge of unusual clearness and ability. The testimony clearly pointed to defendant as the negligent party in permitting one of its ferryboats to strike the rack next to the shed upon which the deceased was employed. No other cause for the fall from the roof is shown and the jar of the colliding ferryboat was amply sufficient to cause the fall. There can be no doubt that those navigating the ferryboat could see the men working on the roof of the Central Railroad's pier when approaching it from the river. The photograph, Exhibit B, showing a ferryboat approaching the pier demonstrates this proposition beyond the peradventure of a doubt. Indeed, the master of the Elmira admits that he saw men working on the roof of the New York Central pier. Knowing this and knowing also that his boat might strike the rack with such force as to jar the shed, he gave no warning signal of his approach. Without adequate warning he came on with unusual speed and struck the rack a severe blow which was sufficient to account for the fall from the shed and the death of the plaintiff's intestate.

The question of the defendant's negligence and of the contributory negligence of the plaintiff's intestate were clearly for the jury. There being ample evidence to sustain the verdict reached, we would not be justified in setting it aside.

The judgment is affirmed with costs.

In re CONROY.

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

No. 60.

BANKRUPTCY ⊂=424—DISCHARGE—DEBTS DISCHARGED.

A judgment for damages, based on a willful and malicious assault inflicted by the bankrupt on the person of plaintiff, is not discharged by the adjudication in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 818; Dec. Dig. ⊂=424.]

Petition to Revise Order of District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of John Conroy. Petition by the bankrupt to revise an order vacating an order restraining James E. Connolly from continuing supplementary proceedings on a judgment recovered in the state court. Affirmed.

Franklin Bien, of New York City, for petitioner.

W. S. Evans, of New York City, for respondent.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This matter comes here on appeal from an order of the United States District Court for the Southern District of New York, which vacated an order restraining James E. Connolly from continuing supplementary proceedings granted by the Supreme Court of New York in an action in which the plaintiff, Connolly, obtained a judgment against the bankrupt for $2,653.85. The judgment was obtained prior to the filing of the petition in bankruptcy, and is for damages sustained by the plaintiff by reason of a willful and malicious assault made upon him by the bankrupt.

The question here presented is whether a party holding such a judgment may proceed to enforce it in the court in which it was obtained upon the ground that the action was to recover damages occasioned by a malicious and willful injury and is not a claim that can be discharged in bankruptcy. There can be no doubt as to the character of the action in the state court. It was brought to recover damages for a malicious assault and injury inflicted by the bankrupt upon the person of the plaintiff. It is, we think, well settled that such a judgment is not discharged in bankruptcy. The question is discussed and decided in Thompson v. Judy, 169 Fed. 553, 95 C. C. A. 51, and, as we agree with the conclusion there reached, we consider further discussion unnecessary.

The order appealed from is affirmed, with costs.

VULCAN SOOT CLEANER CO. v. DIAMOND POWER SPECIALTY CO.

(Circuit Court of Appeals, Sixth Circuit. November 8, 1916.)

No. 2839.

1. PATENTS ⊂328—INVENTION—SOOT CLEANER FOR STEAM BOILERS.
The Eichelberger patent, No. 705,912, for soot cleaners for steam boilers adapted for use in water tube boilers, is void for lack of invention in view of the prior art.

2. PATENTS ⊂328—INVENTION—BOILER FLUE CLEANER.
The Eichelberger & Hibner patent, No. 987,450, for a boiler flue cleaner for use in fire tube boilers, is void for lack of invention in view of the prior art.

Appeal from the District Court of the United States for the Southern Division of the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Suit in equity by the Vulcan Soot Cleaner Company against the Diamond Power Specialty Company. Decree for defendant as to two patents in suit, and complainant appeals. Affirmed.

The following is the opinion of Tuttle, District Judge:

The complainant herein owns letters patent of the United States No. 705,912, issued July 29, 1902, to W. Eichelberger, for soot cleaners for steam boilers. This is a type of soot blower or soot cleaner adapted for the class of steam boilers known as "water tube." A certain installation of a soot cleaner on a boiler of this class, known herein as the "Fairview pumping station installation," as made by defendant, is alleged by the complainant to infringe this patent.

The complainant also owns United States letters patent No. 885,563, dated June 4, 1907, and United States letters patent No. 987,450, dated March 21, 1911, both issued to W. Eichelberger and E. D. Hibner for boiler flue cleaners or soot cleaners adapted for use with the "fire tube" class of boilers, in contradistinction to the "water tube" boilers referred to in connection with the first-named patent. These two latter patents are further restricted to vertical "fire tube" boilers. They are both alleged to be infringed by a certain construction made by the defendant, as evidenced by a certain exhibit "Blue Print 1–654."

As the device disclosed by the first-named patent and the boiler to which it is applied is entirely distinct from the devices covered by the two second patents and the boilers to which the same are applied, and as the experts for the respective parties and the counsel for the respective parties have referred to these and treated them separately, the same course is herein followed.

United States patent No. 705,912, to W. Eichelberger, provides means for removing deposits of carbon or soot from the interior surface of a boiler, which, if allowed to remain, would deleteriously affect the action of the boiler in the production of steam. The type of boiler on which the device is shown is "water tube," wherein upper headers or steam drums are connected to lower headers and mud drums by water tubes extending between them. The particular boiler which the inventor has chosen to illustrate as one which may be operated upon by his device is known by the trade-name of "Stirling," and the evidence shows that such a boiler may have two or more headers connected to one or more lower headers by sets of water tubes, all so arranged that the gases of combustion are led from the boiler furnace over and between the water tubes to the boiler stack. The inventor, however, does not

restrict his soot cleaner to any particular type of such boiler, but says that it may be used on any one of many other styles of boilers of this class.

At various places in the boiler where space is naturally provided, and where possibly the device will be most effective, rotatable steam pipes or headers are mounted across the spaces or passes of the boiler that are traversed by the gases, and are each provided with means in the form of a handle or hand wheel whereby jet nozzles extending laterally from the pipe may be turned so as to direct jets of steam or air that issue therefrom, against and along and between the various water tubes and parts of the boiler, so that any soot or other foreign material deposited thereon is dislodged. These headers or jet pipes are supplied from a steam line from the boiler itself or from any other source of supply, or an air line from any suitable source of compressed air or the like. In the actual construction of cleaner shown by the patent, there are four headers, two of which are rotatable, a third one either fixed or rotatable, and the fourth fixed; the fixed pipe or pipes therefor discharging the jets only in a predetermined manner. Complainant has declared upon the first two claims of this patent, and these are the only ones considered.

Among the various patents which are relied on by the defense, soot cleaners or blowers are shown mounted on various types of water tube boilers, including the boiler of the patent, all of the same general class, so far as having upper and lower members connected by water tubes are concerned; the cleaners consisting of rotatable jet pipes disposed in and across or along the passes of the boiler, so as to command and sweep the water tubes which connect the upper and lower members of the boilers. Such patents show that it was not by any means new thus to equip boilers with one or more rotatable or fixed multiple jet pipes or headers.

United States patent No. 398,749, to Rice & Volkman, pictures identically the same blower unit construction as the Eichelberger patent, No. 705,912, in the form of a jet pipe having a plurality of lateral jets and means for turning the pipe. In the Clark & King United States patents Nos. 404,825 and 404,344, both issued in 1889, there is seen the general type of boiler, consisting of upper and lower members connected by water tubes, and the same general type of soot cleaner, consisting of rotatable and fixed multiple jet pipes arranged across the passes of the boiler transversely to the water tubes. In these Clark & King patents are statements to the effect that the inventors thereof intended to use as many of these pipes, either fixed or rotatable as were necessary, dependent on the boilers.

In United States patent to Reynolds, No. 485,299 of 1892, there is another disclosure of the use of multiple jet pipes on a boiler of the general class shown in the patent in suit, and in a Stirling patent, No. 407,260, which issued after the Clark & King patents, there is a soot cleaner in the shape of an oscillatory tube having elongated nozzles extended up between the water tubes of a Stirling boiler, to be moved back and forth to command certain portions of the boiler passes. United States patent to Hoxie, No. 585,956, discloses a series of distributing pipes or headers.

It is clear that prior to the Eichelberger patent, No. 705,912, the subject-matter of the claims was disclosed in prior patents which were not cited by the Patent Office. Any one, by the exercise of mechanical adaptability or skill, might arrange these blowers in the manner illustrated in the Eichelberger patent, and do this without the exercise of any inventive skill. It is therefore held that claims 1 and 2 of the patent are invalid.

In patent No. 855,563, to W. Eichelberger and E. D. Hibner, issued June 4, 1907, there is a type of flue cleaner that is usable on boilers of the fire tube type, as distinguished from boilers of the water tube type. Furthermore, this patent, according to the file wrapper and the history of the patent, is limited to the application of such a blower to vertical flue boilers, and as illustrated in the drawings and referred to in the specification of the particular kind known commercially as the "Manning" boiler. The boiler consists primarily of an upright shell having a combustion chamber at the lower end and a smoke box at the upper end, with the intervening water space between the upper and lower flue sheets traversed by closely spaced fire tubes or

flues, through which the gases of combustion pass upwardly to the combustion chamber. In discussing this patent complainant had its expert pass upon claims 2, 3, and 5 as being representative, and for the purposes of this opinion these are the only claims that are considered. The type of blower or cleaner covered by these claims is substantially a horizontal rotatable arm or header, supported at one end by a steam supply pipe that is disposed in the smoke chamber, so as to permit the horizontal arm or header to be swung over the outlet ends of the flues and thereby direct jets down into the flues against the natural draft, from jet openings or nozzles in the lower sides of the horizontal arm, when steam or compressed air is admitted through the supporting feed pipe. By means of a conveniently disposed handle above the fire box, the operator may cause the horizontal arm to traverse or sweep over the entire flue sheet, and hence direct jets into all of the flues.

A number of patents have been cited by the defense as showing this construction applied to boilers that are not provided with vertical flues. For example, Johnson, No. 604,397, shows one type of blower on a horizontal flue boiler discharging into the outlet ends of the flues against the draft. Hodge, No. 720,252, shows a jet pipe that is rotatable and discharges into the horizontal flues or fire tubes, but in a direction with the draft; that is, into the inlet ends of the flues. Another Hodge patent, No. 793,834, discloses the same situation. Prescott, No. 838,898, also shows a rotatable arm discharging into the outlet ends of horizontal flues. Nowhere in the art, however, is shown a blower, either of the multiple jet or single jet type, mounted on a vertical flue boiler to discharge into the outlet ends of the flues. A number of other patents have been cited both in furnaces and in regenerative stoves of different types, the latter being of course in an allied art; but there do not seem to be any disclosures which sustain the defense of nonpatentability. It is held that claims 2, 3, and 5 that have been discussed by the complainant are valid, and are infringed by the defendant's structure shown in "Blue Print 1–654."

Patent No. 987,450, to Eichelberger & Hibner, of March 21, 1911, is substantially for the same flue cleaner as in patent No. 855,563, with the horizontal arms rotatably mounted in the smoke box of an upright boiler of the fire tube or flue tube type, and specifically shown herein as a Manning boiler. In addition to these elements which are shown in the other patents, there is mechanism for turning the horizontal jet arm to sweep the flues, that extends over the top and down the sides of the boiler, so as to operate the jet tube from below.

In view of the fact that it is old in numerous devices, in boiler attachments, and in furnace attachments, to operate flue dampers, steam valves, and other devices from a distance, it cannot be seen that extending operating means from the top of the boiler to a convenient spot constitutes invention. The mechanism set up in claim 1 of the patent (the only claim relied on by the complainant), to wit, "a suitably mounted shaft extending at right angles to the rotative pipe and gearing between the inner end of said shaft and blower arm," is of course old. Means connected to the outer end of such shaft for rotating the same, which might take any form under the terms of the claim, is manifestly disclosed in any one of a number of old and well-known devices. It is therefore held that patent No. 987,450, to Eichelberger & Hibner, is invalid. Because of this conclusion there is no necessity of comparing the structures of the last-discussed patent and of the Manning type blower of the defendant before alluded to.

The bill is therefore dismissed as to patents Nos. 705,912 and 987,450. Patent No. 855,563, is held valid and infringed as to claims 2, 3, and 5. Defendant will pay solicitor's fees and clerk's costs, to be taxed; costs of record before the court to be divided. A decree will be entered accordingly, and referring the matter of profits to a master to ascertain and report.

J. B. Connolly and T. A. Connolly, both of Washington, D. C., for appellant.

C. R. Stickney and Otto Barthel, both of Detroit, Mich., for appellee.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The plaintiff below appeals from so much of the decree as held invalid patent No. 705,912, July 29, 1902, to Eichelberger, for soot cleaners for steam boilers, and patent No. 987,450, to Eichelberger & Hibner, March 21, 1911, for another form of flue cleaner. The defendant below appealed from that part of the decree which held valid and infringed patent No. 855,563, to Eichelberger & Hibner, June 4, 1907; but defendant has dismissed this appeal, and the case here involves only the two patents which were held invalid. As to these, we agree with the reasoning and conclusions of Judge Tuttle in the District Court.

[1] With regard to patent No. 705,912, the substance of the matter is that the revoluble live steam pipe, pierced so as to throw out steam jets radially, and called a steam brush, had long been familiar, and had been placed in the various positions which seemed most suitable for reaching and cleaning that particular disposition of water tubes which each structure presented. Earlier patents, mentioned by Judge Tuttle and not referred to in the Patent Office, disclosed in combination every element of the claim as applied to a single steam brush; indeed, one earlier patentee, whose drawing shows a series of chambers between water tubes suitable for carrying such a steam brush in each chamber, but discloses it in position in one chamber only, in his specification speaks of this revoluble tube in the plural, and plainly contemplates using as many as necessary. Eichelberger adopted that type of boiler in which the combustion products passed in a sinuous course through three partially separated chambers, each of which contained water tubes which would need cleaning. To meet the obvious view that there could be no invention in placing a series of these old pipes in the three respective chambers, where each one operated independently, appellant urges that the three combined produce a new result, in that they sweep along the removed dirt through the sinuous passage and into the stack, and thus operate with each other at the same time to clean the tubes and aid the draft. We are not called upon to decide whether, if this function were sufficiently disclosed by the patent, it would be a new result, which would support patentability. The specification says nothing about this operation or this function; but this is not conclusive. Invention may rest upon a function not described in the specification, or even understood by the patentee, if it is inherent in, and so disclosed, by the device itself. Goshen v. Bissell (C. C. A. 6) 72 Fed. 67, 74, 19 C. C. A. 13. The trouble is that Eichelberger's structure, as shown and described, did not possess this capacity. In two out of the three chambers the major action of the steam jets is against the draft; and the conclusive fact is that the patent shows and relies upon a device for collecting the soot at the bottom of the furnace and removing it therefrom, so that if the invention operated as planned—and in the main it would—the soot could never reach the stack. The doctrine that patentability may rest upon a nondescribed function and utility

cannot reach a case where the presence of these things, in any substantial degree, is inconsistent with the intended and necessary working of that form of the device which is shown and described.

[2] With regard to patent No. 987,450, the patentees cannot avoid the effect of patent No. 855,463, because they were patentees in that patent also. It had been issued more than three years before the application for the later patent, and it therefore had its place in the prior art, with the same effect upon the state of the art as if it had been issued to others. There was no copendency of applications which could modify the rule.

The decree is affirmed.

STANDARD TOBACCO STEMMER CO. v. TOBACCO STEMMING MACH. CO.

(District Court, D. Delaware. November 25, 1916.)

No. 323.

1. PATENTS ⟸283(1)—SUIT FOR INFRINGEMENT—EFFECT OF NONUSE OF INVENTION.

If a patent is valid, it will continue in full force during the term for which it was granted, although put to no practical use by the patentee, or any one claiming under him; but, when its validity is in question, the continued nonuse by the patentee of the invention, without explanation satisfactorily accounting for it, naturally suggests a question as to the effect of the patent.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. ⟸283(1).]

2. PATENTS ⟸283(1)—SUIT FOR INFRINGEMENT—ISSUES AND PROOF.

It is a general rule that an infringer will not be heard to deny the utility of that which he has wrongfully appropriated for the purpose of benefiting himself; but the fact of infringement must be proved.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 448–450, 452; Dec. Dig. ⟸283(1).]

3. PATENTS ⟸234—INFRINGEMENT—CONSTRUCTION OF CLAIMS.

It does not necessarily follow, from the fact that an alleged infringing device comes literally within the terms of a patent claim, that there is infringement; but the claim must be read in the light of the disclosure of the invention as contained in the descriptive portion of the patent.

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

4. PATENTS ⟸328—INFRINGEMENT—TOBACCO-STEMMING MACHINES.

The Guerrant patent, No. 630,344, the Underwood patent, No. 661,199, the Hutcheson patent, No. 713,886, the Frankenburg patent, No. 715,651, and the Havens patent, No. 764,845, all relating to machines for stemming tobacco, and all for improvements on machines of the prior art, construed, and *held* not infringed.

In Equity. Suit by the Standard Tobacco Stemmer Company against the Tobacco Stemming Machine Company. On final hearing. Decree for defendant.

Robert Fletcher Rogers, of New York City, for complainant.

William F. Hall, of Washington, D. C., J. Granville Meyers, of New York City, and Charles Warner Smith, of Wilmington, Del., for defendant.

BRADFORD, District Judge. The plaintiff, Standard Tobacco Stemmer Company, a corporation of the State of Virginia, charges the defendant, The Tobacco Stemming Machine Company, a corporation of the State of Delaware, with infringement of a number of United States patents, now owned by the plaintiff, all relating to the stemming of tobacco, and including, among others, No. 630,344, of August 8, 1899, to G. M. Guerrant, No. 661,199, of November 6, 1900, to J. B. Underwood, No. 713,886, of November 18, 1902, to J. A. Hutcheson, No. 715,651, of December 9, 1902, to F. G. Frankenburg, and No. 764,845, of July 12, 1904, to J. G. Havens. The charge of infringement is not pressed as to any patent not included among those above mentioned.

In the practice of the art of stemming tobacco leaves for the purpose of making cigar wrappers it is highly important that the blade or broad expanded part of the leaf should be separated from the stem with as little mutilation or laceration of the former as possible. As the breaking or tearing of the blade increases, the quantity of pulverized tobacco or "shorts" increases and is a distinct element of loss to be avoided as far as practicable. It was stated by counsel for the plaintiff without denial that roughly speaking the amount of shorts in any given brand of tobacco should not exceed about five per cent. The stem of the tobacco leaf is brittle and the membrane is easily broken; and it has been the aim of those engaged in the art to provide such mechanical appliances as will secure the stemming of the leaf with the production of only the minimum quantity of shorts. It has also been their aim to secure an effectual gripping of the stems of the tobacco leaves in order that they may be conveyed through the stripping machine and not dropped or permitted to fall by the way, and thereby clog the machine or necessitate their reintroduction into it. It is further important, owing to the brittleness, fragility, and other characteristics of the tobacco leaf, and possibly for other reasons, that it should not be unnecessarily bent or distorted while passing through and being subjected to the process of stemming in the machine, and hence that the tobacco leaves should as far as practicable pursue an approximately rectilinear course through the machine without marked or sudden deflection either in a lateral or a vertical plane until a point be reached beyond which such deflection will have no detrimental effect upon the stemming.

There are certain mechanical devices performing useful functions common to tobacco stemming machines of the general class to which the patents in suit relate. In order that the leaves may be subjected to the process of stripping it is necessary that they should be automatically drawn or conveyed through the machine. To this end there are gripping devices which firmly grip the stems of the leaves, whether manually or automatically arranged for such gripping, and normally retain such grip until the process of stripping has been completed. The

leaves so gripped by the stem are carried by the translating device, usually called a conveyer, between the peripheral surfaces of two rolls which come in contact with the leaves.

[1] It is to be gathered from the evidence and is not denied that none of the machines of the patents in suit have ever gone into actual use. The defendant contends that in view of this fact the patents in suit are to be treated as mere "paper patents" and as such disregarded. Whatever unfavorable inferences as to the validity of a patent may arise from the nonuser by the patentee of the invention covered by it, it is not now open to question that, if the patent be valid, it will continue in full force during the term for which it was granted although put to no practical use by the patentee or any one claiming through or under him. The essence of the patent monopoly is the power of exclusion. The grant of a patent does not confer the right to make, use or sell the patented invention except as coupled with the power of excluding others from so doing. An inventor would possess the right to make, use and sell without securing letters patent. Others, however, in the absence of unfair or wrongful competition, would have a right to do the same. But the owner of a valid patent has, not only his common law right to make, use and sell, but the statutory right to exclude all others from so doing. He is not obliged to exercise his common law right in order to avail himself of that conferred by statute. But when the validity of a patent is in question the continued non-user by the patentee of the invention without explanation satisfactorily accounting for it naturally suggests a question as to the effect of the patent.

[2] It is a general rule, possibly not without exceptions, that an infringer of a patent will not be heard to deny the utility of that which he has wrongfully appropriated for the purpose of benefiting himself. But the fact of infringement must be established. And where machines as called for by a patent have never been put in practical use there is often present an element of serious difficulty in determining with accuracy the mode and efficiency of their operation, and consequently whether the patent has been infringed.

In the descriptive portion of patent 630,344 in suit Guerrant says:

"My invention relates to a machine to which leaf-tobacco may be delivered and which will tear off and separate the blades of the leaves from their stems. The objects of my invention are to provide a feeder or carrier to which the tobacco may be conveniently and rapidly delivered by hand and which will present the leaves in series or groups in an orderly condition to a conveyer, to provide a conveyer which will effectively and surely take the leaves in groups or series as they are presented by the feeder or carrier and pass them through a stripper, to provide a stripper which will quickly and thoroughly remove the blades from the stems, and to provide a discharger which will separate the fully-stemmed blades from those partly stemmed and deliver them at different points."

In the machine as described a reel rotating on a horizontal shaft constitutes the conveyer; the reel having located upon its periphery grips which extend transversely to the line of feed and pass "in such relation to the feeder or carrier as to close upon a series of stems coextensive with the length of the grip" and withdraw them from the holders in the belt or band of the carrier and pass them "in a group

for simultaneous treatment by the strippers." The stripping rolls are so adjusted with respect to each other that when the gripping bars pass between them the upper and lower rolls separate sufficiently to allow the passage of the bars, the two rolls respectively moving upward and downward an equal distance, thus permitting the bars to pass the rolls without vertical change. This is the most prominent and distinctive feature of the Guerrant machine. The reel is so large in diameter that the gripping bars after passing through the rolls proceed in a rectilinear line, laterally considered, and approximately in a rectilinear line, vertically considered, for a distance representing the whole or a considerable proportion of the length of the average tobacco leaf. It does not clearly appear from the drawings what the diameter of the reel was; but it does appear that it was sufficiently large to insure the movement of the gripping bars in approximately a rectilinear line as above stated, such approximation becoming closer with an increase in the diameter. The claims relied on in this patent are Nos. 14 and 15, as follows:

"14. A tobacco-stemming machine comprising a stripper, consisting of a pair of cooperating brushes, a conveyer for presenting tobacco-leaves to the stripper, a grip mounted on the conveyer for holding the leaves, mountings for the brushes which permit them to move apart, and means for separating the brushes to permit the passage of the grips between them and closing said brushes upon the leaves behind said grips to perform said stripping function; substantially as described.

"15. A tobacco-stemming machine comprising a conveyer having a grip for holding the stems of the tobacco-leaves and a stripper to which the leaves are presented by said grips and which consists of a pair of cooperating brusnes between which the grips pass, hangers in which said brushes are mounted, and shafts about which the hangers are swung to separate the brushes for the passage of the grips and bring them together upon the leaves behind the grips; substantially as described."

Whatever may be its validity I have failed to find any anticipation of the Guerrant patent. In fact the defendant's expert admitted that he had not presented "any single patent which shows the entire combination covered in the Guerrant claims in suit."

The broadest patent in suit on its face is that of Guerrant, and yet it is a narrow one. It marked but a slight advance over the machine of the Cochrane patent 538,660, of May 7, 1895. In that machine the pair of stripping rolls were separated to allow the gripping bars to travel through, the lower roll remaining stationary and the upper being raised the necessary distance automatically. The line of travel of the tobacco leaves was rectilinear and in a horizontal plane tangential to the peripheries of the stripping rolls when coacting upon the blades of the leaves, except when the gripping bars were sufficiently raised to clear the periphery of the lower roll. This movement of the bars deflected the line of travel of the leaves in a vertical plane to the extent rendered necessary by the passage of the bars between the lower stationary roll and the raised roll. Immediately after the bars cleared the rolls the bars descended to and resumed travel in the normal rectilinear line in the horizontal plane. By reason of the fact that the two stripping rolls did not mutually and equally separate from each other to allow the passage of the gripping bars the rolls did not as promptly begin the stripping of the leaves as

would have been the case had the leaves pursued a rectilinear course between the rolls in the horizontal plane. Under the operation of the Cochrane machine there was loss, and but slight loss, in the proportion of the leaf remaining unstripped and there was whatever danger of breakage of the leaf might be involved in its deflection from a strictly rectilinear course. The evidence bearing upon this subject does not show that the mutual and equal separation of the stripping rolls so as to avoid a departure from a strictly rectilinear movement of the leaves was a matter of much importance, although probably of some merit. Guerrant was the first to suggest such mutual and equal separation of the stripping rolls in the tobacco stemming industry. But he failed to provide for the movement of the gripping device in a rectilinear course in a horizontal plane. As before stated, the gripping bars followed the arc of a circle; that arc, for the length of the tobacco leaf, approximating to a rectilinear course. It does not appear that this slight variation from such a course would be calculated to break or otherwise damage the leaves. The machine was in no sense a primary invention, but merely an improvement, if valid, upon the Cochrane machine.

In the Guerrant machine as called for by the patent the stripping rolls consist of a pair of cylindrical brushes rotating upon journals supported in upper and lower hangers which swing around the shafts supporting them, imparting simultaneous and equal rotary movement to the brushes whereby they will slowly and continuously swing about the above mentioned shafts on which the hangers are mounted to permit the passage between the brushes of the gripping bars and coming together upon the leaves immediately behind such bars at the periphery of the reel at the point where the stripping is to take place. Guerrant states that the movements of the mechanism are so timed that the brushes come together immediately after the passing of the gripping device so that, while not interfering with the passage through of that device they will "close upon the leaves and effect the stripping as soon as the grips have passed through, and their travel about their shafts is slow enough to permit them to remain ample time together to effect stripping." There is, however, no spring tension or tension of any other nature causing the brushes to approach each other or be pressed together during the stripping operation or at any other time. The brushes are brought together only through their orbital movement controlled by the hangers, swinging around shafts on which the latter are mounted. I fail to perceive how it could have been possible after the gripping bars had passed between the brushes for the latter to remain in contact or so nearly in contact with each other as to avoid leaving unstripped a very considerable proportion of the respective leaves passing through the machine. The defendant's expert on this point well says:

"The fundamental defect in this Guerrant operation * * * is that these stripping rollers are constantly performong their orbital movement. They are together in a position where they can act upon the leaf only momentarily. They begin to separate immediately afterward and long before the grippers on the rotating carrier can draw the whole length of the leaf through between the stripping rollers the stripping rollers have got entirely out of the way."

[3, 4] It is well settled that it does not necessarily follow from the fact that an alleged infringing device comes literally within the terms of a patent claim that there is infringement. A claim must be read in the light of the disclosure of the invention as contained in the descriptive portion of the patent; for it is in that portion that the inventor is required to clearly set forth his invention or discovery. Having recourse, then, to the description in Guerrant's patent, I am unable to find infringement by the defendant. The mechanical devices in the Guerrant machine as described and in that of the defendant widely differ not only in form but in the principle of their operation; the construction and arrangement of the defendant's machine securing results impossible of attainment by the machine of the Guerrant patent. The mode of operation of the defendant's machine so far as the separation of the stripping rolls is concerned is entirely different. In the defendant's machine there are no hangers imparting an orbital motion to the stripping rolls. These hangers are a necessary and essential part of the mechanism of the Guerrant machine. Walker in his work on Patents (section 376), says:

"The superiority or inferiority of a defendant's process, machine, manufacture or process of matter, as compared with that covered by a patent upon which he is sued, can generally be traced to its cause. When that can be done, attention should be taken from the difference in utility, to the cause of that difference. Non-infringement will result if that cause is such a difference in function, mode of operation, or character of construction, as is of itself sufficient to justify that conclusion."

It is unnecessary to discuss other differences between the defendant's machine and that described in the Guerrant patent involving adjustments regulating the relative speed of the peripheral surface of the stripping rolls and of the conveyer, and other differential features.

In the description of the Hutcheson patent 713,886 in suit it is stated:

"The invention relates to a machine for stripping the leaf portion of a tobacco-leaf from the stem. The invention consists in the combination, broadly, in such a machine, of a leaf-stripping device, a leaf-clamping device, and means for moving said clamping device away from said stripping device during the operation of said stripping device upon the leaf; also, in means for moving said clamping device toward and then from said stripping device; also, in means for moving said clamping device while retaining the leaf between the stripping-rolls; also, in means for simultaneously cutting the leaf from the stem during its movement of translation while clamped as aforesaid; also, in the construction whereby the leaves may be guided in parallel columns to the stripping device; also, in the construction whereby the movement of said leaves to said stripping device is intermittently arrested."

The machine contains a controlling mechanism to arrest intermittently the movement of the leaves to the gripping bars. These bars are so adjusted as to grip and hold the leaves fed to them from channels in the feed table through the gate between such feed table and the bars, and to carry the leaves between the stripping rolls, which automatically and equally move in opposite directions to permit the passage of the bars. After the stripping of the leaf from its stem the latter is released by the separation of the bars. The leaves, whether fed by feed rollers or by hand, are delivered to the gripping bars in parallel

columns corresponding in number to the channels in the feed table, and the movement forward of the columns of leaves continues or is checked as the gate is intermittently opened or closed. The "several columns of leaves are all simultaneously grasped between the clamping-bars, which now begin to travel in a rectilinear path from front to rear of the machine." The patentee does not restrict himself to mechanism showing a series of guide channels for the leaves; for he says he may employ a table "without the channels, in which case, of course, the leaves will not be guided in parallel columns, as described." Each of the two stripping rolls is provided with "a plurality of circumferential grooves" and "with transverse cutting edges in each groove." The stripping rolls are so rotated that their teeth move while acting on the leaves in a direction opposite to that of the movement of the gripping bars, and the relative speed of the bars and the peripheries of the stripping rolls is so adjusted, according to Hutcheson's statement, as to cause no unnecessary tension in the leaves whereby the stems might be broken or other damage result. After the leaf has been stripped from the stem the gripping bars carry it to the rear of the machine where the bars separate and the stem is released. Both stripping rolls are positively rotated. The claims relied on in this patent are Nos. 1, 2, 3, 4, 5, 7, 8, 10, 13, 16, 17 and 18, as follows:

"1. In a tobacco-stripping machine, a leaf-clamping device, means for imparting to said clamping device a movement of translation, means for simultaneously cutting the leaf portion from the stem and gearing substantially as set forth whereby the speed of onward movement of the stem is made substantially equal to the speed at which said cutting means removes said leaf portion from the stem.

"2. In a tobacco-stripping machine, a leaf-clamping device, means for imparting to said clamping device a rectilinear movement of translation, a pair of rotary coacting rolls having circumferential grooves and transverse cutting edges therein and gearing substantially as set forth whereby the tobacco-leaf entering between said rolls has its leaf portion removed from the stem during said rectilinear movement of said clamping device and at a speed substantially equal to that of said movement.

"3. In a tobacco-stripping machine, a pair of coacting leaf-stripping rolls and a pair of coacting drawing-in bars; the said bars moving in a rectilinear path, and means for moving both of said rolls asunder in relatively opposite directions to permit the passage of said bars between them, substantially as described.

"4. In a tobacco-stripping machine, a pair of coacting leaf-stripping rolls, means for intermittently moving both of said rolls asunder in relatively opposite directions, and a pair of coacting drawing-in bars moving in a rectilinear path; the aforesaid parts being constructed and arranged so that a leaf on being grasped between said drawing-in bars is thereby carried between said stripping-rolls to be subjected to the action thereof, and the stem transported away from said rolls, substantially as described.

"5. In a tobacco-stripping machine, a pair of coacting stripping-rolls and means for intermittently moving both of said rolls asunder in relatively opposite directions, a leaf-clamping device, means for transporting said clamping device between said rolls during their separation and for imparting to said clamping device a further movement of translation during the action of said rolls upon said leaf, and gearing substantially as set forth; whereby the speed of said movement of translation is made substantially equal to the speed at which said stripping-rolls remove the leaf portion from the stem."

"7. In a tobacco-stripping machine, a leaf-clamping device, means for intermittently arresting the movement of the leaf to said clamping device, a leaf-

stripping device, and means for moving said clamping device to said stripping device, substantially as described.

"8. In a tobacco-stripping machine, a pair of coacting leaf-stripping rolls, means for intermittently separating said rolls, a pair of coacting drawing-in bars moving in a rectilinear path and passing between said rolls when said rolls are separated, and a controlling device governed by said bars for intermittently arresting the movement of the leaves in position to be grasped by said bars, substantially as described."

"10. In a tobacco-stripping machine, a pair of coacting stripping-rolls, yielding bearings for said rolls, leaf-clamping bars, means for transporting said clamping-bars between said rolls and associated with each of said clamping-bars, a cam constructed to force said rolls asunder in opposite directions during the passage of said clamping-bars between them, substantially as described."

"13. In a tobacco-stripping machine, a device timed and constructed intermittently to arrest the delivery of leaves to a clamping device, a clamping device timed and constructed to grasp said leaves at their advancing ends, a leaf-stripping device and means for conveying said clamping device to said stripping device, substantially as described."

"16. In a tobacco-stripping machine, a pair of coacting stripping-rolls, elastic bearings for each of said rolls, endless belts surrounding said rolls respectively and having their contiguous portions parallel and extending in front and in rear of said rolls, means for causing travel of said belts, a pair of coacting drawing-in bars respectively carried by said belts and a cam connected to each of said drawing-in bars and constructed to force asunder said rolls on passing between them, substantially as described.

"17. In a tobacco-stripping machine, means for intermittently arresting the delivery of leaves into the machine, a leaf-clamping device controlling said means and receiving said leaves, a stripping device, and means for moving said clamping device to convey the leaves to said stripping device, substantially as described.

"18. In a tobacco-stripping machine, a pair of coacting stripping-rolls, endless belts surrounding said rolls respectively, means for causing travel of said belts, a pair of coacting drawing-in bars respectively carried by said belts, and guides for maintaining the contiguous parallel portions of said belts in definite relative position, substantially as described."

The machine described in the Hutcheson patent combined the two distinctive features, respectively, of the Guerrant and Cochrane machines, in that it separates the stripping rolls equally and in opposite directions for the passage between them of the gripping bars, as in the Guerrant machine, and secures the travel of the bars in a rectilinear course, as provided for in the Cochrane machine. The Hutcheson patent represents mere improvements upon the machines of the prior art. It is narrower than that of Guerrant, and the claims contained in it are not, I think, entitled to much liberality of construction. Whatever merit may be found in certain improved features of the Hutcheson machine, the plaintiff is not entitled to claim for the patent the merit resulting from the combination of the rectilinear course of the gripper bars disclosed by Cochrane, and the separation equally and in opposite directions of the stripping rolls disclosed by Guerrant. Further, the plaintiff as owner of the Guerrant patent sues for its infringement. In the defendant's machine the gripping bars pursue a strictly rectilinear course, and not a curve representing the arc of a circle. The fact that the plaintiff sues for infringement of the Guerrant patent involves the assertion that the movement of the gripping bars in the Guerrant machine so clearly approximated to a rectilinear course as not to be distinguishable from it in the sense of the patent law.

If the plaintiff be right in the position it assumes with respect to the Guerrant machine, it is certainly wrong in contending for any broad or liberal interpretation of the claims of the Hutcheson patent. For on the above assumption the Guerrant machine discloses not only stripping rolls separating equally and in opposite directions for the passage of the gripping bars, but their movement substantially in a rectilinear course in a horizontal plane. These are two of the prominent features of the defendant's machine. Under these circumstances, if the claims of the Hutcheson patent can be supported at all their vitality depends solely upon and they must be restricted to mere improvements and minor features not involved in the foregoing considerations. An alleged infringing machine may perform the same function and accomplish the same result as one that is patented without infringement. To hold to the contrary would be to declare in opposition to settled principles the patentability of a mere function. If the mechanical means by which the function is performed be substantially different there is no infringement, and what should be viewed as an unimportant difference in the means employed as between primary or broad mechanical inventions becomes of the highest importance with respect to narrow inventions covering only mere improvements of a machine in some of its features. Bearing in mind the foregoing considerations, attention must be given to some of the points of difference between the defendant's machine and that of Hutcheson. Each of the Hutcheson claims in suit includes as an element of the patented combination the stripping rolls as described in that patent. These rolls are referred to in varying phraseology, being called indifferently "means for simultaneously cutting the leaf portion from the stem," "rotary coacting rolls having circumferential grooves and transverse cutting edges therein," "coacting leaf-stripping rolls," "a leaf-stripping device," "coacting stripping-rolls," and "a stripping device." Notwithstanding the variation in the phrases employed they all refer to the stripping rolls as set forth in the descriptive portion of the patent. In the Hutcheson machine each of the stripping rolls is provided with a "plurality of circumferential grooves" and "with transverse cutting edges in each groove"; and when the stripping rolls come together "each column of leaves now lies in its own pair of grooves and between the rolls, and the stripping action of the latter at once begins." In the defendant's machine the stripping rolls have narrow strips of card clothing wound spirally about the core or shaft, the object of which is twofold—First, convenience in the manufacture of the rolls, and, secondly, the bringing of the teeth "in an indiscriminate way on the roll," to the end that as the tobacco leaf is pulled between the rolls it may be brought more thoroughly into contact with the wire teeth. This difference with respect to the rolls does not constitute a mere improvement upon the Hutcheson stripping rolls, but involves a difference in the principle of operation of the machines; the leaves in the Hutcheson machine normally being severed by the transverse cutting edges from the stem while in the circumferential grooves, while in the defendant's machine the membranous portion of the leaves is separated from the stems, not so much by cutting, as by tearing or abrasion by the card clothing on

the rolls. Further, the defendant's machine is so constructed that normally the speed of the gripping bars is high as compared with the peripheral speed of the stripping rolls, while in the machine of the Hutcheson patent such is not the case. Hutcheson says:

"The stripping-rolls are rotated, so that the teeth therein move while acting on the leaves in a direction opposite that of the movement of the clamping-bars which grasp the butts. The relative speed of movement of bars and rolls is to be such as that the stem will be carried onward at a rate corresponding to that of the cutting away of its leaf portion by the action of the cutting-teeth. In other words, there should be the minimum of draft, or substantially no draft, on the stem, tending by tension to break it or tending forcibly to drag stem and leaf through the opening formed by the meeting of the pair of grooves, and so to tear leaf and stem apart."

It appears from the evidence that in the defendant's machine there is a slow backward rotation of the stripping rolls, their peripheral speed amounting to only about one-tenth of the speed of the gripping bars, while in the Hutcheson machine the peripheral speed of the stripping rolls is twice or thrice as great as the speed of the gripping bars, and consequently the ratio of the peripheral speed of the stripping rolls to the speed of the gripping bars is from twenty to thirty times as great as the corresponding ratio in the defendant's machine. If due allowance be made for errors in calculation caused by inaccuracies in the scale proportions of patent drawings there still can be no question that the peripheral speed of the stripping rolls in the defendant's machine as compared with the speed of the gripping bars is many times less than that in the Hutcheson machine, and constitutes a departure from the former art. This difference in speed coupled with the difference in construction and arrangement of the stripping rolls already mentioned accounts for and explains the distinction in the principle of operation of the rolls upon the leaves between the Hutcheson machine and the defendant's machine respectively; in the former the leaves being stemmed through the cutting action of the transverse teeth, and in the latter through tearing or abrasion resulting from the drawing of the leaf with considerable speed over the card clothing surface of the rolls. As the stripping rolls are included as an element in each and all of the claims in suit, and in the defendant's machine are not the same either in construction or operation as those described in the Hutcheson patent, the defendant has not used any combination mentioned in those claims, and therefore has not infringed that patent.

The Underwood patent 661,199 in suit purports to cover improvements upon the mechanism contained in the tobacco stemming machines disclosed in certain earlier patents issued to him. So far as pertinent to this case it relates to the feeding mechanism. Underwood in the patent description states that among the objects of the invention were the improvement of "the means employed for controlling the feeding of leaves to the stripping mechanism," and the prevention of "leaves from becoming tangled in the stripping mechanism or from wrapping about the stripping or feeding rolls." The claims relied on are Nos. 1 and 2, as follows:

"1. In a leaf-stemming machine, the combination, with stripping mechanism which intermittently receives leaves and then strips the same, and means for

feeding leaves thereto, of means for moving away from such stripping mechanism, at times when stripping is going on, leaves which have been presented to such stripping mechanism but have not been engaged thereby.

"2. In a leaf-stemming machine, the combination, with stripping mechanism, which intermittently receives leaves and then strips the same, and means for feeding leaves thereto, of a movable member located in front of such stripping mechanism, and means for moving said member across the plane of movement of the said leaves, to deflect from their normal path and hold away from the stripping mechanism leaves which have been presented thereto but not engaged thereby."

Claim 1 covers means for moving from the stripping mechanism while stripping is going on leaves which have been presented to but not engaged by such mechanism; and claim 2 covers a movable member located in front of the stripping mechanism and means for moving the member across the plane of movement of the leaves to deflect from their normal path and hold away from the stripping mechanism leaves which have been presented to but not engaged thereby. The "means" and the "movable member" are not described in the claims and, therefore, recourse must be had to the descriptive portion of the patent to ascertain their construction and mode of operation. The description states that "the combined leaf-stop, leaf-rest, and leaf-bridge mechanism" of the invention comprises a single member consisting of side arms pivotally hung on the front edges of the main frame of the machine, and a transverse bar of triangular shape, of which one of its sides faces the front of the discharge end of the feeding table; that the triangular transverse bar is so hung to the main frame as to drop to its lower position by gravity, and the angle of the upper edge of the bar is such that when the bar is at its lowest position the upper edge of the bar is substantially horizontal and forms a bridge-piece between the discharge end of the feed table and two initial feed rolls, of which the upper one is mounted in a cradle, and the lower on swinging arms fulcrumed on a transverse shaft and provided with pendent members pivotally connected to cranks, mounted on a transverse bar or shaft, one of the cranks having fixedly connected with it a second crank arm, which forms the shifting lever; that during the stripping rotation of the stripping rolls the shifting lever remains motionless and the triangular transverse bar rests with its front edge above the table bed and forms a combined leaf-stop and leaf-rest as it projects in the path of the leaf upon one of the feed belts of the table, and prevents the leaf from feeding forward during the stemming of the preceding leaf, also "deflecting and forming a rest for such precedingly-fed leaves as may not have properly engaged the stripper-rolls"; that at intervals the direction of rotation of the stripping rolls, which normally is opposite to that of the leaf through the machine, is reversed, so that the stripping rolls may act temporarily as feed rolls, and at the time when such reversal of direction of rotation occurs certain described mechanism moves the initial feed rolls into a position causing the triangular transverse bar to fall to such an extent that its upper face is in the plane of the surface of the feed table; that the leaves upon the feed table are then carried forward by feed belts over the bridge formed by the upper face of the triangular transverse bar and are caught and carried for-

ward by the initial feed rolls to a point where they are caught by the stripping rolls, at the moment acting as feed rolls, such rolls carrying the leaves on until their stems are firmly grasped by drawing rolls beyond, when the direction of rotation of the stripping rolls is reversed by certain described mechanism, resulting in moving the initial rolls into their normal position and raising the triangular transverse bar so that its upper edge projects above the plane of the surface of the feed table, and renders impossible the passage of leaves forward from the feed table until the transverse triangular bar again descends, thus preventing the machine from becoming clogged and the leaves from becoming tangled and torn or imperfectly stripped. Claim 1 covers a mechanical combination including among its elements "means for feeding leaves" to the stripping mechanism. The patent is a machine patent and the feeding means must consist of mechanism and not the action of the human hand. The defendant's machine does not disclose mechanism for feeding the leaves to the gripping bars or stripping rolls. Whatever partial stripping of the butts of the leaves is practiced by the defendant is a preliminary operation intended mainly if not solely to facilitate the proper engagement of the leaves by the gripping bars, and is completed before the leaves are fed by the hand of the operative to the stripping mechanism.. In the machine described in the Underwood patent the leaves are fed to the stripping rolls by mechanism forming strictly a part of the stemming machine. The defendant's machine, therefore, lacks one of the elements of claim 1. And the same is equally true as to claim 2. Further, claim 1 includes as one of the elements of the combination "means for moving away from such stripping mechanism, at times when stripping is going on, leaves which have been presented to such stripping mechanism but have not been engaged thereby." In order to ascertain the nature and operation of such means it is necessary to refer to the description, and the description discloses that the means provided in the Underwood machine are substantially different, not only in form, but in function from anything contained in the defendant's machine. The mechanism constituting such means in the Underwood machine is located between the forward end of the feed table and the feed rolls, and operates intermittently to prevent the passage of any leaves, whole or fragmentary, perfect or imperfect, from the feed table to the rolls until such time as the immediately preceding leaves have gone through the stripping operation. The mechanism does not throw out of the machine leaves or any portion of leaves. On the contrary they are merely arrested until such time as by the falling of the triangular transverse bar the "leaf-bridge" is in position to permit them to pass automatically to the rolls. Further, while the description states that "a leaf which is not engaged by the stripping-rolls when the stop *8b* first falls will usually enter between said rolls properly the second time the stop falls," it is evident from an inspection of the patent description and drawings that a leaf cannot become engaged by the stripping rolls until after it has passed over the leaf-bridge, and therefore the suggestion in the claim of means of moving away from the stripping mechanism "leaves which have been presented to such stripping mechanism but have not been engaged

thereby" is wholly foreign to anything appearing in the description. Similar considerations apply in full force to claim 2. In the defendant's machine the mechanism which is complained of as infringing claims 1 and 2 consists of a roller having peripheral projections located below the line of travel of the leaves and between the point at which the gripping bars first engage them and the stripping rolls. This roller is rotated in such manner as to cause its upper portion to move opposite to that of the movement of the leaves as they are drawn to the stripping rolls, and to engage the hanging portions of broken leaves and with its rotating speed, to strike against and completely detach and throw the same out of the machine. In no respect does it resemble in form, principle of operation or function any element contained in claims 1 and 2 of the Underwood patent.

The Havens patent 764,845 is for certain alleged improvements upon the tobacco stemming machine of the Hutcheson patent in suit. In the patent description he says:

"The said improvements consist in the novel construction and arrangement of the feed-table, the gate, and clamping-bars associated therewith and also of the rotary receiving-table and mode of operating the same; also, in the construction and arrangement of the brushing and delivering devices; also, in the various combinations more particularly hereinafter pointed out."

The claims relied on are Nos. 1, 2, 3, 4 and 6, as follows:

"1. In a tobacco-stripping machine, a feed-table, a movable gate and a leaf-carrier constructed and arranged to engage the leaves in front of said gate.

"2. In a tobacco-stripping machine, a feed-table, a movable gate, a leaf-carrier constructed and arranged to engage said leaves in front of said gate and means for opening said gate to permit outward travel of said carrier.

"3. In a tobacco-stripping machine, a feed-table, a movable gate and a leaf-carrier constructed to engage said leaves in front of said gate and means for moving said carrier to open said gate.

"4. In a tobacco-stripping machine, a feed-table, a movable gate, a clamping device for the leaves and means for imparting to said device a movement of translation; the said clamping device being constructed and arranged first to grasp the leaves and second to open said gate."

"6. In a tobacco-stripping machine, a feed-table, a movable gate, a pair of coacting clamping-bars and means for bringing said bars together to clamp the leaves and for imparting to said bars a movement of translation; the aforesaid parts being constructed and arranged so that, first, the upper bar descends upon the leaves at the delivery end of the table; second, the bars meet to grasp the leaves; third, the bars moving onward open the gate to permit their own passage."

The machine described in this patent discloses a feed gate supported on pivots from a vertical support. Havens states that the purpose of the gate is "to prevent the leaves from passing into the machine in advance of the clamping-bars and also after the clamping-bars have carried the leaves beneath said gate to draw out and flatten said leaves, and so prepare them for the action of the stripping-rolls." The tobacco leaves are placed butts foremost on the feed table and are fed forward by hand to the feed end, and just as the leaves reach the delivery end of the table the upper of the clamping bars meets them and carries them along and an instant later the leaves become gripped between the elastic faces of the bars. The upper bar in moving strikes the gate, lifts it and passes under it, and the gate then swings

back to its original position. The gripping bars holding the leaves continue forward and pass between the shafts of the stripping rolls forcing them asunder against the action of helical or spiral springs. The claims relied on conform, I think, to the description. The principal question is whether the defendant has infringed. In claims 1, 2 and 3 an engagement of the leaves in front of the gate is required, and it is equally required in claims 4 and 6; claim 4 requiring a clamping device "constructed and arranged first to grasp the leaves and second to open said gate," and claim 6 requiring that the mechanism of the machine be "constructed and arranged so that, first, the upper bar descends upon the leaves at the delivery end of the table; second, the bars meet to grasp the leaves; third, the bars moving onward open the gate to permit their own passage." This requirement strictly accords with the mechanism of the machine as disclosed in the description on a proper construction of the patent as a whole. An engagement of the leaves may occur either while the gate is at rest or after it has begun to move and before the gripping device passes under it. In the one case the leaves are engaged before the gate at rest, and in the other before the gate in motion, but in either case in front of the gate. An inspection of the patent drawings alone would strongly indicate, on the assumption of their correctness, that the leaves could not be actually engaged in the sense in which that term is employed in the patent until the upper of the two gripping bars strikes the gate and causes it to a certain extent to swing toward the stripping rolls. But the leaves must be engaged before they pass through or under the gate. The description and patent drawings harmonizing with an interpretation recognizing an engagement of the leaves in front of the gate after it has begun to move and the claims expressly requiring an engagement of the leaves in front of the gate, I entertain no doubt that in the machine of the Havens patent the gripping device engages the leaves in front of the gate, although moving, and before such device gets behind the gate by passing under it. In the defendant's machine there is no such mechanism. The plaintiff contends that the swinging flap of the defendant's machine and the vertical surface of the fixed abutment or end of the stationary plate or gage, taken in conjunction with each other, constitute the full equivalent of a gate. The upper surface of the stationary plate or gage is sufficiently below the rectilinear line of feed to permit the gripping bars to pass between the stripping rolls without deflection from that line, and if the stems of the leaves were raised only to or barely above the level of the upper surface of the stationary plate or gage it is evident they would not be in the rectilinear line of feed travel, and that to reach that line it would be necessary to raise them considerably above such level, and that the object in so raising the leaves would be not barely to clear the upper edge of the stationary plate or gage but to place them where without deflection they could pass in a rectilinear line through the machine. Under these circumstances, and on the assumption that the normal function of a gate is to shut rather than to open, the vertical surface of the fixed abutment is not interposed in the line of feed travel and in no legitimate sense

shuts off the leaves from pursuing that line. On the contrary, as soon as the gripping bars engage the leaves they proceed in a rectilinear line above and beyond the vertical surface of the fixed abutment without any functional action whatever on the part of that abutment. In the Havens machine the movable gate extends downward to the rectilinear line of feed and until pushed forward by the upper gripper bar prevents the passage of the leaves in their normal line of travel. No mechanism of the kind is disclosed in the defendant's machine. Even if the claims of the Havens patent were entitled to a broad, in contradistinction to a narrow, construction it would be a matter of grave doubt whether there is in the defendant's machine the mechanical equivalent of the Havens movable gate. But in view of the narrow character of the Havens invention and of the prior art as disclosed in the Underwood and Hutcheson patents in suit, as well as others, I consider the contention of the plaintiff inadmissible, even on the assumption that the normal function of a gate is to shut rather than to open. If there be no movable gate in the defendant's machine there is no infringement of the Havens patent. But if the defendant's machine discloses a movable gate it consists of the swinging flap. Before this flap is raised toward the horizontal line of travel the stems of the leaves project beyond its outer edge, and when they are gripped it is either at a point beyond, and therefore behind, in the sense of the Havens patent, such edge, or after the swinging flap has fallen, in which latter case in no legitimate sense could it be said that the stems were engaged at a point in front of the gate. It would display a distortion of ideas as well as of language to claim that leaves are engaged before a movable gate when there is not at the time of engagement or at any time thereafter any gate for the engaged leaves to pass. Whatever effect the raising of the swinging flap may have in preserving an alignment of the leaves in such manner as to obviate possible sagging or other disarrangement, it is the gripping bars which raise the leaves to the proper level and launch them on their rectilinear course, the swinging flap falling before they reach that course, and before their engagement.

The Frankenburg patent, 715,651, relates to the stripping device in tobacco stemming machines. In the patent description it is said:

"My invention relates to tobacco-stripping machines, and has for its object improvements in machines for that purpose. In machines of the class to which the present invention relates the stem of the tobacco-leaf is inserted between knives which open and close, and after the knives are closed the stem is seized by fingers and drawn through the knives, leaving the leaf on one side of the knives and discharging the stem on the other."

The only claim relied on in this patent is the third, as follows:

"3. The combination with a pair of blades for stripping tobacco-leaves, of devices for automatically opening and closing said blades, and means for controlling the movement of said blades whereby the closing action is uniform toward a fixed center."

The patent does not call for rotating stripping rolls, but for a pair of blades which close upon the leaves, the latter being pulled between the edges of the knives in order to be stripped. It is not necessary

to consider the novelty, utility or patentability of the subject-matter of the claim, as in no aspect of the case, I think, has the defendant infringed it.

I have reached the conclusion that for the reasons hereinbefore given the defendant has not infringed any of the patents in suit, and that the bill must be dismissed, with costs.

UNION TOOL CO. v. WILSON & WILLARD MFG. CO.

(District Court, S. D. California, S. D. June 20, 1916.)

No. 1540.

1. PATENTS ⟸36—EVIDENCE OF INVENTION—COMMERCIAL SUCCESS.
Great commercial success in the case of a tool largely used, together with the presumption arising from the grant of a patent, are sufficient to establish invention in case of doubt.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 40; Dec. Dig. ⟸36.]

2. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—UNDERREAMER.
The Double patent, No. 734,833, for an underreamer, for use in the drilling of oil and gas wells, was not anticipated, discloses invention, and covers a combination of decided merit, which is entitled to a fair range of equivalents; also *held* infringed.

3. PATENTS ⟸68—ANTICIPATION—PRINTED PUBLICATION.
A trade catalogue containing a cut of an article is not such a publication as will anticipate a subsequent patent.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 82, 83; Dec. Dig. ⟸68.]

4. PATENTS ⟸240—INFRINGEMENT—EFFECT OF IMPROVEMENT.
An improvement on a patented article, where the principle of operation is not changed, will not avoid infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 379; Dec. Dig. ⟸240.]

5. PATENTS ⟸236—INFRINGEMENT—CHANGE OF FORM.
Change in form alone, unless it substantially changes the method of operation, is not sufficient to avoid infringement.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 372, 373; Dec. Dig. ⟸236.]

In Equity. Suit by the Union Tool Company against the Wilson & Willard Manufacturing Company. On final hearing. Decree for complainant.

Frederick S. Lyon, of Los Angeles, Cal., for complainant.
Raymond Ives Blakeslee, of Los Angeles, Cal., for defendant.

CUSHMAN, District Judge. Complainant sues for the infringement of letters patent No. 734,833, applied for in 1901 and granted Edward Double in 1903. The patent is for a new type of underreamer covering certain combinations therein. The defense is: Want of patentable novelty and invention; anticipation, and infringement is denied.

In drilling oil wells in Pennsylvania, no underreamer was necessary, as the formation stood up, and, when the rock was reached, at a depth of 50 to 100 feet, no casing was required; casing being a pipe entered in the hole for the purpose of holding back soft earth and preventing caving. The devices in question are a part of what is known as the "cable tool system" of oil well drilling, consisting of a high derrick with windlasses, called "bull wheels and calf wheels," for winding up and releasing the cable rope to which the tools are attached. The hole in the ground is made by dropping a string of tools. A certain amount of water is kept in the bottom of the hole, which is churned up into mud. This mud—made by the water and detritus formed by the drilling—is taken out of the hole by a baler or other suitable device, which is run down inside the casing.

In drilling, ordinarily, a heavy bit is used. The bit will pass literally through the inside of the pipe; but, in playing up and down beneath the pipe, unless the formation is soft, it will cut a smaller hole than the outside diameter of the pipe or casing. In hard formations it is therefore necessary that the hole underneath the casing be enlarged, or underreamed; that is, reamed out under the casing, so that the casing may follow through the hole. The device for accomplishing this is an underreamer, which, in effect, is an expansive bit that is so arranged as to expand after it has been dropped through the casing. The casing is supported a sufficient distance above the underreamer to allow of its being played up and down to cut away the hard strata by the weight behind the striking bit.

The ordinary drilling bit drills a hole through the hard ledge first, but this hole is of too small a diameter to permit of the passing of the casing. The hole is then enlarged by means of the underreamer, so that the casing may fall. In order to be a successful underreamer, the machine must be essentially strong. The thrust upon the bit must be as nearly as possible in direct line with the string of tools to prevent breaking. The mechanism by which it expands and collapses must be dependable, so as not to get out of order by reason of the heavy blows, or by reason of the mud and débris in which it has to be worked. It must not only be so arranged as to expand when it is passed down through the casing, but provision must be made by which, in pulling it up against the shoe or foot of the casing, it will again be collapsed, so that it can be drawn within the casing.

These are the main difficulties to be overcome in such a device, and the accomplishment of them—as the evidence shows—has been sought for many years. The drilling of oil wells in California began as far back as about 1890. The industry increased to a great degree in importance about 1897. Prior to the invention of the patent in suit, the underreamers mainly used in California oil fields were known as the "Austrian" and "Russian." With these a greater depth than 1,800 feet was seldom reached. By the use of the Double underreamer a much greater depth was attained, not infrequently twice as deep as formerly.

[1] It is claimed that this great success was not entirely owing to the new underreamer, as improvements in other oil well drilling de-

vices were adopted about the same time. It is clear that much of the credit for this great accomplishment is unquestionably due to the Double underreamer. It almost at once took the lead in the oil well tool trade over all former reamers. There is testimony that, in the California fields, 85 per cent. of the underreamers sold are either of the Double type or that of the alleged infringing device. These facts, coupled with the presumption arising upon the grant of the patent, are sufficient to resolve any doubt, which may exist in this case, in favor of the validity of the patent. Stebler v. Riverside Heights Orange Growers' Association, 205 Fed. 735, 124 C. C. A. 29; Morton v. Llewlyn, 164 Fed. 693, 90 C. C. A. 514.

[2] It is not meant by this that patentable invention is left substantially in doubt upon an inspection of the alleged anticipating devices and the evidence concerning them, for it is not. Upon the trial, defendant sought to establish that one Frederick W. Jones—an employé of the National Supply Company, under the superintendency of Double—was really the inventor of whatever was novel in the patent in suit. Jones testified that he was, in fact, the inventor; but his former conduct, his long silence, even under provocation, and testimony given by him on an interference contest in the Patent Office involving the Double underreamer, are wholly inconsistent with his present statements. The testimony at that hearing was given about the time of the granting of the patent in suit, and was, in part, as follows:

"Q. Did you have a conversation with Mr. Double in regard to this reamer? and, if so, state the conversation. A. Well, I was employed by Mr. Double at the same time he was manufacturing the reamer in question. I had a conversation with him, and he said the reamer was a mean thing to manufacture and that he would change the construction of it, and he showed me what changes he proposed to make, and he also asked me what I thought of the changes, and I told him that I thought the change was a good one. That is all."

This so far discredits the testimony of Jones as to leave no warrant for overthrowing the presumption of regularity in the issuance of the patent, as well as plaintiff's evidence now given in support of the patent.

The main question in the case is: What range of equivalents, if any, is complainant entitled, under the patent in suit, to be protected against? Upon consideration of the prior art, including the alleged anticipating patents and devices, and the marked success in the trade and in operation of the Double underreamer, I find that it constituted combinations of decided merit, entitling complainants to a fair range of equivalents. Los Alamitos Sugar Co. v. Carroll, 173 Fed. 280, 97 C. C. A. 446. While it is true that each of the elements of the combination claims of the patent in suit were old in the art, yet the combinations, as a whole, were new. The claims of the patent in suit in question are numbered 1, 2, 6, 7, and 8, and read as follows:

"1. An underreamer comprising a hollow mandrel furnished with an internal shoulder, a downward extension having opposite parallel bearing faces having a keyway therein, shoulders at the sides of such extension, and upwardly and inwardly sloping dovetail slipways beneath said shoulders; a

spring on the shoulder in the hollow mandrel; a rod playing in the mandrel furnished with a key seat and supported by the spring; dovetail tilt slips playing in the slipways and furnished with key seats respectively; a key in the key seats of the slips and rod and playing in the keyway of said extension to hold the slips against the shoulders; said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up.

"2. An underreamer furnished with a mandrel having a downward extension provided with opposite parallel bearing faces and a keyway in the extension; a spring-supported rod furnished with a key seat and playing up and down in the mandrel; tilt slips slidingly connected with the mandrel and furnished with inward projections to slide upon the opposite bearing faces of the downward extension to spread the slips apart at the lower ends when the slips are drawn up; and a key carried by the rod and carrying the slips."

"6. In an underreamer, a mandrel furnished with a hollow slotted extension, the lower end of which slopes upward at the edges; tilt slips slidingly connected with the mandrel and furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod.

"7. In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with a pivot key, tilt slips provided with key seats adapted to be engaged by said pivot key, said key seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position.

"8. In an underreamer the combination of a hollow mandrel with a hollow slotted extension, said extension having opposite parallel bearing faces, a slip-carrying rod in said mandrel, slips connected to said rod, said slips having projections which bear against said extension, said slips being provided with key seats, a key carried by said rod, each end of the key lying in a key seat of a slip, and the key seat in each slip being somewhat larger than the key to allow the slips to partake of a tilting action."

A hollow mandrel with inner shoulder, a downward extension with shoulder at the side of the extension, a spring on the shoulder in the hollow mandrel, a rod playing in the mandrel supported by the spring, and a key at the lower end of the rod to carry the cutters, were, in such combinations, all old in the art. The chief novel feature of the Double invention was the tilting means adopted for the collapse and expansion of the cutters—in combining that means with interrelated dovetails on the cutters and ways of the body extension.

In the O'Donnell & Willard patent (No. 762,435), while there may be a slight tilt of the cutters, owing to the downward and inward inclination of the interposed section of the body and the fact that, in operation, the bottom of the machine would be full of fragments of rock and other material removed in the progress downward, as well as the interior of the bowl shape of the lower body, the action of the cutters on the key would be *sliding*, rather than *tilting*, *rocking*, or *swinging*.

In the O'Donnell & Willard patent and device the face of the interposed part of the body upon which the cutters travel has but one incline, though tending to curve. The collapse of the cutters is therefore gradual, while in the patent in suit the bearing faces upon which the cutters travel are at first parallel, until the shanks are well free from their seats, when in operative position, the collapse is then sudden, to which a tilting or swinging action on the key is necessary. The

same distinction is to be found in the so-called "Jones round-nosed" reamer.

In the O'Donnell & Willard device, while there are seats in the cutters for the insertion of the key, carried by the spring actuated rod, the periphery of the body is unbroken. While, in the patent in suit, the pocket in the body in which the shank of the cutter becomes seated opens to the outside, permitting the shoe of the casing to contact with the shoulder on the outside of the cutter shank above the lower end of its head or body, and also allows of stronger body construction. The dovetails upon the shanks of the cutters and ways, therefore, are not found in the O'Donnell & Willard patent and device.

The so-called "Jones round-nosed" reamer was a device for which no application was ever made for patent. It never was used, and was abandoned by Jones. In the Jones round-nosed reamer, the entire movement of the cutters is directed by a dovetail structure, the ways being curved inwardly and downwardly, effecting a collapse; but the method of operation is entirely different in this respect from the patent in suit. There is no spreading bearing in the Jones round-nosed reamer to assist in the expansion and collapse of the cutters.

These differences in the mode of operation appearing in both the O'Donnell & Willard device and that of the Jones round-nosed reamer render it unnecessary to consider further whether there should have been an interference proceeding in the Patent Office as between O'Donnell & Willard and the Double applicants, or to consider whether the Jones round-nosed reamer preceded Double's invention, and whether Double was familiar with it.

In the Swan reamer (No. 683,352) there are interrelated dovetail ways upon the body of the reamer and interrelated dovetails upon the cutter, which dovetails and ways, likewise, appear in the patent in suit. But the action of the cutters in the Swan device are entirely of a sliding character. There is no swing or rock, either upon the key or the shoulders or exterior angles in the lower end of the body as in the patent in suit.

In the North patent (No. 674,793) the action of the cutters is entirely a rocking action upon the key and upon each other. There is no interposed portion of the body, and the only portion of the cutters sliding is in their upper extreme contact with the inside of the bowl formation in the bottom of the reamer body.

The Brown reamer (No. 687,296) is doubtless the closest in essential principle of anything in the prior art to the patent in suit, for the cutter is adapted to both slide upon an interposed portion of the body, provided with parallel bearing faces for that purpose, and, as the cutters slide down upon this face, they collapse inwardly over the lower end of the extension, which they are enabled to do directly because of the fact that the cutters, on their inside faces, are provided with a recess for the accommodation of the enlarged lower end of the body, and they are further so enabled to collapse because they hang free upon a spring-actuated device in the interior of the reamer. But they are suspended, not by means of a key seat in a recess in the shank of a cutter larger than the key, as in the patent in suit, but the upper

end of the cutter shank is formed into an inner shoulder hooked over an exterior shoulder upon a spring-actuated box open at the lower end, allowing it to travel downward with the cutters, over an interposed portion of the body. The effect of this difference will be considered later in connection with the rejection of applicant's claim first presented in the Patent Office.

[3] Defendant also avers that a certain Canadian underreamer anticipated the patent in suit. If this Canadian underreamer was patented, the evidence does not disclose that fact. An oil well supply catalogue of 1900 was introduced in evidence, containing a cut of the Canadian underreamer; but such a catalogue is not a sufficient publication to establish anticipation. 30 Cyc. 837, 3–B. There is also some evidence of use in the California fields of this underreamer; but, without undertaking to determine the extent of this use, an inspection of the Canadian underreamer shows that its cutters slide upon the interposed body of the reamer, and are, to a certain extent, allowed to collapse because of inwardly projected shoulders, yet the cutters are not equipped with shanks carrying dovetails, nor the body with pockets to seat such shanks, but the cutters rest upon, and slide entirely without, the body, and are not suspended from a spring-actuated rod in the upper portion of the cutter body, but are locked together and hung on the top of a bolt actuated by a spring in the lower portion of the reamer body, and, as in the Brown device, this spring-actuated bolt, while it carries the cutters as it travels upward, does not, necessarily, do so as it retires downward.

These differences in operation are sufficient to avoid anticipation. None of the underreamers of the prior art combine cutters tilting over the lower end of the reamer body with shanks having dovetails so interrelated with dovetail ways upon the body of the reamer as to afford inner, outer, and lateral bearings when in reaming position.

Claims numbered 1, 2, and 3, as originally proposed, were rejected by the Commissioner of Patents upon reference to the Swan patent, and were only allowed upon their amendment and that of the specifications; the effect of the amendment being to make plain the tilting action of the cutters, or slips, in addition to the interrelated dovetails and dovetail ways thereof upon the cutter shanks and body extension, which latter were found in the Swan device. The effect of the amendment is made plain by an amendment required and made to the specifications and upon which the claims were allowed. This amendment is as follows:

"The sockets or key seats *16* are somewhat larger than the key *17*, to permit the slips *15* to partake of a tilting action, the key *17* thus forming a portion, on the rod *11*, on which the tilt slips or bits *15* are loosely swung or pivoted, adapting their lower ends to tilt or swing in toward the center of the stock or mandrel portion to pass through the well casing, or to tilt away from the center to assume the proper position for reaming. The tilt slips are provided with shoulders *18* adapted to slide upon a spreading portion provided in connection with the mandrel body."

Claim 7—originally numbered 8—in the application was rejected by the Commissioner of Patents upon reference to the Brown patent. The claim as then presented read:

"In an underreamer the combination of a hollow mandrel, a slip-carrying rod in said mandrel, slips connected to said rod, and means for titling said slips."

As allowed, it reads:

"In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip operating rod provided with a pivot key, tilt slips provided with key seats adapted to be engaged by said pivot key, said key seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position."

Defendant insists that, by the limitation voluntarily so placed in the claim, infringement is avoided, and that the language of the broad claim, as it originally stood, "and means for tilting said slips," is necessary to cover defendant's device, and, with that language out of the patent, there is no infringement.

In the Brown patent, upon which the claim was first rejected, the means for holding the cutters in expanded position, over which they were allowed to collapse, appear the equivalents of the Double invention; but the means by which the cutters were carried on the rod were essentially different. It is necessary that they be so freely suspended on this rod as to permit them to tilt forward and back, over and upon the lower end of the extension. In the Brown device, this was accomplished by an inwardly projecting shoulder upon the upper extremity of the cutter, fitted or hanging upon a shelf or shoulder extending from the spring-actuated box into the cavity provided for the accommodation of the cutter shank.

In the Double device, the key carried by the rod loosely fits in the hole in the upper part of the inner face of the cutter shank. In operation, as the rod carries the cutters up into the reaming position, the cutters will travel together, for the rod, with the aid of the key inserted in each shank, would control each cutter. But as the box, upon which the cutters hang in the Brown device, travels downward, the cutters do not, necessarily, travel with it, save by their own weight. The expansion on the end of the rod would keep them from falling out, but it would not bring them down with it, together. The foot of the casing, which forces the cutters down in collapsed position, might become jammed out of shape, so as not to be uniform on both sides, or rocks or other substances might get between the foot of the casing and the outer shoulder of the cutter, resulting in one cutter being carried down ahead of the other, if anything interfered with the descent of such other.

This shows such a difference in the method of operation as to prevent anticipation of the Double invention by the Brown. It is therefore obvious that, as Brown invented one "means" and Double another "for tilting the slips," the Commissioner of Patents rightfully rejected Double's broad claim to all means "for tilting the slips," which would have included the means invented by Brown.

The remaining question, whether the means adopted by Wilson of collapsing, expanding, and holding the cutters in reaming position are

equivalents, substantially the same as those of Double, must be resolved in the affirmative. As already pointed out, the chief novelty and utility of the Double invention over the prior art was the combination of the interrelated dovetails on the cutter shank and ways therefor on the body of the extension, with the means by which the tilting action of the cutters over the lower end of the body was accomplished.

It is insisted by the defendant that the complainant is not entitled to protection of this combination under the claims of the patent; that, while claims 1 and 2 cover the dovetail arrangement, and claims 6, 7, and 8 cover the means securing the tilting action, there is no claim covering both. If defendant's assumption were conceded, as long as the lesser combinations were covered by valid claims, no good reason appears—it being found that the entire combination is an invention of decided merit—for allowing only a narrow range of equivalents, although this course might be justified if each of the claims was considered entirely independently of everything else than the prior art.

Defendant's contention in this particular is based on a false premise. Claim 1 covers both the dovetail ways on the body, coacting with dovetails on the slips or cutters, and means for the expansion and collapse of the cutters over the lower end of the extension. The following language of the claim covers the latter feature:

"Said slips being furnished with inward projections to slide upon the downward extension of the mandrel to spread apart the cutting edges of the slips when the slips are drawn up."

It is obvious that, if the cutters spread when drawn up, they would collapse on being drawn down. That this claim not only covers the dovetail slips and ways, but such expansion and collapse of the cutters and the means for its accomplishment, is further shown by the paragraph of the amended specifications above quoted, upon which amendment the Commissioner of Patents allowed claims 1, 2, and 3.

As to claims 1 and 2, it is insisted by the defendant that its forked or pronged formation of the lower extension, rather than the hollow slotted formation of the closed bottom of the patent in suit, and the omission of the opposite parallel bearing faces on such extension, so differentiates the Wilson reamer as to essentially change the mode of operation. The feature of "opposite parallel bearing faces" is only included in claims 1 and 2, and does not appear in claim 3. The opposite bearing faces *9* upon the prongs in the Wilson device are the equivalent of the opposite parallel bearing faces in claims 1 and 2 of the patent in suit. It is true that the former are not exactly parallel, but they are approximately so, and could be made so without affecting, materially, the function discharged by them.

In the patent in suit, the opposite parallel bearing faces extend upward the entire length of the extension to the shoulder that forms the upthrust bearing for the cutters, except as cut to afford a slot for the playing up and down of the key carrying the cutter; thus they form an inner bearing and guide for the upper end of the cutter as

it travels up and down. In the Wilson, these opposite bearing faces are not carried the entire length of the extension. This omission helps to form the pronged formation which enables Wilson to give the end of the rod inserted between the upper cutter shanks a heavier construction, taking on itself the duty before, in part, performed by the upper portion of the opposite parallel faces in the patent in suit. In view of the state of the art, and particularly of the Brown patent and device, I find this would be the substitution of a well-known mechanical equivalent; therefore no avoidance of infringement. The effect of this changed formation, from the hollow slotted extension to the pronged formation is rather to permit of additional features and the accomplishment of further action.

The change permits the cutter shank to collapse between the prongs, which permits of more stock in the cutter shank, eliminating the notch on the inside, which is a feature of the Double cutter, above the inwardly projecting shoulder, which notch in the Double cutter is necessary to allow of the collapse of the cutter over the lower end of the extension, the web of which is unbroken. There is testimony to the effect that this notch constitutes a weakness in the Double cutter.

[4] This provision for the collapse of the cutter between the prongs is the chief additional function accomplished by the pronged formation, although it also permits of the assembling of the reamer from the bottom, instead of the top, and has an advantage in permitting the re-machining of the lower end of the body of the reamer. But these latter features do not affect directly the operation of the machine when in use. These differences may constitute improvements, warranting the issuance of patent; but substantially the same dovetails on the cutters and ways therefor, and like means for tilting the cutters, remain as in the patent in suit. The principle of action, the mode of operation, is not substantially changed, and infringement is not avoided by the improvements. Stebler v. Riverside Heights Orange Growers' Ass'n, 205 Fed. 735, 124 C. C. A. 29; Lourie Imple. Co. v. Lenhart, 130 Fed. 122, 64 C. C. A. 456; Norton v. Jensen, 49 Fed. 859, 1 C. C. A. 452.

Claim 6 reads:

"In an underreamer, a mandrel furnished with a hollow slotted extension, the lower end of which slopes upward at the edges; tilt slips slidingly connected with the mandrel and furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel; and means connecting the slips with the rod."

It is insisted by the defendant that further substantially different means are employed in its device from the foregoing. In the foregoing claim the lower end of the hollow slotted extension, it is said, "slopes upward at the edges." This feature is one of the means in accomplishing the tilting or collapsing and expanding of the cutters. In the Wilson reamer, the slopes are at the lower end of each prong, described in Wilson's specifications as "the beveled end faces *17* of the downwardly-projecting lugs *2'*." If the prongs were joined by a web, the formation would, instead of pronged, become hollow and

slotted, and the slopes of the prongs would be "at the edges" of their upward slope.

It is clear that the means and manner of discharging this function are substantially the same in each. Claim 6 further provides that the tilting slips shall be "furnished on their inner faces with projections, the upper faces of which slope downward to slide upon the extension of the mandrel." The projections and sloping faces are numbered *18* and *26* in Figures 9 and 11 of the Double drawing.

Defendant contends that, of the parts in question, the Wilson device has no clear mechanical equivalent for this downward sloping face upon an inward projection. The corresponding part in the Wilson cutter is described in the specifications, and referred to in the drawings as follows:

"The expansion bearing faces 4^s terminate at their upper ends in rounded corners or bearings *16* to ride more readily over the beveled end faces *17* of the downwardly-projecting lugs *2'* to engage said bearings for expanding the cutters."

The object sought in both formations was to have the cutter slide freely in collapse and expansion up and down over the upwardly and outwardly sloping portion of the body. Infringement could, therefore, not be avoided merely by rounding the shoulders or corners in place of a straight slope, as merely to effect this purpose the rounded shoulders could, not inaptly, be described as "rounded slopes."

[5] It is further contended that the portion of the face of the cutters which corresponds and slides upon the lower part of the prongs is not upon a "projection." Change in form alone, unless it substantially changes the method of operation, is not sufficient to avoid infringement. No citation of authority is necessary in support of this proposition, though there may be an exception, but the exception is not of importance in the present instance.

In one view, the rounded corners are upon the upper face of the projection, for they are on a projection of the body of the cutter, as distinguished from the shank. By the pronged formation, the cutter shank could be made heavier in the Wilson than the Double, and the shank projects still further inward than the projection on the body of the cutter, which carries the rounded shoulder. By cutting away the heavier portion of the cutter shank, permitted by the pronged formation—which elimination would in no way prevent the discharge of the function in question—it becomes clear that the means and function of the parts in question are the same in both devices, although the improvement by the Wilson arrangement may justify a patent to protect the variation.

Claim 7 reads:

"In an underreamer, the combination with a hollow mandrel, provided with a slotted extension, a spring-actuated slip-operating rod provided with a pivot key, tilt slips provided with key seats adapted to be engaged by said pivot key, said key seats being somewhat larger than the key to allow the slips to tilt, said slips provided with inwardly projecting shoulders, and said slotted extension provided with surfaces adapted to tilt said slips and hold the same in expanded position."

Aside from what has already been considered, the only element covered in this claim to be compared with Wilson's device is the "pivot key" with which the "spring-actuated slip rod" was provided, "the key seats" (on the tilt slips) "being somewhat larger than the key to allow the key to tilt." The enlarged key seat in the Wilson is identical with that of the patent in suit. Its function is identical. While the words "pivot key" do not disclose that the key and the rod are separate elements, yet that such was designed by Double is shown by the drawings and specifications. In the Wilson, the rod and key are integral.

While this and the pronged formation of the body extension permit of a heavier and stronger key and cross-head in the Wilson device than the Double, it does not in any way essentially affect the mode of operation by which its function is discharged, in carrying the cutters up and down and in permitting their tilting.

The elements described in claim 8 have been considered in connection with the other claims, and are found to be identical, or the equivalents of like elements in the defendant's structure.

Many lesser matters have been discussed and elaborated upon by counsel, but enough has been said. I deem the lengthening of this opinion further unwarranted.

Infringement of claims 1, 2, 6, 7, and 8 is clear. The injunctive relief prayed will be granted.

WILSON v. UNION TOOL CO.

(District Court, S. D. California, S. D. June 19, 1916. On Petition for Rehearing, August 26, 1916.)

Nos. A–4 and B–62.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—UNDERREAMER.

The Wilson patent, No. 827,595, for an underreamer, *held* not anticipated, valid, and infringed as to claims 9 and 19, and not infringed as to claims 2, 4, 8, 10, 11, 12, 13, 14, 15, 16, and 17.

In Equity. Two suits by Elihu C. Wilson against the Union Tool Company, consolidated. On final hearing and petition for rehearing. Decree for complainant and rehearing denied.

Raymond Ives Blakeslee, of Los Angeles, Cal., for complainant.
Frederick S. Lyon, of Los Angeles, Cal., for defendant.

CUSHMAN, District Judge. The two foregoing causes have been consolidated, and were tried and submitted at the same time as case No. 1540, this day decided. 237 Fed. 837. The consolidated cases both involve the same underreamer patent, and the general statement in the decision in No. 1540 is applicable to these causes. The Double patent involved in that suit—No. 734,833—was granted in 1903. The application for the Wilson patent, No. 827,595, in suit in these two consolidated cases, was filed in 1905, and patent granted in 1906.

Departures by the defendant from the structure, as described in the Double patent, it is complained by the complainant, infringe the patent in suit.

Cause A–4 was first begun, the alleged infringement being limited to claims 16 and 17 of the Wilson patent. Thereafter, it appearing, as alleged by the complainant, that defendant had further departed from the structure covered by the Double patent, by which he averred other claims of the patent in suit were infringed, cause B–62 was brought, on account of the latter alleged infringements. In both A–4 and B–62 novelty and infringement are denied; anticipation pleaded, and the further averment made that another than Wilson was the real inventor of the device for which Wilson received the patent. The evidence does not support the last defense, and it was not urged upon the trial.

Defendant avers an infringement on the part of complainant of the Double invention, of which defendant is the licensee. This issue has already been decided in cause No. 1540 and need not be further considered.

In pleading anticipation, the defendant in these two causes has, in so far as a number of the alleged anticipating patents and devices set up are concerned, necessarily taken a position inconsistent with its contention in cause No. 1540. This, of course, is permissible, but the court, having already held in the decision this day filed in No. 1540 that Wilson's device infringed the Double patent, and that the Double patent was not anticipated by the prior patents mentioned, it follows that, in so far as the alleged anticipating patents and devices preceded the Double invention in point of time, necessarily, none of them anticipated the Wilson invention. In so far as the patents issued and devices designed and used prior to the Wilson application for patent, and not shown to be prior to the Double invention, are concerned, no anticipation is found.

The O'Donnell & Willard patent, No. 762,435, and the so-called "Jones' Round-Nosed" reamer—a device never patented—have already been considered in cause No. 1540, this day decided. No further discussion of them is required. The Jones' so-called "Removable Bowl" reamer is the device, outside of the Double invention, chiefly relied upon in argument, by the defendant, to show anticipation of the patent in suit. It will be considered in connection with cause B–62.

Claims 16 and 17 of the patent in suit in A–4 are as follows:

"16. An underreamer cutter having two shoulders and a bearing face on the inner side of each of the two shoulders of the cutter.

"17. An underreamer cutter having a shank and a shoulder on either side of the shank of the cutter, each of said shoulders projecting at right angles to the shank of the cutter and having a bearing-face on its inner side."

These claims are to cover the structure of an article of manufacture of a particular form—that is, the cutters—and not for a machine or combination. Many of the claims made by Wilson were repeatedly rejected by the Patent Office on reference to Double's patents. The two foregoing claims were so rejected, upon which rejection Wilson's patent attorney wrote the Commissioner of Patents the following letter under date of May 12, 1906:

"It is noted that the leader from the character 4^s in Fig. 9 of the drawings is too long. Please remove the end thereof, so that the leader will terminate at the right of a vertical drawn from the right edge of the shank 4'. Please add the character 4^s to the left of Fig. 9 and connect the same by a leader to indicate on the left of the view the bearing corresponding to the one indicated by the character 4^s at the right of the view. In Fig. 4 apply the character 4^s in at least two places above and below the view, and connect said character by a leader to indicate the bearings at the edges of the cutters 4."

The effect of this amendment to the drawings was to make plain that the inner bearings on the face of the cutters were out nearest its lateral face—entirely beyond the perpendicular side of the shanks. In this particular the letter concludes:

"It is believed that, in view of the application of the additional characters to Figs. 9 and 4, the examiner will be able to pass claims 16 and 17. The Double cutter has its bearing face entirely across the cutter, instead of on the inner side of the shoulders at the sides of the shank, as specified in these claims."

Upon this representation, the rejected claims 16 and 17 were allowed. By this action, and upon familiar principles of estoppel, the claims were clearly limited and restricted to a cutter with its inner bearings confined to its sides, and not extending across its face. In all of defendant's alleged infringing devices, the bearings extend all the way across the cutter.

In an underreamer made by defendant—referred to in the evidence as Type F—and more particularly on account of which complainant brought the second suit, B–62, the lower end of the body extension, instead of being integral, has a block interposed between the lower ends, extending downward on either side of the central slot. With this interposed block in position, the inner bearings on the cutter extend entirely across its face. With this block left out, the body extension becomes more nearly of a pronged or forked formation.

Complainant contends that the use of the interposed block is only a pretense; that, although furnished as a part of the machine, it is detrimental, and not intended to be used. Complainant relies upon the Weed Chain Case, 196 Fed. 213. The question so presented is one that can only be considered in connection with combination claims, and is irrelevant upon consideration of these claims upon a feature of the cutter as an article of manufacture.

No infringement of claims 16 and 17 is shown. Therefore decree will be for defendant in A–4.

Cause No. B–62.

The claims of the patent alleged to be infringed in cause B–62 are numbered 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, and 19. While included in the bill, upon the trial the contention that claims 10 and 15 were infringed was withdrawn. Although it was later contended that claim 10 was infringed, yet effect will be given to such withdrawal, and those claims are held not infringed.

Claims 2, 4, 12, 13, and 14 are all structural claims, rather than combination claims. Prongs on the lower end of the reamer body,

forming a fork, and each prong terminating in a lug, are, in substance, made features in each one of these latter claims.

The Double invention contracted, to a great extent, the unappropriated field open to invention at the time of the Wilson application, and materially narrowed the range of equivalents to which those claiming under the Wilson patent are entitled. The particulars in which the Wilson device infringes the Double invention have already been pointed out in the decision this day filed in No. 1540. This marks the particulars in which the Wilson device was anticipated by the Double patent.

As already pointed out, while the Double reamer, Type F, has a reamer body the lower end of which, before the reamer is completely assembled, may be said to form a fork, yet, when assembled by a block interposed at the bottom and held immovable at all times while the reamer is in operation, the form of extension covered by the Double invention is restored. The specifications and drawings in the Double patent, No. 734,833, only indicated an integral formation in this respect, and such, the evidence shows, was the construction under it until after the granting of Wilson's patent; but the Double claims are not limited to such integral construction.

The main purpose of the forked formation, and the function to which it contributed, was, on the collapse of the cutters, to allow the cutter shank to swing in between the forks, instead of the cutters swinging entirely over the lower end of the reamer body. In this respect none of the devices made by the defendant encroach in any way upon the patent in suit. As already stated, complainant contends that defendant, in interposing the removable end block, has resorted to a subterfuge; that it is a mere pretense of adhering to the operative form of structure covered by the Double patent; that it is not intended that the block remain in the machine in operation; that it is altogether a detriment to leave it in position while the machine is in use. There was testimony by a salesman that, on one occasion, he had seen one of defendant's reamers of Type F being used without an end block. There is no testimony one way or another why, in this particular operation, the block had been left out.

In Weed Chain Tire Grip Co. v. Cleveland Chain & Mfg. Co. (C. C.) 196 Fed. 213, the court found that a very palpable subterfuge was made use of to colorably avoid infringement. In Parsons Non-Skid Co. v. Atlas Chain Co., 198 Fed. 399, 117 C. C. A. 286, involving the same patent in question in the Weed Chain Case, although not the same parties, the court found that the "natural, usual, and preferential" use of the defendant's device would infringe. There is no such conclusive state of facts in the present case. There is much testimony concerning this matter, but from the fact that, with the block left out, there would be but a slight inner bearing afforded the head of the cutter, I am convinced that it was not intended that the block should be discarded when the machine was in use, nor would such course likely be followed usually.

As respects the forked formation, permitting the reamer to be assembled from the bottom rather than from the top, as in Double's

original invention, and in so far as the claimed added advantage of being able to re-machine more effectively the pronged structure of the Wilson device than the hollow slotted extension of the Double structure are concerned, these are not, directly, matters affecting in any way the mode of operation of the machine and do not show invention, nor more than mere mechanical ability. As to these claims, defendant does not infringe.

The remaining claims, Nos. 8, 9, 11, and 19, are combination claims, and are as follows:

"8. A hollow underreamer body terminating in prongs forming a fork, said prongs having shoulders on their inner faces to form ways, cutters in said ways, means for operating the cutters, and a detachable cross-piece connecting the ends of the fork.

"9. An underreamer body terminating in prongs forming a fork, and provided with shoulders on the inner faces of the prongs which form cutter ways and terminate in downwardly projecting lugs, and cutters mounted between the prongs of said fork and having shoulders inside the fork and faces to bear on the projecting lugs."

"11. An underreamer body, terminating in prongs forming a fork, having beveled faces at the ends of its prongs, cutters having shoulders to ride over said beveled faces, and means for suspending said cutters in said body."

"19. An underreamer comprising a body terminating in two prongs, and cutters each having two shoulders and a bearing face on the inner side of each of the two shoulders to engage said prongs."

The essence of claim 8 is the "detachable cross-piece connecting the ends of the fork." What has already been said is applicable to this claim. When this claim was first presented to the Patent Office, it was rejected on reference to Double's inventions; the Commissioner reciting that Double's patent, No. 796,197, showed "a cross-piece at the end of the forks." After such rejection, upon further petition on behalf of the patentee, in which it was urged upon the Commissioner that Double's No. 748,054 did not show a fork, the claim was allowed.

Unless it was intended to restrict this claim to that feature of the fork allowing the collapse of the cutters, it would appear reasonably certain that a misunderstanding was created and a mistake made in the Patent Office in this patent, as its ruling that Double's patent, 796,197, showed "a cross-piece at the end of the fork," never was answered by the patentee. In Double's patent No. 796,197, Figures 2 and 3 show an end block and the specifications recite:

"This end block *10* is secured on the ends of the walls *3*[3] by a pin or key *22*."

The walls *3*[3] referred to form a fork at the lower end of the extension, and the block *10* is held between these forks by the key *22*, substantially in the same manner as in Type F claimed to infringe the patent in suit. To make an integral construction of separate elements, or to make separate elements into an integral construction only for convenience in assembling, where it does not affect the method of operation, does not show invention. In any event, with the detachable bolt between the prongs in Wilson's device, the cutters are permitted to collapse between the prongs. With the detachable block between the prongs in Type F of Double, the cutters collapse over the

lower end of the reamer body extension, without passing between the prongs in any way, so that, in any event, as long as the defendant has confined itself to the original outline of its structure, there is no infringement of this claim.

The so-called "Jones Removable Bowl" reamer, defendant also contends, is an anticipation of the patent in suit. Only a very few machines of this design were made. These machines were manufactured and sold after the time of patenting Double's device, and more than two years before the application of Wilson for the patent in suit. In the Jones removable bowl reamer, the extension is forked to form bearings, but the inclosing removable bowl, which takes the place of the inclosing recesses or pockets of the Double and Wilson—in which the cutter shanks are seated—is unbroken by any slotting, as occurs in the Double and Wilson, to allow the shoulders on the same to contact with the foot of the casing, to cause the collapse of the cutters.

This removable bowl reamer anticipated the forking of the lower extension of the patent in suit in so far as permitting the rod integral with thread or tee thereon—which carries the cutters—to be inserted from the bottom is concerned. These forks in the removable bowl reamer also form ways for the cutters; but the forks in this reamer were not joined at the bottom in any way. The shanks of the cutters bore at all times against the prongs and did not collapse between them. The bearing at the end of the prongs afforded the inner face of the cutter head in the removable bowl reamer does not anticipate the bearing afforded by the "lug" face of the patent in suit, for, in the removable bowl reamer, the bearing afforded is considerably less across than the diameter of the extension of the reamer body or bowl.

In the Double invention and conception, there was nothing in the nature of a lug or the lugs 2′ of the Wilson patent. In claim 11 these lugs are not mentioned, and, in so far as the action described of the cutter shoulder riding over the beveled face of the prongs is concerned, there is neither an additional function nor advantage given to what was already present in the Double conception. Claim 11 is therefore not infringed.

Passing to claims 9 and 19, it has already been found that, as ways for the cutter to slide or ride on, the faces of the prongs and lugs were no more than equivalents of the ways found in the Double invention; but, in so far as these prongs or lug faces afford bearings for the cutter when in reaming position is concerned, a different question is presented, and this is the feature covered by claims 9 and 19.

In the machine of the Double patent and original design, the slotted web of the lower extension helped to form a pocket for the cutter and furnish the inthrust and outthrust bearing for the cutter shanks and extended to the very bottom of the reamer body. This, necessarily, resulted in two things: An inner bearing for the cutter head, narrow as compared with the diameter of the extension upon the reamer body, and weakened to some extent by the slots therein. In the patent in suit, the lower portion of the outer web is cut away, giving the cutter less lateral and greater inthrust bearings. The lugs on either side are thereby created. The outer faces of these lugs form

bearings for the inner shoulders on the cutters. This formation enables the maker—because of the removal of the side web—to give the cutters a wider inner face and inner bearings at the outer side of the inner face of the cutter.

The bearings on the "lug" thus afforded, being in the direction of the extension of the inclosing web, necessarily, make a stronger formation than the bearing confined, as in the original Double design, to the slotted intersecting cross web. The broader cutter head and broader bearing furnished by the device of the patent in suit, obviously, tend to lessen any tendency of the cutters to twist in operating, and there is testimony in the cause, which I am inclined to credit, that, with the narrower Double cutter, the work of the reamer is more likely to result, under certain recurring conditions, in what is termed "key-holing"; that is, in the cutters which are hung opposite to each other each getting started to cut downward in the same place, and not reaming uniformly all around the hole.

In the so-called "Double Improved" underreamer, and in Type F, with the interposed block in position, a lug at the lower end of the reamer body appears, and, with the block removed in Type F, two lugs appear, in relatively the same position and with relatively the same bearing faces as those upon the lugs of the patent in suit. In so far as these bearings in defendant's "Double Improved" and Type F extend upon the faces of the lug or lugs beyond the sides of the diameter of the pocket in which the cutter is mounted, they are mechanical equivalents of the bearing on the outer face of the lugs in the patent in suit, and the same is true of the widened portion of the inner face of the cutter, adapted to bear upon such portion of the face of the lug. It matters not that, in the device shown in evidence, the cutter head extends but a little distance upon this bearing, for to that extent defendant has appropriated what does not belong to it, and therefore infringes.

Upon the argument, it was contended by defendant that the only novelty and patentable feature of the patent in suit was the pronged formation, which permitted the collapse of the cutters between the prongs. If cutting away the interposed web in the Double device to allow the cutters to collapse more completely was patentable, on the same principle, cutting away the side web to give the cutters yet a greater bearing was also patentable, and, if appropriated, infringement results.

In the earlier Double devices there were secondary dovetails adjacent to the junction of the cutter head and shanks, with corresponding ways in the inner faces of the extension, forming the recess in which the cutter is mounted on the body. These added ways caused an outward flare at the mouth of the recess, or pocket. As these ways were made deeper and the flare increased, a wider bearing would be given, and opportunity for a wider faced cutter to bear upon it; but, when defendant departed from this form of construction, and entirely sheared away the side web of the extension to form a lug, the bearing faces to accommodate the wider cutter head, he appropriated the invention and conception of Wilson, and particularly of the patent in

suit. The fact that defendant did not appropriate the perhaps relatively more important conception of Wilson, whereby the cutter shanks were allowed to collapse between the prongs, does not excuse it, or take from the infringement it has practiced, for the seat or bearing of the cutter head on these faces, or lugs, is not dependent upon the swing in collapse of the cutter shanks between the prongs. 30 Cyc. 977, note 15.

Therefore it is held that the machine of the defendant infringes claims 9 and 19 of the patent in suit. Decree for injunctive relief will be granted.

On Petition for Rehearing.

Prior to the order consolidating A–4 and B–62, much was said by complainant's counsel in the proceedings in A–4 to support the contention now made by defendant upon its petition for a rehearing; but it must be borne in mind that such statements were made with a view to securing, after the taking of complainant's opening proof, or the greater part of it, a stipulation from defendant's counsel to waive complainant's election (which had been announced early in the taking of such proof) to stand—in A–4—upon claims 16 and 17 of the patent, and to discontinue the suit upon the other claims of the patent. The stipulation was not made. B–62 was begun and consolidated with A–4.

All that is said by complainant's counsel, after the commencement of B–62, and especially after the consolidation—upon which statements defendant relies—does not warrant the narrowing in any way of the issues tendered by the allegations of the bill in B–62. Especially is this true in view of the notice given by complainant's counsel after such consolidation and before defendant began taking testimony. This notice was as follows:

"Complainant gives notice to the defendant at this time that alternative to any disposition which may be made of equity suit No. B–62, consolidated by the order of the court with equity suit No. A–4, and thus constituting at present the suit known as equity suit No. A–4 consolidated, in which these proceedings are being conducted, namely, any disposition which may be made of said equity suit No. B–62 at the final hearing of this case with respect to such consolidation of said two cases, complainant at such final hearing will rely upon claims Nos. 2, 4, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 19 of the Wilson patent in suit herein. This notice of alternative attitude or position is given at this time in order that defendant may be apprised in the premises before commencing the taking of its proofs."

That which was said by counsel for complainant after the commencement of B–62 is more reasonably explained by giving effect to the following considerations:

The main purpose in bringing B–62 was, doubtless, to determine the question of the infringement, by Type F, of several claims of the patent withdrawn from consideration in A–4, by the election therein made by complainant to rely entirely on claims Nos. 16 and 17. Further, such statements were rather made as statements of what had been done and said theretofore in A–4 than as announcements of what it was proposed to do in B–62.

Nothing short of a clear, unequivocal election to withdraw or discontinue the suit as to alleged infringements set out in B–62 would suffice to narrow the issues thereby tendered. The discontinuance in A–4 as to other claims—which was worked upon the election to stand upon claims 16 and 17—did not have the effect of a judgment upon the merits, or any other than that of a voluntary nonsuit.

It is not necessary to determine the effect which such election would have had if A–4 had gone to final judgment before B–62 was begun and the consolidation with A–4 ordered. Counsel for complainant, having withdrawn, by the election, part of his claim for infringement, had a right to withdraw such election, and the rights of the defendant growing out of the election, and the proceedings subsequent to such election and prior to notice of its withdrawal, would give no ground for denying complainant's ultimate right to again broaden the issues. The only effect of such election and the proceedings had thereafter, and prior to notice of its withdrawal, or amendment of election, would be to give the defendant, under certain circumstances, a right to the imposition of terms, and the right to demand an opportunity to further cross-examine complainant's witnesses theretofore testifying. The defendant, having made no demand for such opportunity, must be held to have waived the same, and, in consideration of the scope of the cross-examination, the court feels that it was in no way prejudiced thereby.

It is probable, if any of the witnesses already examined—whose testimony was relevant to the broadened issues—had died, the testimony of such witnesses would have to be stricken, or the first suit abandoned and a new one brought. But the court is not called upon to decide such a question. In so far as any question of splitting his cause of action is concerned, that matter was foreclosed by Judge Bledsoe's order denying the motion to dismiss B–62.

Counsel for defendant has again urged upon the court consideration of the merits. The forked formation of complainant's reamer body was essential to the complete collapse of the cutters; but it was not essential to the coaction in the particular in which infringement is found. The fact that, in describing, in the claims, a member of a machine which performs two functions in such a way as to disclose a feature of its fitness to perform one function, which feature is not essential to the discharge of its other function, does not warrant competitors in dropping such feature and thereby appropriate one-half of the invention and its advantage, nor prevent the court from according the patentee such a range of equivalents as will fairly protect him in the substantial merits of his invention. If so, form becomes everything, and substance nothing.

Rehearing denied.

DAVIS et al. v. RAPP et al.

(District Court, E. D. New York. November 25, 1916.)

1. PATENTS ⇐328—INFRINGEMENT—WEATHER STRIP.
The Vose patent, No. 717,641, for a weather strip, *held* not infringed.

2. PATENTS ⇐198—SUIT FOR INFRINGEMENT—TITLE OF COMPLAINANT.
Proof of an assignment of a patent *held* sufficient to vest title in the complainant.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 277; Dec. Dig. ⇐198.]

In Equity. Suit by Grace A. Davis and Isabel M. Vose against John W. Rapp and the John W. Rapp Company. Decree for defendants.

H. B. Philbrook, of New York City, for plaintiffs.
Frederick P. Randolph, of New York City, for defendant Rapp.

CHATFIELD, District Judge. The defendants are charged with infringement by the use of a device claimed to have been covered by patent No. 717,641, which was involved in the case of Vose v. United States Metal Products Co., 216 Fed. 775, tried in this court. Upon appeal the Circuit Court of Appeals (219 Fed. 747, 135 C. C. A. 445) held that claim 1 of this patent was restricted to a form of weather strip in which the window sash was rabbeted so as to receive the strip and to maintain a flush surface. The court also held that claim 2 was limited, so far as the strip attached to the window case was concerned, to a flat piece of metal, with no set-off or bending to accommodate or receive the corresponding strip upon the window sash. The court intimated that the patent had slight grounds for its claim of invention, but based the decision of the case upon questions of title, instead of upon the definite findings of the Court of Appeals as to the validity and scope of the claims.

[1] In the present case, the infringing devices are of the precise form which the Circuit Court of Appeals has substantially found were not covered by the claims in question. In addition to this, the defendant John W. Rapp Company is shown to have transferred its business to the United States Metal Products Company, which was the defendant in the previous action. No particular basis for a decree against it, either for injunction or an accounting, can be ordered. All such questions seem to have been transferred to the United States Metal Products Company, which both continued and completed the work charged to be an infringement, and which was financially liable therefor.

The defendant John W. Rapp is sufficiently shown to have been individually the person conducting the business, directing the form of work, and causing the acts complained of, so far as responsibility for the precise style of weather strip to be used was concerned. If the testimony satisfactorily shows any instance of an infringement under his direction of the claims of the patent in suit, as narrowed by the

determination of the Court of Appeals, the plaintiffs would be entitled to a decree for an injunction and the right to show upon an accounting the extent of that use. But the record is barren of such testimony. On the contrary, it appears that Mr. Rapp and the patentee, one Clifton Vose, at some time prior to the disappearance of Mr. Vose in 1911, were developing and using a modified form of weather strip, which the Court of Appeals has held could be used without reference to the rights of the patentee under the patent in question.

[2] Upon the appeal in the former case, it was held that an alleged wrongdoer could, without evidence, attack collaterally the record of assignment of a patent, if that record upon its face presented language contrary to the theory of such assignment. The court held this in spite of the existence of oral evidence and the written notice upon the paper recorded as an assignment, to the effect that the assignment was actually made for a valid consideration. The effect of this decision is to make the record of the assignment the actual transfer of interest to the assignee, instead of mere notice to those subsequently dealing with the patentee, or his assigns, that the transfer had been made.

It is impossible under the circumstances to discuss this ruling in this court. Whether or not a parol assignment, actually brought to the notice of a subsequent purchaser, would estop that purchaser from claiming rights to the patent, as distinguished from the rights which might be acquired by a subsequent innocent purchaser or grantee, without notice, is a matter that need not be now considered. Even if not determined by the previous decision of the Court of Appeals in the case brought upon this same patent, the present issue is not dependent upon the filing of the assignment in question in the prior case.

It appears that some two days subsequently to the filing of that assignment another transaction, evidently relating to the same subject-matter, and, according to the claim of the plaintiffs, with relation to the assignment of the same patent, occurred in the presence of the various members of the family of which Clifton Vose was one of the sons, Maria E. Vose, the assignee of the patent, was mother, and the two plaintiffs in the present action, who have received their title by assignment from Mrs. Vose, were daughters.

Mrs. Vose died before the argument of the previous appeal. Prior to her death she transferred her rights to her daughters, and they were actually parties to the appeal at the time of argument, although no change seems to have been made in the reported title of the action. They now present a paper which purports to be an assignment in terms of the patent in question, dated upon the 20th day of April, 1903; whereas, the paper held by the Court of Appeals to be open to attack was dated April 18, 1903. It appears from the testimony that for some reason a transaction did occur on the 20th of April, 1903, by which Clifton Vose assigned to his mother the exact interest in the patent No. 717,641 which it was thought he had attempted to transfer upon the occasion two days previous. A typewritten copy of this assignment has been produced from the possession of the at-

torney for the plaintiff, and traced back to a time long prior to the previous trial. A carbon copy of some paper identical with that produced by the attorney, so far as its language is concerned, and bearing a signature which, according to the testimony of the witnesses for the plaintiffs, is that of the patentee, has also been produced and traced to papers which had been in the possession of Mrs. Vose prior to her death.

The defendants contend that this paper was not signed by Clifton Vose, and the proof of the plaintiffs does not satisfy the court that the paper offered was the original, and that it bears the genuine signature of Clifton Vose. It would appear, rather, to be a copy of that original, and it would thus appear that a copy has been filed with the Commissioner of Patents for record. But the existence of an original is sufficiently proven, the transfer of the patent to Mrs. Vose has been plainly shown, and there is nothing in the paper to negative the proposition that Clifton Vose did, on the 20th of April, 1903, actually transfer to his mother all rights under the patent in question.

The validity of this assignment, therefore, is not affected by the decision of the Court of Appeals as to the record of the contradictory paper, dated April 18, 1903, and an infringer or subsequent claimant would certainly have been given notice of the assignment which has been proven to have been made. No evidence has been offered to combat the proof of that making and of the delivery. The loss of the original could be cured, and the title of the plaintiffs to the patent in question would seem to be sufficient.

Without, therefore, seeking to make any finding upon the question of patentability and infringement, but merely following the determination of the Court of Appeals on those subjects, and even finding that the plaintiffs have title to the patent in question, the defendants should have a decree dismissing the action, and, under the circumstances, without costs, upon the ground that no infringement has been shown by the use of a weather strip of which the member fastened to the sash has one side let into a rabbet in the sash, nor in which a flat, unbent strip, as defined by the decision of the Court of Appeals, is attached to the casing.

FOSTER v. COMPAGNIE FRANÇAISE DE NAVIGATION À VAPEUR.

(District Court, E. D. New York. November 22, 1916.)

1. SHIPPING ⟸163—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—DUTY TO REFUND PASSAGE MONEY.

A moratorium or prohibition against withdrawal of bank accounts in a foreign country is not a defense to an action by a passenger in the United States for breach of duty to refund passage money in the foreign country, where it does not appear that it rendered performance of the duty impossible, but merely inconvenient.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⟸163.]

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2. SHIPPING ⊂=163—CARRIAGE OF PASSENGERS—BREACH OF CONTRACT—LIABILITY FOR DAMAGES.

The purchaser of a steamship ticket for passage from a foreign country runs the risk of a declaration of war, and cannot recover damages for breach of the contract resulting from such a declaration and consequent action by the foreign government, which rendered performance by the carrier impossible, particularly where it is exempted from such liability by the terms of the ticket.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⊂=163.]

In Admiralty. Suit by Roger Foster against the Compagnie Française de Navigation à Vapeur, Cyprien Fabre et Cie. Decree for libelant.

See, also, 219 Fed. 351.

Jacob J. Aronson, of New York City, for libelant.

Butler, Brown, Wyckoff & Campbell, of New York City (Homer L. Loomis, of New York City, of counsel), for respondent.

CHATFIELD, District Judge. The libelant will be allowed to recover the sum representing, in New York (at which point the Fabre Line sought to refund the passage money), the amount which the passenger insisted should be given him in Marseilles, where he wished to use it. The rate of exchange has nothing to do with this matter. The passenger has saved exchange by coming to New York. Libelant may recover 400.60 francs, or $80.12, with interest from August 3, 1914, and also the sum of $16.50, with interest from August 11, 1914. The latter amount represents the money expended by him in obtaining cash at Barcelona, which actually took the place of that withheld by the Fabre Line.

[1] The so-called moratorium or prohibition against withdrawal of bank accounts is not a sufficient defense to an action in the United States for breach of duty to refund in Marseilles the passage money in question. Even though this so-called moratorium proved a hindrance or annoyance to the Fabre Line, it does not appear that it rendered the performance of its obligation impossible.

[2] The other items of damage claimed by the libelant, including expenses at Marseilles between August 10th (the intended date of sailing) and August 22d, when the passenger went to Barcelona, the fare to Barcelona, and the passage money from there to New York upon a ship provided by the United States government, as well as the loss occasioned by delay in arrival at New York, are not within the liability of the defendant, without regard to the conditions of the ticket which the passenger obtained in Marseilles on July 23d, for his passage by the Madonna from that port upon the 10th of August.

The declaration of war, accompanied by mobilization of members of the crew, the restraint upon sailing of boats that might be needed by the French government, and the constructive seizure of the supply of coal, are matters of which some were within the general knowledge of the court, and of which cognizance could be taken without further proof; but they have been substantially proven by the depositions in this case. They happen to be covered by the provisions of

the ticket, and the attention of the court has been called to no case absolving the passenger from the effect of *such* conditions.

It is not necessary to discuss the other printed exceptions by which the steamship line seeks to absolve itself from ordinary duties toward its passengers, nor by which it seeks to impose regulations upon the passengers for their conduct upon the steamship. In the case of The Majestic, 166 U. S. 375, 17 Sup. Ct. 597, 41 L. Ed. 1039, and in accord with the general trend of decision in the United States court, it has been held that a passenger is not bound by obscurely printed limitations that are not shown to have been brought to the passenger's attention and which were not so printed as to be obviously a part of his contract.

This would also seem to be the law of England. The Titanic, L. R. 3 K. B. D. 73 (1914). But certain cases have been brought to the court's attention which would indicate that the law of France imposes upon the passenger the obligation of all printed matter contained upon the ticket. In the present case the ticket does not show that the passenger signed in the place where a blank for such signature was provided, so as to subscribe to the various conditions of the ticket. In spite of this, and without relying upon the French law, it seems to this court that the passenger cannot throw upon the steamship company the duty of litigating, by subrogation of rights, a claim against the French government, or those foreign governments declaring the war, for the results of actual conditions of war after the declaration.

The making of the contract for passage was reasonably to be interpreted as subject to provisions relating to governmental direction and acts, as well as to interference because of conditions of war, particularly if set forth on the ticket. The passenger, who ran the risk of a declaration of war by his presence in the foreign country, cannot claim as a breach of contract those acts which show *inability* to perform the contract, through possibly unnecessary and extravagant anticipatory measures by the governmental authorities.

ELLIS v. DODGE BROS.

(District Court, N. D. Georgia. October 19, 1916.)

No. 209.

CONTRACTS ⊂=10(4)—VALIDITY—LACK OF MUTUALITY.

A contract by which a manufacturer of motor cars granted the right to a dealer to sell its cars within a certain territory for its term, with an agreement by the dealer to purchase a stated number of cars each month during the term, but which did not obligate the manufacturer to furnish the cars, and further provided that it might be canceled by either party at any time on 15 days' notice, *held* void for lack of mutuality, and not enforceable.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 37; Dec. Dig. ⊂=10(4).]

At Law. Action by Frampton E. Ellis, administrator of the estate of Samuel A. Pegram, deceased, against Dodge Bros., a corporation. On demurrer to petition. Sustained.

Bryan, Jordan & Middlebrooks, of Atlanta, Ga., for plaintiff.

McGregor & Bloomer, of Detroit, Mich., and King & Spalding, of Atlanta, Ga., for defendant.

NEWMAN, District Judge. This suit was brought originally by Samuel A. Pegram, now deceased, and, since his decease, his administrator, Frampton E. Ellis, has been made party plaintiff. The suit is grounded largely, or almost entirely, on a contract between the parties; the one, Dodge Bros., a Michigan corporation, being a manufacturer of automobiles, and the other, Samuel A. Pegram, doing business in the city of Atlanta under the name of Pegram Motor Car Company, being a dealer in automobiles. The contract is as follows:

"With a view to outlining the business relations that shall exist between Dodge Bros., to be known hereinafter in this agreement as the manufacturer, and Pegram Motor Car Company, of Atlanta, Fulton county, Ga., to be known hereinafter as the dealer, certain conditions and statements of facts are hereinafter set forth.

"Territory: The manufacturer grants unto the dealer the right to sell Dodge Bros. motor cars, and repair parts, during the life of this agreement, in the following described territory: Cobb, Fulton, De Kalb, Gwinnett, Henry, Clayton, Campbell, Douglas.

"Discounts: The dealer's purchases of complete motor cars shall be billed to the dealer and be paid for by him at the following percentages off the manufacturer's list price:

50 to 74 motor cars, inclusive 18%
75 to 99 motor cars, inclusive 19%
100 to 199 motor cars, inclusive 20%
200 to 399 motor cars, inclusive 21%
400 to 599 motor cars, inclusive 22%
600 to 799 motor cars, inclusive 23%
800 to 999 motor cars, inclusive 24%
1000 motor cars or more.....25%

"(The copy of the contract as attached to the declaration includes the following three discounts not shown in copy of contract filed:

6 to 12 motor cars, inclusive 15%
13 to 24 motor cars, inclusive 16%
25 to 49 motor cars, inclusive .....17%)

"Each percentage of discount as shown above will apply only to its specific quantity of motor cars, and will not apply on the preceding quantity unit.

"Terms of payment: The manufacturer will ship cars to the dealer with sight draft against bill of lading attached, and the dealer shall pay such draft with exchange upon presentation. Upon failure to do so, the dealer will pay interest thereon at the rate of 6% per annum from date of presentation. All prices are f. o. b. Detroit, Mich.

"Service stations: In the interest of more universal service to Dodge Bros. car owners, the manufacturers will appoint Dodge Bros. service stations wherever possible, and will sell repair parts for Dodge Bros. motor cars in the above territory as follows:

To owner.....List price C. O. D. net.
To repair shops.....List price less 10% C. O. D. net.
To Dodge Bros. service station.....List price less 15% C. O. D. net.

"Repair parts discounts: The dealer's purchases of repair parts shall be billed to the dealer and be paid for by him at 25% discount from manufacturer's list price. To encourage the dealer to make prompt payment of his repair parts account, the manufacturer will allow the dealer a discount of 5% from the net price of all repair parts, if payment therefor is made on or before the 15th of the month following date of invoice.

"Deposit: To protect the manufacturer against nonpayment of such parts accounts, and to avoid the necessity of C. O. D. shipments, the dealer shall deposit with the manufacturer the sum of $1,000. At the expiration of this agreement, the manufacturer agrees to refund to the dealer the amount of this deposit, with interest at 6% per annum, after deducting therefrom any amount that may be due the manufacturer.

"Associate dealers: The dealer agrees to appoint associate dealers at all points in his territory necessary to meet the manufacturer's ideas of proper representation in all local communities. The manufacturer will help toward the appointment of associate dealers, with the understanding that the dealer will be held responsible for the acts of such associate dealer. In order to receive full benefit of advertising, publicity, and sales promotion, it is essential that all associate dealers' agreements be made on forms provided by the manufacturer, and that such agreements be forwarded to the manufacturer for approval.

"Territory infringement: The manufacturer appeals to the dealer's sense of fairness to prevent the dealer from selling Dodge Bros. motor cars for use in territory included in other Dodge Bros. dealers' agreements. If, however, there be any infringement brought to the attention of the manufacturer, the offending dealer agrees to immediately remit, without protest, to the manufacturer, the sum of $200, to be apportioned as seems fair and equitable, in the best judgment of the manufacturer.

"Report of sales: To assist in permanently increasing the dealer's earning capacity, and to assist the manufacturer to equitably distribute his product, the manufacturer requests the dealer to forward to him at Detroit the triplicate copies of all retail orders immediately upon being signed by the purchaser.

"Provision for cancellation: This agreement shall expire by limitation June 30, 1915, or may be canceled by the manufacturer or dealer upon fifteen days' notice. The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motor cars or parts which have not been delivered prior to date of cancellation.

"Transfer of agreement: The dealer agrees not to transfer or assign this agreement without the written permission of the manufacturer.

"Claims for shortages and damages: To facilitate and expedite the adjustment of claims for shortages, the dealer agrees to make claims within ten days after the receipt of shipment. The manufacturer's responsibility ceases upon delivery to the transportation company, and all claims for damages should be made by the dealer direct upon the transportation company.

"Use of words 'Dodge Brothers': The dealer agrees to use the words 'Dodge Brothers' in advertising Dodge Bros. motor cars, but he agrees not to use the words 'Dodge Brothers' as a part of any corporate or firm name.

"Change in list price: The manufacturer reserves the right to change the list price of Dodge Bros. cars by giving the dealer 30 days' notice in writing.

"Dealer's order: The dealer authorizes the manufacturer to make shipment of Dodge Bros. motor cars in the quantities and according to the schedule printed below. The dealer agrees to accept and pay for such motor cars as shipped, and will not cancel any motor cars in this schedule without giving the manufacturer fifteen days' written notice, in which event the manufacturer will have the right to cancel a number of motor cars equal to those canceled by the dealer.

	Rds.	T. C.		Rds.	T. C.		Rds.	T. C.
Oct.		8	Jan.	2	19	Apr.	3	24
Nov.	2	7	Feb.	3	21	May	3	30
Dec.	2	16	Mar.	2	25	June	3	30

"Repair parts stock: The dealer agrees to purchase from the manufacturer and to carry in stock at all times a stock of Dodge Bros. repair parts that will inventory at all times during the life of this agreement not less than $3,000 at list price. Upon termination of this agreement, the manufacturer agrees to purchase from the dealer any new Dodge Bros. repair parts in good condition that he may have in stock at that time, the dealer to prepay transportation charges on such parts to the Dodge Bros.' factory at Detroit.

"Display cars: In order to obtain the maximum retail business, the dealer agrees to keep in stock at all times at least one Dodge Bros. motor car for display purposes.

"Retail sales at list price: It is the intention of the manufacturer to at all times establish list prices which represent a fair value to the car owners and a legitimate profit to the dealer, discounts considered. Therefore the dealer should sell only at these list prices, to enable him to successfully conduct a permanent business.

"Warranty: The manufacturer warrants each new motor vehicle manufactured by him, whether passenger car or commercial vehicle, to be free from defects in material and workmanship under normal use and service, his obligation under this warranty being limited to making good at his factory any part or parts thereof which shall, within ninety (90) days after delivery of such vehicle to the original purchaser, be returned to him with transportation charges prepaid, and which his examination shall disclose to his satisfaction to have been thus defective; this warranty being expressly in lieu of all other warranties, expressed or implied, and of all other obligations or liabilities on his part, and he neither assumes nor authorizes any other person to assume for him any other liability in connection with the sale of his vehicles.

"This warranty shall not apply to any vehicle which shall have been repaired or altered outside of his factory in any way so as, in his judgment, to affect its stability or reliability, nor which has been subject to misuse, negligence or accident, nor to any commercial vehicle made by him which shall have been operated at a speed exceeding the factory rated speed, or loaded beyond the factory rated load capacity.

"He makes no warranty whatever in respect to tires, rims, ignition apparatus, horns or other signaling devices, starting devices, generators, batteries, speedometers or other trade accessories, inasmuch as they are usually warranted separately by their respective manufacturers.

"Policy: There are certain fundamental principles in business which should be observed by both the manufacturer and the dealer to insure permanent success. It is not the intention of the manufacturer to attempt to force the observance of these principles on the part of the dealer by virtue of this dealer's agreement, but rather to work with the dealer in an effort to bring about results mutually beneficial. If, however, the efforts of the manufacturer along this line meet with no responsive effort on the part of the dealer, the manufacturer will feel privileged to exercise his prerogative and cancel the agreement as provided herein."

The declaration alleges: That, although the defendant agreed to sell, ship, and deliver to the plaintiff 200 cars, as shown by the agreement between them, it failed to ship any cars in October, November, and December, 1914, although the agreement provided for the shipment of 4 roadsters and 31 touring cars during that time. That plaintiff was entitled to receive in January, 1915, 19 cars, while the defendant actually shipped, and the plaintiff received, only 7 cars. That plaintiff received only 3 of the cars called for by the contract in the month of February, although he was entitled to 21 cars. That of the 25 cars to be received in March he received only 9 cars, of the 24 cars for April he received only 20 cars, of the 30 cars for May he received only 20 cars, and of the 30 cars for June, 1915, the last month of the contract, he received only 5 cars; that is, the defendant shipped, and the plaintiff received, only 64 cars in all, and the defendant failed and refused to deliver the 136 cars, the difference between the number of cars delivered and the total number of cars called for.

The declaration then alleges that under the contract the plaintiff was entitled to certain discounts on all purchases of motor cars in

accordance with the schedule set out in the contract, and that the total amount of discounts which he would have been entitled to, if said 136 cars had been delivered to him, as required by the contract, is $21,006.60.

It is alleged that the cars were bought from the defendant for the purpose of resale in the city of Atlanta and in the territory described in the contract, and that the defendant well knew and understood this, and that the contract was entered into by the defendant for the purpose of introducing Dodge Bros. motor cars into the Atlanta market and the market in petitioner's territory named in the contract, and alleges that this was the first season during which Dodge Bros. motor cars had been manufactured and sold, and that Dodge Bros. selected the plaintiff and made the contract sued on in this case with petitioner in order to introduce and sell the Dodge Bros. cars.

The declaration then alleges that the defendant failed and refused to deliver the cars called for by the contract, and there was no market in which the petitioner could procure the Dodge cars, for the reason that no other manufacturer was manufacturing or could manufacture Dodge cars, and there was no substitute that petitioner could procure or offer in the place of Dodge cars.

It is then alleged that the plaintiff could and would have sold the entire 200 cars called for by the contract if they had been delivered to him as provided; that, indeed, petitioner sold a large number of cars, accepting deposits thereon from the purchasers in order to bind the trades, and was afterwards compelled to return such deposits because of the failure and refusal of the defendant to furnish him the cars called for by his contract; that plaintiff did not stop taking orders for the cars until defendant's continued failure and refusal to furnish the cars called for by the contract made it a bad business practice for plaintiff and his salesmen to continue to take such orders and sell such cars.

Plaintiff then alleges that he spent a large amount of money advertising Dodge cars in Atlanta and the surrounding territory covered by his contract; that he leased and was maintaining, at No. 253 Peachtree street, Atlanta, Ga., a handsome showroom for said cars, together with a storage place for supply parts, and a repair shop and service station for said cars; that he had hired and maintained throughout the life of the contract a force of efficient and competent salesmen, and that he devoted almost all of his own time and attention to the business of selling Dodge cars and promoting the interests of Dodge Bros., the defendants; that with his own efforts, and the efforts of his force of efficient salesmen, and his advertising, he could and would have sold, not only the 200 Dodge cars called for by his contract, but the 50 additional cars which he asked the defendant to include in his contract at the time the contract was made.

It is then alleged that the plaintiff has been damaged to the amount of $21,006.60 by reason of the failure and refusal of the defendant, the said Dodge Bros., to deliver to him the said 136 cars in accordance with the contract, and he prays for judgment for that sum.

This is the substance of the first count in the declaration, and there

were three other counts in the original petition. In one of the paragraphs of the second count (paragraph 12) it is alleged that:

"Defendant frequently promised to comply with its contract with petitioner resulting from the acceptance by petitioner of defendant's offer to sell, but that defendant delivered only 64 of the 200 cars ordered from it by plaintiff, and failed and refused to deliver to plaintiff 136 of the cars ordered."

In the third count it is alleged, differing somewhat from the first count, that Dodge Bros. was anxious to have its cars sold in Atlanta and in the territory assigned to plaintiff under the contract, as well as elsewhere throughout the United States, and plaintiff was induced to enter into said contract by the assurances of defendant and its agents and representatives that it was ready, able, and willing to carry out the terms of said contract. It is then alleged that:

"Plaintiff deposited with defendant one thousand dollars in cash, provided for in said contract, and also incurred the following expenses and liabilities in order to place himself in a position for faithfully carrying out and performing his part of the contract." Plaintiff leased the property at No. 253 Peachtree street, Atlanta, Ga., at a cost of $210.60 per month; the total rental for the period covered by the contract between plaintiff and defendant being $2,316.60.

It is then alleged that the business of the National and the Haynes cars, carried on by plaintiff with the full knowledge, consent, and approval of defendant, occupied not more than one-fifteenth of all the space so leased by him, and all the rest of said property was leased for the purpose of being used in the business of selling Dodge motor cars, looking after their repairs, and furnishing them proper service.

It is then alleged that plaintiff furnished and stood ready to furnish practically all of his time and attention to the sale of Dodge motor cars, which he claims were to be delivered to him under his contract for sale in his territory; that he devoted to the business of the defendant all of the months of August, September, October, November, and December, 1914, and January, February, March, April, May, and June, 1915, except a small portion of said time, not exceeding one-twentieth thereof, and the value of plaintiff's time and attention to said business, with his skill and experience as an automobile man, was $10,000.

It is further alleged: That he employed a force of salesmen, and kept and maintained said force during the contract period, at a cost to him of $3,300. That he employed an office force, including stenographers and bookkeepers, for looking after the business he was going to do in Dodge motor cars if defendant carried out its contract and delivered cars in accordance therewith, which office force, so employed, cost him $175 per month, or a total of $1,925. That he established and maintained a service station, and laid in a stock of repairs, so as to operate a repair department for said cars, and established and maintained a shop for looking after the cars, all of which was done by petitioner at a cost to him of $3,000 during the life of the contract.

Plaintiff alleges that the above items of expense and cost, including the value of plaintiff's own time, were largely lost to him, to his great damage, because defendant failed and refused to deliver to him Dodge Bros. motor cars in accordance with its contract, and then alleges

that the total costs and expenses incurred by him was $20,000 on account of this failure and refusal of defendant to live up to its contract and furnish plaintiff with the Dodge cars, and he prays judgment for this $20,000.

The fourth count in the declaration differs from the others, in that it is alleged that:

> Plaintiff "deposited with defendant one thousand dollars in cash, provided for in said contract, and also incurred the following expenses and liabilities in order to place himself in a position for faithfully carrying out and performing his part of the contract, and, as shown by said contract, the said one thousand dollars was to be returned to petitioner, with interest thereon at 6 per cent. per annum, at the expiration of said contract on June 30, 1915."

By an amendment to count 1 plaintiff says that the contract was prepared by defendant, through its agents and attorneys, and was on a printed form purporting to be for use in making contracts between defendant and dealers in its cars.

Count 1 is further amended by alleging that defendant was informed, through its agents, that the said Pegram was going forward with performance under the contract, and was doing much work and incurring large obligations and making great expenditures in performing said contact, and that Pegram believed the contract to be a valid and binding obligation upon himself and said defendant, and defendant voluntarily received the benefits of such performance by Pegram, and at no time did defendant advise Pegram that it would not perform, or that the contract herein sued on was not a valid and binding contract.

The amendment to count 1 further alleges that defendant sought to excuse its failure to perform its contract by informing Pegram that, owing to the large number of orders received by it for its cars and the inadequate facilities of its plant, a sufficient number of cars could not be manufactured to enable it to deliver to the said Pegram the cars provided for in the contract of July 26, 1914, and for the further reason that upon two occasions Pegram failed to accept promptly two shipments of defendant's cars, which was untrue in fact, and was a reason not assigned by defendant in good faith, and even if a breach by Pegram, which plaintiff denies, it was waived by both parties thereafter proceeding with performance under said contract; and plaintiff further alleges that defendant, prior to the bringing of this suit, assigned no other reasons for its failure to perform, and at no time prior to the bringing of this suit did defendant put Pegram upon notice that it contended the contract herein sued on was void for lack of mutuality, or for any other reason whatever, but, on the contrary, through the entire life of said contract, defendant knowingly allowed said Pegram to continue to perform, and accepted the benefit of his performance, and treated the contract as a valid, existing, and binding obligation.

The amendments to the other counts appear to be substantially those made to the first count.

There is a demurrer to the petition or declaration in this case, and it is to this demurrer that the present hearing is directed.

There are a number of grounds stated in the demurrer, the principal one being that this agreement is unilateral; that it lacks mutuality of promise and undertaking, in that the dealer agrees to receive the cars, but the manufacturer, the Dodge Bros., makes no promise on its part to deliver. This is fatal to this paper, which, as will be seen from the declaration, is the basis of the suit. Morrow v. Southern Express Co., 101 Ga. 810, 28 S. E. 998; Velie Motor Car Co. v. Kopmeier Motor Car Co., 194 Fed. 324, 114 C. C. A. 284; Oakland Motor Car Co. v. Indiana Automobile Co., 201 Fed. 499, 121 C. C. A. 319. But the fact that this contention of defendant is correct is conceded by the plaintiff's counsel in their brief, in which this is said:

"Defendant's counsel entirely misconceives plaintiff's argument. We have very earnestly insisted that we do not base our right to recover upon the theory that the agreement of July 29, 1914, was a mutual and binding contract at the time it was entered into. Notwithstanding our strenuous insistence upon the proposition that performance by Pegram accepted by Dodge Bros. has entirely altered the rights of the parties, counsel for defendant seems entirely to have overlooked the precise point in issue, and wholly to have misunderstood our position. We do not question the proposition of law stated by counsel for defendant under this head. We simply contend that they are wholly foreign to the issues in this case. In our former brief we have cited numerous cases where federal courts recognized the distinction which we have insisted upon, and have enforced contracts, even though originally lacking in mutuality, where a party not bound had in fact performed. This principle, that acting upon void acts or agreements gives them validity, has been applied, not only to uphold simple contracts, but also to render valid leases, bonds, judicial sales, judgments, etc."

So that we come to the proposition as to whether or not there has been such performance of the contract on the part of the plaintiff as would prevent the defendant, Dodge Bros., from setting up a lack of mutuality in the agreement between the parties. The agreement has the following provision:

"This agreement shall expire by limitation June 30, 1915, or may be canceled by the manufacturer or dealer upon fifteen days' written notice. The termination or cancellation of this agreement will immediately act as a cancellation of all orders received from the dealer for motor cars or parts which have not been delivered prior to the date of cancellation."

This provision would be fatal to this agreement, as a binding contract between the parties, if it was not otherwise objectionable. Velie Motor Car Co. v. Kopmeier Motor Car Co., supra; White Co. v. American Motor Car Co., 11 Ga. App. 285, 75 S. E. 345. It seems to me that, with this provision in the contract for its cancellation by either party, and without any reason given therefor, simply the right to cancel at will, it would be practically no contract at all. Even if there were an agreement here on the part of Dodge Bros. to deliver the cars, this right to cancel would seem to nullify any such agreement. To agree to do something and reserve the right to cancel the agreement at will is no agreement at all.

As I understand the contention of the plaintiff here, it is that his renting a store on Peachtree street, and employing salesmen and also an office force, was such compliance with the contract on his part as would estop the defendant from setting up lack of mutuality, and,

as I presume it is intended by the plaintiff, also from setting up the right to cancel in this proceeding. I am unable to agree with the plaintiff about this. The original declaration, as stated above, shows that the year during which this contract was to remain in force was the first season in which the Dodge Bros. motor cars had been introduced in this territory, and that the plaintiff's purpose was to resell the cars in Atlanta and the territory described in the contract. It seems to me that both parties must have entered into this contract, from its terms and what is generally stated in the declaration, with the knowledge that the business between them might not prove profitable, and therefore either party could end it at his or its option. It appears to have been an experiment as to how the Dodge Bros. cars would take and sell in this territory, and the contract was made accordingly. Why the plaintiff incurred the expense claimed, in view of the character of the agreement he had with the defendant, it is difficult to understand. He certainly was not justified in doing so by anything the defendant had undertaken to do, as I read the agreement.

I have gone through the authorities cited on this question pro and con, and I am unable to find any authority which would justify a recovery by the plaintiff in this case of the principal amount for which he sues.

Paragraph 7 of the fourth count of the original declaration alleges:

"Petitioner deposited with defendant the one thousand dollars in cash provided for in said contract, * * * and as shown by said contract the said $1,000 was to be returned to petitioner, with interest thereon at 6 per cent. per annum, at the expiration of said contract on June 30, 1915."

And in the eighth paragraph of the same it is alleged that:

"Defendant, the said Dodge Bros., has failed and refused to carry out said contract, * * * in that defendant has failed and refused to return to petitioner the sum of $1,000, together with interest thereon at the rate of 6 per cent. per annum," etc.

I see no reason whatever why this $1,000 was not returned to the petitioner. No excuse is given for it in the pleadings by the plaintiff, and the defendant relies on the demurrer, which, of course, admits everything well pleaded in the declaration to be true. I think the plaintiff is entitled to proceed in this case to recover the $1,000, which is still, according to the petition, in the hands of the defendant, and, unless some good defense is interposed, to the right to recover the same.

An order may be taken sustaining the demurrer, as indicated herein, and overruling it as to the claim of the $1,000.

Subsequent to the filing of the above it was shown to the court that the $1,000 had been returned by the defendant to the plaintiff, so that the demurrer to the entire declaration was sustained.

In re McKINNON CO.

(District Court, E. D. North Carolina. December 15, 1916.)

1. BANKRUPTCY ⟸60—ACTS OF BANKRUPTCY.

Under Bankr. Act July 1, 1898, c. 541, § 3, 30 Stat. 546 (Comp. St. 1913, § 9587), it is an act of bankruptcy for an insolvent debtor to apply for a trustee or receiver for his property, or for a receiver or trustee to be appointed.

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

2. BANKRUPTCY ⟸20(1)—ADMINISTRATION OF THE ESTATE OF THE BANKRUPT —STATE STATUTE.

Proceedings against an insolvent corporation under Revisal N. C. 1908, § 1219, providing for the appointment of a receiver, etc., do not preclude creditors from petitioning to have the corporation adjudged a bankrupt, notwithstanding the action of the state courts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⟸20(1); Courts, Cent. Dig. § 1331.]

3. BANKRUPTCY ⟸76(3)—PROCEEDINGS IN STATE COURT—ESTOPPEL OF CREDITORS.

One of the petitioning creditors, whose claims were small, secured a judgment against the alleged bankrupt, whereupon other creditors prayed for and obtained the appointment of a receiver by the state superior court pursuant to Revisal N. C. 1908, § 1219. The attorney for such petitioning creditor was appointed receiver, and the petitioning creditor expressed satisfaction, and thereafter the receiver as attorney filed the claim of the petitioning creditor, his client. The property of the alleged bankrupt was disposed of pursuant to the order of the superior court for the best possible price, and the receiver proceeded to collect other assets. Of the creditors, practically all filed their claims with the receiver; but some months after his appointment the petitioning creditors filed a petition, seeking to have the insolvent corporation adjudged a bankrupt. *Held* that, as all disputed claims would be determined by the superior court, and as the distribution of the assets of an insolvent corporation is clearly a matter of equitable cognizance, such assets constituting a trust fund for creditors, the petitioning creditors, having delayed and making no showing of prejudice, are estopped from denying their participation in the proceedings in the state court, particularly as the costs of distribution in the bankruptcy would greatly exceed those of continuing the administration in the state court.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸76(3).]

4. CORPORATIONS ⟸544(2)—CREDITORS—TRUST FUND THEORY.

The assets of an insolvent corporation constitute a trust fund for the payment of its debts, and their administration is peculiarly within the jurisdiction of a court of equity.

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

In Bankruptcy. In the matter of the McKinnon Company, alleged bankrupt. Petition by M. Rosenman & Son and others for an adjudication in bankruptcy. Petition denied.

John D. Bellamy & Son, of Wilmington, N. C., for petitioners.
J. G. McCormick, of Wilmington, N. C., for respondents.

CONNOR, District Judge. On September 30, 1916, M. Rosenman & Son, the Standard Oil Company, and the Keuster-Lowe Company,

creditors, in amounts aggregating about $600, filed their petition setting forth: That the McKinnon Company, a mercantile corporation, with its principal place of business at Maxton, N. C., in said district, was indebted to an amount exceeding $1,000. That said company was insolvent and that within four months preceding the filing of the petition it committed an act of bankruptcy, in that, in a suit instituted in the superior court of Robeson county, N. C., on July 29, 1916, against said company, its assets and property were placed in the hands of a receiver by said court, and were, at the time of filing said petition, being administered by said receiver under and pursuant to the orders of the court. Another act of bankruptcy was alleged, but the allegation is not sustained.

Respondent company, answering the petition, admits that on the date named its property was placed in the hands of J. E. Carpenter, receiver, by order of the superior court, as alleged. It also admits insolvency. It avers: That at or about the 28th day of July, 1916, one of the petitioners, M. Rosenman & Son, obtained a judgment, issued execution thereon for $152.75 and was about to levy same on its property, when another creditor, the Bank of Maxton, instituted suit in the superior court of Robeson county and secured an order appointing the receiver, with direction to him to take the assets and property of the corporation into his charge, sell the same, and apply the proceeds to the payment pro rata of its debts. That pursuant to said order said J. E. Carpenter took possession of its assets, consisting of a stock of goods, real estate, book accounts, and other choses in action. Acting under the orders of the court, the receiver sold the stock of goods for 55 cents on the dollar of its inventoried cost. The said sale has been, before the filing of the petition herein, approved and confirmed by the court. The receiver has diligently endeavored to collect the accounts and debts due the company. The proceeds of the sale of the goods and of such collections as he has been able to make are deposited by the receiver in the bank, awaiting the further orders of the said court. Respondent further avers: That petitioners, M. Rosenman & Son, assented to and acquiesced in the appointment of said receiver, who was the attorney of said petitioners and represented them in securing a judgment on their debt. That said petitioner, and the Standard Oil Company, have filed their claims with said receiver as provided by the state statute, and are estopped from joining in the petition herein. That it has no other interest in the proceeding, or the result thereof, than a desire that the creditors shall receive the largest possible amount on their debts against the company. The company suggests, and urges upon the attention of the court: That an administration of the assets in bankruptcy will entail large and unnecessary cost. That the goods have been sold, and, to a large extent, the accounts collected. That the proceeds are now in the bank to the credit of the receiver, ready, upon the order of the court, to be distributed among the creditors, without delay or further expense.

[1-4] Among the acts of bankruptcy, which entitle the creditors to proceed against an insolvent debtor, are having "applied for a re-

ceiver or trustee, for his property, or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a state," etc. Bankr. Act, § 3. The objection to the adjudication in this record is found in the allegation that the petitioners, M. Rosenman & Son and the Standard Oil Company, have, by their conduct in respect to the appointment of the receiver and his action in the administration of the estate, estopped themselves from filing or joining in the petition, asking that the respondent be adjudged a bankrupt. The uncontradicted facts in regard to this contention are:

M. Rosenman & Son, prior to July 28, 1916, placed their claim in the hands of J. E. Carpenter, Esq., attorney, residing at Maxton, N. C., for collection, who obtained judgment against respondent, sued out execution thereon, and was proceeding to have it levied on its property. Some offers were made for a compromise, which were rejected, whereupon the Bank of Maxton, a creditor of the McKinnon Company, in its own and the behalf of other creditors, for the purpose of preventing a preference and of securing a pro rata distribution of its assets, instituted an action in the superior court of Robeson county, setting forth the jurisdictional facts, and asking for the appointment of a receiver, to take charge of, convert into cash, and distribute the assets and property of said corporation. Pursuant to the prayer in the complaint, the judge of said court, on July 29, 1916, appointed J. E. Carpenter, Esq., the attorney of petitioners M. Rosenman & Son, receiver, who qualified by filing a bond, approved by the court, and proceeded immediately to take into his possession and make an inventory of the goods and other assets. He also notified his clients, M. Rosenman & Son, of the situation, and they replied that they had every confidence in him and were glad that he was appointed receiver. The said attorney filed, as required by the North Carolina statute in such cases, the claim of the said M. Rosenman & Son. He heard nothing further from them until notified that they had filed the petition herein, on September 30, 1916. The receiver advertised for creditors of said insolvent corporation, and, acting under and pursuant to the orders of the superior court, sold the stock of goods at 55 per cent. of their inventoried price, which sale was duly confirmed by the court, prior to the date upon which the petition herein was filed. The proceeds of the sale were deposited in the Bank of Maxton, to the credit of the receiver. He also began at once to make every possible effort to collect the accounts due the corporation. All of the creditors of the corporation, aggregating some $20,000, other than petitioning creditors, whose claims aggregate $648, have assented to said receivership and desire the estate administered through that proceeding.

Affidavits by counsel representing other creditors of respondent are filed, in which they express the opinion that the creditors will receive a larger dividend from the receivership than through an administration in the bankrupt court. It is conceded by all parties that the receiver, J. E. Carpenter, is a man of high character, and in all respects a competent and proper person to continue the administration of the estate. He states that the administration of the estate has

been practically concluded, there is very little more to be done, that an administration by a trustee in bankruptcy could not add one dollar to the assets, but would diminish the amount received by the creditors. I am of the opinion that this is true. The only suggestion made to the contrary is that the goods may have been sold for a larger sum; but no evidence is offered to sustain the suggestion. They were sold under the supervision of the superior court, and, after full notice, the sale has been confirmed. There is no suggestion of either wrongdoing or negligence by the receiver. When it is noted that the receiver was appointed July 29, 1916, and the creditor now making the suggestion was promptly notified, that his own attorney, in whom he expressed confidence, and does not now suggest bad faith, made the sale, and it is further noted that this creditor resides and his place of business is within a short distance, with daily communication by rail, of Maxton, there would seem to be but little force in the objection, made two months after the appointment of the receiver. He must have known that the goods were of a character which rendered a prompt sale necessary.

It appears that the McKinnon Company owned real estate upon which D. Boyd Kimball held a mortgage for money borrowed by said company, bearing date February 2, 1915, and duly recorded on February 8, 1915, for $6,000. The note was past due. Guggenheimer & Co., of Richmond, held a second mortgage on the same real estate to secure a debt of $350, dated and recorded more than four months prior to the date of the petition herein. The receiver advertised the land for sale at public auction, and at the sale the Bank of Maxton became the purchaser at the price of $5,500. The receiver delayed the confirmation of the sale because the bankruptcy proceeding was pending, and because he hoped to secure an advanced bid. He has been unable to secure a larger bid. The receiver advertised for creditors to prove their claims, as required by the North Carolina statute, and, in addition thereto, notified all creditors by mail of his appointment. With the exception of the Keuster-Lowe Company, every creditor has filed his claims with the receiver and made themselves parties to the proceedings in the state court. A list of the creditors and amounts of their claims is attached to his affidavit. The receiver states that he has not paid, and does not intend to pay, any claims against the McKinnon Company, until notice has been given each creditor to file objection to said claims; that when objections are filed it is his purpose, as the state statute requires him to do, to submit the same to the superior court for decision; and that no payment will be made until ordered by the court. It will be observed that the proceeding in the state court was brought and is being conducted under the provisions of a statute authorizing any creditor, in his own behalf and in behalf of all other creditors of an insolvent corporation, to institute an action, in the nature of a creditors' bill, for the purpose of winding up the business, and, through the medium of a receiver, bringing to sale its property and paying the proceeds to the creditors according to their priorities. Pell's Rev. (1908) c. 21, § 1219.

Proceedings against an insolvent corporation, under the provisions

of this statute, do not preclude the creditors from resorting to a petition to have the corporation adjudged bankrupt, and, notwithstanding the action of the state courts, have its assets administered in the bankrupt court. It is settled by well-considered decisions of the federal courts, that:

"Where a debtor makes a general assignment for the benefit of his creditors, and judicial proceedings are instituted to enforce and carry out the assignment, creditors who, on being made parties to such proceedings, do not repudiate the assignment, nor begin proceedings in bankruptcy, but file their claims under the assignment, and participate in the administration of the estate, and suffer the assignee to sell the property and collect the proceeds, involving a delay of several months, and the incurring of costs and expenses, are estopped thereafter to file a petition in involuntary bankruptcy against the assignor, based solely on the ground of the assignment." Simonson v. Sinsheimer, 95 Fed. 948, 37 C. C. A. 337 (C. C. A. 6th Cir.).

In an exhaustive opinion in this case, reviewing the English and American decisions, Circuit Judge Taft, with the concurrence of Judge Lurton, referring to the course pursued by the petitioning creditors, said:

"They are alleged to have become parties to the assignment proceedings, to have filed their claims under the assignment, to have requested a reference to pass upon the claims, the accounts of the assignee, and the questions of distribution. They waited 3½ months before filing their petition. By their acquiescence, they certainly induced the assignors, the assignee, and the purchasers of the assets * * * to believe that they would not seek to set aside the assignment. Were the assignment to be set aside now, it would avoid every sale the assignee has made, and revest in the trustee in bankruptcy the title of the assignors. It is conceded that the distribution under the assignment would be exactly the same as under the bankruptcy proceedings. The bankruptcy proceedings will only increase the costs, and possibly defeat the costs already earned in the state court proceedings. Had these creditors filed their petition soon after the assignment, all the unjust results of their delay pointed out would have been avoided, for then the assignee would not have sold the assets, and the state officers would not have rendered the services, and the creditors would not have distribution delayed by four months. As it is, we think the answer stated a good defense, and that the court erred in not allowing it to be filed."

While the facts recited are not, in all respects, the same as those disclosed in this case, they illustrate the principle upon which the conclusion is based. It will be observed that the appeal in the case cited was taken from the refusal of the District Judge to permit the answer to be filed. In this his judgment was reversed. When the answer was filed, and evidence heard, the District Judge was of the opinion that, upon the facts disclosed, the petitioners were not estopped. This conclusion he set forth in a well-considered opinion, to be found in 96 Fed. 579. Upon a second appeal his judgment was affirmed. 100 Fed. 426, 40 C. C. A. 474. Judge Taft says that it appears that the petition was filed shortly after the assignment was made, and withheld, under promise of a speedy settlement and composition of the claims by the defendant, which would have made proceedings in bankruptcy unnecessary. He concludes that, as the delay was due to the solicitation of the respondents, no harm could have come to them by reason of it.

In Durham Paper Co. v. Seaboard Knitting Mills, 121 Fed. 179 (D. C. N. C.), Judge Purnell held that, when it is shown that the petitioners have filed their verified claims against the estate of a debtor, who had made a general assignment, with the clerk of the superior court, as required by the state statute, and permitted the property to be sold and a large part of the proceeds to be disbursed, they would be estopped from filing a petition seeking to have the debtor adjudged an involuntary bankrupt. So, in Lowenstein v. Henry McShane Mfg. Co., 130 Fed. 1007, Judge Morris (D. C. Md.), upon the facts appearing upon the evidence, said:

"This action, it seems to me, was an election by those two creditors to avail [themselves] of the proceedings in the state court, and it appears that, during the period between their intervention in that case and their filing the petition in bankruptcy, much was done by the receivers in the state court."

He held them estopped. It is held in Re Salmon & Salmon (D. C.) 143 Fed. 395, that, upon the facts appearing in the record and fully discussed by District Judge Pollock, the petitioning creditors were not estopped. It appears in that case that the proceedings in bankruptcy were begun on the same day, and at an hour prior to the proceeding in the state court. Attorneys for petitioning creditors "diligently and persistently sought to speed the proceeding. Upon notice served, the claims of the petitioning creditors were presented to the referee appointed by the state court, and their claims allowed." The judge was of the opinion that the action of the petitioners, in that respect, was not voluntary. In Re Curtis, 94 Fed. 630, 36 C. C. A. 430, as said by Circuit Judge Jenkins, the creditors were "in peculiar position"—and easily distinguished from the attitude of the petitioners, Rosenman & Son. He further says:

"It is shown by the record that certain transfers of property by the bankrupts were made, which the petitioning creditors insisted were fraudulent, and certain other frauds are asserted, which need not be detailed, and that knowledge of these fraudulent transactions was not possessed by the petitioning creditors prior to the 1st day of November, 1898, when this petition was presented; that their claims were filed under the assignment in ignorance of these alleged fraudulent transactions. Under the circumstances, and in view of the fact that no legal detriment has resulted to any one from the filing of claims under the assignment, we are of opinion that the petitioning creditors are not precluded by the mere fact of filing their claims with the assignee from selecting another forum, in which, as they think, their rights as against supposed fraudulent transactions may be the better protected."

In Utz & Dunn Co. v. Regulator Co., 213 Fed. 315, 130 C. C. A. 17 (C. C. A. 8th Cir.), Judge Hook discusses the question in the light of the facts in that case, concluding:

"It is an attempt by two of a number of creditors to use a lawful act of their debtor, which they had approved and confirmed with full knowledge of all the circumstances and in the carrying out of which they had joined, as the reason and ground for an antagonistic proceeding. Had the assignment been fraudulent, or had they been deceived or denied the opportunity of full choice, the case might be different."

From a careful examination of these and other authorities, while I would not conclude that the mere filing of the claim with an assignee or receiver operated to estop the creditor from thereafter join-

ing in a petition to have the insolvent creditor adjudged bankrupt, I am constrained to think that if, with full knowledge of the situation and of his rights, he delayed such action, making no suggestion to those interested in the administration of the estate until the property was sold, expenses incurred, and rights of innocent persons attached, he should not be permitted to proceed in a bankrupt court after long delay, upon the sole ground that the assignment was made or the receiver appointed. Not only the respondent, but the other creditors interested in securing the largest possible dividend on their debts, are entitled to be protected. It is manifest that more than 90 per cent. in number and a larger percentage in amount of the creditors of the McKinnon Company, equally as well informed and entitled to consideration as the petitioning creditors, honestly, and I am fully convinced correctly, think that the interests of all of the creditors will be promoted, and the amount received on their debts enlarged, by permitting the receiver to continue and conclude the settlement of this estate. That the cost will be considerably less is not open to controversy. If the petitioners had, immediately upon being notified that the state court had taken jurisdiction of the affairs of this insolvent corporation and appointed a receiver, before the property was disposed of, or any other than the initial cost accrued, their status would have been made better, and their claim upon the consideration of the court much stronger. They waited two months before proceeding, or, so far as the record discloses, making any suggestion of a purpose to act; on the contrary, petitioners, M. Rosenman & Son, whose attorney was named by the court receiver, expressed themselves as "glad he was appointed, and their perfect confidence in him." Their claim, as was that of the Standard Oil Company, was filed, and the receiver, as was his duty, proceeded, in strict compliance with the orders of the state court, to notify the creditors and sell the property. He has acted in perfect good faith, and there is no suggestion that he will not continue to do so. There was, on the hearing, some suggestion that certain alleged claims were not valid; but it was stated that such claims would not be filed or their participation in the distribution of the assets asked. Some suggestion was made that the proceedings in the state courts generally were not "satisfactory," no suggestion was made that, in this case, the state court would not deal with the situation promptly and in justice to all of the creditors. The cases cited arose out of proceedings relative to assignments for the benefit of creditors. The same principle applies in respect to suits brought in the state courts to wind up insolvent corporations. Lowenstein v. McShane Co., supra.

The assets of an insolvent corporation constitute a trust fund for the payment of its debts, and their administration is peculiarly within the jurisdiction of a court of equity. The interest of all of the creditors are, or should be, carefully guarded by the court. The corporation or the stockholders' rights are subordinate to those of the creditors. In this case it is apparent that these rights are being fully protected by the state court. The language used by Judge Bradford in Woolford v. Diamond State Steel Co. (D. C.) 138 Fed. 582, is ap-

propriate upon the facts developed in this case. There the corporation was in the hands of receivers appointed by the state courts, and its assets being administered satisfactorily to a large majority of the creditors. Upon the petition of a small minority to have the corporation adjudged bankrupt, and, until the hearing, to have receivers appointed, after an exhaustive discussion of the evidence, he says:

"I can perceive no possible advantage to the creditors of the company to be derived from the prosecution of the bankruptcy proceedings, and am convinced that such proceedings could enure only to their detriment. An administration of the property of the company under the present receivership, I have no doubt, will be advantageous to its creditors and possibly to its stockholders."

Without further pursuing the discussion, I am of the opinion that, by the course pursued by the petitioners, M. Rosenman & Son, including the delay of two months, during which goods have been sold and the estate reduced to cash ready for distribution, they are estopped from prosecuting the petition. This conclusion leaves but two petitioning creditors, resulting in the dismissal of the petition. If the McKinnon Company were adjudged bankrupt, in view of the facts developed, it would be the duty of the trustee, when elected, to intervene in the action pending in the state court, rather than institute a new proceeding. There is no question of preference or fraudulent transfer of property. The sole equity is, who are the creditors, and in what amounts are they entitled to participate in the distribution of the proceeds of the assets of an insolvent corporation.

Objection was made to the verification of the petition by one of the petitioners. I do not deem it necessary to pass upon the objection.

The petition will be dismissed, at the cost of the petitioners.

EMERSON-BRANTINGHAM IMPLEMENT CO. v. LAWSON.

In re BROM.

(District Court, S. D. Iowa, E. D. June 5, 1916.)

1. BANKRUPTCY ⇐151—TRUSTEES—RIGHT OF.

In the absence of preference or fraud, the trustee of a bankrupt, save as to an instrument reserving a lien on the bankrupt's estate unrecorded at the time the bankruptcy petition was filed, has only the same right as the bankrupt.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 193, 239; Dec. Dig. ⇐151.]

2. COURTS ⇐366(1)—PRECEDENCE—FEDERAL COURTS.

The federal courts will, save in very exceptional cases, follow the construction placed upon the statutes of a state by the courts of last resort of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 956, 957, 967; Dec. Dig. ⇐366(1).]

3. BANKRUPTCY ⇐188(2)—LIENS—PRIORITY—RIGHT OF TRUSTEE.

Code Iowa, § 2905, declares that no sale, contract, or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser, unless recorded, while section 2906 declares that no sale or mortgage of personal property, where the vendor or mortgagor retains possession, is valid as against existing creditors or subsequent purchasers without notice, unless recorded. Claimant sold goods to a bankrupt under a contract of conditional sale, reserving title to itself, which contract was not recorded until a few days before the filing of the petition in bankruptcy. *Held* that, as the lien reserved by the conditional sale contract did not constitute a preference, and the trustee obtained no greater rights than those which would have been acquired by creditors who might have secured a lien by attachment or otherwise on the day of the filing of the petition in bankruptcy, the trustee could not question the lien of claimant; the exceptions of the Iowa statutes in favor of creditors not extending to general creditors, though their indebtedness accrued after the execution of the contract and before recordation, such a creditor having no priority until he shall have obtained the lien, by attachment or otherwise, without notice of the lien of the contract.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 292; Dec. Dig. ⇐188(2).]

4. SALES ⇐454—"CONDITIONAL SALE"—NATURE OF CONTRACTS.

Contracts which reserve title absolutely in the vendor are not conditional sales, within the meaning of the Iowa recording acts, but are bailments; but a contract of sale, contemplating resale by the buyer, is a "conditional sale," and not a bailment.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1324, 1325, 1333, 1334; Dec. Dig. ⇐454.

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

5. SALES ⇐461—CONDITIONAL CONTRACTS OF SALE—VALIDITY.

An order for goods, reciting that it was subject to the conditions and agreements on the back, which was signed by the purchaser, bore on its back the statement that title to, ownership of, and right of possession of all goods shipped under the contract should be and remain in the seller until the same should be paid for. The goods were shipped under the

contract. *Held* that, as between the parties, a valid conditional sale was created.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1349; Dec. Dig. ⊂⊃461.]

6. SALES ⊂⊃462—CONDITIONAL SALES—CREATION.

In such case, though a clause in the order declared that the contract was subject to the approval of the seller, and should not be binding unless accepted in writing by it, a valid conditional sale was created, where a salesman of the seller wrote that the same was accepted subject to the approval of the seller, and the seller showed its approval by delivering the goods.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1350; Dec. Dig. ⊂⊃462.]

7. SALES ⊂⊃472(2)—CONDITIONAL SALES—CONTRACTS—VALIDITY.

In such case, as the Iowa statutes fix no particular time for execution and recordation of such contracts, the validity of the conditional sale contract was not affected, because it was not acknowledged by the buyer or recorded until a considerable time after delivery of the goods; the contract being acknowledged and placed on record before the rights of creditors intervened.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1370; Dec. Dig. ⊂⊃472(2).]

8. SALES ⊂⊃477(3)—CONDITIONAL SALES—CONTRACTS—VALIDITY.

Where a seller reserved title by conditional sale contract, the fact that he thereafter secured additional security by chattel mortgages and notes, which were recorded, will not impair his security under the conditional sale contract.

[Ed. Note.—For other cases, see Sales, Cent. Dig. § 1413; Dec. Dig. ⊂⊃477(3).]

In Bankruptcy. In the matter of the bankruptcy of A. T. Brom, a claim by the Emerson-Brantingham Implement Company, was opposed by Ralph W. Lawson, trustee. Finding of referee reversed, and cause remanded for further proceedings.

R. C. Leggett, of Fairfield, Iowa, for claimant.
R. H. Munro, of Fairfield, Iowa, for trustee.
Leggett & McKemey, of Fairfield, Iowa, for bankrupt.

The Issues.

WADE, District Judge. It is very important to consider the issues in this proceeding. Claimant files a petition, claiming possession of the property in the hands of the trustee under certain alleged contracts of conditional sale.

The answer is in six paragraphs, in the first, second, and third of which it is alleged that certain other creditors sold goods and extended credit to Brom without knowledge of any reservation of title by claimant; and I infer that it is the claim of the trustee that these creditors are entitled to equities in the property superior to the plaintiff's claim, based upon the fact that the contracts of conditional sale were not recorded. Paragraph 4 admits the delivery by claimant to Brom of the goods in controversy, but denies that they were delivered upon a conditional sale, and denies that any bill of sale was executed until February 17, 1915. Paragraph 5 alleges that on February 15, 1915, the

claimant procured notes for its indebtedness, and a chattel mortgage securing the same, which was recorded. Paragraph 6 is in effect a general denial, except as to the receipt of the goods by Brom.

It will be observed that there is no claim of fraud in keeping the bills of sale from record, nor in any other way, and there is no claim of preference, and no claim of insolvency at the time the conditional contracts are claimed to have been made, and no claims of insolvency during the times when the creditors referred to in the first three paragraphs sold the property to Brom. So that substantially there are but three issues in this case: (1) As to the validity of the alleged contracts of conditional sale; (2) did the fact that they were withheld from record give precedence to the claims of those who extended credit without notice? and (3) whether the chattel mortgage executed on the 15th of February constituted a waiver thereof. Waiver is not specifically pleaded; but I assume that that was the intention of the pleader, and the view of the referee in his ruling herein.

The Validity of the Contracts.

[1-3] Now, in considering whether these contracts relied upon by the claimant are valid or not, we must consider their validity as between the claimant and Brom. The trustee stands in Brom's shoes, so far as the issues in this case are concerned. The trustee claims no preference by Brom, and no fraud, and, in the absence of preference or fraud, the trustee has the right only of the bankrupt, except as to an instrument not recorded at the time the bankruptcy petition was filed, and this question might as well be settled at this point.

The answer seems to have been drawn under the ruling of the Court of Appeals of the Eighth Circuit, in Post v. Berry, 175 Fed. 564, 99 C. C. A. 186, and in Re Bothe, 173 Fed. 597, 97 C. C. A. 547, which hold that persons extending credit, with no knowledge of an unrecorded mortgage or bill of sale, are entitled to preference as against such mortgage or bill of sale. These cases were decided by the Court of Appeals of this circuit, but In re Bothe did not involve the statutes of Iowa as to recording, but arose under the statutes of Missouri (Rev. St. 1909, § 2861), which expressly provide that:

"No mortgage [on] personal property * * * shall be valid against any other person than the parties thereto, unless possession of the mortgaged * * * property be delivered to and retained by the mortgagee * * * or unless the mortgage * * * be * * * recorded in the county in which the mortgagor * * * resides."

Post v. Berry arose under the statutes of Iowa, but I feel satisfied that in deciding this case the court overlooked the distinction between the statutes of Missouri and the statutes of Iowa, as construed by the highest courts of those states. The courts of the United States will follow the construction placed upon the statutes of a state by the courts of last resort in such state, unless in very exceptional cases. The statute of Iowa (section 2906) provides that:

"No sale or mortgage of personal property, where the vendor or mortgagor retains actual possession thereof, is valid against existing creditors or subsequent purchasers, without notice," unless recorded.

And section 2905 provides:

"No sale, contract or lease, wherein the transfer of title or ownership of personal property is made to depend upon any condition, shall be valid against any creditor or purchaser," unless recorded.

While the language is very general as to the word "creditor," it has been repeatedly held by the Supreme Court of Iowa that it does not mean a general creditor, not even though his indebtedness accrues subsequent to the execution of the unrecorded mortgage, but that, before a creditor can assert a right superior to the unrecorded instrument, he "must obtain a lien, as by attachment or otherwise, upon the mortgaged property, before notice, actual or constructive, of the mortgage." Murphy v. Murphy, 126 Iowa, 57, 101 N. W. 486. This case is followed in Orr v. Kenworthy, 143 Iowa, 6, 121 N. W. 539, 136 Am. St. Rep. 728, and is merely an expression of numerous decisions by the Supreme Court of Iowa.

It is settled in this state, beyond controversy, that a creditor, subsequent to an unrecorded instrument, has no equity, and has no right to assert a claim, superior to the rights accruing under the unrecorded instrument, unless before record he acquires a lien by attachment, execution, or otherwise. He has the right to allege that the unrecorded instrument was withheld from record as part of a fraudulent scheme to enable the mortgagor to procure credit, and that credit was extended by reason of such fraud, and the failure to record is a strong circumstance to be considered. But in this case there is no issue of fraud. There is no claim that during the time the instruments were withheld from record (assuming that they were valid) Brom was not perfectly solvent; nor is there any claim of any fraud or deceit of any kind whatsoever.

Post v. Berry seems to be the last expression of the Court of Appeals upon this question, construing the Iowa statute, and ordinarily it would be my duty to follow it without question; but since the decision of that case the Supreme Court of the United States has decided Bailey, Trustee, v. Baker Ice Machine Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275, and Carey v. Donohue, Trustee, 240 U. S. 430, 36 Sup. Ct. 386, 60 L. Ed. 726, opinion filed March 13, 1916, both of which I think have strong bearing upon the questions involved; therefore I cannot follow Post v. Berry in the construction of the statutes of this state.

Now the conditional contracts were filed for record before the petition for bankruptcy was filed. The trustee in bankruptcy acquired no rights greater than those which would be acquired by creditors who, on the day that the petition in bankruptcy was filed, secured a lien by attachment or otherwise. Bailey, Trustee, v. Baker Ice Co., and Carey v. Donohue, Trustee, supra. If creditors of Brom had, on February 20, 1915 (the date of the filing of the petition in bankruptcy), procured an attachment and levied it upon the property (if the contracts are held valid), the creditors would have no rights superior to the rights of the claimant, because on that date they had notice by the record of the contracts recorded on February 17th, and in the absence of fraud the

claimant would be entitled to possession. Suppose a valid chattel mortgage were executed and recorded on the 17th of February, creditors certainly could not on February 20th levy an attachment which would take precedence thereof; and the trustee is vested only with the rights of such a creditor as of the date of the filing of the petition. Bailey, Trustee, v. Baker Ice Co., supra.

I am not overlooking the rights of the trustee to reclaim property transferred or mortgaged in preference of creditors, where the mortgage is not recorded within four months of the filing of the petition: but there is no claim of preference in this case. Construing, as I do, the conditional contracts as being in the nature of mortgages upon the property, there is no claim that at the times they were signed by Brom —October 29, 1913, March 23, 1914, and October 19, 1914—any preference was intended, or given, no claim that he was then insolvent, or that claimant had any suggestion of intended preference; and a valid mortgage, executed more than four months before the bankruptcy petition is filed, is valid as against the trustee, even though the same is not recorded until three days previous to the filing of the petition in bankruptcy.

There is no statute making void a valid mortgage not in preference, simply because the same is not recorded until within the four months period. Counsel do not assert any such claim. So now it will be seen that this case turns upon the validity of the alleged conditional sales.

The Validity of the Conditional Sales.

[4-7] There can be no question but that the orders signed by Brom, and the delivery of the goods thereunder, constituted a conditional sale. Language could not be plainer:

"And it is agreed that title to, ownership of, and right of possession of all goods shipped under this contract, in case of loss, to the amount of the invoice price of goods destroyed, shall be and remain in said company until said goods are paid for in cash."

Similar contracts have been in use by other companies, and have been upheld, not as retaining the absolute title to the vendor, but as contracts holding title for security purposes only. I do not feel that these contracts come within the rule of the Baker Ice Machine Co. Case. There the court held that the title never passed; but that was a fixture sold for use, with the intention that the vendee should retain the same absolutely.

The goods in this case were sold with the view of resale by the vendee, and it was not the intention of the parties that the title should not pass to the extent that the vendee could pass title to the goods. The reservation was more in the nature of a lien for the purchase price. Singer Sewing Machine Co. v. Holcomb, 40 Iowa, 33; Wright v. Barnard, 89 Iowa, 168, 56 N. W. 424; Norwegian Plow Co. v. Clark, 102 Iowa, 40, 70 N. W. 808; Moline Plow Co. v. Braden, 71 Iowa, 143, 32 N. W. 247; National Cash Register Co. v. Zangs, 127 Iowa, 713, 104 N. W. 360. From these cases it will be observed that the Supreme Court of Iowa holds that contracts which reserve the title

absolutely in the vendor are not conditional sales within the meaning of the recording act, but are bailments.

But it is contended that the contracts were never executed until February 17, 1915. This is true as to the full execution entitling them to record, but it cannot be questioned that, as between the parties, the contract was valid from the time the same was accepted by the claimant, and they were accepted by the claimant at the time the goods were shipped thereunder. The order signed by Brom was for goods, "subject to the conditions and agreements on the back hereof, which are hereby made a part of this order and contract."

So that, as between him and the company, the delivery of the goods thereunder made the contract effectual. Suppose there was no bankruptcy here, and the claimant asserted its rights to possession—to exercise its right of lien—what defense would Brom have, even though the contracts were never acknowledged or recorded? Could he say, "I bought these goods absolutely, and they are mine," in the face of his order, which specifically reserves title in the vendor as security?

But clause 13 is pointed out, which provides:

"This contract is subject to the approval of Emerson-Brantingham Implement Company, and is not binding unless accepted in writing by it."

As I understand it (though the copy does not so indicate), it was accepted by the salesman writing his name under the heading, "Accepted subject to the approval of Emerson-Brantingham Company," and this was an acceptance in writing by the company through its agent. True, it was subject to the "approval" of the company; but I find nothing which requires such approval to be in writing. The receipt of the order, and the shipment of the goods, is sufficient evidence of approval, so that there was a complete, binding contract between claimant and Brom from the time of the shipment of the goods up to the time of bankruptcy.

As to the acknowledgment and recording, no time is fixed by the statute when this must be done, except that it shall be done before the rights of creditors attach. The statute requires that it "be in writing, executed by the vendor or lessor, acknowledged and recorded." There can be no question, if a man should execute a chattel mortgage, and deliver it, and get money borrowed upon the mortgage as security, that if, a year later, he acknowledged it, and it was recorded, the record would be good as to any subsequent attaching creditor. And so, in this case, the statute requiring the vendor—not the vendee (National Cash Register Co. v. Schwab, 111 Iowa, 605, 82 N. W. 1011; National Cash Register Co. v. Zangs, 127 Iowa, 711, 104 N. W. 360)—to acknowledge the instrument, when it was acknowledged and recorded, it gave notice to the world of the rights of the vendor, and that is the only purpose of recording.

The Effect of the Chattel Mortgage.

[8] New notes and a chattel mortgage were accepted February 15, 1915, and the mortgage was recorded. Afterwards it was released. The contention as to the effect of this mortgage is not clear, but I as-

sume that it is pleaded as a waiver of any rights under the conditional bills of sale. The claimant contends that it was received by its agent without authority; but, even if he had authority, I do not see how the acceptance of additional security could in any manner affect the validity of the prior contracts reserving title as security. I can see, if the original contracts were merely contracts of bailment, where no title passed at all to the vendee, how the chattel mortgage might be material, as indicating an intent to waive the original contracts; but holding, as I do, that the original contracts were simply conditional for the purpose of security, I hold that they cannot be affected by the chattel mortgage, nor can the retention of the notes affect the contracts. In most of the cases above cited notes were taken for the property, and it was held that the acceptance of notes did not negative the retention of a lien for security, nor could the acceptance of renewals or new notes, affect the lien reserved.

The finding of the referee is reversed, and the cause is remanded to the referee for further proceedings consistent with this opinion.

BUCKEYE INCUBATOR CO. et al. v. MODEL INCUBATOR CO. et al.

(District Court, W. D. New York. November 15, 1916.)

1. TRADE-MARKS AND TRADE-NAMES ⊜70(1)—UNFAIR COMPETITION—WHAT CONSTITUTES.

After complainants had advertised a coal-burning brooder stove, and established agencies through which an appreciable number of stoves had been sold, defendants, one of whom had designed a similar stove, began the sale of stoves which were copies of those sold by complainants; the patterns being taken from complainants' stove. Complainants' stove, save in respect to the addition of a door at the base, resembled an earlier patented stove. *Held* that, though on the door at the base, where complainants had placed their name, defendants marked their stoves with their name, nevertheless their copy of the characteristic features of complainants' stoves in all nonessential elements amounted to unfair competition; complainants' stove having been first advertised in a market already created.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊜70(1).]

2. TRADE-MARKS AND TRADE-NAMES ⊜70(1)—UNFAIR COMPETITION—COPY OF NONESSENTIAL DETAILS.

In such case, those portions of the stove necessary to its performance of the work intended, though importing to it a distinctive appearance, are not mere nonessential details, the adoption of which would constitute unfair competition; but the base, which was unnecessary for the discharge of the functions of the stove, was a nonessential detail, a copying of which would constitute unfair competition.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⊜70(1).]

In Equity. Suit by the Buckeye Incubator Company and another against the Model Incubator Company, and others. Decree for complainants.

Staley & Bowman, of Springfield, Ohio, for plaintiffs.
J. Wm. Ellis, of Buffalo, N. Y., for defendants.

HAZEL, District Judge. Action for unfair competition in trade, involving a coal-burning brooder stove manufactured by the Buckeye Incubator Company for use in connection with a canopy or hood. Both complainants' and defendants' stoves, which resemble each other, consist of cone frustum parts of approximately equal height, symmetrically proportioned, and combined with a base and supporting arm for a thermostat.

The principal defenses are that one Adair, an employé of the defendant, Model Incubator Company, was the first to design the stove in question; that he made a pencil sketch of it in March, 1914, with the upper and lower sections tapered, and in the following September a larger drawing, with the upper part of the stove straight, a stove corresponding to the original sketch being manufactured in May, 1915; that complainants have not established that their stove acquired a reputation before defendants' stoves were marketed; and that there is no proof of fraudulent copying of ornamental features, as distinguished from mechanical features.

There was testimony on behalf of complainants tending to show that Samuel B. Smith, as early as February, 1915, designed the stove or coal-burning hover in question, and afterwards established selling agencies in Philadelphia and elsewhere; that in February and March of the same year he advertised it in the American Poultry Advocate, and in other journals and magazines, illustrating such advertisements; and on cross-examination of the witness Cugley it appears that Smith, who manufactured the stoves at the outstart, delivered to Cugley & Mullen Company, selling agents, in the months of February, March, and April, 1915, about 119 stoves, which were sold in the Philadelphia territory, and that subsequently, on August 5, 1915, the Buckeye Incubator Company acquired the sole selling rights from Smith and began more extensive advertising of the hover.

Defendants contend that the evidence is unconvincing as to the acquirement by the Smith stove of any general reputation or good will, either through advertising or sales, in February and March, 1915, and that, therefore, an action for unfair competition, because defendants marketed an imitative stove or hover, is not maintainable. Defendants' witness Adair testified that he originally designed a stove for brooders in March, 1914, and in corroboration produced two pencil sketches, Exhibits B and C, which are essentially similar to complainants' adaptation. He claims to have exhibited one sketch (Exhibit B) to the president of the Model Incubator Company, but the latter gave no testimony in relation thereto. In September, 1914, a large drawing was made of the Adair conception, but such drawing does not have the tapered upper section of the original design. In May, 1915, a stove was made by Adair, who was then in the employ of the Model Incubator Company, in accordance with his design model type, corresponding in appearance to complainants' stove, and in June, 1915, he shipped the same to Browns Mills. He testified that he was not aware of the

Smith advertisements, and that he had no knowledge of complainants' stoves until May, 1915, when the Model Incubator Company was negotiating with the Certified Farms Company for the purchase of some property upon which there were some Smith stoves. He practically admitted, however, that in August of that year he directed his workmen and pattern maker to construct a stove like the Smith stove in size, shape, and appearance, with the result that defendants adapted such stove, resembling complainants' with respect to details, appearance of base, and thermostat arrangement, to their use.

On July 4, 1916, mechanical patent No. 1,189,301, for stoves, was granted to Smith, and since then an interference has been declared by the Patent Office with the application of Adair, which has not yet been determined. Later on, both Smith and Adair filed applications for design patents for their stoves, in which interference proceedings are likewise pending.

It seems to me that the first inquiry is whether complainants' stove acquired a reputation prior to the time defendants manufactured and sold an imitative stove, and the second, whether the asserted characteristic features of complainants' stoves are mechanical.

[1, 2] 1. There are many adjudications, of which Rathbone, Sard & Co. v. Champion Range Co., 189 Fed. 26, 110 C. C. A. 596, 37 L. R. A. (N. S.) 258, is a prominent example, which apparently hold that an action for unfair competition is not maintainable where an unpatented article, in the absence of a general reputation or a market therefor, is imitated and appropriated, if the indicia of the original designer are removed. This is on the theory that the simulation would not deceive the buying public, as the article is unknown to it. These adjudications, however, are not strictly applicable to the present situation, for Smith not only advertised his stove in magazines and periodicals in February and March, 1915 (some of which were produced, but not offered in evidence), but established agencies through which an appreciable number of his stoves were sold prior to August, 1915, at which time he gave exclusive vending rights to the Buckeye Incubator Company. Even though Adair originated his design in March, 1914, he did not manufacture and vend stoves corresponding thereto until June, 1915, a time when Smith had already marketed his stove and to an extent popularized it by advertising.

The defendants have not added to their stove any ornamentation or distinguishing marks, but have made a copy of complainants.' They have copied its form, height, proportion of converging sides, base, sliding door, vertical rods, and projecting thermostat arm—all the essential features of complainants' vendible article. Indeed, it was admitted, as heretofore stated, that in making their stoves patterns were taken from complainants' castings, regardless of the original Adair sketch or drawing. In this situation, and upon the point under discussion, the principle enunciated by Judge Hough in Steiff v. Bind, 215 Fed. 204, is of interest. There the complainant manufactured toy animals, reproduced from photographs of living animals; but the defendant, in making his toy animals, did not make them from photographs, instead he used complainant's toys as models, and it was held that to

thus imitate the product of another, which had become known to the public, constituted unfair competition.

It must be conceded that the Exhibit Woodbury patent No. 34,475, substantially embodies the configuration of the stove in question above its base; its principal distinguishing feature being a low base having no door. Whether or not complainants' design, or defendants' design, for that matter, involves invention, in view of Woodbury, is a question that I am not required to decide on this record.

The fact that defendants have copied the characteristic features of complainants' stove does not, of course, justify the conclusion that they are unfairly competing, unless the combination relates entirely to nonfunctional elements. There was much discussion pro and con with reference to this, and upon consideration of the Smith mechanical patent, in connection with the prior art, I have reached the conclusion that the shape, proportions, and projecting support for the thermostat of the Smith stove were necessary mechanical expedients. These features, though in connection with the base imparting a somewhat distinctive appearance, were in the main necessary in order to secure proper operation of the brooder. Such was also the view of the Patent Office when the applications for design patents were inspected.

The claims of the Smith patent must be construed in connection with the specification and drawings, and it is not believed to be limited to the thermostat feature, as distinguished from the sectional parts of the stove above the base. Simplicity and compactness were necessary in a brooder stove of this description, and no doubt were secured by tapering the upper parts and causing them to converge from the center. The Smith file wrapper and contents show that the tapering form of the stove sections in combination with the base was not regarded as patentable in view of the prior art; and the amendments that were made to the specification and claims seem to bear out defendants' contention that the only novel feature was in the flat top of the stove, which permitted arranging the valve and fuel openings eccentrically. Although no expert witness has testified as to the manner in which these parts function or operate, the said file wrapper does not support the view that the patent relates simply to the thermostat feature, regardless of the cone frustum parts. It is no doubt true that no mechanical principle is involved in the specific shape of the supporting arm for the thermostat; but there was no novelty in such arrangement, and no distinctive appearance was imparted to the stove by it. A thermostat very much like complainants' is found in the Sheer patent in evidence.

Importance is however, attached to the specific type of base in complainants' stove, and the arrangement of the ash pit and sliding door. None of the prior structures shows a base of similar shape, nor is it shown that such shaping was necessary to the performance of its functions. The defendants, in copying and marketing such base with its sliding door in connection with cone frustum sections of equal height, have imparted to their stove an appearance so similar as to unfairly compete with complainants' stoves.

It is true that defendants have marked their stoves in relief on the sliding door with the words "Model," "Model Incubator Company, Buffalo, N. Y.," and "Correct," "Correct Hatcher Company, Leesville, Ohio," while on the sliding doors of complainants' stoves are impressed the words, "Standard Company, Cleveland, Ohio. Shake ashes every 12 hours. Standard Colony Brooder." But these markings of the corporate names of the makers, or of arbitrary designations alone, do not sufficiently differentiate the competing products, and as the only feature entitled to protection in complainants' stove is the specific external shape or form of the base, which defendants have imitated and adapted to their stoves, a decree, with costs, may be entered enjoining such further use.

WM. A. ROGERS, Limited, v. H. O. ROGERS SILVER CO. et al.

(District Court, D. Rhode Island. July 11, 1916.)

1. CORPORATIONS ⊕506—ACTIONS—NECESSARY PARTIES—AGENTS OF CORPORATION.

Where a corporation, a resident of the district, was duly served in an unfair competition case, officers and agents of the corporation, who were nonresidents, are not essential parties, as a judgment against the corporation will be binding on its officers and agents.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1958–1970; Dec. Dig. ⊕506.]

2. TRADE-MARKS AND TRADE-NAMES ⊕73(2)—UNFAIR COMPETITION—WHAT CONSTITUTES.

The individual defendants secured the incorporation of a company, which was enjoined from using the name "Rogers" in connection with silver-plated ware. Thereafter the individual defendants associated with themselves a skilled silver worker, named H. O. Rogers, who was without capital and without an established reputation as a manufacturer, and formed a corporation known as the H. O. Rogers Silver Company, making Rogers its president, though he in fact was given only a few shares of the stock and exercised no control over the corporation. The new corporation began to manufacture silver-plated ware, using the name "Rogers" in connection with it. *Held*, that the corporation was engaged in unfair competition, and will be enjoined from using the name "Rogers," under which name complainant had established a reputation for the manufacture of silverware.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⊕73(2).]

3. TRADE-MARKS AND TRADE-NAMES ⊕86—UNFAIR COMPETITION—OFFENSES—LACHES.

Complainant's delay in securing an injunction against the corporate defendant's use of the name "Rogers" in connection with plated silverware does not amount to laches, where in the interim complainant was endeavoring to secure relief against the individual defendants, who controlled the corporation.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 95; Dec. Dig. ⊕86.]

In Equity. Bill by William A. Rogers, Limited, against the H. O. Rogers Silver Company and John J. Nichols and another, as officers

and directors thereof. On petition for preliminary injunction. Injunction granted against the corporate defendant.

Duell, Warfield & Duell, of New York City (R. W. France, of New York City, of counsel), for plaintiff.

Stanley P. Hall, of Taunton, Mass., for defendants.

BROWN, District Judge. This is a petition for a preliminary injunction against infringement of trade-marks, and unfair competition in the use of the word "Rogers" in connection with silver-plated ware.

The sworn bill and affidavits filed in support of the petition set forth that the individual defendants, McIsaac and Nichols, are citizens of Massachusetts, resident in Taunton, Mass.; that they procured the corporation of the Cohannet Silver Company, with its principal place of business at Taunton; that this company was enjoined from the use of the word "Rogers" upon silver-plated ware on the ground that such use was deceptive and untrue. See Wm. A. Rogers, Ltd., v. Cohannet Silver Co. (C. C.) 186 Fed. 241, November 23, 1910.

It appears that subsequently the defendants McIsaac and Nichols, with one H. O. Rogers, procured the incorporation of the H. O. Rogers Silver Company in Rhode Island, though its place of business, like the Cohannet Silver Company's, was in Taunton, Mass.

From the answering affidavits of Nichols, treasurer, and McIsaac, secretary, it appears that the men interested were "without any capital to speak of" and proceeded with borrowed capital.

In September, 1914, the complainant filed in the District Court of the United States for the District of Massachusetts a bill against the present defendants. The H. O. Rogers Silver Company, a Rhode Island corporation, appeared specially, objecting to the jurisdiction; and on November 3, 1914, the bill was dismissed as to that defendant for lack of jurisdiction. Thereafter the defendants McIsaac and Nichols moved that the bill be dismissed as against them, upon the ground that the H. O. Rogers Silver Company was an indispensable party. This motion was granted, and a decree of dismissal was entered, which, upon appeal, was affirmed.

The opinion of the Circuit Court of Appeals, filed June 18, 1915, is reported in Wm. A. Rogers, Ltd., v. Nichols et al., 224 Fed. 415, 139 C. C. A. 643. The concluding sentence of that opinion is as follows:

"The suggestion has been made that, if this proceeding is not sustained, the result will be a practical denial of justice. Quite likely that question is not before us, but it seems obvious that a proceeding in Rhode Island against the corporation, its officers and directors, would give the complainant such relief as it is entitled to."

[1] The complainant thereupon filed its bill in this court against the same defendants, on February 12, 1916. The defendants again move to dismiss—McIsaac and Nichols on the ground that they have not been served in and are nonresidents of this district, but are residents of Massachusetts, and the H. O. Rogers Silver Company on the ground that Nichols and McIsaac are indispensable parties. It does not follow from the Massachusetts decision that McIsaac and Nichols are necessary parties to a bill against the corporation. The corporation appears

to have been properly served, and a judgment against the corporation will be binding upon its officers and agents.

[2] It sufficiently appears from the answering affidavits of Nichols and McIsaac that the name "H. O. Rogers Silver Company" was deliberately chosen after the defendants Nichols and McIsaac had full knowledge that the use of the name "Rogers" in connection with silver-plated ware would naturally lead to deception.

It appears that H. O. Rogers was a skilled silver worker; but he was without capital and without established reputation as a manufacturer, and there seems to have been no sufficient reason for making him president and director of the corporation. While the affidavits allege that this was done in good faith, and because neither the name of Nichols nor that of McIsaac was appropriate, no suggestion is made of any sound business reason for choosing the name Rogers, rather than some unobjectionable name, for the new corporation.

Taking the defendants' answering affidavits in connection with the previous litigation, and in view of the failure of the defendants' affidavits to meet the sworn allegations of the bill, that Nichols owns a controlling interest and substantially all of the stock of the defendant corporation, the case as presented upon the hearing on motion for preliminary injunction is that, if the defendant Nichols may proceed in control of the Rhode Island corporation, this will amount practically to an evasion of the effect of the decree in the case against the Cohannet Silver Company.

The principal difficulty in the case arises from the fact that the complainant's moving affidavits contain many improper and irrelevant matters, and so much hearsay, that it is difficult to distinguish between those matters which properly bear on the present motion and those which have no legitimate connection with it. An affidavit of a detective is filed which is principally, if not wholly, incompetent.

The complainant offers an affidavit of H. O. Rogers, taken for use in the case brought against these defendants in the district of Massachusetts. This affidavit shows that in September, 1913, Nichols approached Rogers, who had been employed as a workman by manufacturers of silver-plated ware, and proposed the formation of a corporation to be called the "H. O. Rogers Silver Company"; that Nichols pointed out that the name "Rogers" could be stamped on the goods manufactured and a ready sale procured for them; that he stated that he would make the affiant president of the company and give him a few shares of stock; that the defendant H. O. Rogers Silver Company was incorporated under the laws of the state of Rhode Island in accordance with this proposal; that 85 per cent. of the capital stock was owned by Nichols and his wife, and money to finance the same was raised by Nichols by mortgage; that the affiant received 5 shares of stock; that the business office of the company is located at Taunton; that the affiant's position as president was purely nominal, he having no voice in the affairs of the company; that he knew nothing about the business of the office, and took no part in the management; that he received his wages and did his work like any other workman, and was not even a figurehead as an officer of the company.

This affidavit fully confirms what might be justly inferable from the undisputed facts as to the previous litigation, the control of the H. O. Rogers Silver Company by Nichols, and the absence of any justification for the choice of the name "Rogers," under the circumstances. The affidavit was taken to be used in a suit between the same parties in another jurisdiction. The question of its competency in the present case has not been discussed upon the briefs; on the contrary, the answering affidavits make reply to this affidavit. The reply is not convincing.

Upon the whole, I am of the opinion that the plaintiff's sworn bill and competent affidavits, and the defendants' answering affidavits, present a sufficient case to show that the H. O. Rogers Silver Company is to such an extent a mere instrument for giving some color of justification to Nichols for the use of the term "Rogers" that a preliminary injunction is justified, regardless of the affidavit of Rogers. I am further of the opinion that, as there was no motion to strike out the affidavit of Rogers, and as reply was made thereto, and as it was taken for the purpose of being used in a suit between the same parties, that it may be received under these circumstances as additional evidence on the present motion.

[3] The defendants raise the defense of laches, but part of the time which has elapsed was spent in the endeavor to try out these issues with the individual defendants in the district of their residence.

In view of the grounds upon which the plaintiff was defeated in its efforts, I think the defense of laches is not made out. While the objection of the defendants Nichols and McIsaac to the jurisdiction over them as individuals seems to be well grounded, I am of the opinion that a proper case for a preliminary injunction against the defendant H. O. Rogers Silver Company is presented.

A draft decree, granting a preliminary injunction against the use of the name "Rogers" by the defendant corporation, its officers, servants, and agents, in connection with silver-plated ware, may be presented accordingly.

UNITED STATES v. ONE AUTOMOBILE et al.

(District Court, D. Montana. November 25, 1916.)

No. 204.

1. INDIANS ⟸35—INDIAN COUNTRY—INTRODUCTION OF LIQUOR—FORFEITURE OF CONVEYANCE.

Rev. St. § 2140 (Comp. St. 1913, § 4141), provides that, if any white person or Indian is suspected of introducing intoxicating liquor into the Indian country, the boats, stores, packages, wagons, sleds, etc., of such person may be searched, and if any liquor is found therein, the same, together with the boats, teams, wagons, and sleds conveying the same, shall be forfeited. An Indian, who was given possession of a motorcar under a conditional contract of sale, used the machine for the purpose of introducing intoxicating liquor into Indian country. *Held*, that only his interest in the car could be forfeited; the vendor having given possession for no evil purpose, and the provisions for forfeiture not being directed against the means used in violating the law, but against the owner of the means.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. ⟸35.]

2. INDIANS ⟸35—INDIAN COUNTRY—INTRODUCTION OF LIQUOR INTO—"WAGON."

Under such statute, the word "wagon" does not include an automobile or motorcar, such vehicles having been practically unknown at the time of the enactment of the statute; the word "wagon" indicating a plain wheeled road vehicle moved by animate power.

[Ed. Note.—For other cases, see Indians, Cent. Dig. §§ 61, 62; Dec. Dig. ⟸35.

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

3. STATUTES ⟸181(1)—CONSTRUCTION—INTENT OF LEGISLATURE.

In construing a statute, the purpose of statutory construction is to ascertain the intent of Congress from the language used.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 259; Dec. Dig. ⟸181(1).]

At Law. Proceeding by the United States against Joseph Pablo for the forfeiture of one automobile, in which Floyd J. Logan intervened, claiming the motorcar. Libel dismissed.

B. K. Wheeler, U. S. Atty., of Butte, Mont., and Homer G. Murphy, Asst. U. S. Atty., of Helena, Mont.

A. Besancon, of Missoula, Mont., and John P. Swee, of Ronan, Mont., for libelee.

Floyd J. Logan, of Tacoma, Wash., in pro per.

BOURQUIN, District Judge. The information alleges defendant Pablo in the defendant automobile introduced whisky into the Indian country, and prays forfeiture. Pablo denies the introduction, and pleads, as does intervener Logan, that his only right to said automobile is that of conditional vendee, title to remain in the vendor, Logan, until payment, not yet made.

[1] It appears Pablo was and is an Indian ward of the United States, and, resident in the Indian country at all times material herein, in said automobile did introduce whisky into the Indian country, and at the time of introduction possessed said automobile by virtue of the conditional sale alleged. It also appears Logan had no knowledge that Pablo intended to use the automobile unlawfully as aforesaid, and the evidence is not sufficient to charge Logan with notice or negligence from which acquiescence in the unlawful use could be inferred. Since issue joined, Pablo's mother, who signed the contract of conditional sale with him, has paid Logan in full.

Section 2140, R. S., provides that if any white person or Indian is suspected of introducing intoxicating liquor into the Indian country, "the boats, stores, packages, wagons, sleds, and places of deposit of such person" may be searched, "and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person," shall be forfeited.

For reasons set out in this courts' decision in U. S. v. Whisky (D. C.) 213 Fed. 986, it is believed that no more than Pablo's interest in the automobile at the time when forfeiture was incurred, could be forfeited, if the vehicle is within the statute. And see The Calypso, 230 Fed. 962, 145 C. C. A. 108. Even though Logan voluntarily delivered the automobile into Pablo's possession, it was lawfully done and not for evil purposes; and, however it may be in laws to protect the revenue, it is not believed this law for other purposes intends forfeiture of property diverted and used in the law's violation, the owner innocent thereof.

[2, 3] Furthermore, it is also believed an automobile is not within the statute. It is neither a boat, team, wagon, nor sled, enumerated by the statute. While "wagon" is to some extent a generic term, more especially of recent years and in municipal legislation (for genera are largely of opinion, more or less fluctuating), in 1864, when the statute was enacted, the word in both popular and technical sense denoted one of the most ancient conveyances—a plain and simple wheeled road vehicle moved by animate power. Then and since, Congress often differentiated it from carts, carriages, and vehicles, demonstrating "wagon" was not intended to import even all wheeled road vehicles of animate power. Motor vehicles were practically unknown in 1864. Though steam had been experimentally used in road vehicles as early as the last quarter of the eighteenth century, it was not until great improvements in steel making and working and in tools, the invention of the gas engine and its adaptation to liquid fuel, in the '70's and '80's, that motor road vehicles were recognized practical; and it was yet later that the automobile was developed to a degree that, while it is a tremendous and valuable industry, it is also an incentive to great public and private extravagance and debt, too largely owned more or less conditionally by those not more than six lengths ahead of the wolf, infesting the public streets, contemptuous of the rights of pedestrians, like Jehu driving furiously—a rare combination of luxury, necessity, and

waste. In their involved and complicated structure and propulsive force, they are the antipodes of wagons. Hence it seems clear that in 1864, in this statute, Congress did not intend "wagon" to import a genus, and which will embrace as a subsequently created species thereof, the automobile. The word "teams," in the statute, further indicates this.

It is not enough that the mischief is the same, whether whisky be introduced into the Indian country in wagons or automobiles. The deciding factor is the intent of Congress, to be ascertained, not from the mischief, but from the language by Congress used. See U. S. v. Sheldon, 2 Wheat. 120, 4 L. Ed. 199.

The libel is dismissed.

CONSOLIDATED RUBBER TIRE CO. et al. v. B. F. GOODRICH CO.

SAME v. REPUBLIC RUBBER CO.

(District Court, N. D. Illinois, E. D. December 20, 1916.)

Nos. 29176, 29177

1. PATENTS ⟸287—CONTRIBUTORY INFRINGEMENT—MEASURE OF LIABILITY.
Where two parties contribute to an infringement, but by separate acts, as one by the sale of materials, and the other by the manufacture and sale of the infringing article, they are not liable jointly, but separately, each for his own part of the infringement.

[For other cases, see Patents, Cent. Dig. §§ 457–459; Dec. Dig. ⟸287.]

2. PATENTS ⟸286—INFRINGEMENT—DAMAGES RECOVERABLE.
In a suit by the owner of a patent for its infringement by the sale by defendant of material to be used in making the infringing article, complainant may recover for sales made in territory covered by exclusive licenses given by him, but limited to such territory, since the licensees cannot sue in their own names for such recovery.

[For other cases, see Patents, Cent. Dig. §§ 453–456; Dec. Dig. ⟸286.]

In Equity. Suits by the Consolidated Rubber Tire Company and the Rubber Tire Wheel Company against the B. F. Goodrich Company and against the Republic Rubber Company. On exceptions to report of master. Overruled.

In Case No. 29176:

Charles W. Stapleton, of New York City, John W. Hill and Charles C. Linthicum, both of Chicago, Ill., and Staley & Bowman, of Springfield, Ohio, for plaintiffs.

Charles Neave, of New York City, and Rector, Hibben, Davis & Macauley, of Chicago, Ill., for defendant.

In Case No. 29177:

Charles W. Stapleton, of New York City, John W. Hill and Charles C. Linthicum, both of Chicago, Ill., and Staley & Bowman, of Springfield, Ohio, for plaintiffs.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill., for defendant.

SANBORN, District Judge. The widespread infringement following the Goodyear decisions of the Ohio Court of Appeals of May 6,

1902, compelled plaintiffs to lower royalties to five cents. Prior to this there was a fixed license fee of ten cents for licenses under the Grant tire patent and the design patent, the licenses also covering some other advantages. If this license fee had been upon the tire only, it would have established a "reasonable royalty," because the conditions made by the infringers did not bind the plaintiffs, and their lowering of the patent royalty to five cents did not bind them by fixing a reasonable royalty, because such action on their part was involuntary or compulsory.

[1] Neither of the defendants was a joint tort-feasor with their vendees (who put on the tire), because the acts of buyer and seller were independent of each other. I think the following rule, stated in Sedgwick on Damages (9th Ed.) § 36a, is the one which should be applied:

"Where two or more parties are concerned in the damage, and they each acted entirely independently of one another, they are not jointly liable, but each is liable for the damage he himself caused." 1 Sedg. Dam. (9th Ed.) § 36a.

Illustrations of the principle given by the author are injuries by flowage, where part of the damage was caused by one defendant's obstruction and part by another, and trespasses by dogs or cattle of different owners. The same subject is discussed in Sutherland on Damages (3d Ed.) § 141, citing the same and other decisions.

Applying this rule to these cases, I think that, though the rubber tire was found by the master to constitute 90 per centum of the cost of the three patent elements (tire, channel, and wire), yet as the patent was upon a vehicle wheel, and as the licenses gave the right to make this wheel, and also included the right to use tire-applying machinery, the design patent, the right to buy tires, channel, and wire from the licensor at cost, and particularly because it is manifest from the whole situation that plaintiffs would at any time have been glad to make a license to each of the defendants on a five cent royalty; the master's reports recommending five cents as a reasonable royalty should be approved.

The agreement of August 28, 1903, called the pooling agreement, should be entirely ignored upon the question of reasonable royalty, because its purpose was not to fix prices, but to secure a combination of rubber manufacturers.

[2] The master recommended five cents per pound for the rubber sold by each defendant exclusive of that sold abroad, but including that sold in territory covered by exclusive licenses made by the patent owners. In the Goodrich Case the number of pounds of rubber sold by defendant in the exclusive territory was 1,864,830. If this is to be deducted from the recovery recommended by the master, the sum would be $169,057.45, instead of $262,298.95. In the Republic Case no separation of the sales in territory covered by exclusive licenses was made. Some of the exclusive licenses are claimed to have been canceled early in the infringement period, but the proofs are not satisfactory on this point.

As I understand the rule governing the right of a licensee to sue in his own name for infringement, it is settled by the Waterman Foun-

tain Pen Case, 138 U. S. 252, 11 Sup. Ct. 334, 34 L. Ed. 923 (approved in Pope Mfg. Co. v. Gormully Mfg. Co., 144 U. S. 248, 251, 12 Sup. Ct. 641, 36 L. Ed. 423), that the assignee or licensee of part of the patent rights in certain territory, or even in the whole country cannot sue in his own name, because the patent is an entirety and cannot be divided up among different owners. The so-called exclusive licenses in this case included only the right to use and sell, and not to manufacture. In the Fountain Pen Case there was a license to manufacture and sell, without the express right to use, and it was held that the licensee could not sue in his own name, either at law or in equity.

As to the argument that defendants sold rubber tire for repairs to persons having a lawful right to make and sell the patented wheel, and that this could not be contributory infringement, it is sufficient to say that the proofs afford no basis for any exception to the master's report in this respect.

The reports of the master in each case should be approved, and all objections and exceptions thereto overruled.

In re F. & D. CO.

(District Court, S. D. New York. December 26, 1916.)

BANKRUPTCY ⊂=127—TRUSTEES—APPOINTMENT BY REFEREE.

Where neither candidate for trustee in bankruptcy received the requisite votes in number and amount at the creditors' meeting, it was improper for the referee to appoint as trustee one of those candidates, since that in effect nullified the statutory provision requiring a majority in number and amount.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 183; Dec. Dig. ⊂=127.]

In Bankruptcy. In the matter of the F. & D. Company, bankrupt. On motion to review the order of the referee appointing a trustee. Order reversed.

Jacob J. Lesser, of New York City, for the motion.
Augustus H. Skillin, of New York City, opposed.

MAYER, District Judge. This is a motion to review the order of the referee herein appointing a trustee. The circumstances were as follows:

Two candidates were nominated for trustee; neither had the requisite votes of the majority in number and amount of the creditors. The result was no election. The referee appointed as trustee one of these unsuccessful candidates. There is no question as to the integrity or ability of the trustee thus appointed by the referee. It seems to me, however, that the appointment is not in accordance with the purpose and intent of the statute. The statute, in this regard, conferred upon a majority in number and amount of the creditors the right to

select their own trustee, subject always to the approval of the court. That approval always involves the character of the trustee, in addition to the statutory regularity of the selection of the trustee. To hold that the referee had power to select one of the unsuccessful candidates is, in my view, to obviate the very purpose of the statute in requiring that when the creditors act there must be a majority in number and amount in order to make the election effective.

What this action of the referee comes to is that he has appointed one of the persons whom the creditors have demonstrated that they are unable to select. Such an appointment by the referee is, in effect, overriding the clear intent of the statute.

For this reason the order will be reversed, and the court will appoint a new trustee.

Addendum.

I may add to the memorandum above written a further observation, in order to make clear that there is no conflict between my decision in the Matter of Harry Rothleder, 232 Fed. 398, and that in the case at bar. In the Rothleder Case the point decided in this case was not raised, and consequently not passed upon.

STEWART et al. v. ONEAL (two cases).

CARY et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1916. On Petition for Rehearing, January 17, 1917.)

Nos. 2812, 2823, 2868.

1. JUDGMENT ⊂=677—PERSONS BOUND—UNBORN REMAINDERMEN.
A decree vacating probate of and holding void a will is, under the doctrine of virtual representation, binding on a remainderman born after the time limited for contest of the will, there being before the court parties whose interests were identical with his; that is, to uphold the will.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1193; Dec. Dig. ⊂=677.]

2. WILLS ⊂=398—VACATION OF PROBATE—APPEAL—EFFECT—TRIAL DE NOVO.
Mere appeal from a decree vacating probate of a will did not have the effect of vacating the decree, merely because the trial in the Supreme Court was de novo.
[Ed. Note.—For other cases, see Wills, Dec. Dig. ⊂=398.]

3. APPEAL AND ERROR ⊂=437—EFFECT—"SUSPENDED"—"VACATED."
Under Act March 8, 1831 (29 Ohio Laws, p. 79), § 112, providing that decree of the court of common pleas should be suspended by appeal therefrom, it was not vacated by the appeal—"vacate" meaning to annul, set aside, or render void; "suspend," to stay.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2193–2195; Dec. Dig. ⊂=437.
For other definitions, see Words and Phrases, First and Second Series, Suspend; Vacate.]

4. APPEAL AND ERROR ⊂=803—DISMISSAL—EFFECT.
Appeal having only suspended the decree vacating probate of a will, dismissal of the appeal could not have the effect of vacating the decree and leaving the will in force; and this as to an unborn remainderman, though the dismissal was pursuant to a settlement out of court, making no provision for him, he, at most, having only right to have the dismissal set aside by the court which ordered it.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169–3173; Dec. Dig. ⊂=803.]

On Rehearing.

5. APPEAL AND ERROR ⊂=803—EFFECT OF DISMISSAL OF APPEAL.
The dismissal of an appeal, although wrongful, does not vacate the decree appealed from.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3169–3173; Dec. Dig. ⊂=803.]

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

Suit by Robert H. Oneal against Julia G. Stewart and others. From decree for complainant, three appeals are taken; one by the named defendant and others, one by defendant Samuel F. Cary and others, and one by all the defendants. Reversed, with directions.

O. W. Kuhn, W. A. Hicks, Cohen, Mack & Hurtig, Ben. B. Hale, and C. W. Baker, all of Cincinnati, Ohio, for appellants.

J. C. Healy, of Cincinnati, Ohio, for appellee.

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

COCHRAN, District Judge. These three appeals are taken from the decree of the lower court in favor of the appellee, in a suit brought by him against all the appellants, seeking to establish his ownership of two separate parcels of real estate in the city of Cincinnati, Ohio, one possessed and claimed by the appellants in No. 2812, and the other by the appellants in No. 2823. The question as to the ownership thereof is exactly the same as to each parcel, and appellee, therefore, sued the appellants jointly. They have appealed separately and jointly. Hence the three appeals.

The appellee claims the two parcels under a document purporting to have been the will of Elmor Williams, who died February 9, 1843, executed November 28, 1842, and probated as his will February 14, 1843. He left a large estate. It was principally real estate, worth $250,000, and consisted, mainly, of town lots, mostly improved, in the city of Cincinnati, Ohio. Besides these there was some acreage property in Hamilton county, in which that city is located. The town lots, with slight exceptions, were in the heart of the city. Amongst them was the important block, bounded by Fifth, Vine, and Sixth streets, and Lodge Alley. He left surviving him his wife, Lucy Ann Williams, and, as his only heirs at law, three children of a deceased daughter, Martha Allen, viz. William E. Allen, Rebecca A. Allen, and Maria L. Cary, wife of Samuel L. Cary, all of age; two children of a deceased daughter, Rebecca Gazlay, viz. William E. Gazlay and Allen W. Gazlay, aged, respectively, 19 and 14; and a son, Charles E. Williams, aged 14. By the document numerous devises and bequests were made. These were not confined to the natural objects of his bounty, to wit, his wife and descendants. They included collateral kindred, and, apparently, others not connected with him either by blood or marriage. Apparently, also, amongst his descendants, his son was decidedly favored. The children of Rebecca Gazlay fared better than those of Martha Allen, and a nephew, Ephraim D. Williams, and his seven children, and one William P. Hulbert, apparently not so connected, fared as well, if not better, than either set of grandchildren. It contemplated that his wife might renounce the provisions in her behalf, and referred to her act, in case she did so, as a "defiance" of his will. There were over 50 different parcels of real estate devised by over 20 separate devises. In the block referred to there were 14 parcels, and of these 11 separate devises were made. All of the devises, with a few exceptions, were of like character. They were of a life estate, with a contingent remainder with a double aspect; i. e., to the first taker for life, remainder to the children of his or her body begotten, and, if no such child, to another. The document indicated marked antipathy toward his son-in-law, James W. Gazlay, and to a certain other individual unconnected with him. The devises to the children of the former were on the express condition that he should have nothing to do therewith, directly or indirectly, and the latter, characterized as "a dangerous man, cannot be trusted in safety," was forbidden to have the guard-

ianship of his son, or to have anything to do, directly or indirectly, with the settlement of his estate or management of any of the devises or bequests thereby made. His nephew, Ephraim D. Williams, and William P. Hulbert were appointed executors.

The two parcels claimed by the appellee were in the block referred to, one on Vine and the other on Fifth streets. The Vine street parcel was devised as follows, to wit:

"To Sarah M. Floyd, the daughter of my sister, Martha Spader, * * * for and during the life of Sarah Floyd, and at her decease * * * to Charlotte C. Williams, the daughter of Miles Williams, and at her decease * * * to the children of her body begotten forever."

The Fifth street parcel was devised as follows, to wit:

"To my wife, Lucy Ann Williams, * * * to have and to hold during her life, provided she claims under my will, and at her decease * * * to Charlotte C. Williams, the daughter of my nephew, Miles Williams, and at her decease to the children of her body begotten forever."

By a subsequent clause it was provided that, "in case Charlotte C. Williams should decease without leaving a child," her estate was to go "to her father, Miles Williams, forever." Charlotte C. Williams was born February 22, 1840, and hence was, at the time of the probate, almost 4 years old. She married John H. Oneal November 22, 1880. There was born to them, July 24, 1883, the appellee, Robert H. Oneal, and he was the only child "of her body begotten." She died February 24, 1904. The first two life tenants, Sarah M. Floyd and Lucy Ann Williams, died long before Charlotte C. Williams. Thus it is that the appellee claims these two parcels of real estate.

The appellants claim these parcels also under Elmor Williams, who was the ancestor of all of them except the tenants. Their claim comes about in this way: The widow, Lucy Ann Williams, by proper proceedings taken March 2, 1843, renounced the will. March 11, 1843, the grandchildren—i. e., the children of Rebecca Gazlay and of Maria Allen—brought a suit in chancery in the court of common pleas of Hamilton county against all the other devisees and legatees then in being, including Sarah M. Floyd, Lucy Ann Williams, and Charlotte C. Williams, the first takers in the devises of the two parcels in suit, and Miles Williams, father of Charlotte C. Williams, to whom they went in case Charlotte C. Williams died without leaving a child, and the executors named in the document, contesting it as the will of the decedent, and seeking to have it and the probate thereof set aside, which was the mode prescribed by statute for contesting a document admitted to probate as the will of a decedent. The defendants were all duly brought before the court by summons, and guardians ad litem were duly appointed for the infant defendants, including Charlotte C. Williams. On November 15, 1843, an issue "devisavit vel non" was made up, a jury was impaneled and sworn, and after trial on November 30, 1843, the jury returned a verdict declaring that the document was not the will of Elmor Williams. It is not open to question that at this trial the executors of the will and other defendants in good faith endeavored to sustain the document as his will and a fair trial was had. On December 30, 1843, a decree was entered by that court, pursuant to the

verdict, setting aside and holding for naught the probate of the document as the will of Elmor Williams. During the pendency of the suit William E. Gazlay died without issue, leaving Allen W. Gazlay as his only heir. The statutes of Ohio, then in force, provided for an appeal from any judgment or decree in the court of common pleas, including one in a will contest suit, to the Supreme Court of the state, the highest court thereof, which sat in each county and also in banc at the capitol of the state, and which had certain original as well as appellate jurisdiction. The method of taking an appeal was by entering of record an intention to appeal at the term at which the judgment or decree was rendered, and then, within 30 days after the rising of the court, executing a prescribed bond. The defendants in this suit, pursuant to this statute, duly took an appeal from the decree therein to the Supreme Court. The bond, by which the appeal was perfected, was executed January 15, 1844.

Shortly thereafter negotiations began for a compromise of the litigation. To enable it to be effected an act was passed by the Legislature of Ohio February 15, 1844 (42 O. L. p. 70), entitled "An act to enable Charles E. Williams and Allen W. Gazlay to execute deeds of conveyance under certain restrictions," whereby they were authorized to make deeds of conveyance or other writings, for any part of their interests in the estate of Elmor Williams, providing that their legal acting guardians should severally so advise and counsel their execution. It further provided that all other minors named in the will of Elmor Williams were authorized to make deeds or other writings in relation to their interests in his estate, provided that the legal acting guardians of such minors should consent to same in like manner. Thereafter an agreement of compromise entitled "Agreement of Partition of the Heirs of Elmor Williams, Deceased," was entered into. It bears date May 6, 1844. It was executed by all the heirs and the guardians of Charles E. Williams and Allen W. Gazlay, by the main devisees, but not by all of the devisees, and by none of the legatees. The name of Charlotte C. Williams was subscribed thereto by her father, Miles Williams, who also signed it individually. He had not been appointed her guardian until May 22, 1844, so, though the paper was dated May 8, 1844, it could not have been fully executed and delivered until after May 22, 1844. This agreement did not make much change in the distribution of the estate from that made by the will, apart from the parcels devised to the son, Charles E. Williams, and to the widow, as first takers, and those in which Charlotte C. Williams and the children of her body begotten were interested, one of which was devised to the widow as first taker, and from the nature of the estate given by the different devises. In each instance the parties amongst whom the estate was to be divided were to have a fee-simple estate, instead of for life, with remainder as stated and as provided for in the will.

So far as the distribution of the estate was concerned, what seems to have been done was, substantially, to give to the Allen children and Allen W. Gazlay sufficient parcels above those devised to them in the will to place them on an equality with the son, Charles E. Wil-

liams. These came from certain of the parcels devised to him, those devised to Charlotte C. Williams, upon the death of the first life tenants, with remainder as stated, the Vine street parcel to go to Allen W. Gazlay, and the Fifth street one to the Allen children, and the other parcels devised to the widow as first taker. Ephraim D. Williams and his seven children were to have the same parcels devised to them by the will, and William P. Hulbert was to have the parcels devised to him with slight deductions. The other devisees were to have the parcels devised to them respectively. And Miles Williams, the father of Charlotte C. Williams, was to have a parcel fronting 95 feet on Fifth street near its junction with Front, a portion of which had been devised to the son, Charles C. Williams, and a portion to William P. Hulbert. Quitclaim deeds were to be made pursuant to the division. Each parcel was to be held by the party to whom it was to go subject to the widow's dower. The balance of the personal estate, after paying expenses, was to be distributed amongst the legatees pro rata, and any deficiency was to be made up out of the real estate divided in case it was chargeable therewith under the will. It was provided that the appeal, then pending in the Supreme Court, "shall be dismissed by the appellants and in such a manner as to permit the original decree in the court of common pleas to stand as though no appeal had been taken from such decree, or a decree shall be entered in said Supreme Court of the same character as the one in the court of common pleas."

Thereafter a quitclaim deed, bearing date May 20, 1844, was made to Allen W. Gazlay for the Vine street parcel, and one bearing date July 19, 1844, to the Allen children for the Fifth street one, each of which was subsequently acknowledged. The name of Charlotte C. Williams was signed to each deed by her father, Miles Williams, that to the Vine street parcel being signed "Charlotte C. Williams, by Miles Williams, Legal Acting Guardian," and that to the other, "Charlotte C. Williams, by Miles Williams, Miles Williams, Legal Acting Guardian." Thereafter, at the April term, 1845, of the Supreme Court, the following order was entered in the appeal therein pending, to wit:

"It being made known to the court since the trial of this cause in the court of common pleas an act of legislation has been passed by the Legislature of Ohio authorizing the heirs and devisees of Elmor Williams, the testator named in the pleadings in this cause, to settle and compromise the matter in controversy, and it being admitted that under said act the parties have settled and compromised and deeds executed and delivered, and the defendants making known to the court their desire to abandon the appeal taken in the cause, and the costs of suit having been paid, it is, therefore, ordered and decreed that the appeal be dismissed, and that the parties go hence without prejudice to the rights of the legatees of the said Elmor Williams to charge their respective legacies on the lands devised by the said testator."

Allen W. Gazlay lived until June, 1889, and the appellants in No. 2812 claim the Vine street parcel under his will. He and they have been in continuous possession thereof since 1844, claiming it as their own, and it now rents for $17,000 a year, and, upon renewal of lease, will rent for $20,000. In a division amongst the Allen children, the Fifth street parcel fell to Rebecca A. Allen, and the appellants in No. 2823 claim under her by will and descent. She and they have also

been in continuous possession thereof, claiming it as their own, and it now rents for $3,000 a year. Such, then, is the way in which appellants claim the two parcels in suit.

In this connection it may be noted that the parcel which went to Miles Williams in the division was conveyed to him by quitclaim deed, dated September 23, 1844. By a deed dated November 10, 1859, made pursuant to a decree of the superior court of Cincinnati, in a suit brought by Gideon C. Burton against Miles Williams and his daughter, Charlotte C., he conveyed same to Ephraim D. Williams in trust for Charlotte C. and her heirs. On the death of Charlotte C., in 1904, it passed to appellee by descent, subject to the life estate of his father.

It is now in order to consider the questions raised by these facts as to the ownership of the property.

[1] It must be accepted that, if no appeal had been taken from the decree of the common pleas court setting aside and holding for naught this document and the probate thereof as the will of Elmor Williams, appellee would have no right to the parcels of real estate in dispute herein. This follows from the fact that that court had jurisdiction of the question as to the document being his will, all the parties in interest then in being, including the executors named therein, were duly before the court—guardians ad litem were duly appointed for the infant defendants—and the decree was made after a fair trial before a jury, and it had returned a verdict that it was not his will. There is not the slightest indication that there was any conduct which can be characterized as fraudulent in connection with the obtaining of the verdit and decree. It is true that appellee was no party to the proceeding. But it was impossible to make him a party, as he did not come into existence until 40 years afterwards. The statute required that such a proceeding should be brought within 2 years after the probate. Either there was no right of contest on the part of the plaintiffs therein, or the appellee could not be made a party thereto. It was of necessity that he was not. He was, however, represented in the contest by the executors and other devisees and legatees made defendants to the proceeding, whose interest was identical with his; that is, to uphold the document as the decedent's will.

The case comes clearly, therefore, within the principle of virtual representation, recognized by the Supreme Court in the case of McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652, 28 L. Ed. 1015; and by this court in Pugh v. Frierson, 221 Fed. 513, 137 C. C. A. 223. These cases merely recognized this principle. They did not apply it. There was no occasion to apply it, as neither case came within it. In McArthur v. Scott, which involved a will contest in Ohio, the heirs at law, one of whom brought the suit contesting the will, in reality represented both sides to the contest, and the executors, who held the legal title in trust for the grandchildren, not then in being, had resigned, and no other personal representative, had been appointed and represented this interest. In Pugh v. Frierson necessity was wanting, as the parties claimed to have been affected by the adverse judgment were then in being, and had not been made parties to the suit. Cases where it has been applied are the following, to wit: Gifford v. Hart, 1 Schoales

& L. 386, 408; Fox v. Fee, 24 App. Div. 315, 49 N. Y. Supp. 292; Hale v. Hale, 146 Ill. 227, 33 N. E. 858, 20 L. R. A. 247; Burlingham v. Vandevender, 47 W. Va. 804, 35 S. E. 835.

We do not understand that in cases coming within the principle there is any fiduciary relation between the parties defendant representing the nonparties not in being. The representation is not of the interest of such nonparties, but, the interests being identical, the representation is of the questions on which their interests depend. The matter is thus put in Hale v. Hale, supra:

"If persons in being are before the court who have the same interests (as the unborn) and are equally certain to bring forward the entire merits of the question, and thus give such interests effective protection, the dictates of both convenience and justice require that there should be a complete decree."

In this case the interests of the numerous defendants were identical with that of appellee; i. e., to uphold the will. The record of this suit and all papers in it were destroyed by fire in the burning of the courthouse of Hamilton county on March 29, 1884, and proof as to them was made by an attorney who had taken notes in regard thereto in an examination of title. This did not show that the executors were parties defendant to the suit. And it was thought that, under McArthur v. Scott, this affected the validity of the decree of the common pleas court. But this, to say the least, is questionable. The executors there had the legal title to the property in contest and held it in trust for the unborn grandchildren. No such relation existed here between the executors and plaintiff. And in Ohio it is no part of the duty of an executor to defend a will against a contest. Andrews v. Andrews, 7 Ohio St. 143. Besides, one of the executors and the other and his children were substantial devisees. They were defendants in their individual capacities, and their interests were sufficient to lead them to do all in their power to uphold the will. But, however this may be, by the discovery of the original papers in another suit, the character of which is hereafter indicated, after decree on the original hearing in the lower court and introduced in evidence upon rehearing, it was shown that the executors were parties defendant to the suit.

[2, 3] So it is that it must be accepted that, if no appeal had been taken from the decree of the common pleas court, appellee would have no case. He bases his case principally upon the effect of the appeal which was taken to the Supreme Court. He claims that the effect thereof was to vacate the decree of the common pleas court; i. e., to annul it, to set it aside, or to render it void, just as much so as the granting of a new trial in the common pleas court would have done. This being so, there had to be another trial in the Supreme Court, resulting in a verdict against the will, and a decree accordingly. Otherwise the probate stood, and the devises to him under the will were effective to vest the title in him to the two parcels in question. If we do not misconceive him, such is the reasoning upon which he urges that the decree below should be affirmed.

The fundamental position therein is that the effect of the appeal was to vacate the decree. He supports it by two subordinate positions. One is that in those days, in case of an appeal from a judgment or de-

cree of the common pleas court to the Supreme Court, including a decree in a suit contesting a will, the trial in the Supreme Court was de novo; i. e., exactly as a new trial in the common pleas court was if, on motion of the losing party, it were granted. In other words, necessarily it followed from the fact that the trial was de novo that the effect of the appeal was to vacate the decree of the lower court. Where a new trial was granted in that court, the verdict and judgment or decree thereon were vacated, and the case stood exactly as it stood before they were rendered. So the effect of the appeal to the Supreme Court, which was in order to another trial therein, was to vacate the judgment or decree of the common pleas court. The other subordinate position is that the Supreme Court of Ohio has held that such is the effect of the appeal, which holding is conclusive here. The importance of the case and the earnestness with which these two positions are urged demand at our hands, at the risk of being thought pedantic, a detailed consideration of them, which will be given in the order in which we have stated them.

There can be no question that the trial in the Supreme Court on appeal from the common pleas court was de novo. From the first Constitution of the state, adopted in 1802, to that of 1851, appeals were provided from any judgment or decree of the common pleas court, including that in a will contest, to the Supreme Court. Thereafter until now appeals were provided for from that court to an intermediate court, first styled district court, and then circuit court, and now Court of Appeals. On these appeals, from the beginning until now, the trial in the appellate court has been de novo. There has been, since the Constitution of 1851, a limitation of the cases in which an appeal may be taken; i. e., to a case in which "the right to demand a jury therein did not exist." And the right to make such a demand has not been limited to actions at law. But in all cases which have been appealable since this limitation was made the trial in the appellate court has been de novo, precisely as it was before then in every case. Seemingly, as compensation for the loss in jury cases of the right of securing by appeal a trial de novo in the appellate court, provision has been made for a second trial as of right in the common pleas court. So, always, from the beginning until now, it has been provided that any judgment of the common pleas court may be brought to the appellate court by proceedings in error, first until the Constitution of 1851 by writ of error, and afterwards by petition in error, in which case the trial in the appellate court is not de novo, but upon the record in the lower court as to errors of law. And, since the limitation upon the right of appeal to nonjury cases and the prescribing a new test as to cases in which a jury trial may be had, it has, in some instances, been a delicate question to determine whether the right to go to the appellate court was limited to proceedings in error or might be in both ways. The method of carrying a case to the appellate court by appeal and there having a trial de novo has been more than once noted by the Supreme Court of Ohio as a peculiarity in the method of her appellate procedure. In the case of Grant v. Ludlow, 8 Ohio St. 1, 31, Judge Swan said:

"One of the peculiar features of this appellate jurisdiction was that, unlike a writ of error, which passes upon the record, and unlike an appeal to the Supreme Court of the United States, the appeal to the Supreme Court of Ohio took up the subject-matter of the action at the point where the court below took it up, and proceeded from that point, in respect to pleadings, necessary parties in chancery, testimony, trial, and judgment, in like manner as if the cause had never been tried below."

And in the case of Mason v. Alexander, 44 Ohio St. 318, 327, 7 N. E. 435, 438, Judge Spear said:

"The practice in Ohio is essentially different from the practice in other states in removing cases from general trial courts to appellate courts. While in many of the states, and in perhaps all except our own, an appeal from a court of general jurisdiction is in the nature of a writ of error, whereby the appellate court passes upon the record as to facts as well as law, does not hear additional or other evidence, but confines its adjudications to errors appearing upon the record, in Ohio the appeal itself vacates, without revisal, the whole proceeding as to findings of fact as well as law, and the case is heard upon the same or other pleadings, and upon such competent testimony as may be offered in that court. It takes up the subject of the action de novo, in respect to pleadings, necessary parties, trial, and judgment, in like manner as if the cause had never been tried below."

But does it necessarily follow, from the fact that, on appeal, trial in the appellate court is de novo, that the effect of the mere appeal, without anything more, is to vacate the judgment or decree appealed from? Thought must be consistent with itself. But cannot the judgment or decree retain its vitality upon and after the appeal; i. e., coexist with the fact of a trial de novo? Is there any inconsistency between the two? Is it essential that the judgment or decree be devitalized in order to the trial de novo? These questions would seem to answer themselves. Of course, the judgment or decree appealed from necessarily becomes devitalized upon the entering of a judgment or decree in the appellate court. A judgment or decree in both courts cannot coexist. The judgment or decree of the appellate court ipso facto must vacate and take the place of the judgment or decree of the lower court. But until the entering of the judgment or decree in the appellate court, logically, the judgment or decree can retain its vitality along with the right to and fact of a trial de novo. In cases that come here on error or appeal, it is not essential that the judgment or decree of the lower court be vacated, in order that this court may retry the questions of law presented in the one case and the questions of law and fact presented in the other. It is not vacated until it is held that error has been committed and it is so adjudged. It is true that in such cases this court is limited to the record in trying them. But the mere fact that the freedom of action on the part of the appellate court may be so great as to permit it to handle the case exactly as the lower court had done does not require that the judgment or decree be vacated in order to do this. That, logically, the judgment or decree appealed from can retain its vitality along with the right to and fact of a trial de novo until a judgment or decree is rendered in the appellate court, is witnessed by the case of Menuez v. Grimes Candy Co, 77 Ohio St. 386, 83 N. E. 82, 11 Ann. Cas. 1037. By section 5235,

Rev. Stat. Ohio 1906, provision is made for the continuance in force of an injunction granted by a final judgment upon and after an appeal. There an injunction was granted. An appeal was taken, and thereafter the defendant disobeyed the injunction. The question was whether contempt proceedings could be brought in the appellate court. It was held that they could. In that case the judgment appealed from, not only retained its validity after the appeal, but it was actually in force, notwithstanding the appeal. Judge Shauck said:

"This * * * was an appeal with a view to a trial de novo, the steps necessary to perfect the appeal being taken in the original suit and requiring neither further pleadings nor process. When defendant perfected its appeal by giving the required notice and bond, the case by operation of law at once passed from the jurisdiction of the common pleas into the jurisdiction of the circuit court. A part of the case which so passed was the perpetual injunction from which the appeal was taken. Thereafter authority to suspend, modify, or enforce the 'pending motions' was exclusively in the circuit court."

The conclusion, therefore, cannot be resisted that there is nothing in the character of the proceedings in the appellate court, after an appeal, which necessitates that the effect of the appeal shall be to vacate the judgment or decree appealed from. Notwithstanding their character, it can retain its vitality until a judgment or decree is rendered by the appellate court, when of necessity it must cease to exist. If the appeal has such an effect, it must be because the statute authorizing the appeal so provides, or the Supreme Court of Ohio has construed it as so providing.

This brings us to the second subordinate position taken by appellee, to wit, that the Supreme Court of Ohio has held that, under the statute in force at the time of the taking of the appeal in question here, the effect of an appeal was to vacate the judgment or decree appealed from. In view of the fact that such statute had an express provision on the subject, and of its nature, it would be strange, indeed, if it has so held. The statute then in force was an act entitled "An act to regulate the practice of the judicial courts," passed March 8, 1831. (29 O. L. p. 58). By section 112 thereof (Swan's Statutes of Ohio, p. 683) it was provided:

"That when an appeal shall be granted, and bond and security given therefor as aforesaid, the judgment or decree rendered in such case, in the court of common pleas, shall thereby be suspended."

Now "vacate" and "suspend" are not synonymous. Vacate means to annul, set aside, or render void; suspend, to stay. When a thing is vacated it is devitalized. It is not when suspended. It may be suspended, and yet retain its vitality. Yet notwithstanding this, it must be conceded that the Supreme Court of Ohio, in referring to the effect of an appeal upon a judgment or decree appealed from, has frequently spoken of the appeal as vacating it. In the case of Long v. Hitchcock, 3 Ohio, 274, decided in 1827, the Supreme Court said:

"The defendant in this case had perfected his appeal before his death. When that was done, the verdict and judgment were vacated."

In the case of Bradly v. Sneath, 6 Ohio, 490, 496, decided in 1834, Judge Wright said:

"A compliance with these requisitions is held necessary to vacate the judgment of the court of common pleas. The jurisdiction of the Supreme Court only attaches to the case when the judgment rendered in the court of common pleas has been thus vacated."

In the case of Lawson v. Bissell, 7 Ohio St. 129, 132, decided in 1857, Judge Swan said:

"The effect of an appeal of a cause tried by a jury is to vacate the submission to the jury, the verdict and judgment; and the district court proceeds in the action appealed as if there had been no trial in the common pleas. So, if the issues are submitted to the court of common pleas, and verdict and judgment rendered by the court, an appeal vacates the verdict and judgment."

In the case of Bell v. Crawford, 25 Ohio St. 402, 409, decided in 1874, Judge McIlvaine said:

"In case of appeal from such judgment, not only the judgment, but the report also, is vacated and entirely superseded, and the case stands in the appellate court as though no reference had been made."

In the case of Aultman v. Seiberling, 31 Ohio St. 201, 204, decided in 1877, Judge White said:

"The effect of an appeal, under our system, is to vacate the order, decision, or decree appealed from, and to carry the cause into the appellate court, both upon the law and facts, the same as if no decision had been made."

In these five cases the judgment or decree itself is said to be vacated by the appeal. Sometimes no reference is made to the judgment or decree as being vacated. It is what preceded it that is vacated.

In Grant v. Ludlow, supra, 8 Ohio St. 30, decided in 1857, Judge Swan said:

"The appeal itself vacated, without revisal, the operation of all the law decided by the court below, and all the findings of fact by the court or jury below."

And in the case of Mason v. Alexander, supra, 44 Ohio St. 328, 7 N. E. 439, decided in 1886, Judge Spear, in the quotation from his opinion made above, said:

"The appeal itself vacates, without revisal, the whole proceeding as to findings of fact as well as of law."

In each of these seven cases the statutory word "suspend" is not used. And if one looked to them alone, he would not have the slightest suspicion that what the statute provided was that the effect of the appeal was to "suspend" the judgment or decree appealed from. But we find cases where it is used alternately with the word "vacate." As, for instance, in the case of Teaff v. Hewitt, 1 Ohio St. 511, 519, 59 Am. Dec. 634, decided in 1853, Judge Bartley said:

"An appeal from a decree is nothing else than a proceeding in the original cause, which continues the case by vacating or suspending the decree till the final hearing in the appellate court."

And in the case of Pittsburg, etc., v. Hurd, 17 Ohio St. 144, 145, decided in 1866, Judge Scott said:

"The effect of such appeal clearly is to vacate or suspend the effect of the order or decree appealed from, till the matter is heard in the appellate court."

In but a single case, save one hereafter referred to, in which the effect of the appeal was directly involved, do we find the statutory word "suspend" used in describing its effect. That is the case of Bassett v. Daniels, 10 Ohio St. 617, decided in 1858. Judge Swan, who, the year before, in Lawson v. Bissell and Grant v. Ludlow, had used the word "vacate," there said:

"The effect of perfecting an appeal to the district court is to render inoperative the judgment of the court of common pleas. The judgment is suspended, and no proceedings can be had under or by force of it, after the appeal is actually taken."

Again:

"The suspension of the judgment, however, by filing the appeal bond, necessarily suspends and puts an end to all proceedings by execution or otherwise on the judgment."

And again:

"The appeal having intervened and suspended the operation of the judgment and the proceedings under it, before the sale was rendered effectual by confirmation, and the confirmation being a material step under the execution, we are of opinion that the court below did right in refusing to confirm the sale, after the judgment was rendered inoperative and in effect vacated by the appeal."

It will be noted that the word "vacated" is here used, but it is the effect of the judgment, and not the judgment itself, which is vacated.

Now in none of these cases was the exact effect of the appeal on the judgment or decree, as between vacation and suspension, involved, and they are not authorities in support of the position that the effect thereof is to vacate and not merely to suspend. But how did it come about that, in describing such effect, the word "vacate" was used, and not "suspend." Surely some explanation is to be found of this. The Supreme Court cannot have intended to substitute one word for the other in the statute. And it is to be found, principally, in the legislation on the subject of appeals before the act of March 8, 1831. The first act after the adoption of the Constitution of 1802 providing for appeals from the common pleas court to the Supreme Court was an act entitled "An act organizing the judicial courts," passed April 15, 1803 (1 O. L. p. 35). Section 9 thereof provided for the allowance of such an appeal, of course, bond to be given for prosecuting the appeal to effect. This was the sole provision on the subject. Nothing was said as to the effect of the appeal on the judgment or decree appealed from, or as to the procedure in the Supreme Court on the appeal. No provision was contained therein as to granting a new trial in either court. In the act entitled "An act to reduce into one, the several acts organizing the judicial courts, defining their powers and regulating their practice," passed February 16, 1810 (8 O. L. p. 259), by section 11 thereof, the Supreme Court and courts of common pleas were empowered to grant new trials in cases where there had been trials by jury for the reasons for which new trials had usually been granted in the courts of law, provided that not more than two new trials be granted to the same party in the same cause. And by section 12 it was provided that, if a new trial be granted, "the former judg-

ment shall be thereby rendered void." By section 40 provision was made for the allowance of appeals from the common pleas courts to the Supreme Court, and the method of taking such appeals was prescribed, the same as that which has prevailed ever since. And by section 42 it was provided:

"That when an appeal is granted and bond and security given therein as aforesaid, the judgment or decree rendered in such cause in the court of common pleas shall thereby be rendered void."

Thus it was provided in express terms that the effect of the appeal was to render void—i. e., to vacate—the judgment or decree appealed from, just as it would have been so rendered or vacated by the granting of a new trial in the common pleas court. The granting of a new trial and the taking of an appeal were placed on exactly the same basis so far as their effect on the judgment or decree of the common pleas court was concerned. The provisions as to the effect of granting a new trial and taking of an appeal were continued in the act entitled "An act to organize the judicial courts and regulate their practice," passed February 26, 1816 (14 O. L. p. 310).

By section 2 of an act entitled "An act regulating judgments and executions," passed February 16, 1805 (3 O. L. p. 69), provision was made for a lien on the real estate of a judgment debtor to secure the judgment. Of course the effect on such liens of the taking of an appeal from a judgment after the act of February 16, 1810, whereby the judgment was rendered void, which was continued in the act of February 26, 1816, was the same as granting a new trial; i. e., to vacate and remove the lien. Such continued to be the effect of an appeal on a judgment or decree and the lien to secure same until the act entitled "An act to organize the judicial courts and regulate their practice," passed February 18, 1824 (22 O. L. p. 50). By section 100 thereof it was provided that on an appeal—

"the lien of the opposite party upon the real estate of said appellant created by said judgment shall not be by said appeal removed or vacated, but the real estate of said appellant shall be bound in the same manner as if said appeal had not been taken, until the final determination of the cause in the Supreme Court."

This provision was inconsistent with a provision that the effect of an appeal from a judgment or decree would be to render it void. So we find that the provision in the acts of 1810 and 1816 to this effect was not contained in the act of 1824. Instead thereof it was provided in section 102:

"That when an appeal is granted and bond and security given thereon as aforesaid, the judgment or decree rendered in such case in the court of common pleas shall thereby be suspended."

And from that day to this these two provisions as to the existence of the lien after appeal and the effect of an appeal have been continued in the statutes of Ohio.

It is thus seen that the use by the judges of the Supreme Court of the word "vacate" to describe the effect of an appeal from a judgment or decree is a mere reminiscence of the days when such was in fact the effect thereof. Having got in the habit during those days of so de-

scribing it, they, and no doubt the legal fraternity generally, continued to so describe it after the statute had substituted the word "suspend" for the words "render void." It is not unlikely, also, in view of the consideration that after an appeal was taken the situation of things was so analogous to that existing upon the granting of a new trial in the common pleas court, entirely so, except as to the effect of the taking of an appeal on the judgment or decree appealed from as compared with the granting thereof, it was not realized, there being no occasion to think the matter out, that they were not analogous in this particular. Besides, whilst the effect of the mere appeal was not to vacate, the entering of a judgment or decree on the appeal necessarily had the effect of vacating that appealed from. And what was had in mind in using the word "vacate" may not have been the effect of the mere appeal itself, but of it and the entire proceeding, including the judgment or decree thereon, in case the appeal was not dismissed. That the use of the word "vacate," after the act of 1824, to describe the effect of the appeal, was not only inaccurate, but misleading, is evident from a statement of Judge Thurman in the case of Ewers v. Rutledge, 4 Ohio St. 210, 214, decided in 1854. He there said:

"It is true that section 9, before quoted, differs in language from the former statutes respecting appeals. Under the old law, an appeal vacated the judgment appealed from, but preserved its lien; the present statute declares that the judgment shall be 'suspended.' But the purpose in both statutes is, we imagine, the same—namely, to preserve the lien—for the Legislature could not have intended that there should be two judgments in force; one rendered by the common pleas, and the other by the district court."

The statute, section 9 of which he had quoted, was an act entitled "Regulating appeals to the district court," passed March 23, 1852 (50 O. L. 93). It was precisely the same as section 102 of the act of February 18, 1824, and section 112 of the act of March 8, 1831, heretofore quoted; i. e., it provided, the same as they did, that the effect of the appeal was to suspend the judgment or decree appealed from. It is apparent that Judge Thurman thought that the statutes prior to the act of March 23, 1852, provided that the effect thereof was to vacate such judgment or decree, not as the act of March 23, 1852, which provided that the effect was to suspend. Where, then, did he get any such notion? Certainly not from a consideration of the former statutes themselves. A consideration thereof would have shown him that they were precisely the same as the then existing statute of March 23, 1852. He could only have gotten it from the decisions of the Supreme Court, in which, as shown above, the effect of the appeal was almost uniformly described as being to vacate. That he had such notion accounts for his not realizing that the vacation of a judgment and preservation of a lien to secure it cannot coexist in thought. It was aided by the consideration that, though an appeal did not vacate the judgment of the common pleas, judgment thereon in the Supreme Court did, as it was not possible, as he stated, for the two judgments to be in force; i. e., at the same time.

There is nothing, therefore, in this use of the word "vacate" to describe the effect of an appeal, by the judges of the Supreme Court, to conclude the question as to what was really the effect thereof after

1824, and at the time of the taking of the appeal in question here. And it is clear that the effect thereof was not to vacate the judgment or decree appealed from, but only to suspend it until a judgment or decree was rendered in the appellate court, so that, if before the rendition thereof the appeal was dismissed, it would not only be in existence as a judgment, but also effective to bar rights and enforceable to obtain rights thereby conferred. The considerations in support of this position are these. The statute was controlling as to the effect of the appeal, and it merely provided that it should suspend the judgment or decree of the lower court. In so providing it substituted the word "suspend" for the words "render void," thereby indicating that suspend did not mean the same thing as render void. It so did to make this provision consistent with the provision that the lien of the judgment or decree should be preserved, notwithstanding the appeal. The latter provision is inconsistent with a provision that the judgment or decree is vacated by the appeal. Though, possibly, such inconsistency is to be found in the provision of section 8 of the act of March 31, 1859 (56 O. L. 93; Swan & Critchfield, vol. 2, p. 1160), whereby it was provided that the granting of a second trial in the common pleas court should not remove or vacate the lien of the judgment entered upon the verdict on the first trial, and it cannot be done away with except on the view that the effect of the granting of such second trial is not to vacate such judgment.

But beyond these considerations the Supreme Court of Ohio has held that, the necessary effect of which is that the effect of an appeal is not to vacate, and has said in so many words that such is not its effect. We have referred to the fact that from the very beginning, not only has the losing party in the common pleas court had the right to carry a case to the appellate court by appeal, but also by proceedings in error. Whilst the acts of 1810 and 1816 were in force by which it was provided that the effect of an appeal was to "render void" —that is, to vacate—it is not conceivable that these remedies could be prosecuted contemporaneously. There would be no room for a reversal on error of a judgment which had already been vacated or rendered void by appeal. But after the act of 1824, and during the existence of all subsequent acts, if the effect of an appeal was not to vacate, but merely to suspend, as the statute provided, it is conceivable that they could be so prosecuted. And when it became a delicate question as to which was the proper remedy, lawyers began to pursue both remedies, so as not to fail of a hearing in the appellate court because of a mistake in the choice of remedy. Where this was done, and the case was appealable, the right to pursue the remedy in error necessarily involved the question as to the effect of the appeal on the judgment or decree appealed from. If it was to vacate it, the proceeding in error must fail, for, as stated, there is no room to reverse on error a judgment or decree that has aleady been vacated by appeal.

This question came before the Supreme Court of Ohio in two late cases, to wit, Hull v. Bell, 54 Ohio St. 228, 43 N. E. 584, and Jenney v. Walker, 80 Ohio St. 100, 88 N. E. 123. In each case appeal lay. In one, the right of appeal was questioned; in the other, it was not.

In Hull v. Bell, defendants, against whom a judgment was rendered in the common pleas court, appealed and brought error to the circuit court. The latter dismissed the appeal and affirmed the judgment. Separate proceedings in error were prosecuted to the Supreme Court. It held that the case was appealable, and reversed the judgment of the circuit court dismissing the appeal. This left for disposition the proceeding to reverse the judgment of the circuit court, affirming the judgment of the common pleas court. If the effect of the appeal was to vacate the judgment of the common pleas court, the action of the circuit court in affirming it was error, and should have been reversed. A judgment that had already been vacated by appeal should not be affirmed on error. The only thing to do would be to dismiss the proceeding in error, because there was no judgment after the appeal on which it might operate. But the Supreme Court did not so act. It held that, the case being appealable, appellant did not need the proceedings in error to the circuit court. He could obtain correction of any error of law committed by the common pleas court on the appeal. And the affirmance of the judgment by the circuit court was not in the way of his so doing. Judge Williams said:

"The judgment rendered on the appeal becomes the final judgment fixing the rights of the parties, and that appealed from is no longer operative; and its affirmance on error, before trial had on the appeal, can give it no 'additional or different' effect that it did not have without such affirmance."

It therefore dismissed the proceeding in error before it, prosecuted to the judgment affirming the judgment of the common pleas court.

In Jenney v. Walker, appeal was taken from a judgment of the probate court to the common pleas court, and afterwards proceedings in error were presented to the same court. Thereafter the appeal was dismissed, and thereupon the defendant in error moved to dismiss the proceeding in error on the ground that there was no judgment to reverse for error, as the judgment of the probate court had been vacated by the appeal. The common pleas court sustained the motion. The circuit court reversed the action of the common pleas court, and the Supreme Court affirmed its action. Of course, if the effect of the appeal had been to vacate the judgment appealed from, the common pleas court was right in dismissing the proceeding in error. It was only because such was not the effect of the appeal that it could be said that it was wrong in so doing.

The case of Willson Improvement Co. v. Malone, 78 Ohio St. 232, 85 N. E. 51, is not in point here. There both appeal and error were prosecuted. But, as the case was held not to be appealable, the appeal was not in the way of the proceeding in error. In both Hull v. Bell and Jenney v. Walker, however, the case was appealable. That being so, if the effect of the appeal was to vacate the judgment appealed from, it was error on this ground alone for the circuit court to affirm the judgment of the common pleas court in the one case, and not error for the common pleas court to dismiss the proceeding in error in the other. And the action of the Supreme Court in refusing to reverse the judgment of the circuit court in the one case, and its affirming the judgment of the circuit court, reversing the judgment of the

common pleas court in the other, cannot be accounted for on any other ground than that the effect of the appeal was not to vacate, but only to suspend, as the statute provided. The effect of the appeal was necessarily involved in both cases, and both of them are direct authorities, therefore, against appellee's contention.

The other thing which the Supreme Court of Ohio has held, the necessary effect of which is as stated, is that an appeal in a proper case and properly taken may be dismissed by the appellant on his motion, and upon such dismissal the judgment appealed from becomes operative. In the case of Irwin v. Lloyd, 65 Ohio St. 55, 61 N. E. 157, suit was brought by a creditor against an assignee for benefit of creditors in the court of common pleas to compel the allowance of his claim by the assignee. It dismissed the petition on the ground that the claim was barred by the statute of limitations. An appeal was taken from this judgment, and subsequently dismissed by the appellant. During the pendency of the appeal the creditor sued the debtor and obtained judgment against him, and after the dismissal of the appeal brought another suit in the common pleas court against the assignee, to compel the allowance of the judgment. It was held that this suit was not maintainable. Though the only thing decided, according to the syllabus, which is the law of the case, was that a judgment against a debtor obtained after assignment is not a valid claim against an assigned estate, in the course of his opinion in the case Judge Davis said:

"Here the trustee had exercised his statutory privilege by rejecting the original claim, for the reason that it was barred by the statute of limitations. In this he was sustained by the judgment of the court of common pleas. Having appealed to the circuit court, the plaintiffs saw fit to dismiss their appeal without prejudice. Although not so in terms, this was in effect a final dismissal, because there could be no second appeal. The contention as to that claim thereafter was res adjudicata as far as it concerned the assigned estate, represented by the trustee."

According to this, therefore, an appeal is subject to dismissal by the appellant, and after dismissal the judgment appealed from is res adjudicata. The case of B. & O. R. R. Co. v. City of Washington, 34 Weekly Law Bulletin, 266, was affirmed without opinion. We gather, from the report of the case there made, that the suit brought in the common pleas court was decided in defendant's favor. The plaintiff took an appeal from the judgment dismissing his petition. Thereafter, in the appellate court, plaintiff moved to be permitted to dismiss the suit without prejudice. This was overruled, and the appeal was dismissed for want of prosecution. The plaintiff brought error to the Supreme Court, which affirmed the judgment of the lower court, thus holding that plaintiff had no right to dismiss his case, but that his appeal might be dismissed for want of prosecution. The argument of defendant against plaintiff's right to dismiss his case was that a plaintiff, by appealing from an adverse judgment and then dismissing his case on the appeal, could commence over again, follow the same course, and thus prevent defendant from having or obtaining a final adjudication of the controversy. The argument of plaintiff against the right to dismiss the appeal was that the appeal vacated the judgment of the lower court and vested the appellate court with complete jurisdiction

precisely as if the jurisdiction was original. The statute conferred no authority to dismiss the appeal, and it could be dismissed only when the appellate proceedings were defective, and, it might have been added, if the case was nonappealable. So that the only course to pursue was to dismiss the suit with or without prejudice. The Supreme Court, in affirming the judgment, upheld the one argument and decided against the other.

The appellee relies on the case of Banning v. Kirby, 7 Am. Law Record, 601, a decision of the district court of Hamilton county, as aiding him in another particular. It was decided therein that one of several appellants in a will case could not dismiss the appeal against the objection of the others. This decision presupposes that all the appellants could dismiss it. If all could not dismiss, why argue whether some could?

Apart from these decisions, unless there was an express provision against the dismissal of an appeal, one would expect it to be dismissible. And, if dismissible, a dismissal should leave the judgment appealed from in force the same as if no appeal had ever been taken. This it could not do if the effect of the appeal was to vacate the judgment.

In addition to all this, it has been set forth in so many words, in an opinion of the Supreme Court of Ohio, that the effect of an appeal was not to vacate. This was done in the case of Jenney v. Walker, supra, by Judge Crew. He said:

"The error of such contention or claim is found in the fallacy of the premise upon which it rests, namely, that the appeal cancels and destroys the judgment. The effect of the appeal is not, as assumed by counsel, to vacate and destroy the judgment appealed from; but its only effect is to suspend such judgment, and to stay proceedings to enforce its execution. It does not operate to annul the judgment, or to otherwise impair its vitality and obligation than by merely suspending its enforcement during the pendency of the appeal. The lien, if any, created by the judgment, is not removed or vacated by the appeal, but subsists and continues in the same manner and to the same extent as if the appeal had not been taken."

There is nothing in the opinion in Drake v. Tucker, 83 Ohio St. 97, 93 N. E. 534, inconsistent with or in conflict with this statement of Judge Crew in the slightest particular. The statement therein that on an appeal the trial is de novo is not so. There can be, as we have shown, a trial de novo without devitalizing the judgment appealed from.

Several odds and ends remain to be disposed of before our consideration of this fundamental position of appellee, that the effect of the appeal in question here was to vacate the decree of the common pleas court setting aside the document probated as the last will of Elmor Williams, is complete. The appellee relies on the case of Long v. Hitchcock, supra, in support of his position. That was an action at law for slander. By the common law, then in force, the death of defendant in such an action abated the action. The plaintiff recovered judgment in the common pleas court. The defendant appealed to the Supreme Court. After the appeal, and before trial therein, he died. It was held that the action, and not the appeal, abated by his death. This

is not against the position that the effect of the appeal is not to vacate the judgment. Whilst the appeal itself does not have such effect, judgment on the appeal does.

Again, by section 23 of an act entitled "An act relating to wills," passed March 23, 1840 (Swan's Statutes of 1841, p. 895), in force at the time of the probate of the will in question and the proceedings in the common pleas and Supreme Courts in relation thereto, it was provided as follows:

"In such a suit in chancery an issue shall be made up, whether the writing produced be the last will of the testator or not, which shall be tried by a jury, whose verdict shall be final, between the parties, unless the court shall grant a new trial or the cause be appealed to the Supreme Court."

Here it is true that the granting of a new trial and the taking of an appeal are treated alike, but not in their effect on the vitality of the verdict and judgment thereon, but upon the right to retry the question as to whether the document was the last will of the testator. So far the effect of granting a new trial and the taking of an appeal are exactly alike.

And again, the suit, papers in which were found after the original hearing in the lower court and introduced in evidence upon rehearing, heretofore referred to, was a suit by seven of the legatees in the will, whose legacies amounted, in the aggregate, to $4,000, and who had received slight payment on them from the personalty, to recover the balance of them from the parties amongst whom the real estate was divided. They obtained in the court of common pleas a decree, and this decree was affirmed in the Supreme Court. This record was introduced by appellants to show that the executors were parties defendant to the suit contesting the will. Appellee contends that it had a boomerang effect, in that it shows that the Supreme Court had held that the will was still in force, notwithstanding the decree of the common pleas court setting it and the probate thereof aside, and this it could only have done on the ground that the effect of the appeal was to vacate that decree. But it was not held therein that the will was still in force. It is true that the provisions of the will were construed as if it were still in force, and it was held that the will charged the legacies against the rents of the real estate, in case of a deficiency in the personal estate. This, however, was because it was an express term of the agreement of compromise that the persons amongst whom the real estate was divided should not have to make up any deficiency in the personal estate, unless such was the proper construction of the will. The parties evidently acted upon the idea that this was the only question in the case, and that, if such was the proper construction thereof, such persons were bound to meet such deficiency, and that because of the agreement, and not because of the will.

[4] The conclusion of the whole matter, therefore, is that the appellee's fundamental position that the effect of the appeal was to vacate the decree of the court of common pleas setting the document and probate thereof as the will of Elmor Williams aside is not sound. It did not so do. It did not to any extent affect the existence and vitality of the decree. In the language of the statute the appeal merely sus-

pended the decree; i. e., stayed its enforcement. What, then, followed from the dismissal of the appeal? It is urged that the appeal was not dismissible as to the infant appellants, including Charlotte C. Williams, by their guardians ad litem, and hence, under Banning v. Kirby, supra, to no extent. It is not necessary to determine the correctness of this position. It was in fact dismissed. If the position is correct, and the matter can now be inquired into, the sole effect thereof is that the appeal is still pending. It cannot have the effect of vacating the decree setting aside the document and its probate, and thus placing appellee in position to assert a right to the property in question thereunder. That would seem to have followed therefrom which follows from the dismissal of any appeal, to wit, the decree, stayed by the appeal, thereupon became enforceable, as much so as if no appeal had been taken. Clearly such would have been the case, had it been dismissed by appellants without consideration to any of them therefor. They were not bound to take an appeal, and the validity of the decree against appellee would have been in no wise affected by their failure to take one. He had been barred by their defense in good faith against the attack in the common pleas court, and their nonaction thereafter could not affect the matter. He had no claim on them that they should take an appeal. So he had no claim that they should prosecute the appeal to a decree. Is it any different because it was not so dismissed, that after it was taken the agreement of compromise was entered into and substantially performed, and that it was pursuant thereto that the appeal was subsequently dismissed?

The appellee makes much ado about the fact that no provision whatever was made therein for his mother Charlotte C. Williams, and himself. She was the only one of the existing beneficiaries for whom no provision was made, except the widow, who had renounced the will and taken under the law. All the other existing beneficiaries, except Charles E. Williams, the son, had received under the agreement substantially the same that they would have received under the will and that absolutely. There is, however, no occasion for one being wrought up on behalf of appellee as against appellants here because of this. Charlotte C. Williams is not here complaining. Charles E. Williams, the infant son, who, along with her, suffered by the agreement, as compared with the will, seems never to have complained of his treatment. The children of the bodies begotten of all the other first takers of the real estate, as well as appellee, lost out, and it does not appear that any of them, of whom there must have been some, ever so complained. Charlotte C. Williams in the course of time received what had been conveyed to her father, Miles Williams, and on her death it passed to appellee, subject to his father's life estate. Beyond all this, the fact of a wrong having been done Charlotte C. Williams and appellee by the agreement depends entirely on whether the document in question was the last will of Elmor Williams. A jury, after a fair trial, found it not to be his last will. On its face it is marked by eccentricities, to wit, unusual generosity to those not the natural objects of his bounty, favoritism amongst those who were, unkind attitude towards his wife, antipathy to his son-in-law and another person, and

a purpose to tie up a large body of valuable real estate in the heart of a growing city with contingent remainders. The fact that the grandchildren who contested were willing to quit short of getting all that would have been coming to them without a will need not be indicative of a serious weakness in their case. They did receive a substantial addition to what was coming to them under the will, and it may have been prudent caution to be content therewith rather than run the risk of another trial. Possibly, also, the beneficiaries of the will, who were defending, had the advantage of them in pugnacity as well as in numbers and funds.

The meaning of all this is that we are not in position to form any judgment that the document was the last will of Elmor Williams, and, in the absence of such a judgment, there is no room to be concerned about any injustice done Charlotte C. Williams and appellee by the agreement. It is possible that the real wrong done thereby was to the grandchildren, under whom appellants claim, and the infant son, and the withholding from Charlotte C. Williams and appellee of any part of the fruits of this wrong was not by them, but by those who brought it about. What we have to do with here, then, is a purely legal question; i. e., whether the circumstance that the appeal was dismissed pursuant to this agreement of compromise, whereby the estate was divided and distributed as therein provided, makes any difference from what would have been the result if it had been dismissed without any concession made to the appellants therein, and solely because of a feeling by them that it was useless to further prosecute the appeal, in which case appellee here would have been barred.

In the case of Holt v. Lamb, 17 Ohio St. 385, Judge Welch said:

"The verdict of a jury is the only instrumentality given by which to invalidate or set aside the probate."

In view of this it is possible that if, whilst the case was in the common pleas court, a consent decree had been entered setting aside the probate and dividing the estate as provided in the agreement, without the intervention of a jury, the decree would have been invalid even as to the parties to the proceeding. Walker v. Walker, 14 Ohio St. 157, 82 Am. Dec. 474; Holt v. Lamb, supra. Certainly it would have been invalid as to the appellee here, and all other persons not such parties. Such a case would have been one for the application of the doctrine of McArthur v. Scott in its full force. Possibly, also, notwithstanding the verdict of the jury in the common pleas court after a fair trial and decree therein, if the appeal to the Supreme Court had not been dismissed, but such a consent decree had been entered there, the same result would have followed. We are not concerned to determine this. No such nor any other decree was entered there. It is not possible to say, therefore, that the decree of the common pleas court was vacated by a decree in the Supreme Court on the appeal, which took its place. All that was done was to dismiss the appeal. The agreement was a thing done out of court. It was not made the decree of the Supreme Court. Its sole function was to supply the motive for dismissing the appeal. If, whilst the right to take an appeal still existed, but before it had been taken, the agreement had been entered into,

and, because thereof, no appeal was taken, there would have been no room for appellee to claim that the document was in force as the last will of Elmor Williams, and hence he was entitled to the property in dispute. So here, though the appeal had been taken, when the agreement was entered into and it was dismissed pursuant thereto, there is no such room. The document and the probate thereof were set aside by the decree of the Common Pleas Court. The appeal therefrom to the Supreme Court did not vacate that decree. It merely suspended it. The decree was still in existence, notwithstanding the appeal, and had as much vitality as it had before the appeal was taken, or would have had, had not the appeal been taken. The dismissal of the appeal did not add to its vitality. It simply removed the obstacle to its enforcement. It was not possible for the motive for the dismissal or the manner in which it was brought about to give it any other effect. It could not have vacated the decree of the common pleas court, which vacated the probate, thereby leaving the document in force as the last will of Elmor Williams, the only position on which appellee can base his right to recover. And if any wrong was done appellee in the agreement of compromise of which he can now complain, the sole effect thereof is to entitle him to have the dismissal of the appeal set aside by the court which made it. It cannot entitle him to recover the property in dispute on such a basis.

We are therefore constrained to hold that the ownership of the property in dispute is with appellants. The decree of the lower court is reversed, with directions to dismiss the bill.

On Petition for Rehearing.

Appellee has not apprehended the exact and only ground upon which we have decided against him, and the sole necessity for making response to his petition is, if possible, to render it plain to him what that ground is. This consideration alone makes it worth while that we say something further. In doing so we do not admit that the opinion is not clear on this point.

The appellants are in possession of the property in controversy, and appellee seeks to recover it from them. The question in the case is whether he is the owner, and not whether they are the owners, thereof. We put it this way, not because of any doubt as to whether they are the owners, but that this question may be viewed aright. Appellee claims to be the owner by virtue of the probate, February 14, 1843, of the document of date November 28, 1842, as the last will of Elmor Williams. If that probate is still in force, he is the owner. We conceded as much in the opinion. It is equally true that, if it is not still in force, he is not the owner. Appellee has not contended otherwise. His case depends on the truth of the proposition that it is still in force.

The probate was set aside and held for naught December 30, 1843, by the decree of the common pleas court. This decree was a binding decree as to appellee, as well as to the parties to the suit in which it was entered. And, if it is still in force, as it was from the time it was entered until January 15, 1844, when the appeal to the Su-

preme Court was perfected, the probate is not still in force, and the appellee is not the owner. As to these two propositions appellee has not contended otherwise.

This decree is now in force, as it was then, and it has been so in force ever since April, 1845. This is so because at that time the appeal therefrom was dismissed. As the sole effect of the appeal was to suspend the decree during its pendency and until a decree in the Supreme Court, a dismissal thereof before such a decree put it in force thereafter, just as it would have been had no appeal been taken.

[5] This was to no extent affected by the claims of appellee, to wit, that his mother and he were no parties to the agreement and deeds pursuant to which the dismissal was made, and that they were a fraud on them. The appeal was in fact dismissed, though wrongly so, if he is right. The sole possible effect of its having been wrongly dismissed is, either that the appeal is still pending, or that appellee is entitled to have the dismissal set aside and appeal reinstated. It did not have the effect of vacating the decree. We have yet to learn that the wrongful dismissal of an appeal vacates the decree appealed from. That the appeal may be still pending, or that appellee is entitled to have the dismissal set aside and the appeal reinstated, each of which is far-fetched, and which we do not concede, does not render the probate in force, so that the appellee can assert that he is the owner under it.

That the manner in which the dismissal of the appeal was brought about did not vacate the decree was practically conceded by the appellee. This he did by the position which he took that the appeal itself vacated the decree. Of course, if this was the effect of the appeal, the dismissal thereof did not reinstate it, and the decree has not been in existence, much less in force, since it was taken; whereas, on the other hand, the probate has been in force since the dismissal of the appeal, and appellee is the owner. It was here that we differed with the appellee. A careful consideration of the statutes of Ohio and the decisions of the Supreme Court of Ohio drove us to the conclusion that the effect of the appeal was to suspend, and not to vacate, the decree.

The exact and only ground, therefore, of our decision against appellee, was that the probate, the sole basis of his claim, is not still in force. This is because of the decree, which set it aside; and, though it was suspended by the appeal, the dismissal put it in force again, and it has been so ever since. This is not sophistry. It is downright truth.

Appellee has it that we decided against him on the ground that he had been deprived of his title by the agreement of May 8, 1844, and deeds thereunder, pursuant to which the appeal was dismissed. He charges us with assuming that his mother, though only four years old, was authorized by the statute of February 15, 1844, to execute the agreement and deeds, and that she and he were parties to them and bound by them. He says that he was surprised to find that the court rested its opinion largely upon this assumption, and that it is the only possible basis therefor. Furthermore, he gathers from the opin-

ion that we think that this agreement was a meritorious one. He expresses surprise at this, and that we found no fraud or collusion between his grandfather, Miles Williams, and the other parties to the agreement, and states that it seemed incredible to him that it did not shock our sense of justice. And he claims that our conclusion was a sanctioning of the agreement.

Nowhere in the opinion did we take position that appellee was affected by the agreement or deeds. Nor is there the slightest warrant for the claim that we made the assumption stated. It would seem that the thought that we so assumed arose from the consideration that, in setting forth the facts of the case, we stated that the agreement, though dated May 8, 1844, could not have been fully executed and delivered until after May 22, 1844. This was an inference from the fact that Miles Williams, who signed the name of his daughter thereto as guardian, was not appointed guardian until that date. Appellee thinks that we drew that inference as a basis for the position that the agreement was binding on his mother and him. And it is on this slight thread that he hangs the claim that we so assumed, and that this assumption was the basis of the decision. The inference, we still think, was a sound one; but there was no motive behind it, other than a historical one—i. e., to state all the facts in regard to the agreement as we gathered them from the record. Not only did we not make any such assumption; we did not think that there was any basis whatever therefor. In our opinion, then and now, appellee's mother and he were no parties legally to the agreement or deeds. They were not bound by them, and appellee's rights were not affected thereby. We did not express ourselves to this effect, because there was no occasion for us to do so. Appellants were not claiming that appellee was affected by them, as he himself notes, and it was palpable that he was not.

We said nothing intimating that the agreement was meritorious; nor did we sanction it by the conclusion we reached. It is true that we expressed no opinion as to whether there was any fraud in the transaction and that we were not shocked by it. Here, too, there was no occasion to express any opinion, as, conceding that there was fraud, appellee's case was not bettered thereby. As before stated, the sole possible effect thereof was that appellee was entitled to have the dismissal of the appeal set aside and the appeal reinstated. The effect thereof was not to vacate the decree which set aside the probate, the sole basis of appellee's claim. It is the decree which is in the way of appellee's success, and not the agreement and deeds, and until he can show that in some way it has been vacated he can make no progress. He does not show it by making good that his grandfather, Miles Williams, sold out his mother and him.

It is true that we were not shocked by the transaction pursuant to which the appeal was dismissed. We were not shocked for two reasons. One is that we conceive that it is rarely, if ever, a good thing for a judge, whose prime function is to see things as they are, ever to be shocked. It is not essential to doing justice. It may result in injustice. L. & N. R. R. Co. v. W. U. Tel. Co. (D. C.) 218 Fed. 91, 95.

The other is that, taking a broad view of things, there was no real occasion for being shocked. Unless the document in question was in fact the last will of Elmor Williams, it cannot be said that any real wrong was done the appellee, no matter how reprehensible was the conduct of his grandfather, and of those who took advantage of it. It is impossible for one, this far away from those days and with the meager information at hand, now to say that it was. It does not follow, from the fact that Elmor Williams executed the document and that it was probated as his last will, that it in fact was such. A jury in the common pleas court, after a fair trial, found that it was not. To say the least, if the appeal had not been dismissed, it is just as likely that a jury in the Supreme Court would have found the same way as that it would have found in favor of the document. If it would have found against it, the appellee was not hurt by the dismissal. It was the ancestors of appellants who suffered thereby. All that appellee can complain of us for doing is in deciding that the effect of the appeal was not to vacate the decree, but only, as the statute expressly provided, to suspend it, and that we could not help.

The petition for rehearing is overruled.

TEXAS CO. v. INTERNATIONAL & G. N. RY. CO. et al. (two cases).*

(Circuit Court of Appeals, Fifth Circuit. November 18, 1916.)

Nos. 2924, 2932.

1. RECEIVERS ⊜160—CLAIMS—LABOR AND SUPPLY CLAIMS—PREFERENCES.
Claims for labor or operating supplies furnished to a railroad company within six months prior to the appointment of receivers in a foreclosure suit are entitled to a preference upon the net income of the receivership, before any of it is paid to the mortgagees or for betterments to the property, although there is no charge of previous diversion of earnings, and regardless of the fact that the mortgage provides for the impounding of the income through a receivership for the benefit of the bondholders.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 309, 310; Dec. Dig. ⊜160.]

2. RECEIVERS ⊜153—DIVERSION OF INCOME.
Payment of taxes by receivers of a railroad company out of the net income of the receivership is not a diversion of earnings as against labor and supply claimants, such payment being for the benefit of all parties interested in the property.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 276, 277; Dec. Dig. ⊜153.]

3. RECEIVERS ⊜159—DIVERSION OF INCOME.
In a railroad receivership in a suit to foreclose a second mortgage, the court should not as a settled policy divert net earnings of the receivership to the payment of interest on first mortgage bonds, to prevent a default under such mortgage, where the effect is to postpone payment of supply claims, which are entitled to preference from such earnings.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 307, 308; Dec. Dig. ⊜159.]

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

*Rehearing denied December 18, 1916.

4. RECEIVERS ⟸158(2)—CLAIMS—LABOR AND SUPPLY CLAIMS.

Where there are net earnings of a railroad receivership instituted at suit of mortgage bondholders, supply claimants who have a preferential equity therein are entitled to have the same applied to their claims, without waiting the final termination of the receivership, which is not under their control or at their risk, and they have the right to object to the diversion of such earnings to the payment of other obligations inferior in priority to their own.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303; Dec. Dig. ⟸158(2).]

5. RECEIVERS ⟸128—CLAIMS—LABOR AND SUPPLY CLAIMS.

A court is not justified in authorizing the issuance of receivers' certificates by a railroad receiver appointed in a foreclosure suit for the making of permanent betterments on the property, not urgently needed to keep it in operation, and making such certificates a first lien on the net earnings of the receivership, to the displacement of supply claims, which are entitled to priority of payment from such earnings.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 205, 210, 219–222; Dec. Dig. ⟸128.]

6. APPEAL AND ERROR ⟸71(4)—APPEALABLE ORDERS—FINALITY.

Orders of a District Court, made after the entry of a decree foreclosing a railroad mortgage, authorizing the issuance of receivers' certificates and making them a first lien on the net earnings of the receivership, or otherwise disposing of such earnings to the displacement of supply claims, are final orders and appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 399–401; Dec. Dig. ⟸71(4).]

7. RECEIVERS ⟸150—CLAIMS—SUPPLIES—ENFORCEMENT.

Where, in a suit to foreclose a second mortgage on railroad property to which the first mortgagee was not a party, orders were made directing payment by the receiver of interest on the first mortgage bonds from the net earnings of the receivership, displacing prior claims of supply creditors on such earnings, and remitting them to the corpus of the property, such creditors were entitled to maintain an independent bill, making the trustee in the first mortgage a party, for the protection of their rights, by enjoining such trustee from receiving the payments and requiring him to restore the same, and also for enforcing their claims against the corpus of the property, should it become necessary.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 267, 268; Dec. Dig. ⟸150.]

Appeals from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge.

Suits in equity by the Central Trust Company against International & Great Northern Railway Company, and by the Texas Company against the International & Great Northern Railway Company and others. From orders entered in each suit, the Texas Company appeals. Reversed.

The appeals in the two cases may be considered together, since the purpose of each is to accomplish the same result, but by different remedies.

Statement as to 2932.

The appeals in cause numbered 2932 are from two orders of the court below, filed April 18, 1916, one authorizing the issue of receivers' certificates in the amount of $1,400,000, and the other authorizing and directing the receiver to pay the interest falling due May 1, 1916, on the bonds secured by the first mortgage on the railroad out of any net income or earnings in his hands at that time, and also from an order denying a rehearing from those orders.

These orders were made in a suit pending in the District Court, filed August 7, 1914, by the Central Trust Company, as plaintiff, against the International & Great Northern Railway Company, as defendant, to foreclose the lien of a mortgage, securing an issue of second mortgage bonds, upon the railroad property. On August 10, 1914, receivers were appointed, under this bill and with the consent of the defendant, of the mortgaged property, and authorized to operate the railroad pending final decree in the foreclosure suit, and after qualifying entered upon the discharge of their duties, and they, or the survivor, have continued to operate the railroad up to the time the appeals were allowed. Upon the 4th day of May, 1915, the appellant, the Texas Company, intervened by petition in the foreclosure suit, seeking to have established its claim for material furnished the railroad company during a period of six months prior to the receivership in the amount of $225,778.52, and to have it declared a preferred claim against the net income of the receivership and upon the entire corpus of the mortgaged property. There were other preferred claims of like character, making the aggregate, including that of appellant, the sum of approximately $600,000.

The intervention of the appellant was referred by the court to a special master, who reported on April 7, 1916, that the appellant had, during the six months period prior to the receivership, furnished the railroad company supplies of a preferential character in the amount of $225,778.52, and recommending that the appellant's claim in that sum be allowed and charged as a preferential claim, along with claims of like character, against the net income from the operations of the receiver, as to principal amount, and that interest thereon be allowed as an unsecured claim. Exceptions to the findings of the master were filed by both parties and by the receiver, and were pending and undisposed of when the appeals were allowed. Installments of interest upon the bonds secured by the first mortgage fell due semiannually in May and November, and the mortgage securing these bonds provided for the maturing of the principal upon default in the payment of any interest installment. There had been no default in the payment of interest under the first mortgage at the time the foreclosure suit was filed, and the principal of the first mortgage bonds would not have matured for some years, unless prematurely by a default in the payment of interest. To prevent the premature maturing of the first mortgage bonds by reason of a default in payment of an installment of interest, and upon request of the receivers, the court had ordered the receivers to pay, out of the net income of the operations of the railroad under the receivers, all installments of interest upon the first mortgage which fell due up to and including May 1, 1916, and all such interest had been paid by the receivers out of their net income or money borrowed by them prior to that date, and precipitation of the maturity of the bonds so prevented. On May 17, 1915, a decree of foreclosure and sale of the railroad subject to the lien of the first mortgage, was entered by the District Court, but no sale had been had thereunder up to the time the appeals were allowed. The decree reserved the rights of interveners for future determination.

Prior to the making of the orders appealed from, the court had authorized, and the receivers had issued and negotiated, receivers' certificates in the amount of $700,000, which were made a charge upon the net earnings of the receivership, and upon the corpus of the property, ahead of the lien of the mortgage sought to be foreclosed. The proceeds of these certificates were used to pay $338,715, interest due May 1, 1915, upon the first mortgage bonds, and $335,000 in improving the railroad property. At least two other installments of interest on the first mortgage bonds of the like amount, one due November 1, 1914, and one due November 1, 1915, had been paid prior to the making of the orders appealed from by the receivers out of the earnings of the receivership. In April, 1916, it appeared that the surviving receiver was out of funds and had a temporary deficit of $22,684. The first mortgage interest, which fell due in May, was generally provided for by borrowed money, while the earnings of the receivership during the fall months more than sufficed to care for the November installment. The amounts, which had been paid by the receivers during the receivership and prior to the making of the orders appealed from, were: For taxes, $409,589.94; for first

mortgage interest, $1,016,145; for equipment, $225,500; for betterments, other than for equipment, $538,062.36. On the 7th day of March, 1916, the District Court ordered the receivers to make no further payments of first mortgage interest from earnings.

On the 18th day of April, 1916, the court, upon the application of the receivers, modified the previous order of March 7, 1916, so as to make it inapplicable to the first mortgage interest falling due May 1, 1916, and upon the same day entered another order, on the application of the plaintiff and with the consent of the receiver, authorizing and directing the receiver to pay this interest out of net income and earnings, which the order recited would be in his hands at that time. On the same date, upon application of the receivers, the District Court made an order, authorizing the receiver to issue certificates of indebtedness in the sum of $1,400,000, and declaring them, when issued, to be a lien prior to the lien of the bonds secured by the mortgage sought to be foreclosed upon the mortgaged property and all other property then in the possession of the receivers, or which might thereafter come into their possession, and upon the net earnings and income resulting from the conduct of the business by the receivers. The order directed that the proceeds of $700,000 of the certificates should be applied to the payment of $700,000 of receiver's certificates theretofore issued and then outstanding, and which fell due May 1, 1916. The proceeds of any remaining certificates authorized to be issued were to be devoted by the receiver as follows: (1) $200,000 to the construction of shops at San Antonio, Tex.; (2) $155,000 to the acquisition of passenger equipment; and (3) the balance, approximately $345,000, to the ballasting of the tracks of the defendant railroad company. On April 25, 1916, the order of the court, authorizing the issue of receiver's certificates, was modified by an additional order not necessary to set out. On April 26th the appellant, the Texas Company, which had not been heard prior to the granting of the orders recited, filed a motion in the District Court to set aside the three orders mentioned, which motion was by the District Court on April 27, 1916, heard and overruled; the appellant duly excepting.

The appellant thereupon perfected its appeals: (1) From the order of April 18, 1916, authorizing and directing the receiver to pay out of net income and earnings in the hands of the receiver on or before May 1, 1916, the interest due on the first mortgage bonds on that date, amounting to $338,715; (2) from the order of April 18, 1916, as modified by the order of April 29th, authorizing the issuance of receiver's certificates to the amount of $1,400,000, so far as the same decreed and constituted that such certificates be secured by lien upon the net earnings and income resulting from the conduct of the business by the receiver in the operation of the railroad and other property; and (3) from the order of April 27, 1916, refusing to set aside the two orders of April 18, 1916, hereinabove mentioned, and refusing to grant appellant an injunction against such appropriation of earnings of the receivership. No complaint is now made by appellant based on payments of first mortgage interest made before May 1, 1916, nor on the issue of the $700,000 of receiver's certificates, which were to be issued to take up a prior issue in equal amount. This constitutes the subject-matter of the appeal in 2932.

Statement as to 2924.

On May 4, 1915, the appellant, the Texas Company, which was the intervener in the foreclosure suit, in which the orders were made from which an appeal was taken by it in 2932, filed its bill of complaint on the equity side of the District Court of the United States for the Southern District of Texas, making the defendant in the foreclosure suit a defendant and joining with it, as codefendants, the Central Trust Company, the plaintiff in the foreclosure suit, the receivers appointed in that suit, and the Equitable Trust Company of New York, which was the trustee under the trust deed securing the first mortgage bonds of the defendant railroad company. The bill recites the proceedings in the foreclosure suit and its intervention therein; reasserts the claim of appellant and its priority; alleges the payments of first mortgage interest and for betterments made by the receivers, the orders of the court directing such payments, and the issuance of certificates; the insolvency of defendant railroad company; the difficulty of intervener's obtaining full re-

lief in the foreclosure suit, in the absence of the defendant the Equitable Trust Company of New York, which was not a party to that suit, but was made a party defendant in the last suit—and prayed (1) that the defendants be enjoined from making further applications of funds coming into the hands of the receivers as earnings, or from pledging the earnings of said railroad to the payment of interest on bonds, or for betterments, or to the payment of taxes; (2) requiring the receivers to show all payments made by them for interest on prior mortgages, betterments, equipment, taxes, or other similar purposes; (3) that plaintiff's claim be adjudicated on final hearing for its full amount, with interest, and to have a preference or priority of payment over all mortgage bonds and other claims, as to the earnings of said receivership and as to the corpus of the property itself, and for the foreclosure of said lien or priority and the sale of the property to that end, and the application of the proceeds to the payment of plaintiff's claim.

The defendants, including the Equitable Trust Company of New York, appeared and answered the bill of complaint. On November 23, 1915, a motion was made by the plaintiff to consolidate the cause with the pending foreclosure suit. No further action was taken in the cause until April 27, 1916, when the plaintiff filed an application for a temporary injunction, restraining the enforcement and further compliance with the orders of the District Court made on April 18, 1916, as modified by the order of April 25, 1916, and restraining the receiver from making any further application of funds in his hands, or that might come into his hands as earnings of the railroad company, to the payment of interest on bonds, or for betterments, or to the payment of taxes, until the claim of the plaintiff, together with interest, was paid in full. The defendants replied to this application of the plaintiff. On April 27, 1916, the District Court entered an order denying the application for the injunction prayed for, and the plaintiff duly excepted thereto. The plaintiff within 30 days appealed from the order denying the injunction, and here assigns error in cause 2924, based upon that order.

Robert A. John, of Houston, Tex., and Amos L. Beaty, of New York City, for appellant.

Wilson, Dabney & King, of Houston, Tex., for appellees International & G. N. Ry. Co. and its receiver.

Albert Rathbone, of New York City, and Jesse Andrews, of Houston, Tex. (Joline, Larkin & Rathbone and Murray, Prentice & Howland, all of New York City, and Baker, Botts, Parker & Garwood, of Houston, Tex., on the brief), for appellees Central Trust Co. of New York and Equitable Trust Co. of New York.

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

GRUBB, District Judge (after stating the facts as above). As stated, the questions presented by the appeal in case 2932, so far as they appertain to the substantive rights of the parties, are identical with those involved in the appeal in cause 2924. The differences relate entirely to the remedies by which the rights asserted are to be worked out. For this reason, the two causes can be well considered in one opinion.

The two general and controlling questions presented by the record in each of the cases, so far as they relate to the substantive rights of the parties to the litigation, are: (1) Whether supply claimants have a priority in payment over the holders of bonds, secured by a mortgage on the corpus and income of a railroad executed before the supplies were furnished, for supplies furnished to a railroad company during a period of six months before the appointment of a receiver for the railroad property, the receiver having been appointed in a pro-

ceeding to foreclose the prior mortgage, out of the net income arising out of the operation of the railroad property by the receiver, as well as from the net income derived from the operation of the railroad property by the railroad company before it was dispossessed of the property by the receivership; and (2) if such priority exists, whether and under what circumstances the court administering the railroad property has the authority, through its receiver, to divert the net earnings of the receivership to the payment of interest on bonds secured by a prior mortgage to that sought to be foreclosed, to prevent a default, or for betterments of the property, and thereby postpone the payment of supply claims until the sale of the mortgaged property under foreclosure decree, and remit the supply claimants for payment to the proceeds of the sale of the corpus of the property.

[1] 1. In this case the appellant does not rely for its asserted priority upon a diversion of the surplus earnings accruing before the receivership for the benefit of the bondholders, thereby leaving supply claims unprovided for. Its priority is claimed to be upon the net earnings of the receivership only, and upon the idea that the priority applies as well to the net earnings of the receivership as to those of the railroad company before the receivers were appointed, and in the absence of any showing of previous diversions. It is conceded by the appellees that a priority in favor of claims for supplies furnished a railroad company to keep it a going concern, within six months before a receivership of the railroad, exists upon the net income of the railroad company arising out of its operation prior to the placing of it in the charge of a receiver. The contention of the appellees is that no such priority extends in favor of such claims to the net income of the receiver derived from the operation of the property by him after his appointment by the court, where there have been no previous diversions. The argument of appellees is that, where the net income from operation is made a part of the security of the mortgage by its terms, it becomes impounded when a receiver in the interest of the bondholders takes possession of and operates the railroad from which the income is derived, as against all claimants, and thereafter for that reason becomes inapplicable to supply or any class of claims other than those secured by the mortgage. As against this contention, the appellant's position is that current supply claims have a priority in equity over prior mortgages for payment out of net earnings, not only those of the mortgagor company earned before the receivership, but also out of the net earnings of the receivership itself, which it is the duty of the court administering the property to respect; i. e., that the priority extends to the continuing income of the railroad property both before and after the receivership.

In order to consider intelligently these contentions, it is necessary to determine the reason assigned by the courts for the allowance of the priority at all. In the case of Fosdick v. Schall, 99 U. S. 235–252, 25 L. Ed. 339, the Supreme Court said:

"The business of all railroad companies is done to a greater or less extent on credit. This credit is longer or shorter, as the necessities of the case require; and when companies become pecuniarily embarrassed, it frequently happens that debts for labor, supplies, equipment, and improvements are per-

mitted to accumulate, in order that bonded interest may be paid, and a disastrous foreclosure postponed, if not altogether avoided. In this way the daily and monthly earnings, which ordinarily should go to pay the daily and monthly expenses, are kept from those to whom in equity they belong, and used to pay the mortgage debt. The income out of which the mortgagee is to be paid is the net income obtained by deducting from the gross earnings what is required for necessary operating and managing expenses, proper equipment, and useful improvements. Every railroad mortgagee, in accepting his security, impliedly agrees that the current debts made in the ordinary course of business shall be paid from the current receipts before he has any claim upon the income. If for the convenience of the moment something is taken from what may not improperly be called the current debt fund, and put into that which belongs to the mortgage creditors, it certainly is not inequitable for the court, when asked by the mortgagees to take possession of the future income and hold it for their benefit, to require as a condition of such an order that what is due from the earnings to the current debt fund shall be paid by the court from the future current receipts before anything derived from that source goes to the mortgagees. In this way the court will only do what, if a receiver should not be appointed, the company ought itself to do. For, even though the mortgage may in terms give a lien upon profits and income, until possession of the mortgaged premises is actually taken, or something equivalent done, the whole earnings belong the the company and are subject to its control."

That is the original statement of the doctrine and the reason for it. The bondholder, even though his mortgage covers income, has only the right to look for his security to the surplus earnings after payment of the expenses necessary to produce them. The equity of paying the current expenses, essential to produce, and which did in fact produce, the income claimed by the mortgagee, before paying the mortgagee, is certain. The priority of the supply claims extends primarily only to the income from operation. It has no claim upon the corpus, except in case of diversion of earnings to the benefit of the bondholders, when the supply claimant is permitted to resort to the corpus to replace what has been wrongfully diverted from earnings. The claim of the supply creditor on income is, however, primary, and requires no showing of diversion to sustain it. It is only necessary to show that the supplies that were furnished contributed to the creation of the current income, that it is looked to by the creditor, and that there was income in fact received by the railroad company equal in amount to what it currently cost to operate the railroad. There can be no net income until the current expense claims have first been deducted from the receipts of operation, and, as the security of the mortgagee is limited to net income, it follows that it has no equitable claim upon the receipts of operation until the supply creditors, who have contributed to the creation of such receipts, have been paid in full out of them. The equity of the rule lies in the manifest justice of paying those whose labor or material went to create the income which the mortgagee claims as part of his security, before the mortgagee receives it in payment of his debt. If the current expense could be specifically traced to the current income it creates, the application of the rule would be easy and definite. The impossibility of tracing each dollar of expense into the corresponding dollar of income created by it has made it necesssary for the courts to fix an arbitrary period beyond which it will not be presumed that labor and material furnished the railroad will continue to produce income.

This accounts for the arbitrary period of six months fixed by rule of court. It depends upon the assumption that the period over which labor and supplies used by a railroad will continue to contribute to its earnings is a period of not exceeding six months. Under this rule, if a railroad ceased to be operated, upon the appointment of a receiver, supplies and labor, furnished at any time within six months prior thereto, would share in earnings up to the time the receiver was appointed. If operations are continued by the receiver, it would seem proper to assume that labor and supplies furnished the railroad company, during at least some period prior to the receivership, would continue to contribute to create earnings under the receivership; for it is clear that, if the company's operations had not been interrupted by a receivership, such labor and supplies would have entered into future earnings as a creating factor. If the mortgagee is permitted to subject the entire surplus earnings of the receivership to his security, to the exclusion of labor and supply claimants, who furnished the railroad labor and material prior to the receivership, he would be receiving, in part at least, "that which in equity belongs to the whole or a part of the general creditors." He would be receiving as net income what would not be properly net income; the claims of the labor and supply creditors who contributed to its creation not having been deducted from it. He would in that event receive the benefit of the earnings of the receivership, without paying the incidental burden of the expense by which they were created. If there had been no receivership, the supply creditors would receive payment, from the railroad company, out of the same earnings that went to the receiver after his appointment. It is inequitable that the mortgagee should profit in this respect at the expense of supply and labor claimants, through the placing of the mortgaged property in the hands of a receiver. The bondholders also profit by receiving the earnings of the railroad company on hand when the receiver was appointed, as well as earnings earned before the receivership and subsequently collected by the receiver, all of which would have gone to the supply and labor claimants, but for the interruption of the company's operation by the receivership.

The impossibility of tracing the exact extent of the effect of expenditure into the future income of the receivership is no more an argument against the allowance of the priority, or against its equity, than is the same uncertainty with reference to the extent of the effect of expenditure on income before the receivership an argument against the conceded priority of supply and labor creditors as against the income of the company earned before the receivership. It prevailed as to the latter only to limit the time before which the furnishing of supplies or the performance of labor would not entitle the creditor to a priority to six months. If it is to have any effect on the priority of such creditors as against the income of the receivership, it should only be to fix the time after which no priority should be allowed upon the receiver's earnings, and not to deny the priority altogether.

It seems equitable, therefore, that the priority should extend as well to the income of the receivership as to that of the company prior

thereto. We also think that authority as well as reason supports this rule. Indeed, but for the earnest contention of the appellees to the contrary, we would have considered the question so finally settled by the former decisions of the Supreme Court as to pretermit discussion. The appellees contend that the expression of the rule in the opinions of the Supreme Court in the former cases was obiter, and should be reconsidered by us, and that subsequent cases, cited on appellees' briefs, support the correctness of their position. A re-examination of the cases has failed to convince us, either that the question was not settled by the former decisions of the Supreme Court, or that the later cases relied upon by the appellees are in conflict with the rule as laid down in the former cases. A brief reference to the decided cases is necessary to present our views.

We think the case of Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, is decisive of the question. In that case the mortgage covered "all the revenues and income," as well as the corpus. Prior to the receivership there had been no diversion of earnings, either "to pay mortgage interest or to put permanent improvements on the property, or to increase the equipment," and there was no net income that came into the hands of the receiver, upon his appointment, from prior operations. There had been diversions from the earnings of the receivership to pay for right of way. The Circuit Court had decreed that the amount diverted from the income of the receivers for the benefit of the bondholders should be restored from the proceeds of the corpus, to pay a creditor who had furnished supplies to the railroad company before the receivership. The Supreme Court sustained the decree. This could only have been upon the theory that the supply creditor had a priority upon the income of the receivership, as against the right of the bondholder to have such income devoted to the payment of interest or for betterments. The resort to the income of the receivership was not permitted for the purpose of replacing what had been wrongfully taken, and for the benefit of the bondholders, from the income of the company earned before the receivership. There was no such diversion, and there was no such income. Resort to the corpus was permitted because, and only because, the income of the receivership had been diverted from the use of the supply creditor to that of the mortgage bondholder. The priority of the supply creditor was therefore necessarily held by the Supreme Court to extend to the income of the receivership, in order for it to have sustained the decree of the Circuit Court. The language of the Supreme Court admits of no other construction than that the priority extends as well to the income of the receivership as to that of the company itself. The court said (111 U. S. 781, 782, 4 Sup. Ct. 677, 28 L. Ed. 596):

"In the present case, as we have seen, the debt of Bowen was for current expenses and payable out of current earnings. It does not appear from anything in the case that there was any other liability on account of current expenses unprovided for when the receiver took possession, and there is nothing whatever to indicate that this debt would not have been paid at maturity from the earnings, if the court had not interfered at the instance of the trustees for the protection of the mortgage creditors. It is said, however, that as no part of the income, before the appointment of the receiver, was used to pay

mortgage interest, or to put permanent improvements on the property, or to increase the equipment, there was no such diversion of the funds belonging in equity to the labor and supply creditors as to make it proper to use the income of the receivership to pay them. The debt due Bowen was incurred to keep the road running, and thus preserve the security of the bond creditors. If the trustees had taken possession under the mortgage, they would have been subjected to similar expenses to do what the company, with their consent and approbation, was doing for them. There is nothing to show that the receiver was appointed because of any misappropriation of the earnings by the company. On the contrary, it is probable, from the fact that the large judgment for the right of way was obtained about the same time the receiver was appointed, that the change of possession was effected to avoid anticipated embarrassments from that cause. But, however that may be, there certainly is no complaint of a diversion by the company of the current earnings from the payment of the current expenses. So far as anything appears on the record, the failure of the company to pay the debt to Bowen was due alone to the fact that the expenses of running the road and preserving the security of the bondholders were greater than the receipts from the business. Under these circumstances, we think the debt was a charge in equity on the continuing income, as well that which came into the hands of the court after the receiver was appointed as that before. When, therefore, the court took the earnings of the receivership and applied them to the payment of the fixed charges on the railroad structures, thus increasing the security of the bondholders at the expense of the labor and supply creditors, there was such a diversion of what is denominated in Fosdick v. Schall the 'current debt fund' as to make it proper to require the mortgagees to pay it back. So far as current expense creditors are concerned, the court should use the income of the receivership in the way the company would have been bound in equity and good conscience to use it, if no change in the possession had been made. This rule is in strict accordance with the decision in Fosdick v. Schall, which we see no reason to modify in any particular."

It is said, however, that the rule was limited to cases in which the trustee under the mortgage had delayed to take possession after default, and so made the company expend money to keep the railroad a going concern, which the bondholders would have had to expend, had they acted promptly. It is true that the delay of the bondholders is recited by the court, as one of many circumstances giving equity to the priority. The language of the court forbids the idea that it was intended to ground the equity upon the laches of the bondholders or to exclude all cases from the rule except those where such delay had intervened. The equity is stated by the court to rest upon the duty of the court, through its receiver, to do what the company would have done:

"That is to say, pay out of what it receives from earnings all the debts which in equity and good conscience, considering the character of the business, are chargeable upon such earnings. In other words, what may properly be termed the debts of the income should be paid from the income, before it is applied in any way to the use of the mortgagees."

This states the ground for the priority, as was done in Fosdick v. Schall, supra. While other circumstances may in individual cases strengthen the equity of the rule, they are unessential to its application.

In the case of V. & A. Coal Co. v. Central R. R., etc., Co., 170 U. S. 355–368, 18 Sup. Ct. 657, 662 (42 L. Ed. 1068), the Supreme Court, referring to the doctrine originated in Fosdick v. Schall, said:

"The dominant feature of the doctrine, as applied in Burnham v. Bowen, is that where expenditures have been made which were essentially necessary to enable the road to be operated as a continuing business, and it was the expectation of the creditors that the indebtedness created would be paid out of current earnings of the company, a superior equity arises in favor of the materialman as against the mortgage bonds in the income arising both before and after the appointment of the receiver from the operation of the property."

And, coming to apply the rule to the facts in that case, the court said (170 U. S. 370, 18 Sup. Ct. 663, 42 L. Ed. 1068):

"The circumstance that it is uncertain, from the terms of the stipulation, whether the expenditures for betterments were made by the receivers under the stockholders' bill, or under the bill filed by the Central Company, or under the trustee's bill for foreclosure, is immaterial. Even though the mortgages securing the bonds provided for the sequestration by foreclosure of the income of the road for the benefit of the bondholders, for reasons already stated, that income until strict foreclosure or a sale of the road was charged with the prior equity of unpaid supply claimants such as those now before the court."

The court decided that the priority applied to the income of the receivership under the foreclosure bill, and that the filing of that bill did not impound the income as against the claims of those who furnished labor or supplies within the six months period. Again (170 U. S. on page 362, 18 Sup. Ct. 660, 42 L. Ed. 1068), the court, after stating that it was contended "that under the prayer for general relief the petitioners were entitled to have their demands allowed as a preferential claim against any surplus income which might arise from the operation of the Central road under the receiver, after payment of the ordinary expenses of operation, or out of the corpus of the estate or the proceeds of the sale thereof, in the event that the income had been diverted by the receivers in expenditures for betterments," said:

"Had the Central Company, through its own officers, operated its line of railway during the period when the coal in question was furnished, it cannot be doubted in the light of the decision in Burnham v. Bowen, 111 U. S. 776 [4 Sup. Ct. 675, 28 L. Ed. 596], that in the event that the company failed to make payment for such coal while a going concern, the indebtedness created upon the appointment of a receiver might properly have been allowed as a charge upon the surplus income arising during the receivership."

And again (170 U. S. on page 365, 18 Sup. Ct. 661, 42 L. Ed. 1068), the court said, after quoting from the cases of Fosdick v. Schall and Burnham v. Bowen:

"It was thus settled that where coal is purchased by a railroad company for use in operating lines of railway owned and controlled by it, in order that they may be continued as a going concern, and where it was the expectation of the parties that the coal was to be paid for out of current earnings, the indebtedness, as between the party furnishing the materials and supplies and the holders of bonds secured by mortgage upon the property, is a charge in equity on the continuing income, as well that which may come into the hands of a court after a receiver has been appointed as that before. It is immaterial in such case, in determining the right to be compensated out of the surplus earnings of the receivership, whether or not during the operation of the railroad by the company there had been a diversion of income for the benefit of the mortgage bondholders, either in payment of interest on mortgage bonds or expenditures for permanent improvements upon the property. Nor is the equity of a current supply claimant in subsequent income arising from the operation of a railroad under the direction of the court affected by the fact that while the company is operating its road its income is misappropriated

and diverted to purposes which do not inure to the benefit of the mortgage bondholders and are foreign to the beneficial maintenance, preservation, and improvement of the property."

We think the excerpts from the opinion in that case show that the Supreme Court decided in it that the priority of supply claimants attached to the continuing income of the company, as well after as before the appointment of a receiver, and regardless of whether there were diversions from such income for the benefit of the mortgagees; such diversions being necessary to the equity only when resort was to the corpus. We also think that the language of the opinion shows that the court considered the rule announced as necessary to the decision of the cause, and that it should not be treated as obiter by this court, in view of the Supreme Court's contrary holding, for any of the reasons advanced by the appellees.

Nor are the cases of Moore v. Donahoo, 217 Fed. 177, 133 C. C. A. 171, C. & A. R. R. Co. v. United States & Mexican Trust Co., 225 Fed. 940, 141 C. C. A. 64, Martin Metal Mfg. Co. v. United States & Mexican Trust Co., 225 Fed. 961, 141 C. C. A. 85, or Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, in conflict with this rule. In all of those cases, the supply creditor sought to resort to the corpus, and it was held that he could only do so by first showing a diversion from current earnings for the benefit of the mortgagees. These cases hold that resort to the corpus can only be had to restore diversion from earnings on which alone the supply creditor had a preference, and so, if there had been no diversion from earnings, there should be no restoration from the corpus. There was no holding in any of them that such a showing was necessary where the resort was to the income of the receiver, as distinguished from the corpus. In the case of Gregg v. Metropolitan Trust Co., the Supreme Court, thus distinguished the two classes of cases (197 U. S. 187, 25 Sup. Ct. 416, 49 L. Ed. 717):

"Cases like Union Trust Co. v. Souther, 107 U. S. 591 [2 Sup. Ct. 295, 27 L. Ed. 488], where the order appointing the receiver authorized him to pay debts for labor or supplies furnished within six months out of income, stand on the special theory which has been developed with regard to income, and afford no authority for a charge on the body of the fund. Fosdick v. Schall, 99 U. S. 235 [25 L. Ed. 339]; Burnham v. Bowen, 111 U. S. 776 [4 Sup. Ct. 675, 28 L. Ed. 596]; Morgan's L. & Texas R. R. & Steamship Co. v. Texas Central Ry., 137 U. S. 171 [11 Sup. Ct. 61, 34 L. Ed. 625]; Va. & Ala. Coal Co. v. Central R. R. & Banking Co., 170 U. S. 355 [18 Sup. Ct. 657, 42 L. Ed. 1068]; Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257 [20 Sup. Ct. 347, 44 L. Ed. 458]. It is agreed that the petitioner may have a claim against surplus earnings, if any, in the hands of the receiver, but that question is not before us here."

We conclude that the appellant as a supply creditor was entitled to a preference upon the net income of the receivership before any of it was paid to the mortgagees or for betterments to the property. It follows that the payments made by the receivers out of income to the first mortgage bondholders for interest were diversions of the receiver's earnings, of which the supply claimants, who were entitled to priority of payment out of them, could justly complain. We also conclude that the payments made by the receivers to provide equipment, to bal-

last the road, and to furnish additional terminal facilities, were in the nature of payments for betterments, which did not merely go to preserve or operate the property, but to enhance the security of the mortgage bondholders, and so were diversions of earnings as to supply creditors who were entitled to payment out of them before the mortgage bondholders.

[2] The appellant contends that the amounts paid by the receivers out of income for taxes on the railroad property should be treated as diversions as to supply creditors, upon the idea that taxes are liens upon the corpus, while the preferential claim of supply creditors is only on net income, and that the mortgage bondholders, whose first lien is on the corpus, should be charged with their payment, rather than the supply creditors, whose claim is confined to the net income, and who may resort to the corpus only in case of a diversion of income. Taxes have a preferential right of payment over the claims of mortgagees and preferred creditors of all classes, both as to the income and corpus, and their payment is necessary to the preservation and operation of the property from which the income arises. Failure to pay them might result in the loss of the property to all parties interested in it, including supply creditors, who themselves have an interest in its continued operation. It is necessary that they be paid in order that continued possession in and operation by and continued income to the receivers may result. If there were no operation, and no resulting income, the supply creditors would have no fund to resort to. It is of interest to them, therefore, that taxes be paid out of the receiver's income, in order that more income may be earned and applied to their claims. In determining whether there is net income of the receivership, we think payments for taxes should be allowed the receiver, but not payments on account of first mortgage interest or for betterments.

That the receivers in this cause, under the orders of the District Court, had made payments for account of first mortgage interest and for betterments, prior to the making of the orders appealed from, in excess of the amount of supply claims, is conceded. The appellant complains of none made for either purpose before May 1, 1916. We hold that the payments for first mortgage interest, made by the receiver May 1, 1916, and the issuance and negotiation of certificates of indebtedness for future betterments, declared to be a lien on the net income of the receiver, operated as a wrongful diversion of that income as against the supply creditors including appellant. It is clear that, if the payment for betterments out of the receiver's earnings operated as a diversion against supply creditors, the attempt to fasten a prior lien on the income of the receivership by the issuance of certificates would equally operate as a diversion.

2. The appellees contend, however, that, conceding the diversion, the appellant and other supply creditors are amply protected by the rule which remits them to the corpus, where the income has been diverted, and that in this case there is an ample equity in the corpus for that purpose. The appellees further contend that the court, in the interest of the administration of the property, is clothed with a discretion to authorize its receiver to divert current earnings of the receivership

from payment of preferred claims to that of first mortgage interest, or to provide betterments for the preservation and improvement of the property, though the payment of the claims of supply claimants may thereby be postponed until the sale of the property, and then paid out of the proceeds of the sale. That the court administering the property has a discretion as to the order and time of payment of claims from the funds in the hands of its receiver is certain. That the exercise of the discretion may be the subject of abuse, and so of review on appeal, is also certain. Whether the District Court properly exercised its discretion in authorizing its receiver to pay first mortgage interest and the cost of betterments out of current earnings, thereby postponing payment of the claims of supply creditors until the sale of the property, is the second question presented by the appeal.

[3] (1) And first as to the payment of interest on the prior mortgage: The purpose of the District Court in authorizing the payment of interest on the first mortgage bonds was to prevent a default and the premature maturing of the principal of those bonds, which would have precipitated a foreclosure of the first mortgage on the railroad. As the District Court has a discretion to direct its receiver to apply current earnings to the payment of interest on bonds secured by a prior lien, that would otherwise go to satisfy the claims of supply creditors, the question here, as to the payment of interest, is whether the circumstances justified the exercise of the court's discretion in favor of such payment. The arguments advanced in support of the exercise of the discretion of the District Court are: (a) The necessity of preventing a default upon the first mortgage; (b) that the supply claims were still in litigation, and not in a condition to be presently paid; and (c) that payment of supply claims could be made only out of net income, and the existence of net income was not determinable until the receivership was finally settled.

(a) As the first mortgage bonds might have been declared in default for nonpayment of interest, the protection of the second mortgage bondholders, represented by the plaintiff in the foreclosure suit, required that this interest be paid. That it was to the interest of the plaintiff in that suit and those represented by it that such interest be paid and a default postponed is certain. If no other conflicting interest was adversely affected, the propriety of the payment would admit of only one answer. However, the interest of the supply creditors must be considered. Their claims, if established, within the rule would be entitled to payment out of the net income of the receiver before it could be applied on any mortgage. This preference over the first mortgage made a default in that mortgage a matter of indifference to them. They were not interested in preventing such a default, or in postponing collection of their claim for that purpose. If foreclosure were had under the first mortgage, their claims would be as much entitled to a preferential payment out of the income of the receivership under that foreclosure as under the present receivership. It was a matter of no moment to the supply creditors under which mortgage the railroad was foreclosed, administered, and sold. Their right to immediate payment out of the net income of the

receivership, before any of it was applied to any mortgage, was the same, no matter which mortgage was being foreclosed.

The question is, therefore, how far it was proper for the District Court to subordinate the interest of the supply creditors to that of the second mortgage bondholders. Some latitude in the method of administration must be allowed the court, even to the detriment of the supply claimants. It must be remembered, however, that the nonpayment of the first mortgage interest would not result in the disintegration of the railroad property, or destroy its unity, or remove its administration from those having an interest in it, as would be the result of a failure to pay taxes or mechanics' or materialmen's liens on specific parts of the railroad. Nonpayment of the latter would tend both to disintegrate the property and to take it away from those interested in it. On the other hand, a failure to pay first mortgage interest would but transfer the control of the administration of the property from one class of security holders to another. To prevent a disintegration of the property, all those having an interest in it are concerned. To prevent a transfer or administration from one class of security holders to another is the concern only of the class having present control. The burden of preventing a physical disintegration of the railroad is that of all interested in it. The burden of preventing the foreclosure of a prior lien is entirely that of the subordinate lienholder to whose advantage it will result.

In the instant case, the second mortgage holders are the class interested in preventing a foreclosure of the first mortgage; the supply creditors have no such interest. The duty of financing the payment of interest on the first mortgage bonds was, therefore, that of the second mortgage bondholders, to the exclusion of the supply creditors. The only consideration the court should allow the second mortgage bondholders, as against the supply creditors in this matter, would be with a view of allowing the second mortgage bondholders a reasonable time in which to arrange to finance the payment of first mortgage interest. A single payment of first mortgage interest out of the surplus earnings of the receiver, first applicable to the payment of supply claims, might be justified. A settled policy of diverting the current earnings of the receiver to the payment of first mortgage interest, at the expense of supply creditors, and with the resulting postponement of payment to them till the sale of the property, cannot, we think, be justified. It operates to shift the burden of financing the first mortgage interest from the second mortgage bondholders, who are alone interested in accomplishing it, to the supply creditors, who have no such interest, to the disadvantage of the latter. That disadvantage is patent. The master allowed interest, but not as a preferred claim. Mere loss of interest does not, however, measure the detriment. The financial embarrassment to the supply creditors, resulting from indefinite delay in payment, in cases where the amount is large, is to be considered.

In this case the foreclosure suit was begun in August, 1914, payments of first mortgage interest were made by the receiver out of his earnings, or borrowed money, under orders of the District Court, in

November, 1914, in May, 1915, in November, 1915, and again in May, 1916. The District Judge in March, 1916, entered an order forbidding the receiver from paying any further first mortgage interest from current earnings, which was rescinded at the solicitation of the receiver in April, 1916. A decree of foreclosure and sale was obtained by the plaintiff as early as May, 1915; but no steps to enforce it had been taken up to the time the appeals had been allowed. We think, under these circumstances, the payment of first mortgage interest, which the receiver was directed to make in May, 1916, was made in pursuance of a settled policy, which subordinated the interests of the supply creditor to those of the second mortgage bondholders in the respect mentioned, and which was not justified.

(b) It is contended by appellees that the supply claims have not been established, but are still in litigation, and present payment of them is not, therefore, possible. This would be a good argument, if the complaint was that the court below had refused to direct their immediate payment. It is not an answer to a complaint that the receiver, under the order of the court, was diverting the fund out of which the supply claims should have been paid, when established, so that it would be then unavailable, and the supply creditors consequently remitted to the proceeds of the corpus after a sale of it. This is the complaint which appellant presents by its appeal.

[4] (c) It is also argued that it is not possible to determine whether there will be a net income until the receivership has been finally settled, and that any application of earnings to supply claims before final settlement would be premature for that reason. The fact that earnings had been more than once applied to first mortgage interest shows there had been a net income from operations up to the time of the allowance of the appeals. The duration of the receivership is not controlled by the supply creditors. If a net income has accrued during the 21 months of operation prior to the time the appeals were allowed, equal or in excess of the amount of the preferred claims, it would seem inequitable that loss on the subsequent operations of the receiver should defeat the application of such surplus earnings to preferred claims. The continued operation, not being at the instance of, or for the benefit of, supply creditors, should not be at their risk. Certainly, if the preference or supply creditor is to be restricted to a fixed period after the appointment of the receiver, the period for computing the net income to be devoted to supply claims should be likewise limited. In any event, the argument is not persuasive against the right of the supply creditors to prevent the diversion of earnings, then apparently applicable to their claims, to the payment of obligations inferior in priority to the supply claims. If the then net income of the receiver is not presently applicable to supply claims, it is certainly less applicable to interest on the first mortgage bonds. The appellant does not complain of the receiver's failure to presently pay its claims, but of the receiver's act in paying the first mortgage bondholders what, in equity, will in any event belong to it as against such bondholders. To this complaint it is no adequate reply that perhaps neither may be entitled to be paid out of such fund. The first in

right certainly has an equity to prevent such a diversion of earnings, until it is determined whether they will constitute a net income applicable to the payment of its claim.

The appellees rely upon the case of Lloyd v. Chesapeake, O. & S. R. Co. (C. C.) 65 Fed. 351. In that case the court found that the objection to the application of receiver's earnings to payment of interest on first mortgage bonds came from the first mortgage bondholders, who wished to precipitate a default for purposes of reorganization, and that the supply claimants were objecting, if at all, only because some of them were controlled in the interest of the first mortgage bondholders, and for the same purposes of reorganization. The court found that the only interest, under the facts in that case, that could have been injured by the payment of interest, was the second mortgage bondholders, a minority of whom, as well as the trustee under the mortgage, requested the court to order the payment. The court eliminated the objections of both the majority of the second mortgage bondholders and the supply claimants from its consideration, because it found that both these interests were controlled by, and the objections made in the interest of, two other railroads, who, through ownership of the securities and obligations of the insolvent railroad, were endeavoring to gain control of it by precipitating a default and a foreclosure under the first mortgage. Nor does it appear in that case that a settled policy of deferring the payment of supply claims out of net earnings, in order to pay interest on a prior mortgage, had been pursued. In matters of discretion, each case must be governed largely by its own facts. In this case, the objection is presented in good faith by a supply claimant, in its own interest and without ulterior motive, and a systematic course of diversion covering almost two years is shown.

[5] 2. As to diversions of earnings to provide for betterments: The District Court, by its order of April 18, 1916, authorized the issue of $1,400,000 of receiver's certificates of indebtedness, and made them, when issued, a prior lien "upon the net earnings and income resulting from the conduct of the business of said receiver." The proceeds of $700,000 of the certificates were to be devoted: (1) In the amount of $200,000, for the erection of shops at San Antonio; (2) in the amount of $155,000, for passenger equipment; and (3) the balance, of approximately $345,000, for ballasting the track of the defendant railroad company. The certificates have been issued, and are alleged by appellant to have been negotiated to the second mortgage bondholders. The appellant does not question the propriety of issuing the certificates for the purposes mentioned, and making them a lien on the corpus, ahead of the lien of the second mortgage, but does assail the order, so far as it attempts to confer a prior lien in favor of the certificate holder on the net earnings and income of the receiver. It is clear that the character of the improvements to which the proceeds were to be devoted are in no proper sense expenses of operating or preserving the property, which would be entitled to be considered as a deduction from the gross earnings of the receiver in order to arrive at his net income. If paid for directly out of the receiver's earnings, the amounts paid for such improvements would have constituted di-

versions from current earnings, of which supply creditors could have complained. The lien of supply creditors on the net income of the receiver could not be properly displaced to provide funds for the improvement of the railroad property, which would better the security of the mortgagees, whose liens on the net income of the receiver were inferior to that of the supply creditors. Creating a prior lien on the net earnings of the receivership by the issue of negotiable certificates is as much a diversion as the payment of earnings on account of improvements would be.

The appellees contend that, conceding it to have been a diversion, the supply creditors suffered no injury, since their claim on the net income so diverted would be transferred to the corpus, which was adequate for their protection. We have held that resort to the proceeds of the corpus, upon a sale of the property, is not the equivalent of a claim on current net income, in the sense that the court administering the property is at liberty to so displace the supply creditors' lien on income, on the theory that it is furnishing an equivalent security. There are doubtless occasions, in the interest of the estate, which would justify the diversion of the current earnings of the receiver to urgently needed improvements, remitting the supply creditors to the corpus. We do not think that the building of new shops, the purchasing of steel equipment for a new kind of passenger service, nor an entire rehabilitation of the roadbed to meet new traffic conditions, present such an exigency. The supply creditors have no interest other than to be paid out of net income. In no event can they be benefited by the improvements of the railroad property, except to an extent necessary to keep it in operation, so that a net income may result to the receiver. As they do not share in the reorganization, they are not benefited by the physical rehabilitation of the property. Their security, being limited to the net income of the receiver, is not enhanced by the improvement of the corpus. Diverting earnings, on which they have a primary claim, to the improvement of property, on which they have only a substituted claim, is a method of improving them out of their security without their consent. We do not think that such improvements should be made at the expense of supply claimants, even to the extent of remitting them to the corpus for their security. The cost of such improvements should be borne altogether by those who have a permanent interest in or lien upon the property to be improved. The lien of the receivers' certificates should have been limited to a lien, prior to the lien of the second mortgage bonds, upon the corpus of the mortgaged property, and, so far as it attached to the receiver's net income, subordinate to that of supply claimants.

It is contended that it is too late to change the form of the certificates, since they are negotiable, and the record does not affirmatively show that they have not passed into the hands of innocent purchasers. An inference may be drawn from it that they are held by or in the interest of the second mortgage bondholders. The defense that they are innocently held by purchasers without notice is an affirmative one, which can be presented in the District Court, if the appellees are so advised.

[6] It is contended by appellees that the orders appealed from were not final judgments or decrees, and hence that no appeal lies from them. There had been a decree of foreclosure in the case before the appeals were allowed. The appealability of supplementary orders, affecting the fund or property, entered after final decree in a foreclosure cause, was considered in the case of Farmers' Loan & Trust Co., Petitioner, 129 U. S. 206, 9 Sup. Ct. 265, 32 L. Ed. 656, and it was there held by the Supreme Court that an order of the Circuit Court, in a suit for the foreclosure of a railroad mortgage, entered after final decree, authorizing "the receiver of the mortgaged property to borrow money and issue receivers' certificates therefor, to be a first lien upon it," was "a final decree from which an appeal may be taken to this court." After deciding that the effect of the order was to give the holder of the certificate a prior lien on the mortgaged property, the Supreme Court said (129 U. S. 214, 215, 9 Sup. Ct. 266, 32 L. Ed. 656):

"If this view of the subject be correct, of which we entertain no doubt, the order is a final one. It is a decree fixing upon the property, on which the trust company now has a first lien, another lien of $120,000, and making it paramount to that. It changes the relation of that company to this property, displaces its rights as settled by a decree now pending in this court, and if that decree is affirmed it in effect modifies it, although this court may say that it should stand and be enforced. This order comes within all the elements of finality which we can imagine to belong to a decree of the Circuit Court. It establishes certain rights of the parties, to the injury, as petitioners believe, of their interests in the property."

Answering the contention that the order was discretionary, and for that reason would not support an appeal, the court said (129 U. S. 215, 9 Sup. Ct. 267, 32 L. Ed. 656):

"The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all, after the case has been removed from its jurisdiction into this court by an appeal, accompanied by a supersedeas, is itself a proper matter for review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such manner that they can have no relief, except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order."

The appealability of the order of the District Court authorizing the issue of certificates, and declaring them to be a prior lien upon the net income of the receivership, is within the letter of this decision; the order directing the payment of the first mortgage interest out of the same fund is, we think, clearly within its spirit. The effect of the latter order is the destruction of the fund on which the supply claimants have a preferred claim or lien, and the transfer of their preference or lien to the corpus or the proceeds of its sale. The supply claimants have the right to be heard as to the disposition of the fund out of which they are primarily to be paid, and a disposition of that fund, which operates to exclude their claims from participation in it, is final as to their rights. The fact that they are given a lien upon other property, or another fund, is not important, in view of their claim that

their lien cannot be so transferred without their consent. We think the two orders of April 18th, appealed from, were appealable orders.

[7] The appellees assert that the installments of first mortgage interest payable May 1, 1916, had been in fact paid by the receiver to the Equitable Trust Company, as trustee under the first mortgage, before the appeal from the order directing its payment had been perfected, and that it cannot now be restored, especially by any action of the court in a cause to which the Equitable Trust Company is not a party to the record; and this contention brings us to the consideration of the independent bill, filed by the Texas Company, and the order made in it by the District Court, denying the temporary injunction prayed for by the plaintiff, which is the subject-matter of the appeal in cause numbered 2924. To this bill the Equitable Trust Company was a party, and appeared and answered in the District Court. The absence of the Equitable Trust Company as a party in the foreclosure suit, as a barrier to an order directing restoration, is therefore unimportant, if restoration should have been ordered in the former suit.

The equity of the independent bill is asserted upon these grounds: First, that restoration of the first mortgage interest paid the Equitable Trust Company May 1, 1916, can only be ordered in a suit in which the Equitable Trust Company was a proper party, and that it was not a proper party to the pending foreclosure suit; second, that the supply claimants were entitled to an order restraining future diversions, as well as those covered by the orders in the foreclosure suit appealed from; third, that the beneficiary of the diversions was a necessary party to any suit asking that they be restrained, and the Equitable Trust Company was the beneficiary; fourth, that the diversion of income of the receivership to the benefit of the first mortgage bondholders, by payments of interest and for betterments which enhanced their security, remitted the supply claimants to a lien on the corpus, ahead of all mortgages, and that the protection of the supply claimants may require a sale for the satisfaction of their claims, free from the lien of all mortgages, which could only be obtained in a suit to which all mortgagees were parties, which was not true of the foreclosure suit.

The second and third grounds are not well founded. The rights of supply creditors as to future diversions of the net income of the receivership to first mortgage interest can be amply protected in the foreclosure suit, by orders forbidding such future diversions, applied for therein. Nor is the trustee under the first mortgage a necessary party to the relief. It has no claim on the net income of the receiver in the pending suit until the supply claims have been satisfied from it. The lien of the first mortgage has not yet attached to the income of the receiver, and will not until it has been impounded by a receivership in the interest of the first mortgage bondholders.

The first and fourth grounds give the bill equity. The right of the supply claimants to a lien on the corpus, ahead of that of the first mortgage, upon a showing that the earnings of the receiver have been diverted to the benefit of the first mortgage bondholders in payment of interest and for betterments, is established. A bill to satisfy such

claims by the sale of the mortgaged railroad, to which all mortgagees were made parties, would contain equity. The intervention of the supply creditors in the foreclosure proceedings under the second mortgage would afford an adequate remedy to them, only if the equity in the property over the first mortgage was ample to satisfy the supply creditors. The record indicates that there is such an equity in this case. However, there is at least a theoretical equity in the independent bill upon this ground. If no other reason for its filing existed, it might be held unnecessary and vexatious.

However, it appears that the first mortgage interest due May 1, 1916, has been paid by the receiver to the Equitable Trust Company, as trustee under the first mortgage, and has been by it passed to its coupon account. From this we infer that the amount so paid has not been distributed to the first mortgage bondholders, but is still in the possession and control of the trust company. We have held that it was wrongfully paid by the receiver to the trust company, and should therefore be restored to the receiver, unless it has been disbursed to the bondholders, and passed beyond the control of the trust company. No order of restoration can be made in the pending foreclosure suit, to which the trustee under the first mortgage is not a party. The independent bill, therefore, has a practical purpose to justify its existence, as well as a theoretical equity. Whether or not the interest installment of May 1, 1916, has so far passed beyond the control of the trust company as that its restitution to the receiver cannot be equitably compelled, can better be determined in the District Court.

It is contended that the prayer of the application for the temporary injunction, which was denied in the District Court, was not broad enough to entitle the plaintiff to a restoration; but the writ was not denied in the court below for that reason, and the supposed defect in the prayer can be remedied, if necessary, in the District Court, when the cause is returned there. The District Court, in its discretion, may also consolidate the two pending causes, when the reason for their continued separate existence ceases.

In cause numbered 2932, the orders appealed from are reversed, with directions to enter an order setting aside the order directing the payment of the first mortgage interest, which fell due May 1, 1916, and to modify the order authorizing the issue of certificates of indebtedness, by subordinating the lien of $700,000 of such certificates of indebtedness, authorized to be issued by the receiver for betterments, so far as it attaches to the net income of the receiver, to the claims of such supply creditors as have or may establish a priority to it. The method of accomplishing this may be left to the District Court, as it will depend upon the status as to the ownership of the certificates.

In cause numbered 2924, the order denying the temporary injunction is reversed, and the cause remanded, with directions to enter an order, in the District Court, enjoining the defendant the Equitable Trust Company to restore to the receiver the amount paid to it by the receiver for interest due on the first mortgage bonds on May 1, 1916, if such sum has been paid to it and is still in its possession or

control, and from receiving such payment if it has not been theretofore made by the receiver.

And to proceed in each cause in further conformity with this opinion.

HEINZ v. NATIONAL BANK OF COMMERCE IN ST. LOUIS et al.

(Circuit Court of Appeals, Eighth Circuit. September 4, 1916.)

No. 4531.

1. CORPORATIONS ⊕=211(4)—SUIT BY STOCKHOLDERS—CONDITIONS PRECEDENT.
Complainant, who was the owner of a fraction of 1 per cent. of the stock of a national bank, brought suit against the bank and a former president to set aside an agreement between the directors and such officer under which, on his resignation, he was paid a sum in cash in settlement of his claim to participation in a pension fund established by resolution of the stockholders. Complainant alleged a request to the directors to bring suit to recover the money, and their refusal, and that the suit was not collusive, but did not allege any application to the stockholders, although there had been a meeting since the transaction. There was no allegation of fraud, nor that the directors owned a controlling stock interest, nor that they had any interest adverse to that of the corporation or the other stockholders. *Held*, that complainant did not show compliance with the requirements of equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv) to entitle him to maintain the suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 817; Dec. Dig. ⊕=211(4).]

2. CORPORATIONS ⊕=389—IMPLIED POWERS—JUDGMENT OF DIRECTORS AND STOCKHOLDERS.
In determining whether an act of a corporation is within its implied or incidental powers, the judgment of the directors and stockholders, while not conclusive, is entitled to consideration.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1568–1571; Dec. Dig. ⊕=389.]

3. BANKS AND BANKING ⊕=260(1)—NATIONAL BANKS—IMPLIED POWERS.
The stockholders of a national bank have the incidental power to create a pension fund to be shared by officers and employés.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 977, 978, 986½–990; Dec. Dig. ⊕=260(1).]

4. CORPORATIONS ⊕=389—POWERS—PRESUMPTION.
Acts of a corporation are presumed, in the absence of evidence to the contrary, to be within either the express or implied powers of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1568–1571; Dec. Dig. ⊕=389.]

5. CONTRACTS ⊕=54(1)—CONSIDERATION.
A contract by the directors of a national bank to pay a retiring president a sum of money in part consideration of his waiver of participation in a pension fund created by the bank in which he had the right to share *held* not without consideration.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 233; Dec. Dig. ⊕=54(1).]

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6. CONTRACTS ⊂=117(2)—LEGALITY—CONTRACTS IN RESTRAINT OF TRADE.
An agreement by the retiring president of a bank not to enter into the employment of any other bank or trust company in the same city for a term of less than a year is not invalid as against public policy.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 555, 556, 568; Dec. Dig. ⊂=117(2).]

Appeal from the District Court of the United States for the Eastern District of Missouri; Jacob Trieber, Judge.

Suit in equity by Charles G. Heinz against the National Bank of Commerce in St. Louis and others. Decree for defendants, and complainant appeals. Affirmed.

Dorsey A. Jamison and Shepard Barclay, both of St. Louis, Mo. (Jamison & Thomas and Barclay, Orthwein & Wallace, all of St. Louis, Mo., on the brief), for appellant.

H. S. Priest, of St. Louis, Mo. (Boyle & Priest, William E. Baird, and George T. Priest, all of St. Louis, Mo., on the brief), for appellees.

Before SANBORN, Circuit Judge, and REED and BOOTH, District Judges.

BOOTH, District Judge. Suit in equity by a stockholder of the defendant bank, a corporation organized under the national banking laws, to compel the defendant B. F. Edwards to refund to the bank the sum of $50,000, which the plaintiff alleges was paid to him by order of the board of directors, gratuitously and without consideration. The trial court, upon the hearing, dismissed the suit for want of equity. The following facts appear from the record:

That the defendant bank is a corporation engaged in the banking business at St. Louis, Mo., and organized under the National Banking Act; that the plaintiff Heinz is a resident of the state of Illinois, and a stockholder in said bank; that on the 24th of April 1913, the defendant B. F. Edwards was president of said bank, and had been an officer of said bank, or connected therewith as an employé, for more than 25 years, and was drawing a salary in the year 1913 of $25,000 a year, and for several years prior thereto had drawn the same or a larger salary. On April 24, 1913, the following instrument was executed by Mr. Edwards:

"St. Louis, April 24, 1913.

"In consideration of the payment of the sum of fifty thousand dollars ($50,000), this day made to B. F. Edwards by the National Bank of Commerce in St. Louis, he hereby waives participation in the pension fund, salary for the remainder of the year, and all other claims against said bank, and agrees not to enter the employ or engage in the business of any St. Louis bank or trust company, nor use his influence in behalf of any other bank or trust company, prior to December 31, 1913. [Signed] B. F. Edwards."

This instrument was approved on the last-mentioned date by a resolution of the board of directors of the bank, and the money paid to Mr. Edwards. On said date Mr. Edwards resigned from the bank, and thereafter and during the remainder of that year did not enter into the employ or engage in the business of any St. Louis bank or trust company.

In the year 1900 the board of directors of said bank, pursuant to a resolution of the stockholders, established a pension fund for the officers and employés of the bank, the rules and regulations concerning which were by the resolution of the stockholders, to be enacted from time to time by the board of directors. Pursuant to said vote of the stockholders, the board of directors thereafter adopted certain rules and regulations in reference to said pension fund, and among others the following:

"(a) If the employment has been continuous for five years, then during the period of disability the pensioner shall be paid monthly 10 per cent. of the average monthly salary received by him during said 5 years of service. If the time of employment has been over 5 years, then 2 per cent. shall be added for each full year of employment until 25 years or more is reached, when the pensioner shall be paid monthly 50 per cent. of the average monthly salary received by him during said entire term of service; but no pension shall monthly exceed 50 per cent. of the average monthly salary for the whole time of service.

"(b) No officer or employé, whose connection with the bank is severed before the expiration of 25 years of continuous service, for any reason other than physical disability, shall receive any benefit from the fund.

"(c) Officers and employés severing their connection with the bank after 25 years or more of continuous service for any reason whatever, other than neglect of duty, shall receive pensions as above provided, such pensions, however to cease if the beneficiary accepts a position in any other bank or trust company."

It is claimed, upon behalf of the appellant, that the instrument above set forth, signed by Mr. Edwards, approved by the board of directors, and purporting to be a contract, was ultra vires the bank, that it was without consideration and that the payment of the money thereunder to Mr. Edwards was a mere gratuity. It is claimed on the part of the appellees that the contract was not ultra vires the bank, and that it was upon a good and valuable consideration. It is further claimed by the appellees that the plaintiff cannot maintain the present suit, because he has not shown compliance with equity rule No. 27 (198 Fed. xxv, 115 C. C. A. xxv), which reads as follows:

"Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action, or the reasons for not making such effort."

Two questions present themselves for consideration: First, whether the plaintiff can maintain the present suit; second, whether there was any consideration for the payment by the bank to Edwards of the $50,000 in question.

[1] Equity rule No. 27 is the same as former equity rule No. 94, with the following clause added to the original rule: "Or the reasons for not making such effort." The reason for the rule was twofold.

In Del. & Hudson Ry. v. Railway Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, the court said:

"The purpose of rule No. 94 hardly needs explanation. It is intended to secure the federal courts from imposition upon their jurisdiction and recognizes the right of the corporate directory to corporate control; in other words, to make the corporation paramount, even when its rights are to be protected or sought through litigation. Cases in this court have indicated such right. But the directory may be derelict and the interests of the stockholders put in peril, and a case hence arises in which the right of protecting the corporation accrues to them. Rule 94 expresses primarily the conditions which must precede the exercise of such right, but emergencies may arise in which the antagonism between the directory and the corporate interest may be unmistakable, and the requirements of the rule may be dispensed with, or, it is more accurate to say, do not apply."

In Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827, four classes of cases are given in which, under certain circumstances, a stockholder in a corporation may sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself and in which the corporation itself is the appropriate plaintiff. Those classes are: (1) Actions, or threatened actions, by directors beyond the authority conferred upon them by their charter, or other sources of organization. (2) Fraudulent transactions by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury. (3) Where the board of directors are acting for their own interests in a manner destructive of the corporation itself, or of its stockholders. (4) Where a majority of the stockholders are oppressively and illegally pursuing a course in the name of the corporation, in violation of the rights of the other stockholders. The court in its opinion said (104 U. S. 460, 26 L. Ed. 827):

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law, and that the suit is not a collusive one to confer on a court of the United States jurisdiction in a case of which it could otherwise have no cognizance, should be in the bill, which should be verified by affidavit."

Hawes v. Oakland was a case where a stockholder in a corporation filed a bill, on behalf of himself and other stockholders, to prevent a water company from furnishing water to the city of Oakland free of charge for all municipal purposes. He alleged that he had re-

quested the board of directors to desist from such practice, and that said board had declined to take any proceedings in the premises. The court held that he had not taken the steps necessary to enable him to maintain the suit in his own name. The rule laid down in Hawes v. Oakland was the foundation of equity rule 94, now new equity rule 27, and has been recognized and followed in many cases.

As illustrative of the cases where the rule has been held to apply, and the plaintiff upon the record not shown to be entitled to maintain the suit in his own name, are the following:

Huntington v. Palmer, 104 U. S. 482, 26 L. Ed. 833. Suit to restrain a railway company from paying certain taxes alleged to be illegal. The bill alleged that the plaintiff had called the attention of the board of directors to the matter, and that they refused to act. There was no allegation of fraud or bad faith on the part of the directors. The court said:

"There is no averment of any effort to invoke the control of the body of the stockholders, or any reason why it was not done. Nor is it made to appear that a single stockholder was consulted by the complainant, or has any wish to contest the payment of these taxes with the state authorities."

The rule laid down in Hawes v. Oakland was held to apply.

Detroit v. Dean, 106 U. S. 537, 1 Sup. Ct. 500, 27 L. Ed. 300, was a case brought by a stockholder to restrain the enforcement of a city ordinance. Plaintiff was himself a director. The evidence in the record showed a desire on the part of the officers to bring the action in the federal court, and that the refusal of the directors, which was alleged, was a pretense. The rule was applied.

Taylor v. Holmes, 127 U. S. 489, 8 Sup. Ct. 1192, 32 L. Ed. 179, was a suit by a stockholder of a corporation whose term of existence had expired, to have corrected a deed of land. One director only was living. It was alleged that he had by his acts rendered himself incompetent to act. No request had been made to him, and no effort to have action by the stockholders. The rule was applied.

Dimpfel v. Railway Co., 110 U. S. 209, 3 Sup. Ct. 573, 28 L. Ed. 121. Action by two stockholders to have certain bonds issued by defendant company declared void, and ultra vires the company. No demand appeared to have been made upon the directors, and no appeal to the stockholders. The rule was applied.

Corbus v. Gold Mining Co., 187 U. S. 463, 23 Sup. Ct. 160, 47 L. Ed. 256, was a suit by a stockholder to restrain the company from paying a license tax. Failure to request the directors to refuse to pay was excused on account of their distance from the place where plaintiff was. The rule was applied, and the court said in its decision:

"It must not be understood that a mere technical compliance with the foregoing rule is sufficient, and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety, and determine whether, under all the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interests of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder, or at his instance submitted for review to a court of equity.

The directors may sometimes properly waive a legal right vested in the corporation, in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right, or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon, at the appeal of any single stockholder, to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs."

Wathen v. Jackson Oil Co., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395. Suit to restrain compliance with a statute alleged to be unconstitutional. It was alleged that the directors desired to disobey the statute, but dared not on account of the penalties. It was alleged that the suit was not collusive. Held not sufficient, and the rule was applied.

On the other hand, Greenwood v. Freight Co., 105 U. S. 13, 16 (26 L. Ed. 961), was a suit to restrain the enforcement of a law which in effect annihilated a corporation, and transferred its property. Plaintiff alleged that he had requested the directors of his corporation to take steps to assert its rights, and that they had refused to do so. Bill set out the resolution of the board of directors, giving its reasons. The court said:

"It is sufficient to say that this bill presents so strong a case of the total destruction of the corporate existence, and of the annihilation of all corporate powers under the act of 1872, that we think complainant as a stockholder comes within the rule laid down in that opinion, and which authorizes a shareholder to maintain a suit to prevent such a disaster, where the corporation peremptorily refuses to move in the matter."

Doctor v. Harrington, 196 U. S. 579, 25 Sup. Ct. 355, 49 L. Ed. 606, was a suit by a stockholder to set aside a judgment against the corporation and a levy and sale thereunder, in favor of Harrington. It was alleged that Harrington controlled the action of the stockholders, and declined to give plaintiff any redress, or give him an opportunity to lay before the board of directors or stockholders the matters complained of. This was held sufficient within the rule.

In the case of Del. & Hudson Ry. v. Railway Co., 213 U. S. 435, 29 Sup. Ct. 540, 53 L. Ed. 862, where a stockholder of a lessor corporation sued for its benefit the lessee, and it was shown that the directors of the two corporations were also identical, and that the lessee corporation owned or controlled the voting power of sufficient stock of the lessor corporation to control its action, it was held that this was sufficient, without demand for relief upon the board of directors, and without effort to obtain relief at a stockholders' meeting.

Howard v. National Telephone Co. (C. C.) 182 Fed. 215. Suit by stockholder. Plaintiff alleged that the directors could not take the action desired, and that a majority of the stock was antagonistic in interest. Held sufficient.

Corey v. Independent Ice Co. (D. C.) 207 Fed. 459. Action for damages under the Sherman Act. Record showed demand on the directors, and that such relationship existed between the plaintiff

and the other stockholders that effort through them would be useless. Held that it showed sufficient compliance with the rule.

Hyams v. Cal. & Hecla Mining Co., 221 Fed. 529, 137 C. C. A. 239. Bill by stockholder in two corporations to prevent consolidation with a third, as contrary to the federal and state Anti-Trust Acts. Record showed that the suit, if successful, would be against the interests of the directors in the two companies, in which plaintiff was a stockholder; also that the third company held control of the voting power of the two companies. Held that it showed sufficient compliance with the rule.

Ogden v. Gilt Edge Consol. Mines Co., 225 Fed. 723, 140 C. C. A. 597. Petition for intervention in bankruptcy on behalf of a corporation by a stockholder. No demand shown on the directors, but the record showed that the interests of the directors were antagonistic. Held sufficient.

Ross v. Quinnesec Iron Mining Co., 227 Fed. 337, 142 C. C. A. 33. Bill to set aside contract made by a corporation. Bill alleged no demand on the directors, and the record showed that they were in absolute control through stock ownership, and that they would benefit by the contract. Held a sufficient showing.

The bill and record in the present case disclose the following facts:

That the plaintiff is and since August, 1911, has been, the owner of 90 shares of stock in the defendant bank, out of a total of 100,000 shares; that in February, 1914, plaintiff and two other alleged shareholders wrote a letter to the defendant bank and directors, stating that they were and had been for more than a year stockholders in the bank, calling attention to the payment of $50,000 to Edwards, stating that in their opinion such payment was beyond the power of the bank or said board, and asking the rescission of the action, and the institution of proceedings to recover said amount from Edwards, and that the board refused to cause suit to be brought. It is not shown what reason, if any, the board had for the refusal. No further correspondence was had with the board, or efforts made with that body. Plaintiff further alleges that the suit is not a collusive one, and that the plaintiff believes that neither the bank nor the board of directors will take action in the direction requested by the plaintiff.

It appears from the record that a meeting of the stockholders intervened between the time of the payment to Edwards and the letter by the plaintiff to the directors, and that plaintiff was a stockholder at the time of the meeting. It is not shown that any attempt was made to bring the matter to the attention of the stockholders at this meeting, and no showing is made why this was not done. The record does not show that any attempt was made to bring about action by the stockholders in regard to the matter, or to call it to their attention. In May, 1914, the plaintiff alone brought the present suit. There is no claim of fraud or of bad faith on the part of the directors. There is no showing that the directors hold or have ever held a controlling, or even a large, interest in the stock of the bank. There is no showing that the directors received any benefit from the payment made, or that they would lose anything by a successful out-

come of a suit, if brought by the corporation to recover the money paid to Edwards, or that their interests were in any way antagonistic to those of the corporation, or of the plaintiff. There is no showing that any of the stockholders were antagonistic to the bringing of such suit, or that the interests of the other stockholders were in any way antagonistic to the interest of the plaintiff.

The question of the right of the plaintiff to maintain this suit was first urged by motion, and again upon the trial of the cause. Opportunity was expressly given by the trial court to plaintiff to amend his complaint, and to make further showing in accordance with equity rule 27. Plaintiff expressly declined to amend or make further showing, on the ground that he considered it unnecessary.

If it be conceded that the establishment of the pension fund was within the power of the corporation, then the questions of whether Edwards had a right to participate therein, and whether the directors acted wisely in recognizing and compromising his claim, are questions properly belonging to the directors for decision, and, in the absence of fraud or bad faith, will not be inquired into by courts upon the suit of a single stockholder. If the question whether the corporation had the right to establish the pension fund is sought to be determined, then clearly, since the stockholders had authorized its establishment and directed the board of directors to carry out the plan, it could hardly be expected that the directors, at the request of one or two stockholders, would bring suit to have the whole pension plan fund declared invalid. The matter would be one pre-eminently for the consideration of the stockholders as a body, and the objection of the plaintiff to the pension fund plan should first have been brought to the attention of that body for redress of any wrong that he claims to have suffered. This is not an emergency suit, and no irreparable injury is threatened. Indeed, the wrong, if any, was committed long prior to the commencement of the suit. The extent of the damage which plaintiff suffered, if any wrong was committed, was about $45. The record presents a case where the plaintiff has not shown himself entitled to maintain the suit under equity rule 27, and the decree might well be affirmed on this ground alone. We have concluded, however, not to rest the decision solely upon this ground.

Turning to the merits: Plaintiff claims that the payment of the money to Edwards was purely gratuitous. Defendant claims that the payment was pursuant to the contract above set out. Plaintiff claims that there was no consideration for the contract. The question of adequacy of consideration is not open for discussion under the pleadings. If there was any consideration for the contract, plaintiff's attack upon it must fail. The items of consideration claimed are four in number: (1) Waiver of participation in the pension fund. (2) Waiver of salary for the remainder of the year. (3) Waiver of all claims against the bank. (4) An agreement not to enter into the employ, or engage in the business of any St. Louis bank or trust company, nor use his influence on behalf of any other bank or trust company, prior to December 31, 1913.

As to the waiver of a pension. It seems clear under the evidence

that Edwards had a claim to a pension. He had been in the service of the bank more than 25 years. Paragraph (c) of the pension provisions provides:

"Officers and employés severing their connection with the bank after 25 years or more of continuous service for any reason whatever, other than neglect of duty, shall receive pensions as above provided, such pensions, however, to cease if the beneficiary accepts a position in any other bank or trust company."

The contention of plaintiff that Edwards severed his connection with the bank by reason of neglect of duty is without evidence to support it. The statement made by the bank examiner, which was read into the minutes of the board of directors at their meeting July 24, 1912, which minutes were offered in evidence by plaintiff, objected to on the part of the defendant, and the objection sustained by the trial court, does not prove or tend to prove that there had been any neglect of duty on the part of Edwards. It simply calls attention to the fact that for some specific reasons the government had demanded a separation of Edwards from the bank, but these specific reasons were not stated. No mention is made of neglect of duty, and there may have been many reasons quite apart therefrom. Neglect of duty will not be presumed, and the evidence in the record does not support such a conclusion.

There being a valid claim to a pension on the part of Edwards, it was within the powers of the board of directors to compromise it. At what figure it should have been compromised is not open to inquiry under the pleadings in the case. The only real question, therefore, as to this alleged item of consideration, is whether the establishment of the pension fund itself was within the powers of the bank. It is elementary that the corporate powers of a national bank, as well as of other corporations, are of two classes: (1) Those expressly granted; and (2) those impliedly granted, as reasonably incident and necessary to the carrying out of the powers expressly granted. The former have to do largely with the main business objects and purpose of the corporation; the latter largely with the means and methods of attaining those objects and carrying out those purposes. The former are determined once and for all by the language of the charter or the fundamental law; the latter may change according to time, place, and surrounding circumstances. The test of the former is whether they are found in the words of the charter or law; the test of the latter is whether they are fairly incident to the former, and reasonably necessary to carrying them out.

[2] In determining whether a given act is within the former, the judgment and actions of the directors and stockholders have no legal weight or bearing. In determining whether a given act is within the latter, the judgment of the directors and stockholders, while not conclusive, is entitled to consideration. Morse on Banks and Banking, § 54; Machen, Modern Law of Corporations, vol. 1, §§ 68, 87–90; Thompson on Corporations (2d Ed.) §§ 2100–2129.

[3] In Burnes v. Burnes, 137 Fed. 781, 70 C. C. A. 357, this court said, speaking of the implied powers of a private corporation:

"While the powers of a corporation are limited to those expressly granted and those fairly incidental thereto, they include the latter as completely as the former, and they always include the indispensable and the suitable means to exercise the granted powers."

In Colorado Springs Co. v. American Publishing Co., 97 Fed. 843, 38 C. C. A. 433, this court said, in speaking of the same subject:

"To sustain an act done by a private corporation as a valid exercise of corporate power, it is only necessary, where the act is not challenged by the state, to show that the act in question was not prohibited by the company's charter, and that it had a natural and reasonable tendency to aid in the accomplishment of one or more of the objects for which the corporation was created."

That the word "necessary," when used in reference to implied powers, does not mean indispensable, and is not to be given a narrow, restricted meaning, it is only necessary to refer to McCulloch v. Maryland, 4 Wheat. 316, 413, 414, 4 L. Ed. 579.

The foregoing principles have been applied by the courts in almost numberless cases: As applied to acts and contracts by railroad companies, see, as illustrative, Green Bay Ry. Co. v. Union Co., 107 U. S. 98, 2 Sup. Ct. 221, 27 L. Ed. 413; Railway Co. v. Keokuk Co., 131 U. S. 371, 9 Sup. Ct. 770, 33 L. Ed. 157, and Jacksonville, etc., Ry. Co. v. Hooper, 160 U. S. 514, 16 Sup. Ct. 379, 40 L. Ed. 515. In the last case, the court quoted approvingly the following language of Lord Chancellor Selborne in reference to the doctrine of ultra vires, as follows:

"This doctrine ought to be reasonably, and not unreasonably, understood and applied, and that whatever may fairly be regarded as incidental to, or consequential upon, those things which the Legislature has authorized, ought not, unless expressly prohibited, to be held, by judicial construction, to be ultra vires."

The court said:

"In the application of the doctrine the court must be influenced somewhat by the special circumstances of the case."

As applied to relief associations formed by railway companies in connection with the care and treatment of their employés while injured, the same principles have been applied by the courts. State v. Pittsburg, etc., Ry. Co., 68 Ohio St. 9, 67 N. E. 93, 64 L. R. A. 405, 96 Am. St. Rep. 635; Harrison v. Railway Co., 144 Ala. 246, 40 South. 394, 6 Ann. Cas. 804; Maine v. Ry. Co., 109 Iowa, 260, 70 N. W. 630, 80 N. W. 315.

As applied to acts of business corporations, Ft. Worth City Co. v. Smith Bridge Co., 151 U. S. 294, 14 Sup. Ct. 339, 38 L. Ed. 167; Burnes v. Burnes, supra; Colo. Spgs. Co. v. Am. Pub. Co., supra; Schaeffer Piano Mfg. Co. v. National Fire Ext. Co., 148 Fed. 159, 78 C. C. A. 293; Steinway v. Steinway & Sons, 17 Misc. Rep. 43, 40 N. Y. Supp. 718. In the last case, the principles were applied where funds of a corporation were used in the establishment of a free library and free baths for its employés.

As applied to a national bank, see Brown v. Schleier, 118 Fed. 981, 55 C. C. A. 475, in which this court held that it was within the power of a national bank to erect a building for its own use, and that in so doing it was not limited to the construction of a building to be used solely for itself.

As applied to the granting of a pension by a bank to the relatives of a deceased employé, see Henderson v. Bank, Law Reports, 40 Chanc. Div. 170. Counsel for appellant, in commenting upon this last case, lays stress upon the fact that the stockholders gave authority to the directors to grant this pension. It must not be lost sight of that in the instant case the pension fund was established by express authority of the stockholders. It appears from the record that at a regular meeting of the stockholders on the 9th day of January, 1900, the following resolution was duly passed by the stockholders:

"Be it resolved that the board of directors of the National Bank of Commerce in St. Louis be, and they are hereby empowered to set aside from the net earnings of the bank annually, after first deducting losses and a sum equal to 6 per cent. of the capital, surplus, and undivided profits as the latter appears at the beginning of the year, such a sum as they may deem proper, not to exceed one-tenth of the remainder of said net profits, for the purpose of creating an officers' and employés' pension fund and an officers' and employés' profit participation fund, under such rules and regulations as may from time to time be enacted by said board."

[4] As we have seen above, appellant is not in a position to attack the action taken by the board of directors in reference to Edwards' claim of a pension, unless appellant can show that the pension plan as a whole was void. The burden is upon appellant to show this, for the same presumption of legality which attends the acts of a natural person attends the acts of a corporation, unless they are plainly and upon their face outside the powers of the corporation. Acts taken by corporations are presumed, in the absence of evidence to the contrary, to be within either the express or implied powers of the corporation. Thompson on Corporations (2d Ed.) § 2120, uses the following language in reference to acts by a corporation:

"A person who questions such transactions cannot assume either that the corporation had no power to act, or that in the given transaction the corporation exceeded its power, and that hence it must show that the transaction was within the scope of its powers. Precisely the opposite rule obtains. The maxim, 'omnia acta rite esse præsumuntur,' applies to the transactions of corporations as well as to individuals."

See, also, Railway Co. v. McCarthy, 96 U. S. 258, 24 L. Ed. 693.

Even if it were possible, it would serve no useful purpose to enumerate specifically the implied powers of a private corporation, whether engaged in the business of carrying on a railroad, a bank, or other business. In relation to the subject of employés only, numerous questions arise: What shall be the number of employés? What the amount of their salaries? Shall they be paid weekly or monthly? What shall be their hours of service? Shall they be paid for overtime work? Shall they be allowed vacation periods, and, if so, to what extent? Shall they receive pay during such periods of vacation? Shall they be paid during absence caused by sickness, and, if so, during what period of time? Where the employés are numerous at a given place, shall a lunch counter be provided and operated at cost, for the benefit of the employés? Shall hospital benefits be provided for sick or disabled employés?

There can be no doubt that these are matters relating to the internal management of the corporation, and as such within its implied powers

for determination. Can any valid distinction be drawn between the above matters and the establishment of a pension fund, in proper cases and under proper circumstances? May not this, under proper circumstances, as well as the former matters, have a direct and reasonably necessary bearing upon the successful carrying out of the business of the corporation, upon the class of employés likely to be obtained, upon the character of the service likely to be rendered, and upon the length of such service and the loyalty of the employés?

The tests in regard to all such matters are: Is the act or transaction prohibited by the charter or other law? Is the act or transaction reasonably suitable and necessary for the carrying on of the business for which the corporation was created and organized? Is the act or transaction performed in good faith, or as a mere cloak to some illegal or fraudulent act?

[5] In the instant case, the burden resting upon the appellant to show the invalidity of the action taken by the stockholders in establishing the pension fund, or the invalidity of the action taken by the board of directors in reference to Edwards' claim to a pension, has not been sustained. The cases cited by appellant are cases involving the question whether certain transactions were within the express powers of the bank in question. None of them involved the question whether the given act or transaction was within the implied powers of the bank. Indeed, several of the cases recognize that if the particular transaction under consideration was performed incidentally, and not as part of the main business of the bank, it would have been held valid. Such, for example, was the case of California Bank v. Kennedy, 167 U. S. 362, 17 Sup. Ct. 831, 42 L. Ed. 198, where the court held:

"The statutes of the United States relating to the organization and powers of national banks prohibit such banks from purchasing or subscribing to the stock of another corporation, although they may, as incidental to the power to loan money on personal security, accept stock of another corporation as collateral, and thus become subject to liability as other stockholders."

The same is true of First National Bank v. Converse, 200 U. S. 425, 26 Sup. Ct. 306, 50 L. Ed. 537.

What we have said relative to the burden resting upon appellant as to the pension matter, applies equally to the other items of consideration stated in the contract above mentioned by Edwards with the bank. The defendants were not called upon to show that the waiver of claims against the bank by Edwards constituted a good and valuable consideration, in other words, to show that there were such claims and their character; but the burden rested upon the plaintiff, under the pleadings, to show that there were no claims, if this were the fact.

The agreement in the contract by Edwards not to enter the employ of any other St. Louis bank or trust company during a certain period was also, in view of all the circumstances, a valid item of consideration.

[6] The claim that this provision of the contract was against public policy, as in restraint of competition, does not require discussion. The restraint was limited as to time, limited also as to place, and no public interest was involved. Limited restraints, under such circumstances,

have frequently been held valid. Gibbs v. Baltimore Gas Co., 130 U. S. 396, 9 Sup. Ct. 553, 32 L. Ed. 979; Cincinnati Packet Co. v. Bay, 200 U. S. 179, 26 Sup. Ct. 208, 50 L. Ed. 428; Harrison v. Glucose Sugar Refining Co., 116 Fed. 304, 53 C. C. A. 484, 58 L. R. A. 915; Knapp v. S. Jarvis Adams Co., 135 Fed. 1008, 70 C. C. A. 536.

In our opinion, the appellant has failed to show that the payment to Edwards was a mere gratuity, and has failed to show that the contract made by him was either ultra vires the corporation or the board of directors.

The judgment and decree of the court below is affirmed.

SOUTHERN PAC. CO. v. CALIFORNIA ADJUSTMENT CO.*

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

1. CONSTITUTIONAL LAW ⟸½, New, vol. 4 Key-No. Series—CARRIERS—STATE REGULATION OF RATES—PARTIAL INVALIDITY.

   Const. Cal. art. 12, § 21, prior to its amendment in 1911, provided: "No discrimination in charges or facilities for transportation shall be made by any railroad * * * company between places or persons, or in the facilities for the transportation of the same class of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad * * * shall be delivered at any station * * * at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station. * * *" *Held* that, conceding that the first clause might be held invalid as applying to interstate commerce, its invalidity could not be imputed to the second clause, which contained no reference to the other, or to interstate commerce, and must be construed to apply only to intrastate commerce.

2. CARRIERS ⟸202—DISCRIMINATION IN RATES—RIGHT OF ACTION BY SHIPPER.

   Where a state Constitution or statute prohibits carriers from discriminating in rates by charging a higher rate for a short than for a long haul, a shipper, who has been discriminated against in violation of such provision, has a right of action to recover the excess paid by him over the long haul rate.

   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⟸202.]

3. CARRIERS ⟸202—DISCRIMINATION IN RATES—RIGHT OF ACTION BY SHIPPER.

   By St. Cal. 1909, p. 499, St. 1911, p. 13, and St. 1911 (Ex. Sess.) p. 18, a person injured by a carrier by charging a higher rate for a short than for a long haul, in violation of their provisions, is expressly given a right of action to recover his damages.

   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⟸202.]

4. CARRIERS ⟸12(3)—CONSTITUTIONAL LAW ⟸298(2)—DUE PROCESS OF LAW—DEPRIVATION OF PROPERTY—STATE REGULATION.

   A provision of a state Constitution prohibiting common carriers from charging more for a short than for a long haul does not force the adoption by a carrier of unreasonably low rates to competitive points, and is not in violation of the federal Constitution, as depriving it of its property without due process of law, because, if the carrier voluntarily adopts

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

*Rehearing denied February 13, 1917.

such rates, it is compelled to make corresponding rates to intermediate points.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 9, 15–20; Dec. Dig. ⊂⊃12(3); Constitutional Law, Cent. Dig. § 847; Dec. Dig. ⊂⊃298(2).]

5. CARRIERS ⊂⊃202—EXCESSIVE CHARGES—ACTION TO RECOVER.
Payments made to a railroad company for freight charges are payments under compulsion, and if in excess of lawful rates the excess may be recovered, although no protest was made at the time of payment.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⊂⊃202.]

6. CARRIERS ⊂⊃12(3)—DISCRIMINATION IN RATES—STATE REGULATION.
Const. Cal. art. 12, § 21, as amended October 10, 1911, contains the provision of the old section prohibiting carriers from charging a higher rate for a short than for a long haul, but further provides that on application a carrier "may in special cases after investigation" be authorized by the state Railroad Commission to charge less for a longer than for a shorter haul, and that the Commission may prescribe the extent to which the carrier may be relieved from the prohibition. *Held*, that orders of the Commission permitting railroads to file schedules with applications for desired changes in rates, and to continue rates then in force pending investigation, did not legalize rates subsequently charged in violation of the constitutional prohibition; it not appearing that the Commission ever investigated or approved such discriminations.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 9, 15–20; Dec. Dig. ⊂⊃12(3).]

7. CARRIERS ⊂⊃12(3)—POWERS OF LEGISLATURE—CONSTITUTIONAL LIMITATION.
A further provision of such constitutional amendment, conferring upon the Legislature plenary power to confer on the Railroad Commission additional powers "which are not inconsistent with the powers conferred * * * in this Constitution," cannot be construed to authorize the Legislature to confer power on the Commission to relieve a carrier from the long and short haul provision of section 21, otherwise than in the manner therein prescribed.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 9, 15–20; Dec. Dig. ⊂⊃12(3).]

8. CARRIERS ⊂⊃202—EXCESSIVE CHARGES—RIGHT OF ACTION FOR RECOVERY.
Public Utilities Act Cal. (St. 1911 [Ex. Sess.] p. 18) § 71, which provides that when complaint is made of any rate or charge, and the Commission has found after investigation that the rate or charge was excessive, it may order reparation, does not apply to a rate charged by a carrier in violation of the long and short haul clause of the state Constitution, which presents no question for determination by the Commission, but such case is governed by section 73(a) of the act, which gives a right of action for damages or injury resulting from the violation by any public utility of any provision of the Constitution or statutes of the state.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 906–915; Dec. Dig. ⊂⊃202.]

Ross, Circuit Judge, dissenting in part.

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 the California Adjustment Company against the Southern Pacific Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 226 Fed. 349.

The plaintiff in error seeks to reverse a judgment of the court below, rendered in favor of the defendant in error for the sum of $3,928.01. The parties

will be herein named plaintiff and defendant, as in the court below. The complaint contains 120 counts; each being on a claim assigned to the plaintiff, and each alleging that the assignors of the plaintiff sent various shipments over the defendant's railroad line from San Francisco or Los Angeles to certain intermediate stations, for which they were charged a higher rate than the charge then made by the defendant for transportation in the same direction on the same amount and class of property from the point of shipment to Los Angeles or San Francisco. The amount for which judgment was demanded on each count was the difference between the greater charge for the short haul and the lesser charge for the long haul in the same direction. The counts in the complaint fall into two groups: First, the counts upon the charges collected prior to October 10, 1911, the date when article 12 of the California Constitution was amended; and, second, counts upon the charges collected after that date.

Section 21, art. 12, as it existed prior to the amendment of October 10, 1911, was as follows: "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state, or coming from or going to any other state. Persons and property transported over any railroad, or by any other transportation company or individual, shall be delivered at any station, landing, or port, at charges not exceeding the charges for the transportation of persons and property of the same class, in the same direction, to any more distant station, port, or landing. Excursion and commutation tickets may be issued at special rates."

As amended on October 10, 1911, section 21 reads as follows: "No discrimination in charges or facilities for transportation shall be made by any railroad or other transportation company between places or persons, or in the facilities for the transportation of the same classes of freight or passengers within this state. It shall be unlawful for any railroad or other transportation company to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates; Provided, however, that upon application to the Railroad Commission provided for in this Constitution such company may, in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may from time to time prescribe the extent to which such company may be relieved from the prohibition to charge less for the longer than for the shorter haul. * * *"

Section 22 contains the following: "No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution. The provisions of this section shall not be construed to repeal in whole or in part any existing law not inconsistent herewith, and the 'Railroad Commission Act' of this state, approved February 10, 1911, shall be construed with reference to this constitutional provision and any other constitutional provision becoming operative concurrently herewith. And the said act shall have the same force and effect as if the same had been passed after the adoption of this provision of the Constitution and of all other provisions adopted concurrently herewith, except that the three commissioners referred to in said act shall be held and construed to be the five commissioners provided for herein."

As to the first group of claims—that is, those on charges collected prior to October 10, 1911—it was claimed by the plaintiff, and held by the court below, that the Commission was powerless to fix, and the carrier was powerless to

charge, rates in contravention of the prohibition of the Constitution, and that, if the Commission assumed to fix such rates, the act was void, and cast no obligation upon the carrier to obey its order, and afforded no protection for its act. As to the second class of claims, it was claimed by the plaintiff, and ruled by the court below, that when the amendment of October 10, 1911, took effect, all rates violative of the long and short haul clause in section 21, art. 12, as then amended, still remained illegal to the extent that the greater charge for the shorter distance exceeded the lesser charge for the greater distance, and that the defendant could not be relieved from the illegality unless it filed a petition for such relief, and an investigation was had by the California Commission, and the extent was prescribed to which it might be relieved from the prohibition against discrimination between long and short hauls, and that, pending such determination of the Commission, the rates existing on October 10, 1911, which were violative of the amended section 21, furnished ground of action for the collection of excessive rates in favor of any one who paid them.

Henley C. Booth, Frank B. Austin, and George D. Squires, all of San Francisco, Cal. (Wm. F. Herrin, of San Francisco, Cal., of counsel), for plaintiff in error.

Hoefler, Cook, Harwood & Morris and Alfred J. Harwood, all of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The defendant contends that the constitutional provision as it existed from 1879 until October 10, 1911, is invalid, because in terms it attempts to regulate interstate commerce, and the attempt so to regulate interstate commerce is so intermingled with the other provisions that it cannot be presumed that the section would have been adopted if the invalidity of the first portion thereof had been known, and that therefore the whole section falls. It is true that the first clause of section 21 expressly refers to freight and passengers within the state, or coming from or going to any other state, and as to such freight and passengers it prohibits discrimination in charges or facilities for transportation. Conceding that that clause of the section may be held invalid as applying to interstate commerce, its invalidity cannot be imputed to the second clause, or the long and short haul clause, for that portion of the section does not depend upon or refer to the first clause, and it contains no reference to interstate commerce. No ground is perceived for holding that provision unconstitutional. It was unnecessary to its validity that it should contain in express terms a limitation of its provisions to the borders of the state. It is sufficient if it may be so construed.

The decision in Wabash, etc., Ry. Co. v. Illinois, 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244, cited by defendant, does not, we think, sustain its contention. That was a case in which the Supreme Court held unconstitutional, as interfering with interstate commerce, a provision of the statute of Illinois not unlike the long and short haul provision of the Constitution of California. But the Supreme Court held the act unconstitutional for the express reason that the Supreme Court of Illinois, in construing it, had given it an interpretation which made it

apply to commerce between the states, a construction which the Supreme Court of the United States declared itself bound to accept. But that court said:

"It might admit of question whether the statute of Illinois, now under consideration, was designed by its framers to affect any other class of transportation than that which begins and ends within the limits of the state."

In the Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297, the court held an act addressed to all common carriers engaged in interstate commerce, imposing a liability on them in favor of any of their employés, whether the employés were engaged in interstate commerce or not, of necessity includes subjects wholly outside the power of Congress. The court held the whole act unconstitutional, and was moved thereto by two considerations: First, because the provisions of the statute were dependent and indivisible; and, second, because to give effect to the act only so far as it was addressed to interstate commerce would be to discriminate between the states and the territories and the District of Columbia. The court said:

"Where a statute contains provisions which are constitutional and others which are not, effect may be given to the legal provisions by separating them from the illegal. But this applies only to a case where the provisions are separable, and not dependent one upon the other, and does not support the contention that that which is indivisible may be divided. Moreover, even in a case where legal provisions may be severed from those which are illegal, in order to save the rule applies only where it is plain that Congress would have enacted the legislation with the unconstitutional provisions eliminated."

In Attorney General v. Rutland R. R. Co., 86 Vt. 328, 85 Atl. 654, cited by the defendant, the court had under consideration a statute which related to the right of railroads to charge demurrage on freight cars held by a consignee for the purpose of unloading, the prohibition of the statute being that no railroad doing business in the state should charge, collect, or receive any demurrage charge on freight received at any station in the state until four days after notification to the consignee. The court, in view of the fact that a freight car might concurrently be an instrument of interstate and intrastate commerce so frequently as to be a matter proper of notice in determining the question which was presented, and that the statute could not be applied to local traffic, without in many instances directly affecting interstate traffic, held that the invalid portion of the statute could not be eliminated without striking out or inserting words. The court said:

"The effect is not to be determined on the basis of striking out or disregarding some of the words in the statute, nor by inserting others not there. It is not within the judicial province to give the words used a broader or a narrower meaning than they were manifestly intended to have, in order to bring the scope of the statute within the constitutional power of the Legislature to enact."

In the case at bar, in order to give effect and validity to the long and short haul clause, it is unnecessary to disregard words, or to insert words, or to broaden or narrow the meaning of the terms used. To the argument that the people would not have adopted a constitutional provision against discrimination, if they had known that it could apply only to intrastate traffic, the answer is that, since the people admittedly

realized the evils of discrimination, it may be assumed that they would have sought to correct as much of that evil as lay in their power, and would have adopted a provision which would at least prevent discrimination on traffic within the borders of their state.

[2] It is contended that the plaintiff had no right of action for the recovery of the difference between the greater charge for the short haul and the lesser charge for the long haul, because no such right of action existed at common law, and no such right of action has been conferred by the Constitution or statutes of California. The defendant cites the case of Cowden v. Pacific Coast S. S. Co., 94 Cal. 470, 29 Pac. 873, 18 L. R. A. 221, 28 Am. St. Rep. 142, a case in which the plaintiff sought to recover damages for discrimination in freight rates by sea between San Francisco and San Diego, alleging that the steamship company had favored a certain other shipper by charging him 12½ per cent. less than it did the plaintiff for freight on the same character and quantity of goods. The court, in view of the fact that there was no statutory or constitutional provision relating to the matter, and that there was nothing in the common law to hinder a carrier from carrying for favored individuals at an unreasonably low rate, or even gratis, and the fact that the plaintiff had not alleged that the charge made was unreasonable, held that the plaintiff had no cause of action. That conclusion was influenced largely by the decision in Great Western R. R. Co. v. Sutton, 4 Eng. & Ir. App. 238, a case in which Mr. Justice Blackburn had said that at common law a person holding himself out as a common carrier of goods was not under any obligation to treat all customers equally, and that all that the law required was that he should not charge any more than was reasonable. But in that case the court had under consideration the effect upon the common law of an act of Parliament fixing charges for railroad carriage and requiring uniformity of freight rates for goods of like description and quantity conveyed along the railway under like circumstances. The action was for money had and received to recover charges alleged to have been improperly made against the plaintiff. Mr. Justice Blackburn said:

"The defendants may, subject to the limitations of their special acts, charge what they think fit, but not more to one person than they, during the same time, charge to others under the same circumstances. And I think it follows from this that if the defendants do charge more to one person than they, during the same time, charge to others, the charge is, by virtue of the statute, extortionate. And I think that the rights and remedies of a person made to pay a charge beyond the limit of equality imposed by the statute on railway companies acting as carriers on their line must be precisely the same as those of a person made to pay a charge beyond the limit imposed by the common law on ordinary carriers as being more than was reasonable."

This quotation from the opinion in that case is directly in point in the present case, and it marks the vital distinction between Cowden v. Pacific Coast S. S. Co., and the case at bar. In the case at bar the obligation to refund is not based upon the common-law rule against unreasonable charges, but is based upon the common-law rule which requires the repayment of money which has been received in violation of an express statutory obligation, as in the case of Great Western Railway Co. v. Sutton. In harmony with this view is Louisville & N.

R. R. Co. v. Walker, 110 Ky. 961, 63 S. W. 20, in which the court held that a railroad company which charges more for a short than for a long haul, in violation of the constitutional provisions of that state, is liable to the shipper for the excess charged, "as he whose money is taken from him illegally is to that extent damaged." And in Louisville & Nashville Rd. Co. v. Eubank, 184 U. S. 27, 22 Sup. Ct. 277, 46 L. Ed. 416, the court assumed without question the right of the plaintiff to sue for and recover the excess of payments made under like circumstances as in the case last cited from Kentucky.

The difference between the case at bar and Penna. R. R. Co. v. International Coal Co., 230 U. S. 184, 33 Sup. Ct. 893, 57 L. Ed. 1446, Ann. Cas. 1915A, 315, and Knudsen & Co. v. M. C. Ry., 148 Fed. 969, 79 C. C. A. 46, is that in those cases the damage to the plaintiff did not appear from the act of discrimination itself; the court holding that the fact that some other shipper was charged less than the lawful rate did not entitle the plaintiff to have its property transported for the same unlawful rate, and that the measure of damages did not appear upon proof alone of the discrimination. In the case at bar the measure of damages does distinctly appear. The effect of the constitutional provision is to fix a measure of charge and that measure is the charge which is actually made for the longer haul. Any charge in excess of that for a shorter haul is by the amount of the excess illegal, and each violation of that provision furnishes the measure of the shipper's damage therefor.

[3] In addition to stating a cause of action under the common law, we think that the complaint states an action for damages under the statutes of California. Act 1909 (Laws 1909, p. 499); Act 1911 (Laws 1911, p. 13); and Public Utilities Act (Laws Extra Session 1911, p. 18). The acts of 1909 and 1911 expressly prohibit discrimination of all kinds, and provide that the offending carrier shall be liable to the person or persons, firm, or corporation injured thereby for the damages sustained in consequence thereof. And the Public Utilities Act provides that if any carrier shall do any act forbidden, or declared to be unlawful by the statute, it shall be liable to the person damaged thereby for all loss, damage, or injuries sustained by such person, and that an action to recover such loss, damage, or injury may be brought in any court of competent jurisdiction. One of the rights of action expressly recognized by that act is the right of a person injured by the violation of the prohibition against charging more for the shorter than for the longer distance.

[4] It is contended that, to give effect to the long and short haul clause of the Constitution, both as it existed before 1910 and as it was after the amendment of that year, is to deprive the defendant of its property without due process of law, and to deprive it of the equal protection of the laws, since in its answer it alleged that the rates by rail between San Francisco and Los Angeles on all the commodities referred to in the complaint were through rates, which had been forced down below a reasonable rate by reason of actual water competition between the port of San Francisco and the port of Los Angeles, and that to compel the defendant to carry property to in-

termediate points at less than a reasonable rate for the service rendered, or at the said through rates, would be to require it to establish its intermediate rates at less than a reasonable compensation for the service performed, and on the trial the defendant offered to show by the testimony of its assistant general freight agent that in his opinion the rates charged to the plaintiff's assignors were reasonable for the service performed, and that the through rate was a rate less than a reasonable rate, and was compelled by actual water competition between the two ports named.

The Supreme Court has been urged, and has refused, to declare the very principle for which the defendant here contends. On the contrary, it has held that such a provision of a state Constitution is not violative of the Fourteenth Amendment. In Louisville & Nash. Rd. Co. v. Kentucky, 183 U. S. 503, 22 Sup. Ct. 95, 46 L. Ed. 298, it was held that a state railroad corporation cannot exempt itself from the control reserved to the state by its Constitution, and if not protected by a valid contract, it cannot successfully invoke the interposition of federal courts in respect to long and short haul clauses in a state Constitution simply on the ground that the railroad is property. Said the court:

"When the citizens of Kentucky voluntarily seek and obtain a grant from the state of a charter to build and maintain a public highway in the form of a railroad, it would seem to be evident that it takes, holds, and operates its road subject to the constitutional inhibition we are considering, and is without power to challenge its validity. * * * We are unable to see how such company can successfully contend that it can be exempted by the courts from the operation of the Constitution of the state."

The court intimated that if thereafter a Railroad Commission should fix and establish rates of a confiscatory character, the corporation would be within the protection which courts of equity have heretofore given in cases of that description. But the plain meaning of the decision is that such a constitutional provision does not force the adoption of low competitive rates, and does not deprive a carrier of its property without due process of law, or deny it the equal protection of the laws; that it should be regarded as declaring that it is against the policy of the state to permit a carrier to charge an unreasonably low rate to competitive points, the necessary tendency of which is to cause it to increase unjustly the rates to intermediate points. In the Intermountain Cases, 234 U. S. 476, 34 Sup. Ct. 986, 58 L. Ed. 1408, the court was asked to reconsider and overrule Louisville & N. R. R. Co. v. Kentucky, but declined to do so.

[5] We find no merit in the contention that the court below erroneously sustained a demurrer to the defense wherein the defendant pleaded that each assignor of the plaintiff paid without protest the charge complained of. The complaint had not alleged that the money was paid under protest, but it did allege that in cases where the assignors were consignees of the goods, in order to obtain possession and delivery of the same so transported by the defendant, the said consignees were compelled to pay such charges demanded by defendant, and in the answer it was admitted that the defendant would not have delivered said property to the consignees if said charges demand-

ed by defendant had not been paid. In cases where the plaintiff's assignors were consignors of the goods, the same facts were alleged and admitted. It is well settled that money paid under compulsion may be recovered, even in the absence of protest at the time of payment. Lafayette & I. Railroad Co. v. Pattison, 41 Ind. 312; Chandler v. Sanger, 114 Mass. 364, 19 Am. Rep. 367; Robinson v. Ezzell, 72 N. C. 231; Stephan v. Daniels, 27 Ohio St. 527; First National Bank v. Watkins, 21 Mich. 483. Payments made to a railroad company for freight charges, as these payments were made, are clearly payments under compulsion. In order to get the goods, the consignees were obliged to pay the charges demanded by the railroad company, and it is common knowledge that it would have been futile to dispute the charges. In Mobile & Montgomery Railway Co. v. Steiner et al., 61 Ala. 559, 595, the court, after referring to the fact that the public was left no discretion but to employ railroad companies or suffer irreparable injury, said:

"They have their established rates and charges, and these the shipper must pay, or forego their facilities and benefits. To object or protest would be an idle waste of words. The law looks to the substance of things, and does not require useless forms or ceremonies. The corporation and the shipper are in no sense on equal terms, and money thus paid to obtain a necessary service is not voluntarily paid, as the law interprets that phrase."

So in Chicago & Alton Railroad Co. v. C., V. & W. Coal Co., 79 Ill. 121, the court held that the appellees, in paying enhanced freight charges, were bound to accede to any terms the appellants might impose:

"They were under a sort of moral duress, by submitting to which appellants have received money from them which, in equity and good conscience, they ought not to retain."

In Pennsylvania R. Co. v. International Coal Mining Co., 173 Fed. 1, 97 C. C. A. 383, the court declared the principle which must apply here, when it said:

"This is not the ordinary case of a suit to recover back a sum of money which has been mistakenly paid and received, but is one where a statute has stamped the receipt of the money as unlawful."

[6] As to the shipments herein involved which moved after October 10, 1911, the defendant contends that the collection of the charges complained of is defensible on the ground that the Railroad Commission of California, pursuant to the power given it by section 15 of the act of February 9, 1911, to fix rates, made a series of orders with the intention of preserving the status of the rates then being charged by the defendant until it could be determined by the Commission whether and how far the defendant was entitled to relief. The amended section 21 of article 12 of the act of 1911, after reaffirming the long and short haul clause, added the proviso that, upon application to the Railroad Commission, the carrier—

"may in special cases, after investigation, be authorized by such Commission to charge less for longer than for shorter distances for the transportation of persons or property, and the Railroad Commission may, from time to time, prescribe the extent to which such carrier may be relieved from the prohibition to charge less for the longer than for the shorter haul."

On October 26, 1911, the Commission made an order that every railroad or other transportation company which at that time was charging a greater compensation in the aggregate for a shorter than for a longer haul over the same line might file with the Commission a schedule of such rates, and, in case it was desired to justify the same, or any of them, an application for relief from the constitutional provision. The orders of November 20, 1911, and January 16, 1912, made by the Commission, went no further than to give permission to railroads to file with the Commission for establishment such changes in rates and fares as would occur in the ordinary course of their business, "continuing under the present rate bases or adjustments higher rates or fares at intermediate points, provided that in so doing the discrimination against intermediate points is not made greater than that in existence October 10, 1911," etc., but expressly declaring:

"That the Commission does not hereby indicate that it will finally approve any rates and fares that may be filed under this permission, or concede the reasonableness of any higher rates to intermediate points, all of which rates and fares will be investigated at the hearing to be held January 2, 1912."

But it does not appear that the defendant filed such an application until December 30, 1911, or that an investigation was ever had by the Commission, or that it ever made an order finally approving any of said rates or fares. If, indeed, the orders of the Commission may be construed as expressly giving by their terms authority to continue in effect until an investigation of the rates then in existence, which deviated from the constitutional provision as to the long and short haul, it is obvious that the Commission erroneously assumed that the act of 1911 gave it the power to make such an order. The amendment of 1911 gives the power to authorize a deviation from the prohibition of the Constitution only upon the application of the carrier, and after an investigation by the Commission, for it does not, as does the act of Congress giving authority to the Interstate Commerce Commission, authorize the fixing of temporary rates pending investigation. Assuming that under such a temporary order the defendant continued to make charges forbidden by the Constitution, it would be necessary for it to show, in defending an action for the recovery of such charges, that the Commission finally approved the rates, and made them valid by an order made after an application and investigation as required by the statute.

[7] But it is said that the Legislature had power to give the Commission authority to establish rates contrary to the long and short haul provision of section 21, in the absence of the application or investigation which that section prescribes. This contention is based upon the terms of section 22 of article 12, as amended, which declares:

"No provision of this Constitution shall be construed as a limitation upon the authority of the Legislature to confer upon the Railroad Commission additional powers of the same kind or different from those conferred herein which are not inconsistent with the powers conferred upon the Railroad Commission in this Constitution, and the authority of the Legislature to confer such additional powers is expressly declared to be plenary and unlimited by any provision of this Constitution."

We think it is very clear that an act authorizing the Commission to establish rates regardless of the provisions of section 21 of the amended Constitution would be inconsistent with that section. While section 22 declares that the Legislature may confer upon the Commission powers additional to those conferred upon it by the Constitution, it erects a barrier which the Legislature cannot pass, in providing that such powers must not be inconsistent with the powers conferred upon the Commission by the Constitution. The Constitution specifically points out the method whereby relief can be had from the prohibition as to the long and short haul, and it is clear that any statute which provides a method for obtaining such relief other than the method therein prescribed is inconsistent with it.

We have given careful consideration to the case of Pacific Telephone & Telegraph Co. v. Eshleman, 166 Cal. 660, 137 Pac. 1119, 50 L. R. A. (N. S.) 652, Ann. Cas. 1915C, 822, cited by the defendant to sustain its contention that in conferring powers upon the Railroad Commission the Legislature is untrammeled by any constitutional provision. The question in that case was whether the act of February 9, 1911, which conferred upon the Commission power to require a telephone company to permit a physical connection between its lines and the lines of a competing company, was a taking of private property for public use without compensation first made, in violation of the Constitution. In disposing of that question the Supreme Court used language which the defendant now relies upon, as follows:

> "We regard the conclusion as irresistible that the Constitution of this state has in unmistakable language created a commission having control of the public utilities of the state, and has authorized the Legislature to confer upon that commission such powers as it may see fit, even to the destruction of the safeguards, privileges, and immunities guaranteed by the Constitution to all other kinds of property and its owners."

The decision, in other words, holds that the Legislature, in conferring powers on the Commission, is placed above and beyond the control of constitutional restrictions as they had theretofore existed. It does not follow, however, that it was placed beyond the control of the very constitutional provisions which define that power, or that in carrying out the provisions of section 22 of the amendment of 1911 the Legislature was at liberty to ignore the provisions of the section which preceded it, and which was adopted at the same time and as a part of the same amendment. This is evidently the view which was taken in the Eshleman Case, where in the opinion Mr. Justice Henshaw approved the argument "that there is the fullest * * * grant of authority to confer all kinds of additional powers, with the sole limitation that whatever additional powers may be vested by the Legislature in the Commission shall not be inconsistent with the constitutional powers conferred," meaning thereby that, while all other constitutional provisions were set aside, the Commission was held to the constitutional provision which was a part of its charter, its authority to act, and which prescribed its method of procedure.

[8] It is urged that the complaint is fatally defective for its failure to allege that the plaintiff or any of its assignors had applied to and secured from the Railroad Commission of California a reparation order based on the payment of excessive charges, and it is said that from and after March 23, 1912, when section 71 of the California Public Utilities Act became effective, one who has paid a greater charge for a given distance than the carrier was charging for the same class of property for a greater distance over the same line of route, and who claims reparation on the ground of a violation of the long and short haul clause of the Constitution, must first apply to the Commission for, and secure, an order prescribing the amount of reparation to which he is entitled, and that until that is done the courts have no jurisdiction to entertain such a cause of action. Section 71 of the Public Utilities Act provides:

"When complaint has been made to the Commission concerning any rate, fare, toll, rental or charge for any product or commodity furnished or service performed by any public utility, and the Commission has found, after investigation, that the public utility has charged an excessive or discriminatory amount for such product, commodity or service, the Commission may order that the public utility make due reparation to the complainant therefor, with interest from the date of collection; provided, no discrimination will result from such reparation."

We think that the court below properly ruled that this section has reference only to instances where the question whether the carrier had charged an excessive or discriminatory rate is dependent upon facts to be ascertained from investigation, upon evidence taken by the Commission, as in Texas & Pacific Ry. Co. v. Abilene, etc., Co., 204 U. S. 426, 27 Sup. Ct. 350, 51 L. Ed. 553, 9 Ann. Cas. 1075, and Robinson v. B. & O. R. R. Co., 222 U. S. 506, 32 Sup. Ct. 114, 56 L. Ed. 288. The Legislature, it may be presumed, did not intend that the plaintiff in such a case as this was required to do a useless and idle act. The facts in this case, if presented to the Commission, would have afforded no ground for its action. There was no occasion for the exercise of the powers lodged in the Commission as an administrative body, and there was no question of permissible discrimination based upon differences in conditions. There was nothing as to which the Commission could make a reparation order. The measure of the plaintiff's damages was fixed by the very nature of the transactions. There was no issue as to the measure of damages upon which testimony could have been taken before the Commission, as there has been none upon which testimony was in fact taken in the court below. The plaintiff's right to recover depends upon a question of law. The statute which is applicable here is section 73 (a) of the Public Utilities Act, which provides:

"In case any public utility shall do, cause to be done, or permit to be done any act, matter or thing prohibited, forbidden or declared to be unlawful, or shall omit to do any act, matter or thing required to be done, either by the Constitution, any law of this state, or any order or decision of the Commission, such public utility shall be liable to the persons or corporations affected thereby for all loss, damages or injury caused thereby or resulting therefrom."

In Southern Pacific Co. v. Superior Court of Kern Co., 27 Cal. App. 240, 150 Pac. 397, the District Court of Appeal of California, in construing these statutes, said:

"The record here shows that the demand actually was founded upon the claim that the plaintiff's assignor had been compelled to pay a charge which was illegal, in that it was in violation of the 'long and short haul' clause of the state Constitution. If the charge was thus in conflict with the Constitution, it was a charge beyond the jurisdiction of the Railroad Commission, because it was a charge that the Railroad Commission could not legalize after it was made and paid. However just the amount might seem to be—conceding that it could legalize any subsequent charges—the jurisdiction to pass upon an alleged illegal charge of this kind is necessarily vested in the courts, because the law has provided no other source of relief."

We find no error. The judgment is affirmed.

ROSS, Circuit Judge (concurring in part, and dissenting in part). I concur in the conclusion in respect to the first group of claims counted upon, and to which reference is made in the opinion of the court, and in the reasons given in support thereof.

But in respect to the conclusion reached by the majority of the court in regard to the second group of claims I am unable to concur, for the reason that, as I understand the concluding portion of section 22 of the amendment of October 10, 1911, of the Constitution of California the "Railroad Commission Act of California," approved February 9, 1911, and commonly known as "the Eshleman Act," is made valid in all of its parts by the constitutional amendment itself; it being therein expressly declared that it "shall have the same force and effect as if the same had been passed after the adoption" of the constitutional amendment, from which I conclude that all of the acts performed by the Railroad Commission, and all rates adopted by it, or recognized as just rates by it under the Eshleman Act, are by the constitutional amendment recognized as valid and continue in force until changed by the Railroad Commission. As I understand the record in the case, the rates collected by the railroad company in the second group of claims mentioned in the opinion were recognized by the Railroad Commission as just rates, and by it continued in force under the Eshleman Act, and were in force at the time of the adoption of the constitutional amendment of October 10, 1911, and are therefore valid rates until the Railroad Commission shall in pursuance of the law deem it proper to change them.

ELDER et al. v. WESTERN MINING CO. et al.

(Circuit Court of Appeals, Eighth Circuit. November 29, 1916.)

No. 4724.

1. QUIETING TITLE ⇐7(1)—SUIT TO REMOVE CLOUD—GROUNDS FOR RELIEF IN EQUITY.

There is a legal presumption that any cloud or unlawful incumbrance upon real property inflicts such an injury upon parties interested therein who have the right to have it free from such cloud as will give a

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

court of equity jurisdiction to remove it at their suit without proof of other damage.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 14, 15, 17; Dec. Dig. ⊂⊃7(1).]

2. MINES AND MINERALS ⊂⊃105(2)—CORPORATIONS—SUITS BY STOCKHOLDERS—ILLEGAL LEASE OF PROPERTY—"INCUMBRANCE."

Rev. St. Colo. 1908, § 865, which provides that any "incumbrance" of the property of a mining corporation shall be void until it shall have been approved by a vote of a majority of the stock at a proper and legal meeting, applies to a lease of mining property, and a lease not so approved is voidable by the stockholders, and the right of action to avoid it is in them and not in the corporation.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229½; Dec. Dig. ⊂⊃105(2).

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

3. MINES AND MINERALS ⊂⊃105(2)—CORPORATIONS—LEASE OF PROPERTY—VALIDITY—CONSTRUCTION OF STATUTE.

Such statute cannot be construed to validate a lease of the property of a mining corporation made by its directors until it has been repudiated by vote of a majority of the stockholders.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 229½; Dec. Dig. ⊂⊃105(2).]

4. CORPORATIONS ⊂⊃189(6)—SUIT BY STOCKHOLDERS—LACHES.

A suit by stockholders for the cancellation of a renewal of a lease made by the directors *held* not barred by laches or acquiescence, where the renewal was executed three or four years before the expiration of the former lease and was concealed from complainants until within less than one year before the commencement of suit.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 715; Dec. Dig. ⊂⊃189(6).]

5. EQUITY ⊂⊃67—LACHES—NATURE AND ELEMENTS.

Equitable estoppel is the indispensable foundation of such laches, acquiescence, or ratification as will bar a suit.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 191–196; Dec. Dig. ⊂⊃67.]

6. EQUITY ⊂⊃147—PLEADING—MULTIFARIOUSNESS.

A bill is not mutlifarious which presents a common point of litigation, the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters involved in the suit, but it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others.

[Ed. Note.—For other cases, see Equity, Cent. Dig. § 340; Dec. Dig. ⊂⊃147.]

7. CORPORATIONS ⊂⊃190—SUIT BY STOCKHOLDERS—PLEADING.

A bill by stockholders of a corporation against other stockholders, alleging that defendants arbitrarily overruled the action of the stockholders in electing a new board of directors, leaving the old board in power, and thereby keeping in effect an illegal lease under which such defendants and others were removing ore from the property of the corporation, *held* to state a cause of action.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 723–731; Dec. Dig. ⊂⊃190.]

Appeal from the District Court of the United States for the District of Colorado; John A. Riner, Judge.

Suit in equity by Rufus C. Elder and Frank E. Mann, executors of the will of George W. Elder, deceased, and Frank E. Mann, against the Western Mining Company, Samuel D. Nicholson, the Adams Mining Company, Julius Rodman, the American Smelting & Refining Company, the Guggenheim Exploration Company, the American Smelters Security Company, the A. M. W. Mining Company, W. W. Sylvester, W. A. Rule, A. D. Grant, H. B. Louderman, Jr., J. F. Broemelsick, W. D. Waters, James Campbell, J. A. Ewing, and the Empire Zinc Company. Decree for defendants, and complainants appeal. Reversed.

This is an appeal from a decree which granted motions of the defendants Western Mining Company, Samuel D. Nicholson, Julius Rodman, the A. M. W. Mining Company, the Adams Mining Company, J. A. Ewing, and the Empire Zinc Company, to dismiss the complaint upon the ground, among others, that it did not state facts sufficient to entitle the plaintiffs to any relief in equity. According to the allegations in the complaint, the plaintiffs were stockholders of the Adams Mining Company, a corporation. They reside in Pennsylvania. The general office and place of business of the Adams Company was in Kansas City, Mo., and its property, certain lode mining claims, was situated in Lake county, Colo. In June, 1899, the Adams Company leased all its property to Samuel D. Nicholson for nine years and eight months from May 14, 1899, until January 14, 1909, for certain royalties specified in the lease. On May 14, 1899, Nicholson and his associates entered upon and thereafter operated the property until December 26, 1902, when he assigned his lease to the Western Mining Company of New Jersey, a corporation organized December 17, 1902, by Nicholson and his associates and of which he has been and is the president, general manager, a director, and a large stockholder. From December 26, 1906, the Western Mining Company, Nicholson, and Rodman, who was a stockholder and director of the Western Mining Company, have remained in possession of the leased premises and have extracted therefrom, sold, and converted to their own use ores of a net smelter value exceeding $2,762,000. On June 1, 1904, the Adams Company made an agreement with the Western Mining Company to extend the term of its lease from January 14, 1909, until January 1, 1914, and on October 31, 1910, it made an agreement with the Western Mining Company to extend its lease six years from January 1, 1914, until January 1, 1920. The statutes of Colorado provided that such leases should be absolutely void, "until the question shall have been submitted at a proper * * * legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition, * * * and the vote upon such proposition shall be entered on the minutes of the corporation." Revised Statutes of Colorado 1908, § 865. Neither the original lease nor the agreements of extension thereof were submitted to the stockholders or approved by a majority vote of the shares of the stock of the Adams Company.

The Western Mining Company, Nicholson, Rodman, and their associates conspired with the president and the other officers of the Adams Company to prevent the plaintiffs from learning the facts relative to the making of the lease and the extensions thereof, the amount and value of the ore developed in the property of the Adams Company, the amount and value of the ore extracted therefrom yearly from 1899 until December 3, 1914, when this suit was brought, the fact that the question of the making of the original lease was not submitted to nor approved by the stockholders of the Adams Company, and the making and the lack of the stockholders' approval of the extensions of the lease; so that until January 1, 1914, the plaintiffs were ignorant of all these facts, except the fact that the original lease was made in 1909. No reports or statements of the actual production of ore from the property of the Adams Company in tons and in dollars were made to the stockholders of that company for 12 years before the commencement of this suit, although ores worth more than $2,000,000 were extracted from its property during those years. During this time the plaintiffs through their agents and attorneys repeatedly attempted by letter and by personal visits to the general office of the

Adams Company in Kansas City, Mo., to procure reports of the actual sales and shipments of ore from the property of the Adams Company; but such reports and examinations of the books and records of that Company were peremptorily refused them at all times. Until January 9, 1914, the plaintiffs were ignorant of the making and of the terms of the extensions of the original lease, of the fact that those extensions had not been approved by a vote of the stockholders, of the value of the ores developed in and the value of those that had been extracted from the property of the Adams Company, although the plaintiffs had repeatedly sought from the officers of the Adams Company reports and information on these subjects, which had been repeatedly denied them, as well as an examination of the books and records of the company.

The second extension of the lease was made on October 31, 1910, although the first extension did not expire until January 1, 1914. The two extensions were made without notice to or knowledge of the plaintiffs by the president and directors of the Adams Company and Nicholson, the president and general manager, and Rodman, the assistant secretary and one of the directors of the Western Mining Company, the lessee, in order to continue the control and operations of the latter company and its extraction of the ore of the Adams Company for an insignificant royalty, and for this purpose they and the officers of the Adams Company concealed and kept secret from the plaintiffs the value and the amount of the ore developed in and of the production of ore from the property of the Adams Company.

The first extension of the lease expired on January 1, 1914. Nicholson, the president and manager of the Western Mining Company, and Rodman, the assistant secretary, each owned ten shares of stock in the Adams Company. They and the directors and officers of the Adams Company had attended every stockholders' meeting of the latter company from 1899 until the commencement of this suit, and they knew that neither the lease nor the extensions had been approved by a vote of the majority of the shares of the stock of the Adams Company, and they had united in making the extensions, extracting the ore from the property for insignificant royalties and keeping secret from the complainants the value of the ore in and of that extracted from the Adams property, as well as the extensions of the lease and their doings thereunder. On December 18, 1913, thirteen days before the six-year term of the second extension of the lease was to commence, there was an annual meeting of the stockholders of the Adams Company. At that time there were in existence 150,000 shares of the capital stock of that company; 141,000 shares were duly represented by owners or their proxies at this meeting. The complainants and other registered stockholders voted 78,136 shares, a legal majority of all the shares represented against the board of directors and the members thereof and Nicholson, the chairman of the meeting and president of the Western Mining Company, together with Rodman, assistant secretary of that company, Sylvester, the president of the Adams Company, and John A. Ewing, the attorney for both companies, forcibly and illegally overruled and disregarded that vote in order to keep the control of the Adams property in their hands, to sustain the lease and its extensions, and to postpone and defeat an investigation of the leases, contracts, accounts, and acts of the Adams Company, its directors, and Nicholson, Rodman, Ewing, and their associates. Pursuant to these acts, the defendants the Western Mining Company, Nicholson, Rodman, and Ewing, its officers, are still in possession of the property of the Adams Company extracting ores for insignificant royalties under the unauthorized extensions of the lease. The plaintiffs bring this suit on behalf of themselves and other stockholders of the Adams Company similarly situated, and, among other things, they pray that the lease and its extensions be set aside, for an accounting from the Western Mining Company, Nicholson, Rodman, and other defendants who have operated or extracted ore under them, for possession of the Adams property, and for an injunction against the further operation of that property by the defendants.

In their complaint the plaintiffs set forth a claim against the directors of the Adams Company for damages which they allege resulted from breaches of trust, fraud, and ultra vires acts of such directors. But service was obtained upon only two of these directors, and as in the brief of the plain-

tiffs their counsel do not complain of, but practically consent to, the elimination of this cause of action and the dismissal of these two defendants, this claim for damages against the directors of the Adams Company will be considered abandoned and will not be further noticed.

The plaintiffs allege that the Western Mining Company, Nicholson, and Rodman, who took and have held and operated the Adams property under the lease and its extension, have transported through the drifts, levels, and workings of that property ores of other companies for which the Adams Company and the plaintiffs have received nothing, while the privilege of making that transportation was worth $500,000, that those defendants are continuing, and unless enjoined will continue, such transportation, and they pray for an injunction against the further use of the property of the Adams Company for the transportation of ores of other companies or otherwise by the defendants, for an accounting of the transportation, and for a recovery of the amout justly owing on account thereof.

Robert Dull Elder, of Denver, Colo. (George R. Elder, of Leadville, Colo., on the brief), for appellants.

Henry A. Dubbs, of Denver, Colo. (John A. Ewing and Henry C. Vidal, both of Denver, Colo., on the brief), for appellees.

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

SANBORN, Circuit Judge (after stating the facts as above). [1] The object of this suit is to remove from the title to real estate the cloud of a lease and two extensions thereof which are valid on their faces but are in reality unauthorized and voidable by reason of facts they do not disclose, to quiet the title against those holding under them, to have an accounting and recovery from them of the value of the ore extracted from the land under the unauthorized instruments, for an injunction against the further extraction of ore, and for the possession of the property. The cause of action set forth in the complaint falls well within a familiar head of equity jurisprudence, for there is a legal presumption that any cloud or unlawful incumbrance upon real property inflicts such an injury upon parties interested therein who have the right to have it free from such cloud as will give a court of equity jurisdiction to remove it at their suit without proof of other damage. Schofield v. Ute Coal & Coke Co., 92 Fed. 269, 271, 34 C. C. A. 334, 336; Ormsby v. Ottman, 85 Fed. 492, 493, 29 C. C. A. 295, 296; Westerlund v. Black Bear Mining Co., 203 Fed. 599, 618, 619, 121 C. C. A. 627, 646, 647.

The order challenged by this appeal dismisses the complaint against all the defendants named therein without leave to the plaintiffs to amend. The facts set forth in the complaint appear at first view to entitle the plaintiffs to an avoidance of the last extension of the lease at least, to an accounting and recovery of the amounts found owing, an injunction and possession of the property, and if these averments are sufficient to entitle the plaintiffs to any relief, and therefore to require an answer from the defendants, it is, in the opinion of this court, unnecessary and unwise to attempt to determine at this time the extent of the relief which the plaintiffs may have against any of the defendants. That question will be more wisely and justly determined after the defendants have answered and after the facts of the case have either been specifically admitted or proved. There is no

opinion or statement of the court below of the reasons for its order of dismissal of this suit, and we turn to the brief and arguments of counsel for the defendants for the presumptive reasons for the court's conclusion.

The plaintiffs are Rufus C. Elder and Frank E. Mann, executors of the will of George W. Elder, deceased, and Frank E. Mann, and they bring this suit as stockholders of the Adams Company, for themselves and all others similarly situated. Counsel for defendants say that, since Elder and Mann were appointed as executors by a court of the state of Pennsylvania, they cannot maintain this suit because they have not complied with the provisions of sections 7951, 7952, Mills' Ann. Statutes of Colorado 1912. But if that position is sound it constitutes no ground for the dismissal of the complaint against these defendants, because Mann in his own right has owned since 1899, and still owns, 3,000 shares of the stock of the Adams Company, and he can maintain this suit if the executors cannot.

If the plaintiffs are entitled to any relief against the last extension of the original lease, the acts and possession of defendants under it, the order of dismissal was erroneous, whatever may be the extent of the relief to which the plaintiffs are entitled against the original lease, the first extension, and the acts and possession under them. The discussion of this case, therefore, may be confined to the consideration of the rights of the plaintiffs under this last extension. The claim of the plaintiffs to the avoidance of this extension, to an accounting from the defendants for the ore extracted under it, to an injunction against the further extraction of ore, and to the possession of the Adams property, rests upon two grounds: (1) The invalidity of the extension as against the plaintiffs under section 865, Revised Statutes of Colorado 1908; and (2) the acts of the defendants knowing its invalidity in overruling and disregarding the majority vote of the shareholders at the annual election in December, 1913, whereby a new board of directors was elected, in maintaining the old board in office and themselves in possession of the Adams property under the invalid extension, and in continuing to extract ore from that property.

[2] Section 865 of the Revised Statutes of Colorado 1908, provides:

"The board of directors or trustees of a mining or manufacturing corporation shall not have power to incumber the mines or plant of such corporation, or the principal machinery incident to the production from such mine or plant until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void, and the vote upon such proposition shall be entered on the minutes of the corporation."

A lease is an incumbrance. A lease which is subject to this statute made by a corporation without a legal vote of the majority of its shares of stock approving it is voidable by the stockholders of the corporation and the right of action to avoid it is in them and not in the corporation. Westerlund v. Black Bear Mining Co., 203 Fed. 599, 610, 613, 121 C. C. A. 627, 638, 641; Dillon v. Myers, 58 Colo. 492, 146 Pac. 269, 272, 274, Ann. Cas. 1916C, 1032.

[3] These propositions are conceded, but counsel for the defendants

insist that such a lease, and hence this extension, is not voidable by any stockholder until the holders of a majority of the shares of the corporation have affirmatively repudiated it by act or vote, and that, because the complaint contains no allegation that they had done so before this suit was commenced, it fails to state a cause of action for the avoidance of the extension on account of failure to comply with the statute. They argue:

"The vote of authorization which the statute provided is the vote of the majority. The majority may authorize in the first instance regardless of the wishes of the minority. It can lie quiescent and the lease remain binding as against the entire body of stockholders. The majority cannot be compelled to act, but they can fail to repudiate, and the lease remains valid until they do repudiate. * * * If the majority must affirm where the thing requires affirmance, the majority must avoid where the thing requires avoidance. Otherwise a minority would control the corporation."

This argument is ingenious, but is it sound? If so, the statute which now reads that, "The board of directors or trustees * * * shall not have power to incumber * * * until the question shall have been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock shall have been voted in favor of such proposition; and any mortgaging or incumbering of such property, without such consent shall be absolutely void," must be amended and transformed so that in effect it will read, "The board of directors or trustees shall have power to incumber * * * until the holders of a majority of the shares shall by vote or act affirmatively repudiate such incumbrance, and any mortgaging or incumbering of such property shall be absolutely valid until such repudiation is made." Is this the true construction of the statute? The object of the Legislature in its passage was to prevent the incumbrance of the mines, plant, and machinery of a mining corporation without the vote of a majority of the shares of its stock at a proper and legal meeting of the stockholders of the corporation, and to render any such incumbrance without such vote voidable by the stockholders. As the statute now reads, it secures to each stockholder the right, before the property of his corporation can be lawfully incumbered, to be present at a regular and proper meeting of the stockholders at which the question of the incumbrance of the property is to be submitted to their vote. It secures to him the right to oppose that incumbrance before it is approved by argument and conversation with other stockholders and by argument and protest in the open meeting of the stockholders before the vote is taken, and it secures to him the right to vote his stock against the incumbrance. The amended statute proposed would deprive him of the valuable right of defense against the proposition to incumber. It is far easier to defeat than to pass a bill or proposition through a legislative body. It would deprive him of the right to argue and protest against the incumbrance in open meeting where he could present at one time to all who were to act or vote upon the proposition his reasons for opposing it, and it would deprive him of the right to have the question determined by the vote of the stockholders in a regular and proper meeting thereof. Not only this, but it would impose upon him, without warrant of statute or of law, the burdensome handicap

of seeking out the holders of a majority of the stock of his corporation and securing from them, after the incumbrance was imposed, an act or vote of repudiation before he could commence to free the property of his corporation from an unauthorized incumbrance. So radical a change in the terms and effect of this statute passes the bounds of permissible construction, falls far within the line of forbidden judicial legislation, flies in the teeth of the familiar rules of interpretation that a statute must be given a rational, sensible construction, that, if consonant with its terms, it must have the construction which will advance the remedy and repress the wrong (Stevens v. Nave-McCord Mercantile Co., 150 Fed. 71, 75, 80 C. C. A. 25, 29), and that the plain natural meaning of a statute should be preferred to any curious and recondite signification discovered only by the study, ingenuity, and desire of unusually acute and able minds (Northern Pacific Ry. Co. v. United States, 213 Fed. 162, 168, 129 C. C. A. 514, 520).

The statute of 13 Elizabeth, c. 5, to which the statute under consideration is analogous, and with which it was compared in the opinion of this court in Westerlund v. Black Bear Mining Co., 203 Fed. 611, 121 C. C. A. 627, declared that a conveyance in fraud of creditors should be "utterly void, frustrate and of none effect." Statutes to that effect exist in all the states. Such a conveyance, however, is voidable, and any creditor injuriously affected by it may maintain an action to avoid it without first securing its repudiation by a majority of the creditors so affected. Cook in his work on Corporations (6th Ed.) § 596, writes:

"Where notice of a meeting is not mailed 30 days before a meeting, as required by the by-laws, a stockholder who does not attend may have an election held at such a meeting set aside, even though his vote would not have changed the result. He is entitled to be present and argue with the other stockholders, or to buy their stock if he can and wishes to do so."

And our conclusion is that, until the question of the approval of an incumbrance created by the board of directors or trustees upon the property of a mining corporation described in section 865 of the Revised Statutes of Colorado 1908 has been submitted at a proper and legal meeting of the stockholders and a majority of all the shares of stock have voted in favor of such proposition, the incumbrance is voidable by any stockholder, and he may maintain a suit to set it aside without the assent of the majority of the stockholders or of any other stockholder than himself to a repudiation of the incumbrance. Rogers v. Nashville, C. & St. L. Ry. Co., 91 Fed. 299, 305, 316, 33 C. C. A. 517.

Counsel for the defendants cite in opposition to this conclusion Foss v. Harbottle, 2 Hare, 461, 67 English Reports, 189, 203, 204; Macdougall v. Gardiner, 1 Chan. Div. (1875) 13, 25, 26; Peters v. Waverly Water Front Imp. & Devel. Co., 113 Va. 318, 74 S. E. 168, 170; Macon, D. & S. R. Co. v. Shailer, 141 Fed. 585, 593, 72 C. C. A. 631; Venner v. Chicago City Ry. Co., 236 Ill. 349, 86 N. E. 266; Bill v. Western Union Tel. Co. (C. C.) 16 Fed. 14, 19; Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827; Dudley v. Kentucky-High School, 9 Bush (Ky.) 576. The opinions in these cases have not failed to receive

consideration. In two of them (Peters v. Waverly Water Front Imp. & Devel. Co., 113 Va. 318, 74 S. E. 168, 170, and Macon, D. & S. R. Co. v. Shailer, 141 Fed. 585, 593, 72 C. C. A. 631), the majority of the stockholders had duly ratified the unauthorized act. They have not done so in this case. In each of the other cases the cause of action under consideration was the corporation's, and the right of the stockholder to maintain it was derivative and was hampered by many conditions and requirements to which an original action by a stockholder in his own right is not subject. The portions of the opinions pertinent to the questions in this case are so by analogy only. They relate to conditions and requirements of derivative causes of action, and not of original ones. This is a suit in the original right of the stockholder. None of the cases cited was founded on the particular statute of Colorado which conditions the suit in hand, and none of the courts that decided them considered that statute. The foundation of this suit is section 865 of the Revised Statutes of Colorado, and the question here is the true construction of that statute. When the decisions in the cases cited were considered in the light of these facts, nothing was found in them to overcome or dissuade from the conclusion which has been reached, or the reasons which have been stated in support of it. The result is that the complaint stated a good cause of action against the defendants on the ground of the invalidity of the extension under section 865. It also stated a good cause of action against them on account of their overruling and disregarding the election of a new board of directors at the stockholders' meeting of December, 1913, their maintenance of themselves in possession, and their extraction of ore from the property of the Adams Company under the unauthorized extension; and the dismissal of the complaint cannot be sustained on the ground that the plaintiffs could not maintain their cause of action because they had not alleged that a majority of the stockholders of the Adams Company had by act or vote repudiated it.

[4] Counsel for the defendants next contend that the plaintiffs are barred from maintaining their suit by laches, ratification, and acquiescence. The original lease was made in January, 1899, for the term from May 14, 1899, to January 14, 1909. This lease was recorded, and the plaintiffs knew there was such a lease. On June 1, 1904, more than four years and six months before the expiration of the term of the lease, the first contract of extension was made. The term of this extension was from January 14, 1909, until January 1, 1914. On October 31, 1910, three years and two months before the expiration of the first extension, the second contract of extension was made. The term of this extension was six years from January 1, 1914, until January 1, 1920. The plaintiffs were not informed of these agreements of extension. They alleged that they were made secretly and were concealed from them until January, 1914. During this time the defendants were extracting ores worth millions of dollars from the property of the Adams Company for insignificant royalties. The defendants knew, and the plaintiffs did not know, the amount and value of the ores developed in the property, the amount and the value of the ores that were being taken from it year after year. They repeatedly

applied to the Adams Company and its officers for information regarding these amounts and values; but, pursuant to a scheme devised and executed by the Western Mining Company, the lessee, its officers, and the officers of the Adams Company, this information and an examination of the books and records of the Adams Company were denied to the plaintiffs. And at the annual meeting of the stockholders of the Adams Company when the majority of the shares were duly voted against the old board of directors, Nicholson, Rodman, and Ewing, officers of the Western Company, in combination with Sylvester and the members of the old board of the Adams Company, overruled and disregarded that election, held the possession of the Adams property in the Western Mining Company, continued and still continue to extract ore therefrom under the unauthorized extensions of the lease. This last unwarranted usurpation of power, possession, and use was effected in December, 1913, a few days before January 1, 1914, when the term of the last extension commenced, and it has continued since that date under the second unauthorized extension. This suit was brought within a year after that annual election and within a year after the commencement of the term of the last extension. It is true that the contract for that extension was made on October 31, 1910, three years and two months before its term commenced and four years and two months before this suit was commenced, and that the contract for the first extension was made more than four years and six months before its term commenced. But these contracts of extension and their terms were unknown to the plaintiffs until January, 1914, less than a year before the commencement of the suit. And such leases in futuro facilitate abuses and are abnormal. United States v. Noble, 237 U. S. 74, 82, 35 Sup. Ct. 532, 59 L. Ed. 844. When made by directors of a corporation without the requisite statutory approval of the stockholders, they forcibly suggest an intent to forestall and prevent the lawful exercise by the stockholders of their authority in subsequent years shortly before the expiration of the existing lease, and when kept secret from the stockholders of the lessor by their directors, while known to the lessees and their officers, they cannot estop such stockholders from maintaining suits to avoid them against the corporation, the lessees, and their officers who procured or accepted them.

The facts which have been stated negative any possible bar of this suit by laches, acquiescence, or ratification. The directors and officers of the Adams Company hold its property in trust for the plaintiffs its stockholders. The latter had the right to rely upon the faithful discharge by these trustees of their duty upon the legal presumption that they would not make or deliver a lease, or an extension of a lease, of the property of their corporation until it was first approved by a majority vote of the shares of its stock. No duty rested upon the stockholders to watch over or search out the acts of their trustees, and neither the trustees, nor those who secured or accepted leases from them knowing that these leases lacked the requisite statutory approval of the stockholders, may be permitted to defeat the suits of the stockholders to avoid them, because, while ignorant of the existence of them

or of their lack of approval by a vote of the majority of the shares, they did not bring suit to avoid them.

[5] Equitable estoppel is the indispensable foundation of such laches, acquiescence, or ratification as will bar a suit. Knowledge on the part of the person to be estopped, or such notice as would lead the ordinarily diligent to knowledge of the material facts that would ordinarily cause action, ignorance of those facts by the party claiming the estoppel, and silence and inaction for an unreasonably long time by the party to be estopped, causing the party claiming the estoppel to take such a position in reliance thereon that injury to him will result from delayed action to avoid, are essential elements of such an estoppel or of such laches, acquiescence, or ratification by silence and inaction as is here claimed. These elements are not found in the case at bar. On the other hand, according to the averments of the complaint, until January, 1914, the plaintiffs were ignorant of the material facts that the extensions had been made without the approval of a vote of the majority of the shares of the company, of the amount and value of the ore developed in the Adams property, of the amount and value of the ore that was yearly removed, and of the terms under which it was taken, while during all this time the Adams Company, its directors and officers, the Western Mining Company, the lessee, and its officers, Nicholson and Rodman, knew all these facts, and the suit was commenced within a year after the plaintiffs discovered the facts. It was brought far within the time fixed by the analogous statute of limitations at law. Section 4071, Revised Statutes of Colorado. The complaint discloses no unusual facts or circumstances making it inequitable for the plaintiffs to bring their suit within the time fixed by such a statute, but it sets forth many unusual conditions and extraordinary circumstances tending to make it inequitable to forbid the maintenance of the suit even after a longer time than that specified in the statute, such facts as the secret execution of the extensions without the approval of the majority of the shares of the Adams Company years before the terms mentioned in them respectively commenced, the knowledge of the Adams Company, its directors and officers, and of the Western Mining Company, and its officers, of those facts, their knowledge of the amount and value of the ore developed in the Adams property and of the amount and value thereof yearly extracted therefrom, the ignorance of the plaintiffs thereof, and the denial of the officers of the Adams Company of information on these subjects and of the examination of their books and records until January, 1914. Kelley v. Boettcher, 85 Fed. 55, 62, 29 C. C. A. 14, 21. Upon the facts set forth in the complaint this suit was not barred by laches, ratification, or acquiescence.

[6] Counsel argue that the complaint was properly dismissed because: (1) The plaintiffs improperly joined therein the cause of action for the removal of the cloud of the lease and its extensions with the cause of action for compensation for the use of the drifts, levels, and workings of the Adams property for the hauling of ores of other companies through them; and (2) because the complaint does not state facts sufficient to constitute a cause of action for this haulage.

If the complaint does not state facts sufficient to constitute a cause of action for the haulage, the statement it contains upon that subject does not effect a fatal misjoinder of causes of action because it states but one cause of action. The court is, however, of the opinion that it states facts sufficient to constitute a cause of action for the haulage founded on the invalidity of the lease and its extensions on account of the absence of their approval by the vote of a majority of the shares of stock of the Adams Company and that, because this cause of action and the cause of action for the removal of the cloud of the lease and its extensions present a common point of litigation, the validity or invalidity of the lease and its extensions, their joinder neither made the complaint multifarious nor wrought a misjoinder of causes of action. No complaint is multifarious which presents a common point of litigation the decision of which will affect the whole subject-matter and will settle the rights of all the parties to the suit, and it is not indispensable that all the parties should have an interest in all the matters contained in the suit, but it is sufficient that each party has an interest in some material matters involved therein and they are connected with the others. Curran v. Campion, 85 Fed. 67, 70, 29 C. C. A. 26, 29; Brown v. Deposit Co., 128 U. S. 403, 412, 9 Sup. Ct. 127, 32 L. Ed. 468; Hayden v. Thompson, 71 Fed. 60, 17 C. C. A. 592.

[7] It is contended that the complaint stated no cause of action against the defendants Nicholson, Rodman, and Ewing. But it contains averments that they caused the overruling and disregard of the legal election of the new board of directors at the annual meeting of the Adams Company in December, 1913, and the subsequent continued possession of the property of the Adams Company and the extraction of ore therefrom by the Western Mining Company under the unauthorized extensions with knowledge that they had not been approved by the shareholders and that Nicholson and Rodman with such knowledge had theretofore caused the like action by the Western Mining Company. These and other allegations in the complaint have led to the conclusion that the complaint ought not to be dismissed against any of the defendants named in the decree challenged until the specific facts of the case are admitted by answer or otherwise, or proved so that the actual connection of each of these parties with the alleged wrong may be clearly seen and a just result attained.

The decree below is therefore reversed, with directions to the court below to deny the motions of the defendants therein named for a dismissal of the complaint and to permit them to answer.

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

(Circuit Court of Appeals, Eighth Circuit. October 30, 1916.)

Nos. 4595, 4596.

1. BAIL ⊂=79(2)—RELIEF FROM FORFEITURE—PLEADING.
A petition for the remission of the penalty of a forfeited recognizance, under Rev. St. § 1020 (Comp. St. 1913, § 1684), which authorizes such remission in the discretion of the court whenever it appears to the court that "there has been no willful default of the party" and that a trial can notwithstanding be had in the cause, is properly signed by a person who put up the money to indemnify the sureties, and who is the real party in interest, and an allegation therein that there was no willful default of the defendant is sufficient; it being neither necessary nor proper to plead the evidence.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 363–365, 369; Dec. Dig. ⊂=79(2).]

2. BAIL ⊂=79(2)—RELIEF FROM FORFEITURE—DISCRETION OF COURT.
Such an application being addressed to the discretion of the District Court, its decision that there was no willful default by defendant cannot be reversed, if supported by substantial evidence, although there is also evidence to the contrary.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 363–365, 369; Dec. Dig. ⊂=79(2).]

3. DEPOSITS IN COURT ⊂=4—"RECEIVED IN A PENDING CAUSE"—"MONEY ACCRUING TO THE UNITED STATES"—FORFEITURES.
Rev. St. §§ 995, 996 (Comp. St. 1913, §§ 1644, 1645), provide that all moneys paid into any court or received by the officers thereof in any cause pending in such court shall be deposited with the treasurer or a designated depositary of the United States to the credit of such court, and withdrawn only on orders of the judge. By regulation of the Treasury Department public moneys, including moneys accruing to the United States from the forfeiture, shall be deposited to the credit of the treasurer. After the entry of an order adjudging default on a criminal recognizance and directing the issuance of a scire facias, but before any hearing thereon, one of the sureties remitted the amount named in the recognizance, but without interest or costs, to the clerk, who credited the same to him and deposited the money to the credit of the court. *Held*, that the money did not "accrue to the United States," so as to become its absolute property, prior to final judgment of forfeiture on return of the scire facias, but until that time was money received by the clerk in a pending cause within section 995, and was properly deposited by him, and subject to withdrawal on order of the judge.

[Ed. Note.—For other cases, see Deposits in Court, Cent. Dig. §§ 5, 6; Dec. Dig. ⊂=4.]

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

Criminal prosecution by the United States against Thomas R. Smart and others. From an order vacating an order adjudging forfeiture of a recognizance, the United States brings error and appeals. Affirmed.

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

John A. Deweese, of Denver, Colo. (Edgar Caypless, of Denver, Colo., on the brief), for defendants in error and appellees.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

SANBORN, Circuit Judge. The United States challenges by appeal and writ of error an order of the court below, made on September 6, 1915, vacating its order of November 19, 1914, which adjudged the forfeiture of the recognizance of the defendant Thomas R. Smart and his sureties, and directing that, out of the $1,500 which the sureties had caused to be paid to the clerk of the court in the case, $403.60, the cost of the apprehension and return of the defendant to the jurisdiction of the court, should be paid to the United States, that $18.20 should be paid to the clerk of the court on account of the defendant's costs in the case, and that the remainder should be paid to Tena Smart, who owned and furnished to the sureties the $1,500 which they paid to the clerk. The order assailed was made under section 1020 of the Revised Statutes upon a petition for the relief granted by the court, made by Thomas Smart, Tena Smart, his wife, and others, the answer of the United States, and affidavits and other evidence. Section 1020 provides that:

"When any recognizance in a criminal cause, taken for, or in, or returnable to, any court of the United States, is forfeited by a breach of the condition thereof, such court may, in its discretion, remit the whole or a part of the penalty, whenever it appears to the court that there has been no willful default of the party, and that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the same penalty to be enforced."

[1] The first reason urged by counsel for the United States for a reversal of the order is that the allegation of the petition "that there has been no willful default of Thomas R. Smart, and that there was no willful default of Thomas R. Smart or his sureties," was an insufficient averment of that fact, and that allegations of the evidence that this default was not willful were indispensable to warrant proof and a finding of Smart's purpose and intention. But the averment was of the intent and purpose of Smart. His acts and words before and at the time of that default were evidence of that intention and purpose, but it was not necessary or desirable that the petition should plead this evidence. The clear statement of the essential fact is a sufficient and better pleading of it than a rambling statement of acts and statements that indicated the intent and purpose of the defendant. Another objection to the petition is that it was verified by Tena Smart and that she was not a proper party to it. But she was the real party in interest in the application. The fact was alleged in the petition that the $1,500 which induced the sureties to sign the recognizance of Smart was her money, which she caused to be delivered to them to indemnify them for their undertaking, and that it was on account of this money that they caused the $1,500 to be paid to the clerk of the court after the recognizance was adjudged forfeited. Tena Smart under these circumstances was a proper party to the petition, and its averments were sufficient to warrant a remission of the penalty of the recognizance.

[2] The second reason urged by counsel for a reversal of the order is that the court below abused its discretion in remitting the penalty

and vacating the forfeiture, because the uncontradicted evidence adduced at the hearing was that the default on the part of the defendant Smart was willful. It is unnecessary, in the discussion and determination of this contention, to recite all the evidence for the United States, for the Congress intrusted to the discretion of the District Court, and not to the discretion of this court, the decision of the question whether or not Smart was guilty of a willful default and whether or not the penalty of his recognizance should be remitted, and if there was substantial evidence before that court that his default was not willful, there was no abuse of its discretion in so finding, although there is also evidence to the contrary. There was evidence before the court of these facts: On August 7, 1914, Smart and his sureties made their recognizance under a penalty of $1,500, conditioned that he should appear before the court at Denver on the first day of that or any future term of the court when required, and that he should answer to the criminal charge against him specified in the recognizance. Tena Smart caused $1,500 of her money to be placed under the control of the sureties on this recognizance to indemnify them for signing it at about the time they did so. On August 31, 1914, Smart wrote to the clerk of the court at Denver that he was completely in the dark as to the time when he was required to appear, requesting him to inform him and his bondsmen of the time and to send his mail to him in the care of Herbert Anderson at the Brooks Hotel, Idaho Falls, Idaho. On September 3, 1914, the United States attorney, in response to that letter, wrote Smart that the date when he was to appear was not determined, and asked him to communicate with him about October 1, 1914, and receive more definite information. On October 29, 1914, the United States attorney wrote Smart and his bondsman Anderson that his case was set for trial on November 19, 1914. No answer was received by the United States attorney from Smart. On November 6, 1914, the attorney telegraphed Anderson: "Have not heard from Smart as I should have. Is his bond to be forfeited?" And Anderson telegraphed that he had not heard from Smart for some time and that in case they had to forfeit the bond the money was ready. On November 19, 1914, Smart did not appear, and an order was made which recited that the district attorney moved for a forfeiture of the recognizance, that Smart and his bondsmen were called, but came not and made default, and closed with these words:

"Wherefore it is considered by the court that the said Thomas H. Smart, Charles H. Anderson, and Robert Irwin have each of them broken the conditions of their said recognizance, and that the same be taken as forfeited, and that a scire facias issue in that behalf, returnable on the first day of the next term of this court sitting at Denver."

Thereupon the United States attorney wrote to the bondsmen that the recognizance was forfeited by the court, and called upon them to send the amount of the bond to the clerk of the court. On December 23, 1914, the clerk of the court received a draft of the State Bank of Idaho Falls, Idaho, payable to him for $1,500, which he placed to the credit of the surety Anderson on his docket cash account, and held subject to the order of the court until September 6, 1915, when the court below vacated the forfeiture of the recognizance and directed the payment of

$403.60 of this $1,500 to the United States, $18.20 to the clerk for the costs of the defendant, and the remainder to Tena Smart. Meanwhile in April and May, 1915, Smart had been apprehended in the state of Washington, ordered by the District Court of the District of Washington to be removed to Denver, had been brought to the court below, had been tried for the offenses charged against him before the same judge who granted the petition to vacate the forfeiture of his recognizance, had been found guilty, and on July 21, 1915, had been sentenced. At his trial and at the time of his sentence Smart stated to the court that he was advised by the United States attorney when he gave his recognizance that the attorney would let him know when his presence was needed, that the defendant was not a resident of the district of Colorado, that he received a letter from the attorney not to appear at a term of court at which he expected his trial, that he did not appear at that term, that he went to old Mexico and on account of the revolution could not return when he desired, that he came back as soon as he was able, that he did not receive any further communication from the attorney advising him when he must appear for trial, and that it was at no time his intention to willfully absent himself from court when his case was set for trial.

The bill of exceptions in this case recites that, in passing upon the application to set aside the forfeiture and remit the penalty thereof, the court below considered and gave weight to these statements of the defendant Smart, and no objection or exception to that action appears in the record. There is much evidence in the bill of exceptions regarding the course of the defendant Smart subsequent to November 19, 1914, and concerning the endeavors to apprehend and expenses of apprehending and securing him, and there is the affidavit of one of the post office inspectors that in May, 1915, after Smart had been brought back to Denver, he told that inspector that he started back to Denver, and was there at the time the trial was set, but "that he lost his nerve and beat it," and that since then he had been in numerous places under the assumed name of Thomas Grant. But the default occurred on November 19, 1914, and the question was whether or not he then intended to make default. What he did afterwards, what intention he had subsequently, especially after his wife's money, or the proceeds of it, in December, 1914, had been received by the clerk, are much less persuasive of his intention when the default was made than what he did and said before and at that time. He was a nonresident of Colorado. He said that the United States attorney told him when he made his recognizance that the attorney would inform him when he was required to appear. His departure from Colorado, therefore, indicated no intention to flee, and his letter of August 31, 1914, to the clerk, giving his address and requesting him to give him and his bondsmen notice at that address of the time of his trial, and his statement at his trial and sentence that he did not intend to make default, constitute substantial and persuasive evidence that he did not, on or before November 19, 1914, intend to fail to appear at his trial, or to make a default of his recognizance. Here was substantial evidence that Smart was not guilty of a willful default, and the court was not guilty of an abuse of discretion in so finding.

[3] The third reason which counsel give for the reversal of the order challenged is that the $1,500 received by the clerk of the court in December, 1914, became, upon its receipt by him, the absolute property of the United States, and that the court below had no jurisdiction or authority to order it, or any part of it, paid to Tena Smart, who had furnished it. Section 995 of the Revised Statutes, provides that:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court."

Section 996 provides that:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said court, respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn."

There were regulations of the Treasury Department (Department Circular No. 47, April 5, 1905) to the effect that:

"Receivers of public moneys living in the same city or town with * * * a national bank depositary must deposit their receipts at the close of each day," that "all collections must be deposited to the credit of the treasurer of the United States," and that "clerks of the United States courts who receive public moneys accruing to the United States from * * * forfeitures of recognizances, * * * will deposit the same in accordance with the foregoing paragraphs."

Section 1020 of the Revised Statutes, as we have seen, empowers any court of the United States in which any recognizance in a criminal cause has been taken and forfeited by a breach of its condition, without limit as to time, to remit the whole or a part of the penalty in its discretion, when it appears to it that there has been no willful default of the party, that a trial can, notwithstanding, be had in the cause, and that public justice does not otherwise require the enforcement of the penalty. It is settled by the weight of reason and of authority that this power may be exercised and the penalty may be remitted after final judgment against the sureties on scire facias, and after the expiration of the term in which the default was adjudged, and after the expiration of the term in which the final judgment on scire facias was rendered. United States v. Jenkins, 176 Fed. 672, 100 C. C. A. 224, 20 Ann. Cas. 1255; United States v. Duncan, Fed. Cas. No. 15,004; United States v. Traynor (D. C.) 173 Fed. 114, 115. There can be no doubt, therefore, that unless the $1,500 received by the clerk of the court on December 23, 1914, and in the actual control of the clerk and the court on September 7, 1915, had become the absolute property of the United States, and had legally passed beyond the jurisdiction and control of the court before the latter date, that court had the authority and the right to remit it to the party on whom the penalty really fell, to Tena Smart, who furnished the money from which the deposit made with the clerk of the court in the pending cause on December 23, 1914, was derived.

The contention that the deposit was without the control of the

court rests on the proposition that this $1,500 became the absolute property of the United States the moment it was received by the clerk, that it was his duty to deposit it on that day in a national depositary to the credit of the treasurer of the United States, that he wrongfully failed to do this, and that the court erred because it was without right or power to take advantage of this dereliction of duty of the clerk to remit the money to the party equitably entitled to it, although it still remained under the actual control of the court. Thus it appears that the indispensable basis of the theory of counsel for the United States is the dereliction of the clerk in the discharge of his duty to decide, when he received this money, that it was the absolute property of the United States and to deposit it forthwith as such to the credit of the treasurer of the United States, instead of depositing it in the national depositary in the pending cause to the credit of the court.

The regular course of proceeding, when a defendant in a criminal case with his sureties has made a recognizance to appear at his trial and has failed to do so, is for the court on motion of the United States attorney to make an order that the defendant and the sureties have broken the conditions of their recognizance, that the same is forfeited, and that a scire facias issue to the defendant and his sureties, returnable at a time certain, to show cause why final judgment thereon should not be rendered and an execution be issued against them; the scire facias is then issued and served on the defendant and his sureties, and in answer to it they may defend by presenting such matters of legal avoidance as may be shown by plea, by questioning the amount of the judgment to be rendered, and by presenting such matters of relief as may tend to induce the court to remit or mitigate the forfeiture. On the hearing upon the return of the scire facias such matters are heard, the amount of the debt is then first liquidated and fixed, and if the defenses do not prevail, then for the first time a final judgment fixing the amount of the liability is rendered and the issue of an execution is ordered. United States v. Duncan, 25 Fed. Cas. 937, No. 15,004; United States v. Feely, 25 Fed. Cas. 1055, 1057, No. 15,082; United States v. Santos, 27 Fed. Cas. 954, No. 16,222; United States v. Winstead (D. C.) 12 Fed. 50, 51; United States v. Von Jenny, 39 Appeal Cases, District of Columbia, 377, 378; United States v. Traynor (D. C.) 173 Fed. 114, 115. In some of the courts of the United States the practice is, instead of issuing the scire facias, to bring an independent action against the defendant and his sureties on the forfeited recognizance; but not until scire facias or summons has been served on the sureties and they have had opportunity to plead in answer may final judgment fixing the amount of their liability and directing the execution be rendered. The judgment of default of the recognizance is an interlocutory judgment in a pending cause, which, in the absence of the defendant and the sureties may go to final judgment only after notice to the defendant and the sureties and an opportunity for them to be heard. The judgment of default of the recognizance is conditioned by the subsequent failure of the sureties after such notice

to present legal grounds for its avoidance, and by the subsequent determination of the amount of the recovery after such notice. So it is that, when the $1,500 was received by the clerk, there was a cause pending in his court between the United States, on the one hand, and Smart and his sureties, Anderson and Irwin, on the other hand, upon their recognizance. A judgment of default of the recognizance and of the issue of a scire facias returnable on the first day of the next term of the court had been rendered, and there the pending cause stood.

Sections 995 and 996 of the Revised Statutes provided that moneys paid into any court or received by the officers thereof in any cause pending in such court should be deposited with the treasurer or a designated depositary of the United States in the name and to the credit of such court, and that such moneys might be withdrawn and paid out on orders of the judge of that court, signed by him and entered and certified by the clerk. As the $1,500 was received by the clerk in a pending cause, credited to Anderson, one of the parties to that cause, on the clerk's docket cash account, and subsequently paid out on the orders of the judge, the legal presumption is that the clerk deposited it on the day he received it in a designated depositary to the credit of the court under sections 995 and 996. If that money was received by the clerk without any direction to apply it to the payment of a part of the liability of the sureties on the recognizance, for their liability on the day of its receipt was $1,500 and interest from November 19, 1914, or $1,512.46 and costs, if he received it with instructions to apply it to the payment of their liability on condition that the United States would accept it in compromise and settlement of that liability, and would satisfy and discharge on the record of the court the judgment of default of their recognizance against them, if he received it with instructions to hold it to the credit of Anderson until the judgment was satisfied or until an application to avoid the forfeiture could be heard by the court, and in many other conceivable circumstances, that money could not and did not become the absolute property of the United States upon its receipt, and it was not his duty to deposit it to the credit of the treasurer of the United States, but it was his duty to place and hold it in a designated depositary subject to the disposition of the court in the pending cause. As he so placed and held it, the legal presumption is that he did so for some such justifying reason.

As counsel for the United States insist that the $1,500 became the absolute property of the state on its receipt by the clerk, that he knew this, and that he violated his duty in failing to deposit it as such to the credit of the treasurer, and as they further insist that the court below was in error in treating it as deposited in a pending cause under section 995, and as this theory flies in the face of the legal presumption, the burden was upon them to establish the fact by the record that this $1,500 did become such absolute property of the United States, and that the clerk violated his duty in depositing it in the pending cause to the credit of the court under section 995. The following is all the record material to this issue: The petitioners

alleged that Anderson and Irwin, the sureties, remitted to the clerk of the court the said $1,500, and that the same is in the registry of the court, subject to the proper order or further disposition of this court. The answer of the United States was that said sum of $1,500 is now in the hands of the District Court of the United States as a full payment of the obligations created by said bail bond. There was no averment or claim in the answer, or during the trial, so far as the record discloses, that the money had been misappropriated, or that it was not rightfully within the jurisdiction of the court. The clerk was not called or sworn as a witness, and the only facts proved relevant to the issue under consideration were that the State Bank of Idaho Falls in December, 1914, sent to the clerk of the District Court a draft for $1,500, that the clerk indorsed the draft, and on December 23, 1915, credited the surety Anderson with $1,500 on his docket cash account, and that on August 30, 1915, eight months thereafter, Anderson and Irwin made affidavits that the $1,500 was paid to the clerk of the court in full payment of the debt created by the forfeiture. But this proof falls far short of overcoming the legal presumption that the clerk and the court below properly treated this fund, far short of proving violation of duty by the former, or lack of jurisdiction over the fund by the latter. There is no proof in this record that the clerk was directed by the bank that drew the draft, or by the surety or sureties, or by any other party to pay this money over to the United States on their recognizance; no proof what instructions, if any, were given him by the sender or senders of the draft. The money received was insufficient to pay the debt evidenced by the recognizance, and even if the sureties had instructed the clerk at the time he received it that it was sent as a full payment thereof (and there is no proof that they did), he could not lawfully have paid or delivered it to the United States until the United States, by its attorney or some other authorized agent, had agreed to accept it in compromise and settlement of the larger amount owing on the recognizance and to satisfy the judgment of default. The record fails to show that the $1,500 received by the clerk ever became the absolute property of the United States, that the clerk of the court failed properly to deposit the $1,500 he received, that this $1,500 and its disposition were not lawfully within the jurisdiction and control of the court below or that that court did not lawfully dispose of it in the exercise of a wise and just discretion, and the order of September 6, 1915, must be affirmed.

It is so ordered.

TOLEDO NEWSPAPER CO. et al. v. UNITED STATES.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1916.)

No. 2786.

1. CONTEMPT ⊜44—JUDGES ⊜15(1)—JURISDICTION—CALLING IN JUDGE.
Where a newspaper is charged with contempt in publications concerning a judge sitting in a pending suit, such judge has jurisdiction to dispose of the contempt proceedings, the contempt being of a direct character; but, if there be sufficient time, he should call in another judge.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 128–130; Dec. Dig. ⊜44; Judges, Cent. Dig. §§ 48–50; Dec. Dig. ⊜15(1).]

2. CONTEMPT ⊜66(7)—REVIEW—FINDINGS OF FACT.
A proceeding to punish for criminal contempt being one at law, those matters which are to be naturally inferred, and which the opinion of the lower court assumed, will be considered as found; no specific findings being requested or made.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 232–237; Dec. Dig. ⊜66(7).]

3. APPEAL AND ERROR ⊜719(3)—ASSIGNMENTS OF ERROR—JURISDICTION.
Objections that the trial court was without jurisdiction need not be assigned, to be considered, but will be raised by the appellate court on its own motion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2971, 3490; Dec. Dig. ⊜719(3).]

4. CONTEMPT ⊜9—CRIMINAL CONTEMPT—JURISDICTION.
Nonresident judgment creditors of a street railroad company, the terms of whose franchises were about to expire, filed a bill in the District Court against the company, setting forth that compliance with a three-cent fare ordinance of the municipality in which it was located would destroy the equity of redemption from existing mortgages, to which equity alone they could resort. The city was made a party, but motions for a temporary injunction against enforcement of the ordinance were denied, on the grounds that the ordinance was not self-executing and that the old franchises had not been extended, as claimed. After the first hearing the court subsequently granted a temporary injunction on the ground that the situation had changed; the officers of the city treating the ordinance as self-executing. *Held*, that during the time the court was disposing of the first motion for an injunction, as well as the time when the subsequent motions were pending, the court had jurisdiction, for, despite the denial of the contention that the franchise had been extended, the court had jurisdiction to subsequently grant the injunction, conditions having changed, on the theory that its first order was improvidently made or that the status quo should be preserved pending final determination, and so the publication of articles during those periods interfering with the court's exercise of its jurisdiction, so as to obstruct the administration of justice, would constitute criminal contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18; Dec. Dig. ⊜9.]

5. APPEAL AND ERROR ⊜477—RIGHT TO PRESERVE STATUS QUO.
Though an injunction be denied, the court has jurisdiction to preserve the status quo pending appeal or final determination, though dismissing the bill.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 2247–2249; Dec. Dig. ⊜477.]

6. CONTEMPT ⟸9—NEWSPAPER PUBLICATION—PENDING CAUSE—OBSTRUCTION OF JUSTICE.

Judicial Code (Act March 3, 1911, c. 231) § 268, 36 Stat. 1163 (Comp. St. 1913, § 1245), declares that courts shall have the power to punish contempts of their authority, provided that such power shall not be construed to extend to any cases, except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice. A newspaper company, referring to a pending action involving the enforcement of municipal ordinances regulating street car fares to be charged, published articles tending to provoke public resistance to an injunctional order, in case one should be made by the federal judge in a pending suit. *Held*, that the publication, being calculated to produce resistance to the order of the court, amounted to misconduct, or a misbehavior constituting a contempt.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 8, 15–18; Dec. Dig. ⟸9.

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

7. CONTEMPT ⟸6—NEWSPAPER PUBLICATION—PENDING CASE—OBSTRUCTION OF JUSTICE.

Such publications being in a newspaper of general circulation in a city and sold under the very courthouse windows, if not brought into and sold within the corridors and offices of the building, and being calculated to obstruct the administration of justice, amount, in view of the history of the enactment of the section, to direct contempt, punishable under Judicial Code, § 268; it appearing that Congress refused to exempt newspapers.

[Ed. Note.—For other cases, see Contempt, Cent. Dig. §§ 6, 9, 10, 13; Dec. Dig. ⟸6.]

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

The Toledo Newspaper Company and another were convicted of criminal contempt (220 Fed. 458), and they bring error. Affirmed.

Lawrence Maxwell, of Cincinnati, Ohio, for plaintiffs in error.

Wm. L. Day and E. S. Wertz, U. S. Atty., both of Cleveland, Ohio, for the United States.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. The chief franchises of the street railway system in the city of Toledo were by their terms to expire on March 27, 1914, and there had been long and bitter controversy between the street railway company and some elements in the city which opposed franchise renewals, unless on conditions which the railway company would not accept. The council passed an ordinance fixing three cents as the rate of fare after March 27th, and an application was made to the court below for a temporary injunction to forbid any attempt to enforce this ordinance. The Toledo Newspaper Company, a corporation, was the publisher of the Toledo News-Bee, and this paper contained editorial and news articles on the subject. Later, and upon the direction of the judge of the court, an information was filed against the publishing corporation and its managing editor, charg-

ing that certain of the publications constituted a contempt. A demurrer to this information was overruled, an answer was filed, and upon the issue so joined a trial was had. The respondents were found guilty and were condemned to pay fines—a nominal one by the editor, but a very substantial one by the publishing company. 220 Fed. 458. Both respondents join in this writ of error. A more detailed statement of facts will be found in connection with the discussion of the questions involved.

[1] 1. One matter, more or less mentioned on the argument, should receive notice, although it cannot be important to our disposition of the case. At the trial the court was presided over and the findings were made and sentence pronounced by the same judge who was holding the court at the time of the publications complained of. His legal right to conduct the trial is not questioned; indeed, it is obvious that, in the typical case of direct contempt, to require a substitution of judges before the contempt could be punished would be to deprive the proceeding of its summary character and destroy its efficiency as a means of securing the unimpeded administration of the law. However, there are frequent cases where, even though mistakenly, a general belief may easily arise that there is a personal controversy between the contemner and the judge of the court. Even in cases of this class, if the necessity for summary action or if other reasons make impracticable the substitution of another judge to hear the contempt matter, the duty of the regular judge of the court to proceed with it is clear, no matter how embarrassing this duty may be to him; but, in these cases, if there is no immediate urgency, and if no other reason exists making it specially appropriate that the same judge act, we think it by far the better policy to call in another judge; and the federal system provides special facility for so doing. We can well understand the reluctance with which a District Judge would put himself in a position which seemed to be a shifting to another of this sometimes very burdensome and very delicate duty; but it is of the greatest importance that contempt proceedings be put, as far as possible beyond the reach of even unjust adverse criticism, and, in such a situation as has been recited, the judges of this court upon whom the duty may fall will always be ready to assign a judge from another district.

[2] 2. This is an error proceeding, in a case at law. No specific findings of fact were requested or made. General and ultimate findings were embodied in the order. Under these conditions it is not necessary that every fact necessary to support the judgment should be particularly found. Even if we do not here apply the strictness of the rule that every fact necessary to support the judgment will be assumed so far as not contradicted by the record, we may at least assume those things which are naturally to be inferred, and which the opinion and the course of the proceedings below indicate every one took for granted.

[3-5] 3. It is undisputed that the newspaper publications had reference to the general subject-matter, some phases of which were then pending in the District Court, and had reference to the making and the effect of the injunctional order, the application for which was

then pending. It is suggested, if not very directly urged, upon the oral argument, that the court had no jurisdiction whatever in the pending cause to make such an injunctional order as asked, or any order to that effect, and that, therefore, there could be no contempt with regard to such subject-matter. This question is not distinctly covered by any assignment of error nor is it mentioned in the very careful brief prepared by respondents' counsel; but it pertains to the jurisdiction and should be noticed even upon our own motion. It requires further details to be stated.

On January 26, 1914, judgment creditors, citizens of New York, filed in the court below a bill in the nature of a creditors' bill against the railway, citizen of Ohio, setting out, among other things, that the three-cent ordinance was confiscatory, and that compliance therewith would destroy the equity of redemption from existing mortgages, to which equity alone judgment creditors could resort, and that there had been in effect an extension of the franchises until October. It prayed a receivership, and that, if the judgment was not satisfied before the date set for going into effect of the ordinance, the city of Toledo then be made a party defendant, and that it then be enjoined from enforcing the ordinance. A motion for the appointment of a receiver was entered, but not brought on for hearing. March 24th, on petition that day filed, an order was entered permitting plaintiffs to make the city a defendant, and an amended bill was filed accordingly. On the same day the railway company filed its cross-bill against the city, asking the same relief; and motions for preliminary injunction were duly entered. These motions were brought to the attention of the court on March 26th. The court did not that day hear the motions formally, but indicated that, until there was time for decision, matters ought to remain in statu quo. On March 30th, and after formal hearing on the 28th, an opinion was filed holding that the ordinance was not self-executing; that it provided for its execution by the filing of a bill and the obtaining of a court order to put it in force; that all questions involved could be raised in defending such application; that plaintiffs had, in this way, an adequate remedy without themselves moving affirmatively in a court of equity; and, hence, that the court could not grant the injunction asked. No order denying the motions seems to have been entered. Later, the motions were renewed and arguments and hearings before the court were had from time to time in August and September. On September 12th the court filed an opinion holding that the situation had changed in that the city officials were interpreting the ordinance as self-executing and were attempting to enforce it without any court proceeding, and that, since it was practically conceded that the three-cent rate was confiscatory, plaintiffs were entitled to a temporary injunction.

There was ample jurisdiction to justify punishing any contempt committed at this stage of the case. Even if it might be said that the court is not entitled to full protection as a court while it is considering and deciding, either way, the question whether it has power to give the relief sought (U. S. v. Shipp, 203 U. S. 563, 27 Sup. Ct. 165, 51 L. Ed. 319, 8 Ann. Cas. 265; Fair v. Kohler,

228 U. S. 22, 33 Sup. Ct. 410, 57 L. Ed. 716), and even if it might be denied that the real dispute here was whether use of the streets by the company would be an acceptance of the ordinance, notwithstanding the declared purpose not to accept, and might be denied that this dispute presented a justiciable controversy giving power to make an order fixing the terms of use temporarily, yet it cannot be doubted that the bill as filed presented also a claim that the old franchise would not expire until October, and so asserted a good case for the relief asked. The judge on March 30th announced his opinion that this claim was not good in law, and part of the publications complained of were of a later date; but this question abided in the case, in spite of his provisional decision. On the final hearing or on appeal it might turn out that plaintiff was right; and a court may temporarily preserve the status quo, even after deciding to dismiss the cause. Cotting v. Kansas City, 183 U. S. 79, 80, 22 Sup. Ct. 30, 46 L. Ed. 92. The jurisdiction to make a provident order in the subject-matter is clear; and it would not be material to the preliminary jurisdiction if it should be thought that an order actually made was improvident.

The publications complained of were made during the periods from March 24th to March 30th, and from August 14th to September 11th, during the pendency, respectively, of the first and second motions.

[6] 4. The question of jurisdiction past, the next inquiry is whether the publications constituted that "misconduct," to the punishment of which the power of the court is limited by the statute. Judicial Code, § 268. It is clear, from the very words of the statute, that "misconduct" carries a double limitation. Not everything which may rightly be classified under this general name is punishable; to be so, it must have the required character and the required location.

First, as to character: It must "obstruct the administration of justice." Although this limitation is expressed only as to that class of contempts not committed in the physical presence of the court, it must be implied in the other class as well; for the typical case of misconduct in a courtroom inherently "obstructs the administration of justice," and in these five words are epitomized the reasons why power to punish for contempt must exist. If we give our attention alone to this matter of the character of the misconduct, omitting for the present any thought as to its location, we see that we may—so far as the decision of this case is concerned—disregard all cases of mere libel and slander against the judge of the court and all cases of newspaper or other comment directed against past judicial action. In both of these classes, such tendency as there is to obstruct the administration of justice is not of the direct nature which we have here to consider. Whether there may be cases which seem only to refer to the past action of the court, or which seem to be substantially slander or libel, and which, nevertheless, should be treated as an obstruction within the meaning of this statute, is a matter about which we have no occasion to express an opinion. Upon this record, the publications had reference to pending judicial action, and there is a finding of fact ("as alleged in the information") that they tended and were intended to provoke public resistance to an injunctional order, if one should be made, and there is a finding that they constituted an attempt to

intimidate—at least unduly to influence—the District Judge with reference to his decision in the matter pending before him. That each of these findings is supported by competent evidence, and for that reason binding upon this court, is too clear for dispute; but we may rightly go further, and say that it is difficult to see how any other findings could have been made. The publications are set out in some detail in the opinion of the District Judge, 220 Fed. 460–472. They must be considered collectively, not singly; they must be taken, headlines as well as text, as intended to produce the effect which all must know they would be likely to produce upon many of the great audience to which they were addressed. Thatcher v. United States (C. C. A. 6) 212 Fed. 801, 810, — C. C. A. —. They were, in form and substance, well adapted to bring about resistance to and utter public disregard of an injunctional order, and to influence a weak judge into denying the order through fear of those weapons of public abuse and ridicule which respondents controlled and showed their willingness to use. Manifestly, it is of no importance that, when the order was finally made, and its operation had been postponed a short time expressly to give opportunity for excitement to die out, no riotous disobedience followed; and it is equally of no importance that in such a case the attempt may produce in the judge's mind irritation, instead of fear.

[7] 5. This leaves for consideration only the second statutory limitation—that pertaining to the place where the misconduct occurs. The elaborate printed brief for plaintiffs in error is devoted wholly to this question, and it is argued, in effect, that a newspaper publication, no matter what its character, and no matter whether with reference to a matter pending, is wholly immune from punishment as for contempt, provided it is not circulated in the courtroom while the court is in session.

It is urged that the record does not show that the publications were currently read by the judge of the court, or that the papers containing them were sold or distributed in the courthouse corridors, on the steps, or in the immediate vicinity of the courthouse. If these facts are essential, they may and should be presumed in support of the judgment. There is no proof to the contrary, and it is highly probable that in a city like Toledo, and with a courthouse situated as it there is, an afternoon paper, with a daily circulation of 50,000, and with five editions each day, not only is read every day by the great part of the reading public, including the judges, but is cried and sold by the hundreds and thousands under the courthouse windows, and is brought into, if not sold in, the corridors and offices of the building. We refer to these presumptions and probabilities only to indicate that the lack of precise allegation or proof as to these facts cannot, in any event, be fatal, but without intending to decide whether these facts may be necessary.

Considering only the face of the statute, we see no reason to think that a newspaper publication, circulating in enormous numbers in the very community where the court is sitting, and where its order, if made, is to be executed, and reaching and appealing to the very per-

sons who are to be affected by the order, and surely tending to prevent an impartial and free decision by judge or jury, may not rightly be deemed "so near thereto" as to constitute an obstruction to the due administration of justice. The very statement of the situation seems to show that such a publication, if it is of the character to be called "misconduct," is within the class which may be punished. Indeed, the only substantial argument to the contrary is that the history of the statute shows an intent by Congress to make all newspaper publications immune, and, hence, that the language of the statute should be construed, even at the cost of some violence to its letter, so as to carry out this congressional intent. The history of the statute and the various decisions, state or federal, which have considered and construed this or similar laws, are most thoroughly considered by the District Judge in his opinion. See 220 Fed. 474–491. We are not called upon to sanction every characterization or every subordinate conclusion found in this discussion; we may or may not do so; but we approve its general course and its result and its analysis of the opinions cited. We can add only one thing. The Pennsylvania statute (Laws 1808–1812, p. 55), which is said to have been so far the basis and model of the federal statute that the latter should be treated as for the same purpose and having the same effect as the former, not only gave immunity to all misconduct not in the presence of the court, and omitted the modifying "or so near thereto," but also contained a section expressly prohibiting any contempt proceedings based on any newspaper publication.[1] The Pennsylvania Legislature, apparently realizing that a newspaper publication, on account of its very broad operation, might perhaps be considered as being "in the presence of the court," thereupon added an express provision on the specific subject, and by that express provision (section 2) granted that further immunity which the Legislature thought the public policy of the state required. If it be true, as claimed, that the Pennsylvania statute was the model which Congress had before it, and if it be true that the federal statute should be construed on the theory that the protection of a newspaper from oppressive contempt proceedings, as exemplified in the matter of Judge Peck, was the real subject-matter present in the congressional mind, we find, first, that the evil under consideration, and the exemption which the Peck proceedings suggested, pertained, not to interference in pending cases, but to comments on past decisions; we find, second, that in the language intended to exclude from immunity Congress inserted a limitation—"or so near thereto, etc."—well adapted to reach, and so exclude from immunity, many cases of newspaper publication; we find, third, that Congress refused to adopt, from the model before it, that provision which sought expressly to reach and protect a newspaper. From this history of the statute, we cannot understand how a general intent to

[1] Section 2, Act of April 3, 1809: "All publications out of court respecting the conduct of the judges, officers of the court, jurors, witnesses, parties, or any of them, of, in and concerning any cause pending before any court of this commonwealth, shall not be construed into a contempt of the said court, so as to render the author, printer, publisher, or either of them, liable to attachment and summary punishment for the same."

make all newspaper publications immune can be inferred; the ordinary canons of construction lead to the contrary inference.[2]

What has been so far said pertains to the first count of the information. The sentences imposed are amply supported by conviction under the first count, and whether the record shows any error, as to the second and third counts becomes immaterial. Claassen v. United States, 142 U. S. 140, 146, 12 Sup. Ct. 169, 35 L. Ed. 966; Hardesty v. United States (C. C. A. 6) 168 Fed. 25, 26, 93 C. C. A. 417. We the more readily apply this rule, and refrain from detailed consideration of these counts, because it is clear enough that they pertain merely to matters in aggravation of the unitary course of conduct covered by the first count.

The judgment and the sentences imposed are affirmed; but, since costs are not awarded either for or against the United States, the affirmance will be without costs.

KLEMAN v. ANHEUSER-BUSCH BREWING ASS'N.

(Circuit Court of Appeals, Third Circuit. December 18, 1916.)

No. 2147.

1. FRAUDS, STATUTE OF ⊜159—SUFFICIENCY OF MEMORANDUM—VARIANCE—QUESTION FOR JURY.

A writing is not sufficient as a memorandum to take a prior oral agreement out of the statute of frauds, if it varies in terms substantially from the oral agreement; but where the evidence is conflicting as to the terms of the agreement, the question is one of fact for the jury.

[Ed. Note.—For other cases, see Frauds, Statute of, Cent. Dig. § 378; Dec. Dig. ⊜159.]

2. GUARANTY ⊜7(4), 25(3)—REQUISITES AND VALIDITY—NOTICE OF ACCEPTANCE.

While an offer to guarantee the debt of another does not become a contract of guaranty until the offer is accepted, and notice of acceptance and reliance thereon has been given, no formal notice is required, and proof of notice may be made, as of other facts, by evidence either direct or circumstantial.

[Ed. Note.—For other cases, see Guaranty, Cent. Dig. §§ 9, 104; Dec. Dig. ⊜7(4), 25(3).]

3. APPEAL AND ERROR ⊜169—REVIEW—MATTERS NOT PRESENTED TO TRIAL COURT.

In general, an appellate court will not review an alleged error of a trial court in a matter to which its attention was not directed, which was not passed upon, and with respect to which no objection was made, no exception noted, and no error assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⊜169.]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

[2] Decisions, since the opinion below, and tending to support the same conclusion are: In re Independent Pub. Co. (Bourquin, D. J.) 228 Fed. 787; State v. Nelson, 29 N. D. 155, 150 N. W. 267; Tate v. State, 132 Tenn. 131, 177 S. W. 69.

Action at law by the Anheuser-Busch Brewing Association against John P. Kleman. Judgment for plaintiff, and defendant brings error. Affirmed.

George E. Alter and Ralph Strawbridge, both of Pittsburgh, Pa., for plaintiff in error.

W. S. Dalzell, of Pittsburgh, Pa. (Robb & Miller and Dalzell, Fisher & Hawkins, all of Pittsburgh, Pa., of counsel), for defendant in error.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The transaction out of which this case arose appears in the opinion of this court when the case was last here for review. 219 Fed. 522, 135 C. C. A. 272. Only a brief outline of the facts is necessary to a consideration of the questions raised by this writ of error.

Kleman (the defendant below) owned a saloon property in Pittsburgh, in which he had conducted the liquor business. He sold the business to Wiese and received in part payment Wiese's notes endorsed by the Tube City Brewing Company. Aside from his obligation to the Tube City Brewing Company for its endorsements, Wiese was indebted to that company for money borrowed, and was accordingly bound, either in policy or by contract, to sell its beer in his saloon. Complaints arose concerning the beer; business fell off; and Wiese's affairs generally became so alarming, that Kleman, being interested in Wiese both as landlord and creditor, undertook to negotiate for him a new loan, whereby he could discharge his indebtedness to the Tube City Brewing Company and get from under his obligation to sell its beer.

After failing in one or two attempts with other breweries, Kleman succeeded in interesting the Anheuser-Busch Brewing Association in the matter. Upon Kleman's representation that the saloon would handle its beer and that he would be responsible for the payment of the loan, the Brewing Association loaned Wiese $15,000 under an agreement, bearing date July 20, 1906, calling for payment by installments, covering a period of years. The obligation to the Tube City Brewing Company was discharged with the money loaned, and the beer of the Brewing Association was put on sale. The change in beer, however, did not change the trend of Wiese's failing business. In December, 1907, Wiese was verging on bankruptcy, and the Brewing Association entered judgment against him for a balance of $8,000 due on the loan. This was embarrassing to McMorris, the local representative of the Brewing Association, through whom the loan had been negotiated and by whom also it had been guaranteed. So upon the day of the entry of the judgment, McMorris and Kleman entered into a written agreement between themselves respecting payment to the Brewing Association of any balance remaining due after exhausting the resources of Wiese. In this agreement appears the first written reference to Kleman's oral undertaking with the Brewing Association to guarantee Wiese's debt. It is as follows:

"Whereas the said John P. Kleman, party of the first part hereto, at the time of the said loan to the said Wiese, guaranteed the repayment in full of said loan, *except interest*, to the said Brewing Association, and undertook himself to pay so much thereof as should be due at the time of any default upon the part of the said Wiese, and that said Brewing Association *made said loan* to the said Wiese *upon the strength, faith and credit of the said guarantee:*

"That therefore * * * the said Kleman will * * * pay to the party of the second part, local representative as aforesaid, any balance of said debt, without interest, which the said Anheuser-Busch Brewing Association will be unable to collect from the estate of the said Wiese in bankruptcy," etc.

The Brewing Association brought this action against Kleman, and, by separate counts, declared on the oral contract and the written memorandum, but subsequently amended so as to limit the action to the oral contract. At the first trial, the court directed a verdict for the Brewing Association, upon the theory that the action was on the writing and that the writing was a binding obligation upon Kleman. This court reversed the judgment, first, because the writing was between Kleman and McMorris, both citizens of the State of Pennsylvania, in which the action was brought, and the court had no jurisdiction of an action on that obligation; second, because the writing between Kleman and McMorris vested no right of action in the Brewing Association; and third, because the Brewing Association had declared on the oral promise of Kleman, holding that Kleman's memorandum, subsequently written, was not an additional promise to the Brewing Association creating a new liability, but was merely evidence to be used in proving his prior promise and in taking that promise out of the Statute of Frauds. 219 Fed. 522, 135 C. C. A. 272. The second trial was conducted conformably with the opinion of this court, and the trial court submitted to the jury the question of the fact, as well as of the terms, of Kleman's oral contract of guaranty, under proper instructions as to Kleman's memorandum of that contract, as evidence tending to prove his prior oral promise and as a writing sufficient to take that promise out of the Statute of Frauds. Act of 1855, P. L. 308, § 1. The verdict was for the Brewing Association, and Kleman sued out this writ.

The assignments of error are classified by the defendant into three abstract propositions of law. In these, certain principles of law are invoked, concerning which we apprehend there can be no dispute. Our concern is with respect to their application to the facts of the case.

[1] The first proposition or question involved, as formulated by the defendant, is whether the writing relied upon as a memorandum of a prior oral guaranty of the debt of another, is sufficient, when the alleged oral contract of guaranty, *as proved by the plaintiff*, differs materially from the recital of the contract in the memorandum.

This question is predicated upon the long settled principle that, if, after an oral contract has been made there is a writing stating what it was, and conformable to the real contract, the Statute of Frauds is satisfied thereby, McLean v. Nicoll, 7 Hurlstone and Norman, 1024; or, stated conversely, that if a writing offered as a memorandum of an oral agreement, differs substantially from the agreement as made, the Statute of Frauds has not been complied with. It is elementary that

the writing must be a memorandum of the contract, for if it states something different from the contract, it manifestly is not a memorandum of the contract, but is a memorandum of something else, and the statute is not satisfied. This principle is amply supported by the authorities, and perhaps is no better stated than by Wood in his work on Frauds, section 345, as follows:

"In order to make a writing of this character sufficient, it must admit the substance of a previously completed contract between the parties. It cannot be used to make, but only to prove a contract already made; and although it admits the contract, if it annexes conditions to it or otherwise varies it, it has no effect as a memorandum."

To the authorities cited in support of this statement, the following may be added: Dale v. Humphrey, 1 Ellis, B. & E. 1014 (E. C. L. R. 96); Fitzmorris v. Bayley, 9 H. L. Cas. 78; Cooper v. Smith, 15 East, 103; Davis v. Shields, 26 Wend. (N. Y.) 341; Title Guaranty & Surety Co. v. Lippincott, 252 Pa. 112, 97 Atl. 201; Paul v. Stackhouse, 38 Pa. 302; Shively v. Black, 45 Pa. 345; Eilbert v. Finkbeiner, 68 Pa. 243, 8 Am. Rep. 176; Hewes v. Taylor, 70 Pa. 387; Goldsmith v. Stocker, 249 Pa. 180, 94 Atl. 829.

But in employing this principle in his first proposition, the defendant assumes as a fact and asserts that in truth the terms of the oral contract of guaranty are, *upon the plaintiff's proofs,* materially different from those recited by the defendant in the written memorandum. We fail to find that this assumption is warranted by the evidence. The trial court found a conflict in the evidence as to the terms of the oral contract, and instructed the jury that if they found its terms different from those recited in the memorandum, the plaintiff could not recover. The court therefore directed the attention of the jury to the question of variance between the contract as recited in the memorandum and the oral contract sued upon, and instructed them, pointedly and correctly, as to the consequence of a variance.

The question of the alleged variance arose with respect to the obligation of the guarantor to pay interest, the testimony being that Kleman promised to "stand back of the loan," and was silent on the subject of interest, while the written memorandum recites the contract of guaranty to be for "the repayment in full of said loan, except interest." It thus appears on Kleman's own statement in his memorandum of the contract, that the guaranty did not extend to interest on the loan. This was his testimony as to the terms of his oral contract. He thus concedes that the character of the loan was such as neither to induce nor require him to guarantee anything further than the principal. Into the character of the transaction the jury was properly permitted to inquire, in order to ascertain the character and the extent of Kleman's guaranty. They found the parties silent upon the subject of interest. From that silence, as shown by their verdict, the jury deduced the inference, in accord with the fact conceded by Kleman, that the contract of guaranty extended only to principal. While a contract of guaranty for the payment of the debt of another, that does not include payment of interest, may, indeed, be unusual, yet as such an unusual contract was said by Kleman to

be his contract in this case, it is not repugnant to the situation or unreasonable for the jury to find the same fact by sustainable inferences from the evidence. Having found the terms of the oral contract precisely as Kleman had himself recited them in his memorandum, the contention that the court erred in not directing a verdict for the defendant on the ground of variance in terms between the oral contract and the written recital of the contract, is disposed of.

[2] The second matter charged as error was the court's refusal to direct a verdict for the defendant, because there was no evidence of notice by the Brewing Association to Kleman that his offer to guarantee the loan to Wiese had been accepted by the Brewing Association and the loan made in reliance upon it.

It is not necessary to quote authority for the proposition that an offer to guarantee the debt of another does not become a contract of guaranty until the offer is accepted and notice of its acceptance and reliance thereon has been given, nor need we cite authority to show that no formal terms of notice are prescribed either by statute or rule of law to ripen an offer into a contract. There is in this case no evidence of a formal notice of acceptance. Although Kleman's defense to this action, with respect to the original promise, consisted of a denial that the loan was made upon his solicitation or upon his oral promise to guarantee its payment, and with respect to the written memorandum, that he signed the writing without knowing that it contained a recital of the alleged prior promise, there is abundant evidence from which the jury might find that from the moment the loan was made, Kleman knew that it was made upon the strength of his guaranty. There was evidence, preponderant in character, that the loan was effected by Kleman for Wiese and not by Wiese for himself. Wiese was in failing circumstances, and besides being his tenant, was indebted to Kleman in a considerable sum. Kleman was interested in keeping Wiese's business going in order that Wiese might pay his rent and discharge his debt to him. The transaction of the loan was not merely suggested by Kleman but was conducted and completed by him. It was upon his request that the Brewing Association considered the loan. It was upon his application that the loan was made, and, when made, the money was paid not to Wiese but to Kleman, and by him applied in part to Wiese's debt to the Tube City Brewing Company, and thereby to the release of Wiese from his obligation to sell its beer. There was also evidence to the effect that Kleman long knew of his guaranty, for, beginning shortly after the loan was made, he told Wiese from time to time that he must meet his periodical payments to the Brewing Association or else he would have to meet them himself; and lastly, in the memorandum of writing, with the contents of which the jury evidently found, notwithstanding his protestations, that he was familiar, Kleman admits his knowledge (which may be inferred was acquired by notice of some kind) that his offer to guarantee the loan was accepted, by saying:

"The said Brewing Association made said loan to the said Wiese upon the strength, faith and credit of said guaranty."

Proof of notice may be made, as of other facts, by evidence either direct or circumstantial. In this case there is no direct evidence of notice, but Kleman's relation to the loan transaction and his conduct in its inception, throughout its negotiation, and in its completion, constitute circumstances from which may very reasonably be drawn an inference of notice. We are of opinion that the court committed no error in refusing to decide as a matter of law and in submitting to the jury the question, "whether the defendant was given notice of the acceptance of the defendant's guaranty"; and also, "whether he had notice of such acceptance within a reasonable time after such guaranty was made," for until the jury found from the conflicting testimony the fact and the time of notice, there could be no decision as to whether the notice was given within a reasonable time. The finding of the jury upon this submission is conclusive.

The remaining error charged to the court was its refusal to direct a verdict for the defendant, on the ground, as stated by the defendant, that the guarantor of the payment of a loan cannot be held by the loaner where the loan is made subject to oppressive conditions which may diminish the borrower's ability to repay, without the guarantor being notified of or agreeing to the imposition of such conditions.

[3] It appears that in the contract between Wiese and the Brewing Association, Wiese agreed to handle and sell exclusively the Anheuser-Busch draught beer. This is the undertaking which Kleman claims is onerous and of which, as guarantor, he had no knowledge, and because of which, therefore, the court should have directed a verdict in his favor. No point or request for action by the trial court upon this contention can be found in the record. No reference is made to it as a ground for a directed verdict, nor does it appear in rulings on the evidence, or in the law, as charged or refused to be charged. In other words, the matter does not appear to have been raised before or considered by the trial court at all, and there is no exception or specific assignment of error covering it. While we are prompt to act upon our rule to notice a plain error not assigned, when such action is manifestly necessary to administer justice, we are not inclined in this instance to depart from the general rule that an appellate court will not review an alleged error of a trial court in a matter not directed to its attention and not passed upon, and with respect to which no objection has been made, no exception noted and no error assigned by the party complaining on appeal. We may say, however, because of the emphasis of the insistence with which this point was urged, that it is difficult to believe that Kleman was ignorant of the provision which he now claims to be so oppressive as to annul the contract, because it appears that it was he who suggested the change of beer and who got the Anheuser-Busch beer into the saloon as a means of improving his tenant's business. This was the very thing which induced him to procure the loan from the Brewing Association and guarantee its payment. It was testified that in negotiating the loan he represented that the saloon would handle the Brewing Association's product, and it is certain that the moving cause for the change of the loan from the Tube City Brewing Company to the Anheuser-Busch Brewing As-

sociation was to procure a change of beer. Instead of such an undertaking being classed as an onerous or oppressive undertaking, we believe it is quite a customary one. Brewers do not usually advance money to saloon-keepers without an understanding that their product is to be sold by them, either exclusively or together with other designated brands, and it was from under just such an obligation to the Tube City Brewing Company that Kleman sought to relieve his tenant with respect to its beer, and succeeded in doing so by securing for him a new contract with another brewing company containing a like obligation for the exclusive sale of its beer. As Kleman appears to have been the active instrument in making the contract of loan and as the jury have found that he had undertaken to guarantee its performance, it is difficult to believe that he did not know and acquiesce in its terms. In declining to consider further the question of the alleged oppressive undertaking in the contract of loan because it was not raised before and passed upon by the trial court, we are inclined to believe there is a strong probability that no injury is being done the defendant. We find no errors in the trial of this cause.

This case has been in the courts for several years. The protracted character of the litigation, as well as the vigor with which it has been conducted, is a justification for the unusual length of our discussion of its final phases.

The judgment below is affirmed.

VICTOR AMERICAN FUEL CO. v. EIDSON.

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

No. 4629.

1. PLEADING ⟸35—COMPLAINT—SURPLUSAGE.

A paragraph of a complaint in a servant's personal injury action, which alleged that it was the duty of the master to use reasonable care in furnishing and providing the servant with a suitable and safe place in which to work, and to provide the servant with competent and suitable overseers, foremen, and fellow servants, may be rejected as surplusage, because pleading matters of law, and not fact.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76–80; Dec. Dig. ⟸35.]

2. PLEADING ⟸35—COMPLAINT—SURPLUSAGE.

Where the averments of fact in the complaint did not show any violation of the duties alleged to exist in such paragraph, the paragraph may be stricken.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 76–80; Dec. Dig. ⟸35.]

3. MASTER AND SERVANT ⟸258(18)—INJURIES TO SERVANT—NEGLIGENCE—COMPLAINT.

A complaint of an injured servant must allege facts showing negligence on the part of the master, and, as it is not necessarily negligence to order an employé to perform a dangerous service, a complaint alleging that plaintiff, a rope tender in one of defendant's mines, was directed to disentangle a cable used to propel a car, without stopping the engine operating the cable, and so was caught and injured, does not charge negligence;

there being no averments of facts showing negligence or a necessity to warn.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 833; Dec. Dig. ⊜=258(18).]

4. MASTER AND SERVANT ⊜=265(11)—PRESUMPTION—WARNING.

Where his complaint alleged that plaintiff had been in the employ of defendant mining company for some time, and there was no allegation of youth or inexperience, it must be presumed that he was in full possession of his faculties, and so capable of appreciating the danger of being caught by machinery; hence the master was not bound to warn.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊜=265(11).]

5. PLEADING ⊜=408—DEFECTS—WAIVER OF DEFECTS.

Comp. Laws N. M. 1897, § 2685 (Code Civ. Proc. subsec. 39) now Code 1915, §§ 4110, 4114, declaring that objections to the complaint shall be deemed waived, when not taken by demurrer or answer, excepting only the objection to the jurisdiction of the court over the subject-matter of the action and the objection that the complaint does not state a cause of action, merely declare the usual rule that the failure of a complaint to state facts sufficient to constitute a cause of action is not waived by failure to raise the objection by demurrer or answer, but that it can be raised at any time.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1362, 1366; Dec. Dig. ⊜=408.]

6. PLEADING ⊜=433(5)—DEFECTS—VERDICT.

Where by motion for directed verdict defendant questioned the sufficiency of the complaint to state a cause of action, and again raised the matter in motion in arrest, the doctrine of cure by verdict cannot be extended to the complaint.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1459, 1469–1471, 1476; Dec. Dig. ⊜=433(5); Replevin, Cent. Dig. § 209.]

In Error to the District Court of the United States for the District of New Mexico; Wm. H. Pope, Judge.

Action by Beryl Eidson against the Victor American Fuel Company. There was a judgment for plaintiff, and defendant brings error. Reversed and remanded, with leave to plaintiff to file a new complaint.

Ralph E. Twitchell, of Santa Fé, N. M., and Caldwell Yeaman and Frank E. Gove, both of Denver, Colo., for plaintiff in error.

A. T. Hannett, of Gallup, N. M., and H. B. Jamison, of Albuquerque, N. M., for defendant in error.

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

CARLAND, Circuit Judge. This is an action brought by Eidson, as plaintiff, against the Fuel Company, as defendant, to recover damages for personal injuries received by plaintiff while in the employ of the defendant. There was a verdict for plaintiff, and defendant brings the case here, assigning error.

At the close of all the evidence counsel for defendant moved the court to direct the jury to return a verdict in favor of defendant, on the ground, among others, that the complaint did not state facts suf-

ficient to constitute a cause of action. The motion was denied, and an exception allowed. Counsel also moved in arrest of judgment upon the same ground. This motion was also denied, and an exception allowed. These rulings of the court constitute the second specification of error argued in the brief, and the question so raised must be decided.

Omitting the allegations of the complaint as to citizenzship, the appointment of a guardian ad litem, and the ad damnum, the complaint charges:

"III. That on the 5th day of June, 1911, the defendant was, and for a long time prior thereto had been, engaged in the business of conducting, carrying on, and working a coal mine in the vicinity of Gallup, in the county of McKinley, state of New Mexico, and that said plaintiff was on the said 5th day of June, 1911, and for a long time prior thereto had been, employed by the defendant as its servant in the capacity of helper and rope tender at one of the defendant's mines. Plaintiff furthermore alleges that upon said date he was performing the duties of his position before mentioned in the employ of the defendant in a careful and skillful manner.

"IV. Plaintiff further alleges that it became and was the duty of the said defendant to use reasonable care in furnishing and providing the said plaintiff with a suitable and safe place in which to do his work, and to provide the plaintiff with competent and suitable overseers, foremen, and fellow servants.

"V. That on said 5th day of June, 1911, this plaintiff, while so engaged in his said occupation in the employ of the defendant, was instructed by his foreman, Charles Ennis, who was by order of the defendant in charge of the work which the plaintiff was performing, not to cause the car which the plaintiff had charge of to stop when the cable by means of which the said car was propelled caught under the ties, but that he, the plaintiff, was ordered by said foreman to seize said cable with his hands, and to disentangle it without calling to the person in charge of the engine propelling said cable car to stop the said engine.

"VI. Plaintiff further alleges that, in obedience to the instructions of his foreman, Charles Ennis, as aforesaid, on the said 5th day of June, 1911, on the cable which propelled the car becoming fastened, he seized it while in motion, with his hands, and endeavored to free the cable, and further that his left hand was instantly caught in said cable, and that he was dragged 50 or 60 feet, and that three fingers of his left hand were permanently injured, and that his said hand was permanently damaged and crippled.

"VII. Plaintiff further alleges that he had no knowledge of the danger there was in seizing the said cable while in motion as aforesaid, and that he relied upon the statement of his foreman, the said Ennis, who told him that it was the proper manner to adjust the said cable."

[1-4] Paragraph 4 of the complaint may be rejected as surplusage: First, because it pleads matter of law, and not fact; second, because the facts pleaded do not show any violation of the duties alleged to exist in paragraph 4. Counsel for the plaintiff concedes that paragraph 4 may be rejected as surplusage. The fact that the plaintiff was injured, as between himself and the defendant, would be no evidence of negligence; therefore, no allegation of negligence. We have, then, a statement in the complaint that the plaintiff, while in the employ of the defendant, in obeying an order of the foreman, Ennis, was injured in the manner specified in the complaint, and that the plaintiff had no knowledge that the work which he was ordered to perform was dangerous, and Ennis did know such fact. There is no allegation of fact whatever that the defendant was negligent in any respect.

To order an employé to perform a dangerous service, standing alone, is not negligence; and to allege such fact, without alleging other facts showing a duty on the part of the master to warn and a violation of such duty, does not charge negligence. All machinery is dangerous, more or less; still the duty to warn does not exist only in special cases. From all that appears from the complaint, we must presume that the plaintiff was a man in the full possession of all his faculties. If so, he was as capable of knowing and appreciating the danger of the service which he was ordered to perform as the foreman, Ennis; therefore the allegation that he did not know of the danger does not help his case. As to the duty to allege facts showing negligence, see Hammond v. Michigan Central R. Co., 162 Mich. 431, 127 N. W. 318, Saylor v. Bon Jellico Coal Co., 153 Ky. 474, 155 S. W. 1138; McElwaine-Richards Co. v. Wall, 159 Ind. 557, 65 N. E. 753; Medley v. American Car & Foundry Co., 140 Ill. App. 284; Kinnear Manufacturing Co. v. Carlisle, 152 Fed. 933, 82 C. C. A. 81; Stegmann v. Gerber, 146 Mo. App. 104, 123 S. W. 1041.

[5, 6] Counsel for defendant did not demur to the complaint, nor raise the question as to its insufficiency, otherwise than as stated. It is the general rule, however, that, except where it is otherwise provided by statute, the failure of a complaint to state facts sufficient to constitute a cause of action is not waived by failure to raise the objection by demurrer or answer, but it may be raised at any time. 31 Cyc. 728, and cases cited. The statute of New Mexico is simply declaratory of this rule. Compiled Laws of New Mexico 1897, § 2685 (Code Civ. Proc. subsec. 39, art. 4), provides:

"When any of the matters enumerated in subsection 35 of this act do not appear upon the face of the complaint, the objection may be taken by answer. If no such objection be taken, either by demurrer or answer, the defendant shall be deemed to have waived the same, excepting only the objection to the jurisdiction of the court over the subject matter of the action, and excepting the objection that the complaint does not state facts sufficient to constitute a cause of action."

This provision has been carried into the New Mexico Statutes Annotated, 1915, §§ 4110 and 4114.

The doctrine of cure by verdict cannot be applied in this case, for the reason that the objection to the sufficiency of the complaint was raised by motion for a directed verdict before the verdict was rendered and the objection overruled. 31 Cyc. 765, and cases cited.

We have carefully read the argument of counsel for plaintiff to the effect that, under the New Mexico practice, the sufficiency of the complaint to state a cause of action was not properly raised, and find no merit in it. Objection to the complaint was specifically made, both in the motion for a directed verdict and in the motion in arrest. The attention of the court below was sharply called to the question in both instances. We are therefore compelled to hold that the trial court erred in denying both motions.

The judgment, therefore, is reversed, and a new trial ordered, with leave to the plaintiff to amend the complaint, if he shall be so advised.

WESTERN COAL & MINING CO. v. McCALLUM.

(Circuit Court of Appeals, Eighth Circuit. November 25, 1916.)

No. 4556.

1. APPEAL AND ERROR ⊂=959(3)—PLEADING ⊂=236(3)—TRIAL AMENDMENTS—DISCRETION OF COURT.

The allowance of a trial amendment rests in the discretion of the trial court, whose rulings will not be disturbed, in the absence of an abuse of discretion.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3830; Dec. Dig. ⊂=959(3); Pleading, Cent. Dig. § 601; Dec. Dig. ⊂=236(3).]

2. CONTINUANCE ⊂=30—PLEADING ⊂=236(4)—AMENDMENT—REVIEW—ABUSE OF DISCRETION.

The act of the trial court in allowing plaintiff to amend her complaint, after the close of all the testimony and the dispersal of the witnesses, so as to add another act of negligence not amounting to a new cause of action, evidence of which was received without objection, and principally elicited from defendant's own witness, cannot, though defendant was denied a continuance to meet such ground of negligence, be deemed an abuse of discretion.

[Ed. Note.—For other cases, see Continuance, Cent. Dig. §§ 99–112; Dec. Dig. ⊂=30; Pleading, Cent. Dig. § 601; Dec. Dig. ⊂=236(4).]

3. MASTER AND SERVANT ⊂=90—INJURIES TO SERVANT—"VOLUNTEER."

The term "volunteer," in the law of master and servant, includes not only a stranger who unnecessarily obtrudes himself into the situation, but the willing servant, who in order to protect the master's property in an emergency, with the knowledge and consent of his immediate superior, does some act not strictly within the contractual scope of his employment, and as to the first the master owes no duty save not to willfully or intentionally injure him while as to the latter much more may be required.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 139; Dec. Dig. ⊂=90.

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

4. MASTER AND SERVANT ⊂=150(5)—INJURIES TO SERVANT—DUTY.

Where a mechanic employed by a mining company with the full knowledge and consent of his superior, proceeded to assist in the extinguishing of a mine fire, he cannot be treated as a trespasser, and the mining company owed him the duty of using ordinary care not to increase the dangers, and so it was negligence to start without warning a fan not in operation when the fire-fighting began, which disseminated smoke and resulted in the mechanic's suffocation.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 306; Dec. Dig. ⊂=150(5).]

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

A servant does not assume the risk of those dangers which he merely could have known by the exercise of ordinary care on his part, considering his age, experience, and the circumstances by which he was surrounded.

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

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6. MASTER AND SERVANT ⊂=286(19)—INJURIES TO SERVANT—ACTIONS—NEGLIGENCE—JURY QUESTION.

In an action for the death of a mechanic employed in a mine, who was suffocated while attempting to extinguish a mine fire, *held*, that the evidence of negligence raised a question for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1026; Dec. Dig. ⊂=286(19).]

In Error to the District Court of the United States for the Western District of Arkansas; Frank A. Youmans, Judge.

Action by Jocie McCallum, administratrix, etc., against the Western Coal & Mining Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Thomas T. Railey and Edward J. White, both of St. Louis, Mo. (Ira D. Oglesby, of Ft. Smith, Ark., on the brief), for plaintiff in error.

T. P. Winchester, of Ft. Smith, Ark. (W. R. Martin, of Ft. Smith, Ark., on the brief), for defendant in error.

Before HOOK, Circuit Judge, and REED, and BOOTH, District Judges.

BOOTH, District Judge. Action by Jocie McCallum, as administratrix of the estate of William McCallum, to recover damages for the benefit of the next of kin of William McCallum, on account of his death, claimed to have been caused by the negligence of the defendant company. Plaintiff recovered in the court below, and defendant brings error.

It appears from the evidence: That William McCallum was employed by the defendant as a machinist, under the immediate charge of the pit boss, in connection with one of the defendant's mines. His usual duties were above ground, though sometimes he was called below. That about the 14th of April, 1913, a fire broke out in the mine, and the pit boss, Edwards, and several others, including McCallum, went into the mine to try to extinguish the fire. Whether McCallum went in as a volunteer, or by request of the pit boss, is in dispute under the evidence. We do not, however, consider this question as of controlling importance, in view of other facts disclosed in the record.

There were two shafts into defendant's mine—one known as the hoisting shaft, and the other, some 250 feet distant, known as the air shaft. The main south entry of the mine extended from the hoisting shaft for a considerable distance southward. A toolhouse, which was in an opening in the side of the main south entry, was located some 20 or 30 feet south of the hoisting shaft. Parallel with the main south entry, and at a distance of about 30 or 40 feet, extended one of the air courses; the air shaft being connected with the air course. This air course was also connected with the main south entry by a cross-cut. This cross-cut, or passageway, had two doors—one near the air shaft, and the other near the main south entry. Some distance farther south of the air shaft, and also west of the main south entry, was located a mule stable, with a passage connecting the same

with the main south entry. A fan was located in the air shaft, and when in operation it had the effect of sucking the air up from the mine through the air shaft; the air entering downwards into the mine through the hoisting shaft, thus affording ventilation.

The fire in question started at or near the toolhouse in the main south entry. As soon as the fire was discovered, the fan in the air shaft was stopped. This was to stop the draft in that direction, thus preventing the spread of the fire. The men, including McCallum, descended the air shaft, went through the cross-cut to the main south entry, and tried to go along the main south entry to the point where the fire was located. They were unable to reach the fire on account of the smoke, and returned to a point near the cross-cut, and discussed a plan of reaching the fire by going round through the mule stable, and thence in a roundabout way until they could get north of the fire. At this time there were present at that point in the mine Edwards, the boss, Nelson, Hixon, Bailey, and McCallum. Shortly after starting to reach the place of the fire by the proposed new route, Edwards, the boss, told Nelson to tell Bailey, who was in the rear, to go back up the air shaft and start the fan, and Nelson did so; whether this order was heard by McCallum is left uncertain by the evidence. Edwards, Nelson, and Hixon then proceeded through the mule stable, and endeavored to reach a point north of the fire; but upon opening a door at a certain point in one of the passages, they were again prevented by smoke from advancing, and they turned back again to the mule stable for the purpose of returning to the air shaft. By this time the mule stable was filled with smoke, and they could not reach the air shaft through the mule stable and main south entry; so they went through an overhead passageway, called the overcast, leading over the main south entry to the air course connected with the air shaft, and in that way escaped.

In the meanwhile Bailey had followed out his instructions and started the fan; the effect of this was to create a suction and draw the smoke from the place of the fire, round through the various passages, and into the air shaft. Whether McCallum followed Edwards, Nelson, and Hixon closely until they first reached the mule stable, or whether he remained near the cross-cut until after they had gone, is uncertain. However, he was found an hour or two later in the mule stable, after the fire had been extinguished. He was then unconscious, and died several days after from the effects of the suffocation.

In the complaint plaintiff alleged a number of items of negligence against the defendant company—among others, failure to use care in the selection of a competent pit boss; failure to make provision for extinguishing fire in the mine; failure to give instructions as to the method of fighting a fire; failure to keep the doors closed in the cross-cut leading from the main south entry to the air shaft, but "negligently leaving said doors open, and by reason of the operation of said fan in drawing the smoke and heat through said passageway, effectually cut off all means of ingress and egress."

At the close of the evidence, defendant moved for a directed verdict. During the course of the argument upon the motion, plaintiff

moved to amend the complaint to conform to the proof, by adding an allegation, at several places in the complaint, to the general effect that defendant negligently caused the fan to be started in the air shaft after the men had descended the air shaft into the mine. This amendment was objected to by the defendant, but the objection was overruled, and the amendment allowed. The evidence in the case had been closed, and the defendant's witnesses had been allowed to disperse, prior to defendant's motion to direct a verdict. After the amendment was allowed, the defendant moved for a continuance, and, this being denied, moved for a postponement of further proceedings in the trial until it should have an opportunity of introducing further evidence upon the point covered by the amendment to the complaint. The motion for a postponement was denied, and the case was submitted to the jury. The court in its instructions to the jury eliminated all questions of negligence in regard to the matters specified, except the starting of the fan.

It was left to the jury to determine whether or not it was negligence on the part of the pit boss to start the fan in the air shaft while the men were still in the mine; also whether McCallum knew, after he was in the mine, that the fan had been started; also, if he did know of this, whether he appreciated the effect and the risk resulting therefrom. It was also left to the jury to determine whether McCallum died from injuries by the suffocation; also whether he was guilty of any negligence himself. The jury found in favor of the plaintiff upon the issues submitted.

There are 30 assignments of error. They may be arranged in 4 groups: First, those relating to the allowance of the amendment to the complaint, and the refusal of a continuance or a postponement of the trial; second, those relating to the exclusion of certain testimony offered on behalf of the defendant; third, those relating to the giving of certain instructions covering the question of assumption of risk, and the refusal to give others on the same topic; fourth, those relating to the refusal to direct a verdict in favor of the defendant.

[1] As to the first group, it is sufficient to say that these matters were within the discretion of the trial court, and rulings thereon do not furnish ground for reversal in the absence of an abuse of discretion. See Tilton v. Cofield, 93 U. S. 163, 23 L. Ed. 858; Bamberger v. Terry, 103 U. S. 40, 26 L. Ed. 317; Mex. Central Ry. v. Pinkney, 149 U. S. 194, 201, 13 Sup. Ct. 859, 37 L. Ed. 699; Mex. Central Ry. v. Duthie, 189 U. S. 76, 23 Sup. Ct. 610, 47 L. Ed. 715; McDonald v. State of Nebraska, 101 Fed. 171, 41 C. C. A. 278; Vanarsdale v. Hax, 107 Fed. 878, 47 C. C. A. 31; Dunn v. Mayo Mills, 134 Fed. 804, 67 C. C. A. 450; Stillwagon v. B. & O. Ry., 159 Fed. 97, 86 C. C. A. 287; Hernan v. American Bridge Co., 167 Fed. 930, 93 C. C. A. 330; Southern Ry. v. Gadd, 207 Fed. 277, 125 C. C. A. 21; Cœur D'Alene Lumber Co. v. Thompson, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731.

[2] It is to be noted that the amendment to the complaint set up no new cause of action; it simply added one more item of alleged negligence, and this item had already been brought out in the testimony.

The matters of the operation of the fan, the stopping of it when the fire was discovered, the starting of it after the men had descended into the mine by way of the air shaft, why it was started, the propriety of starting it at that time, and the effect of starting it, were all testified to, and the evidence was introduced without objection. The defendant could not have been taken by surprise; the facts were within its own knowledge, and were testified to mainly by its own witnesses. Under the circumstances, we hold that there was no abuse of discretion on the part of the trial court in allowing the amendment and refusing a continuance.

[3] As to the second group, covering the exclusion of testimony: The testimony sought to be introduced related to certain conversations had by Edwards, the pit boss, with McCallum prior to going into the mine. The main purpose, apparently, on the part of the defendant in trying to introduce this testimony, was to show that McCallum was a volunteer in going into the mine. The defendant takes the position that, if McCallum was a volunteer, the defendant owed him no duty except to refrain from intentionally injuring him.

The term "volunteer," in the law of master and servant, has come by usage to cover a large class of persons, ranging from the casual stranger, on the one hand, who unnecessarily obtrudes himself into the situation, to the willing servant, on the other hand, who, in order to protect his master's property in an emergency, but with the knowledge and consent of his immediate superior, does some act not strictly within the contractual scope of his employment. The various persons in this class called "volunteers" do not stand upon the same plane in respect to the duty which the master owes to them. One may be a mere trespasser upon the master's premises; another may be a licensee with an interest. To the former, the master's duty may be simply not to willfully or intentionally injure him; towards the latter, much more than this may be required.

[4] In the case at bar, there is no dispute that Edwards the pit boss represented the company in going into the mine, and in taking charge of the extinguishing of the fire. There is no question raised as to his authority to direct the employés of the company in regard to putting out the fire, at least, those employés whose duties called them into the mine. There is no dispute in the evidence that the services of McCallum were accepted by Edwards, whether they were directly requested or not. So that, even though McCallum may be classed under the term "volunteer," when used in its broadest sense, it cannot, in our opinion, be said that the company owed him no duty, or that such duty consisted merely in not intentionally injuring him. The company owed him the duty of using ordinary care not to increase the dangers of an already dangerous situation, in which he was known to be. As a volunteer McCallum may have assumed the risk of the conditions as they existed when he entered the mine. He cannot, in our judgment, be held to have assumed the new risk, when the defendant by affirmative action increased the danger, unless he had knowledge of the change in the situation after he entered the mine,

and appreciated the risk of such change. See Thompson on Negligence, §§ 4675–4682.

Miner v. Franklin County Tel. Co., 83 Vt. 311, 75 Atl. 653, 26 L. R. A. (N. S.) 1195, in which case the court used the following language:

"The voluntary offer of a willing servant to make himself useful in a matter not covered by any express command, when the proffered service is accepted by his superior, although not by an approval expressed in words, cannot be said as a matter of law to put the servant outside the limits of his employment."

In the case at bar we have the added element of emergency.

[5] As to the third group, touching the matter of instructions regarding assumption of risk: Typical of these assignments is the following:

"The court erred in instructing the jury that deceased only assumed such risks as were patent and readily observable, or such as could be readily observed," but should have added "that he assumed such dangers as were patent and readily observable, or such as he knew, or could have known by the exercise of ordinary care upon his part, considering his age, experience, condition, and the circumstances by which he was surrounded."

The additional clause which the defendant requested the court to give is not a correct statement of the law, as announced in the decisions of this court. See Owl Creek Coal Co. v. Goleb, 232 Fed. 445, 146 C. C. A. 439.

[6] As to the fourth group, touching the matter of directing a verdict upon all the evidence in the case, in view of what we have already said, we think that this requires neither discussion nor the citation of authorities. Our conclusion is that the court was plainly justified in submitting the case to the jury, and the evidence sustains the verdict.

Judgment affirmed.

DE OROZCO et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. December 12, 1916.)

No. 2892.

1. BAIL ⊂⊃79(1)—FEDERAL COURTS—PRACTICE.

Code Cr. Proc. Tex. 1911, § 500, enumerating the causes which will exonerate a defendant and sureties on his bail bond from liability upon a forfeiture taken, specifies death before forfeiture, but not death after forfeiture and before final judgment. Rev. St. § 1014 (U. S. Comp. St. 1913, § 1674), declares that for any crime or offense against the United States the offender may, agreeably to the mode of process against offenders in such state, be arrested and imprisoned or bailed, for trial before such court of the United States as by law has cognizance of the offense. Accused was arrested in Texas for an offense against the United States and liberated on bail. *Held* that, as the Texas law governed, his death after forfeiture of bond, but before final judgment, was no defense.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 350–362, 365–368; Dec. Dig. ⊂⊃79(1).]

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2. BAIL ⟸79(1)—BAIL BONDS—DEFENSES.
Death of a principal after forfeiture, but before final judgment on a bail bond, will not, as a general rule, relieve against the forfeiture.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 350–362, 365–368; Dec. Dig. ⟸79(1).]

3. BAIL ⟸59—BAIL BONDS—CONDITION.
Code Cr. Proc. Tex. art. 293, relating to the examining trial of one accused of crime, provides that he shall be held unless he give bail to be present from day to day before the magistrate until the examination is concluded. One charged with violation of federal laws, and arrested in Texas on a warrant issued upon a sworn complaint by the United States commissioner, was liberated by the commissioner upon the execution of a bail bond conditioned that accused should appear before the commissioner at his office, and remain from day to day and from time to time to answer the charge. *Held*, that the condition was a substantial compliance with the Texas law, which governs, and so forfeiture of the bail bond cannot be defeated.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 225–227; Dec. Dig. ⟸59.]

4. BAIL ⟸74(2)—EXONERATION—CONTINUANCE.
Where one accused of violating United States laws was arrested in Texas and liberated on bail bond furnished United States commissioner issuing the warrant, the fact that the commissioner postponed the hearing without the support of an affidavit as to the existence and contents of absent testimony as required by Code Cr. Proc. Tex. art. 205, will not excuse accused's failure to appear at the postponed hearing or release his bond, for section 293 authorizes the committing magistrate to postpone for a reasonable time the examination.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 313, 314; Dec. Dig. ⟸74(2).]

5. BAIL ⟸74(2)—EXONERATION—CONTINUANCE.
The failure of the United States commissioner, ordering the arrest of the principal in a bail bond, to enter a continuance of the hearing on his docket, will not exonerate the bail and authorize the principal to refuse to appear at the time set for the subsequent hearing.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 313, 314; Dec. Dig. ⟸74(2).]

6. NEUTRALITY LAWS ⟸3—OFFENSES AGAINST—WHAT CONSTITUTES.
Where accused conspired to set on foot, and provided and prepared the means for, a military expedition to be carried on from the territory of the United States against the dominions of the United States of Mexico, with whom the United States of America was at peace and committed overt acts, he was guilty of a violation of Penal Code (Act March 4, 1909, c. 321) § 13, 35 Stat. 1090 (Comp. St. 1913, § 10177), denouncing the offense of providing or preparing the means for any military expedition to be carried on from the United States against the territories or dominions of any foreign prince or state, or any colony, district, or people with whom the United States is at peace, and the fact that the government at that time in control of the principal portion of Mexico had not been recognized is no defense.

[Ed. Note.—For other cases, see Neutrality Laws, Cent. Dig. §§ 3–8; Dec. Dig. ⟸3.]

7. CRIMINAL LAW ⟸113—JURISDICTION—FEDERAL DISTRICT COURTS—CONSPIRACY TO VIOLATE NEUTRALITY LAW.
In such case, where the conspiracy was entered into in a city within the federal district where proceedings were instituted, the court of such

district had jurisdiction of the offense, though the supplies for the expedition were shipped and stored in a place outside the district.

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

8. SUNDAY ⊂⊃30(5)—BAIL BONDS—EXECUTION—VALIDITY.

A bail bond executed on Sunday, given to secure the release of one arrested in Texas on a charge of violating the federal law, is valid under the Texas laws, which govern, pursuant to Rev. St. § 1014 (U. S. Comp. St. 1913, § 1674).

[Ed. Note.—For other cases, see Sunday, Cent. Dig. § 80; Dec. Dig. ⊂⊃30(5).]

9. BAIL ⊂⊃93—BAIL BONDS—JUDGMENT—PERSONS LIABLE.

No judgment can be rendered against the wife of the principal in a bail bond, who did not execute the bond as principal or surety, and did not upon the death of the principal become his legal representative.

[Ed. Note.—For other cases, see Bail, Cent. Dig. §§ 409, 410, 413–417; Dec. Dig. ⊂⊃93.]

In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Proceeding by the United States of America against Pascual Orozco and others for forfeiture of a bail bond, in which Refugia F. De Orozco was allowed to become a party defendant on the death of the principal defendant. There was judgment for plaintiff, and defendants bring error. Affirmed as to all defendants save Refugia F. De Orozco, and as to her reversed and remanded, with directions to dismiss.

See, also, 201 Fed. 106.

This was an action in the court below, instituted by the defendant in error originally against Pascual Orozco and the sureties on a bail bond executed by him. Orozco, the principal on the bail bond, died pending the suit, and upon suggestion of his death the court entered an order authorizing the plaintiff in error, Refugia C. De Orozco, to appear in the cause and make herself a party defendant, which she did. She was the widow of Pascual Orozco. The principal in the bond, Pascual Orozco, was arrested on the 27th day of June, 1915, on a warrant issued upon a sworn complaint by George B. Oliver, who was the United States Commissioner at El Paso, on a charge of having conspired to violate the neutrality laws of the United States. Upon the same day, which was Sunday, he was brought before the commissioner and his bond was fixed at $7,500. On the same day he executed a bail bond in that sum, with the plaintiffs in error, other than Refugia F. De Orozco, as sureties, and secured his release thereby. The bond was conditioned to be void if the principal, who it recited was charged with a felony by complaint in writing and under oath before the United States commissioner for the Western district of Texas, at El Paso, Tex., should personally appear before said commissioner at his office in El Paso at 10 o'clock in the morning of the 1st day of July, 1915, and there remain from day to day and from time to time to answer said charge. The cause was continued verbally, and without affidavit being filed, and against the objection of the defendant, by the commissioner until July 12, 1915. On that day the principal, Orozco, failed to appear before the commissioner, as required, and his bondsmen failed to produce him, upon being called upon to do so. Thereupon a forfeiture was taken on the bond against the principal, Orozco, and his sureties. On July 12, 1915, suit was begun on the bond by the defendant in error against said Orozco and his sureties. Thereafter Orozco died, and his widow was made a party defendant to the suit. A jury was waived by written stipulation, and the cause was heard by the District Judge, who entered a judgment, on October 23, 1915,

against all the then defendants for the amount of the penalty of the bond. All the defendants sued out a writ of error to this court. The plaintiff, upon the trial, introduced the complaint, the warrant, the return of the marshal thereon, and the bond sued upon. The plaintiff also introduced in evidence a certified copy of the transcript from the proceedings of the commissioner upon the complaint, which recited the arrest of Huerta and Orozco, their arraignment before the commissioner, and plea of not guilty of the offense charged in it against them; the setting of the case for July 1, 1915, the fixing of the amount of Orozco's bond at $7,500; that on July 12th the case was called pursuant to continuance at 10 o'clock in the morning; that, Orozco failing to appear, he and his sureties were called, and still failing to appear the bond was declared forfeited in the sum of $7,500. The oral evidence of George B. Oliver, the commissioner, was introduced to the effect that June 27, 1915, the day the bond was executed and approved, was Sunday; that the amount of the bond was fixed verbally, at the request of Orozco's attorney, and not during a session of court, at the office of the commissioner on Sunday; that the entries on the docket of the commissioner were written up on Monday morning; that the case was continued on July 1, 1915, on motion of the United States attorney and against the objection of Orozco's attorneys, till July 12th by him. It was stipulated into the record that Pascual Orozco, the principal on the bond, died September 1, 1915, in Culberson county, Tex., and before a grand jury was impaneled for that division, after his arrest.

M. W. Stanton, of El Paso, Tex., for plaintiff in error Refugia F. De Orozco.

John L. Dyer and Lea, McGrady & Thomason, all of El Paso, Tex., for other plaintiffs in error.

R. E. Crawford, Asst. U. S. Atty., of El Paso, Tex.

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

GRUBB, District Judge (after stating the facts as above). The plaintiff in error assail the validity of the judgment against them upon a number of grounds, which we will consider seriatim.

[1, 2] 1. It is contended that the right to recover on the bond abated by the death of the principal before final judgment on the bond, and before he could have been indicted or tried for the felony charged in the complaint.

Section 1014, Revised Statutes, provides that, for any crime or offense against the United States, the offender may by certain named state or United States officers, and "agreeably to the usual mode of process against offenders in such state, be arrested and imprisoned or bailed, as the case may be, for trial before such court of the United States as by law has cognizance of the offence." Section 500 of the Texas Code of Criminal Procedure enumerates the causes which will exonerate a defendant and his sureties from liability upon a forfeiture taken. Death before—but not after—the forfeiture is taken is specified as one of them. The Texas procedure governs the federal courts in such matters pursuant to section 1014, Revised Statutes. United States v. Sauer (D. C.) 73 Fed. 671; United States v. Dunbar, 83 Fed. 151, 27 C. C. A. 488. In the case of United States v. Van Fossen, 28 Fed. Cas. 357, No. 16,607, the Circuit Court for the District of Kansas held, through Justice Miller and Circuit Judge Dillon, as a matter of general procedure, that it was a settled rule that death of the

principal after forfeiture, but before final judgment on the bond, did not relieve against the forfeiture.

[3] 2. It is contended that the bond is void because not conditioned according to law. Its condition was that the principal "shall appear before the said United States commissioner at his office in El Paso on July 1, 1915, and there remain from day to day and from time to time to answer said charge." Article 293, Texas Code of Criminal Procedure provides that the defendant "shall in the meanwhile be detained in the custody of the sheriff or other duly authorized officer, unless he give bail to be present from day to day before the magistrate until the examination is concluded." The difference is one rather of words than legal effect. We think the condition was substantially as required by law. Certainly it is not the basis of such a plain error as this court would notice, when not made the ground of objection in the court below.

[4, 5] 3. It is contended the continuance of the case from July 1st until July 12th was unauthorized, because (1) made verbally by the commissioner, and not entered on his docket, and (2) made against the objection of the defendant and without the support of an affidavit as to the existence and contents of absent evidence, as required by article 205 of the Texas Code of Criminal Procedure. Article 293 of the same Code authorized the committing magistrate to postpone for a reasonable time the examination. Continuances are discretionary, and the failure to require the affidavit as to the nature of the absent testimony could not authorize the defendant to decline to appear at the postponed hearing or release his bond, if he did so. The failure to enter the continuance on the docket could have no such effect. If the defendant was notified of the time and place at which he was expected to appear, it was his duty to do so, despite such irregularities. His failure to appear would work a forfeiture of his bond.

[6] 4. It is contended that the sworn complaint, on which the warrant issued, failed to charge the defendant with an offense under the laws of the United States. The complaint charges Orozco and others with having conspired "to begin, and set on foot and provide and prepare the means for a military expedition to be carried on from the territory and jurisdiction of the United States against the territory and dominions of the United States of Mexico, with whom the United States of America are at peace," and charges the purchase and shipment to and storage at a warehouse at Fifth and Santa Fé streets of military supplies as the overt act. The contention is that the preparation of such a military expedition was not a violation of section 13 of the Penal Code, because the government of Carranza had not been recognized at that time as the legitimate government of Mexico. We think the decision of the Supreme Court in the case of The Three Friends, 166 U. S. 1, 17 Sup. Ct. 495, 41 L. Ed. 897, shows that neither prior recognition of legitimacy or of belligerency of the government or faction against which the expedition is directed, by this government, is necessary to make applicable the provisions of section 13 to such an expedition.

[7] It is also contended that the overt act is not shown by the complaint to have been done within the jurisdiction of the District Court for the Western District of Texas. The complaint fails to allege the name of the city where the supplies were shipped and stored. The jurisdiction of the court may be determined by the place of the formation of the conspiracy, as well as that of the commission of the overt act. The complaint alleges the formation of the conspiracy to have been at El Paso, in the Western district of Texas. This was sufficient. Dealy v. United States, 152 U. S. 539, 14 Sup. Ct. 680, 38 L. Ed. 545; Hyde v. Shine, 199 U. S. 62, 25 Sup. Ct. 760, 50 L. Ed. 90. We do not think that the complaint showed on its face that no offense of which the District Court of the United States for the Western District of Texas had jurisdiction had been committed, as claimed.

[8] 5. The fact that the amount of the bond was fixed and the bond executed and approved on Sunday does not make it invalid. In 37 Cyc. 581, the text reads:

"It is well settled that a bail bond or recognizance entered into on Sunday, for the purpose of releasing a person held in custody, is valid, the entering into such bond being considered as an act of necessity and charity and not judicial business."

This is the holding in Texas, whose decisions this court would follow, pursuant to the direction of section 1014, Revised Statutes. Ex parte Millsap, 39 Tex. Cr. R. 93, 45 S. W. 20; Lindsay v. State, 39 Tex. Cr. R. 468, 46 S. W. 1045.

The foregoing are the objections offered to the judgment on the bond by all the plaintiffs in error, none of which we think should avail to reverse the judgment.

[9] The judgment against the plaintiff in error, Refugia F. De Orozco, is in a different attitude. She did not execute the bond, either as principal or surety. Nor was she the legal representative of her deceased husband, who was the principal on the bond. She was therefore under no liability to the plaintiff for the breach of the bond, and no judgment could have rendered against her individually, based upon its breach.

The judgment against Refugia F. De Orozco will be reversed, and the cause as to her remanded, with directions that the suit as to her be dismissed. The judgment as to the other plaintiffs in error is affirmed.

JEW LEE v. UNITED STATES.

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

No. 78.

1. ALIENS ⟸32(5)—CHINESE EXCLUSION—BURDEN OF PROOF.

A Chinese person, contesting deportation on the ground that he was born in the United States, has the burden of proof.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(5).]

2. ALIENS ⟸32(12)—DEPORTATION—REVIEW—FINDINGS.
Determination of commissioner of question of fact as to birthplace of Chinese person, whose deportation was sought, having been approved by the District Court, will not be disturbed on appeal.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⟸32(12).]

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

Proceeding by the United States against Jew Lee, alias Jew Guey. From an order of deportation, defendant appeals. Affirmed.

D. M. Silver, of Buffalo, N. Y., for appellant.

S. T. Lockwood, U. S. Atty., of Buffalo, N. Y., for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. This is an appeal from a decision of the United States District Court for the Western District of New York holding that the appellant is a Chinese laborer having entered the United States from Canada and being unlawfully within the United States. Upon these findings appellant was ordered deported to China.

The controversy here turns upon a question of fact. The appellant seeks to remain in this country upon the theory that he was born in San Francisco in 1876 and lived there until he was 9 years of age, when he went to China and lived there 20 years, returning to San Francisco about 9 years prior to his examination. His testimony is not at all persuasive.

[1] The burden was upon him to prove that he was born in the United States and he has failed to sustain it. The commissioner and the District Judge passed upon the questions here involved and agree as to the main proposition, viz. that the proof fails to sustain appellant's contention that he was born in the United States.

[2] The burden was upon him to prove this contention, and it would be contrary to the long-established rule in this court that, upon questions of fact as to the place of birth of Chinese persons, we will not substitute our opinion for that of the commissioner and Judge, especially when they have seen and heard the witnesses.

The judgment and order of deportation are affirmed.

MEMORANDUM DECISIONS

ATCHISON, T. & S. F. RY. CO. v. SWEARINGEN. (Circuit Court of Appeals, Fifth Circuit. December 11, 1916.) No. 2948. In Error to the District Court of the United States for the Western District of Texas; William B. Sheppard, Judge. J. W. Terry and A. H. Culwell, both of Galveston, Tex., for plaintiff in error. S. Engelking, of San Antonio, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find none of the assignments of error well taken. The judgment of the District Court is affirmed.

BAKKER v. NETHERLANDS-AMERICAN STEAM NAV. CO. (Circuit Court of Appeals, Second Circuit. November 14, 1916.) No. 34. In Error to the District Court of the United States for the Southern District of New York. Edwin G. Davis, of New York City, for plaintiff in error. M. L. Fearey, of New York City, for defendant in error. Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. Judgment affirmed.

BESHLIN v. McSWEENEY PACKING CO. et al. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2876. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. A. H. Kirby, of Abilene, Tex., and Theodore Mack, of Ft. Worth, Tex., for appellant. I. W. Stephens and George E. Miller, both of Ft. Worth, Tex., for appellees. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find no reversible error in this case, and the decree appealed from is affirmed.

BONVILLAIN v. HOWELL. (Circuit Court of Appeals, Fifth Circuit. January 8, 1917.) No. 2926. Petition to Superintend and Revise Order of the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. C. F. Borah, of New Orleans, La., for petitioner. E. A. O'Sullivan and Walter J. Suthon, Jr., both of New Orleans, La., for trustee. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The reasons given by the District Judge fully cover the case and support the decree rendered (232 Fed. 370), and we concur therein. The petition to superintend and revise is denied.

BRAZIEL v. UNITED STATES.* (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2943. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Guy H. Sigler, of Ardmore, Okl., for plaintiff in error. James C. Wilson, U. S. Atty., and William E. Allen, Asst. U. S. Atty., both of Dallas, Tex. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find no error in the rulings in the trial of this case, and the evidence fully warranted the verdict found. Judgment affirmed.

*Rehearing denied February 27, 1917.

BURNHAM, STOEPEL & CO. et al. v. STANDARD MERCHANDISE CO. et al. (Circuit Court of Appeals, Sixth Circuit. January 3, 1917.) No. 2908. Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge. Millis, Griffin, Seely & Streeter, of Detroit, Mich., and Thompson, Hine & Flory, of Cleveland, Ohio, for appellants. Spear, Mills, Knight & Godfrey, W. R. Godfrey, Bardwell & Hagenbuch, Charles Greenberg, Albert Mendelson, Weed, Miller & Rothenberg, and Louis J. Grossman, all of Cleveland, Ohio, for appellees. Dismissed on stipulation of counsel.

CALIFORNIA CANNERIES CO. v. DUNKLEY. (Circuit Court of Appeals, Ninth Circuit. January 8, 1917.) No. 2764. Appeal from the District Court of the United States for the Second Division of the Northern District of California. Asher, Meyerstein & McNutt, of San Francisco, Cal., for appellant. John H. Miller, of San Francisco, Cal., and Frederick L. Chappell, of Kalamazoo, Mich., for appellee. Upon stipulation of counsel for respective parties, filed December 27, 1916, and upon motion of counsel for the appellee for the dismissal of the appeal, without costs to either party, ordered: Appeal dismissed, without costs to either party.

CHARLES B. MOLING CO. et al. v. KNIGHT et al. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2885. In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. Presley K. Ewing, of Houston, Tex., for plaintiffs in error. Sam Streetman, of Houston, Tex., for defendants in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find no reversible error in the proceedings in this case, and none of the assignments of error are well taken. Judgment affirmed.

CLINCHFIELD PORTLAND CEMENT CORP. v. GREEN. (Circuit Court of Appeals, Sixth Circuit. October 12, 1916.) No. 2880. In Error to the District Court of the United States for the Eastern District of Tennessee; Edward T. Sanford, Judge. Lee F. Miller, of Johnson City, Tenn., for plaintiff in error. James B. Cox, of Johnson City, Tenn., for defendant in error. Dismissed on stipulation of counsel.

CORSICANA NAT. BANK v. JOHNSON. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2934. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Richard Mays, of Corsicana, Tex., and F. M. Etheridge, J. M. McCormick, and H. L. Bromberg, all of Dallas, Tex., for plaintiff in error. Henry C. Coke and Cullen F. Thomas, both of Dallas, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find no reversible error in the rulings and proceedings in the court below. None of the assignments of error are well taken. Judgment affirmed.

EHRET MAGNESIA MFG. CO. v. LUNGWITZ. (Circuit Court of Appeals, Third Circuit. January 10, 1917.) No. 2128. In Error to the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge. Assumpsit by Emil E. Lungwitz against the Ehret Magnesia Manufacturing Company. Judgment for plaintiff on the pleadings, and defendant brings error. Reversed, with directions to proceed to a trial. M. Hampton Todd, of Philadelphia, Pa., for plaintiff in error. Joseph J. Brown and Henry P. Brown, both of Philadelphia, Pa., for defendant in error. Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

PER CURIAM. This writ of error has been argued twice, but we regret to find ourselves still uncertain about the meaning (taken as a whole) of the litigated clauses in this contract, as the case comes before us at a stage when no testimony has been taken. We hope and expect that these difficulties may be removed when the testimony discloses the situation of the parties at the date of the agreement, and that what is now obscure may thus, if possible, be cleared up. Solely for this reason we feel constrained to reverse the judgment, and to direct the District Court to proceed to a trial.

EVANS v. ARKANSAS & M. RY. BRIDGE & TERMINAL CO. (Circuit Court of Appeals, Sixth Circuit. October 6, 1916.) No. 2861. In Error to the District Court of the United States for the Western District of Tennessee; John E. McCall, Judge. Thos. A. Evans and G. J. McSpadden, both of Memphis, Tenn., for plaintiff in error. J. W. Canada, of Memphis, Tenn., for defendant in error. Dismissed by consent of counsel.

FRIEDLEY-VOSHARDT CO. v. FRANKEL et al. (Circuit Court of Appeals, Sixth Circuit. November 10, 1916.) No. 2881. Appeal from the District Court of the United States for the Northern District of Ohio; John H. Clarke, Judge. Eli E. Doster, of Cleveland, Ohio, and Harry Lea Dodson, of Chicago, Ill., for appellant. Fay, Oberlin & Fay, of Cleveland, Ohio, for appellees. Dismissed on stipulation of counsel.

HARRELL & NICHOLSON CO. v. McCONNELL et al. (Circuit Court of Appeals, Sixth Circuit. November 10, 1916.) No. 2927. Appeal from the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Henry B. Graves, of Detroit, Mich., for appellant. Albert McClatchey, of Detroit, Mich., for appellees. Dismissed on stipulation of counsel.

In re HENRY C. WEBER & CO. (Circuit Court of Appeals, Sixth Circuit. October 13, 1916.) No. 2942. Petition to Revise in the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Lucking, Helfman, Lucking & Hanlon, of Detroit, Mich., for plaintiff in error. Bernard B. Selling, of Detroit, Mich., for defendant in error. Dismissed on stipulation of counsel.

KO MATSUMOTO v. UNITED STATES. Ex parte KO MATSUMOTO. (Circuit Court of Appeals, Ninth Circuit. October 23, 1916.) No. 2782. Appeal from the District Court of the United States for the Territory of Hawaii. George S. Curry and E. A. Douthitt, both of Honolulu, T. H., for appellant.

PER CURIAM. There being no appearance in open court of counsel for either party, and it appearing to the court that the record herein has not been

printed as required by rule 23 of the rules of practice of this court (231 Fed. v, 144 C. C. A. v), and it further appearing to the court that as the counsel for the appellant has failed to file with clerk of this court at least fifteen days before the case was called for argument, as required by rule 24 (231 Fed. v, 144 C. C. A. v), and that according to said rule appellant is in default, and that as prescribed by section 5 thereof the case may be dismissed, on consideration whereof, it is now here ordered, adjudged, and decreed by this court that the said appeal in this cause be and hereby is dismissed for the noncompliance by the appellant with the provisions of rules 23 and 24 of the rules of practice of this court.

LEE et al. v. FT. WORTH SAVINGS BANK & TRUST CO. (Circuit Court of Appeals, Fifth Circuit. November 30, 1916.) No. 2890. Appeal from the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. B. K. Goree, J. A. Templeton, and Ike A. Wynn, all of Ft. Worth, Tex., for appellants. R. W. Flournoy, of Ft. Worth, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. In this case, on the issues properly presented, the District Court ruled that the Ft. Worth Savings Bank & Trust Company was a banking corporation within the meaning of the bankruptcy law of the United States (Act July 1, 1898, c. 541, § 4b, 30 Stat. 547 [Comp. St. 1913, § 9588]), and therefore not subject to be adjudged a bankrupt. We have examined the record and evidence, and conclude that this finding was correct. The judgment appealed from is therefore affirmed.

LUTZE et al. v. CITY OF NEW ORLEANS. (Circuit Court of Appeals, Fifth Circuit. December 19, 1916.) No. 2972. Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge. Carl C. Friedrichs and Harold A. Moise, both of New Orleans, La., for appellants. I. D. Moore and John F. C. Waldo, both of New Orleans, La., for appellee. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. The reasons given by Judge Foster in denying a temporary injunction in this case (235 Fed. 978) meet with our concurrence. The decree appealed from is affirmed.

MacARTHUR BROS. CO. v. LAWLEY. (Circuit Court of Appeals, Fifth Circuit. November 30, 1916.) No. 2991. In Error to the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge. Ray Rushton and Philip H. Stern, both of Montgomery, Ala., for plaintiff in error. Robert E. Smith, of Birmingham, Ala., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. On consideration of the record, in the light of the briefs of counsel, we find no reversible error assigned or patent of record. The judgment of the District Court is affirmed.

In re MICHIGAN MOLINE PLOW CO. MICHIGAN MOLINE PLOW CO. v. SANDERHOFF. (Circuit Court of Appeals, Sixth Circuit. January 3, 1917.) No. 2922. Petition to Revise in the District Court of the United States

for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Seth Q. Pulver, of Owosso, Mich., for petitioner. John T. McCurdy, of Corunna, Mich., Bernard B. Selling, of Detroit, Mich., and Walter M. Bush, of Corunna, Mich., for respondent. Dismissed on stipulation of counsel.

MAULL v. L. B. SKINNER MFG. CO. FLORIDA CITRUS SUPPLY CO. v. SAME. (Circuit Court of Appeals, Fifth Circuit. January 24, 1917.) Nos. 3001, 3002. Appeals from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge. George C. Bedell and F. M. Durrance, both of Jacksonville, Fla., for appellants. T. Hart Anderson, of New York City, and L. W. Baldwin, of Jacksonville, Fla., for appellee. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. These two cases, involving the same questions, were heard together. We find no reversible error, and the two decrees are affirmed. See Campbell v. Skinner, 236 Fed. 359.

NICHOLS v. WESTERN UNION TELEGRAPH CO. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2963. In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. H. W. Wallace, of Cuero, Tex., for plaintiff in error. V. B. Proctor, of Victoria, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find this case was correctly ruled and decided in the court below, and the judgment is therefore affirmed.

OCHOA et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 8, 1917.) No. 2891. In Error to the District Court of the United States for the Western District of Texas; Thos. S. Maxey, Judge. J. F. Weeks, of El Paso, Tex., for plaintiffs in error. R. E. Crawford, Asst. U. S. Atty., of El Paso, Tex., for the United States. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On examination of the record, in the light of brief of plaintiffs in error, we find that none of the assignments of error are well taken. There was ample proof of the conspiracy charged in the indictment and also to prove the overt act. The evidence of the alleged accomplice, Mendenhall, was sufficiently corroborated by other evidence in the case. The alleged misconduct of one of the jurors in the case pending the trial is not sufficiently established by the evidence. Finding no reversible error assigned or patent of record, the judgment of the District Court is affirmed.

PACIFIC COAST S. S. CO. v. HOKANSON. (Circuit Court of Appeals, Ninth Circuit. October 23, 1916.) No. 2857. Appeal from the District Court of the United States for the First Division of the Northern District of California. Ira A. Campbell and McCutchen, Olney & Willard, all of San Francisco, Cal., for appellant. Thomas A. Thacher, William Denman, and G. S. Arnold, all of San Francisco, Cal., for appellee. Upon motion made on behalf of counsel for the respective parties for the dismissal of the appeal herein, and pursuant to stipulation filed November 13, 1916, ordered: Appeal dismissed, with costs in favor of the appellee and against the appellant.

REITZER et al. v. MEDINA VALLEY IRR. CO. (Circuit Court of Appeals, Fifth Circuit. December 15, 1916. Rehearing Denied January 9, 1917.) No. 2980. In Error to the District Court of the United States for the Western District of Texas; Wm. B. Sheppard, Judge. C. L. Bass, of San Antonio, Tex. (T. T. Vander Hoeven, of San Antonio, Tex., on the brief), for plaintiffs in error. Wm. Aubrey, of San Antonio, Tex. (West & McMillan, of San Antonio, Tex., on the brief), for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. By uncontradicted evidence, admitted on the trial without objection, it was shown that the defendants had estopped themselves to deny the right of the plaintiff to acquire the land in question by condemnation. This fact renders unavailable many of the assignments of error which have been insisted on in argument. Our examination of the record in the light of the arguments and briefs has led us to the conclusion that it does not show that any reversible error was committed. The judgment is affirmed.

ROBINETT & BUCHANAN v. ANGLO-AMERICAN MILL CO. (Circuit Court of Appeals, Fifth Circuit. December 11, 1916.) No. 2875. In Error to the District Court of the United States for the Eastern District of Texas; Gordon Russell, Judge. H. W. Head and Cecil Smith, both of Sherman, Tex., for plaintiff in error. W. L. Hay, of Sherman, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. On a full consideration of the transcript, we find none of the assignments of error well taken. The case seems to have been correctly ruled. We find no reversible error in the proceedings, and, for the elaborate reasons given by the District Judge, we conclude that the verdict was properly directed. Judgment affirmed.

RUBEL v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. January 17, 1917.) No. 2933. In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge. John E. Hartridge, of Jacksonville, Fla., for plaintiff in error. Herbert S. Phillips, U. S. Atty., of Tampa, Fla., and Fred Botts, Asst. U. S. Atty., of Jacksonville, Fla. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. We find no reversible error assigned or patent of record. There was sufficient evidence to warrant the verdict rendered. Judgment affirmed.

SANDOVAL et al. v. PFEUFFER et al. (Circuit Court of Appeals, Fifth Circuit. December 11, 1916.) No. 2879. In error to the District Court of the United States for the Western District of Texas; Henry D. Clayton, Judge. Don A. Bliss, of San Antonio, Tex., for plaintiffs in error. J. D. Guinn, Marcus W. Davis, and Wm. Aubrey, all of San Antonio, Tex., for defendants in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. On consideration of the transcript, in the light of the oral arguments and briefs, we find no reversible error. The judgment of the District Court is affirmed.

SKINNER v. CAMPBELL. (Circuit Court of Appeals, Fifth Circuit. January 24, 1917.) No. 2998. Appeal from the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge. T. Hart Ander-

son, of New York City, and L. W. Baldwin, of Jacksonville, Fla., for appellant. Grafton L. McGill, of Washington, D. C., and Richard P. Marks, Sam R. Marks, and Francis M. Holt, all of Jacksonville, Fla., for appellee. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. On an examination of the record in this case, we concur with the District Judge in the conclusions reached by him. See 236 Fed. 358. The decree appealed from is affirmed.

SOUTHERN RY. CO. v. BUTLER.* (Circuit Court of Appeals, Fifth Circuit. January 8, 1917.) No. 2956. In Error to the District Court of the United States for the Eastern Division of the Southern District of Georgia; Emory Speer, Judge. Action by Mrs. Vinnie Butler against the Southern Railway Company. There was a judgment for plaintiff, and defendant brings error. Affirmed. Jos. W. Bennet, F. E. Twitty, and Millard Reese, all of Brunswick, Ga., for plaintiff in error. Frances M. Oliver, of Savannah, Ga., and Vernon E. Padgett, of Baxley, Ga., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and CALL, District Judge.

PER CURIAM. This is a suit brought to recover $25,000 damages for injury to the plaintiff while a passenger on, and in alighting from, the train of the defendant. After a hotly contested trial before the court and a jury, the jury returned a verdict of $6,000 damages. In this court the case was fully and elaborately argued, both orally and by brief, and we have given attention and consideration to each one of the assignments of error, all relating to the admission of evidence and instructions to the jury, and our conclusion is that in no one of the errors assigned was there such prejudicial error as would warrant a reversal of the case. In our investigation it has been necessary to examine the evidence, and in that we are led to the conclusion that the plaintiff, without substantial negligence on her part, was severely injured at the time and place charged, and on the admissible evidence the jury was warranted in finding damages in favor of the plaintiff. The amount of the verdict rendered in the case is not attacked as excessive. The judgment of the District Court is affirmed.

STRONG et al. v. UNITED STATES. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2889. In Error to the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. Fred R. Switzer and A. C. Van Velzer, both of Houston, Tex., for plaintiffs in error. John E. Green, Jr., U. S. Atty., of Houston, Tex. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. After carefully considering the transcript, in the light of the briefs and oral arguments, we conclude that none of the assignments of error are well taken. The evidence fully supports the verdict. Judgment affirmed.

TEXAS STORE et al. v. CARLTON-FERGUSON DRY GOODS CO. (Circuit Court of Appeals, Fifth Circuit. December 11, 1916.) No. 2866. Appeal from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge. J. D. Williamson, of Waco, Tex., for appellants. W. M. Sleeper, of Waco, Tex., for appellee. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. This is a suit in equity to protect and enforce a trust, and praying the appointment of a receiver and an injunction, and this appeal is

*Rehearing denied February 9, 1917.

from a decree granting the relief prayed for. The court had jurisdiction through diverse citizenship of the parties and the amount involved. We find no reversible error warranting relief on appeal. Decree affirmed.

TUCKER v. CRAWFORDSVILLE STATE BANK. (Circuit Court of Appeals, Fifth Circuit. January 24, 1917.) No. 2949. In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge. J. C. Davant, of Brooksville, Fla., for plaintiff in error. Peter O. Knight, of Tampa, Fla., 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. The judgment of the District Court is affirmed.

UNITED STATES v. FIVE HUNDRED AND TWENTY-SEVEN BIRDS OF PARADISE AND ONE TRUNK. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2961. Appeal from the District Court of the United States for the Southern District of Texas; Waller T. Burns, Judge. John E. Green, Jr., U. S. Atty., of Houston, Tex. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. The condemnation of the property as forfeited to the United States in this case was correct and proper; but we find that part of the decree and the amendment thereto which ordered a public sale of the goods is not in consonance with the purpose and intent of the law (paragraph 347, Schedule N, Act Oct. 3, 1913, 38 Stat. 148, c. 16), and to that extent the decree should be amended, by striking out and vacating the provisions ordering a sale of the condemned and forfeited goods, and providing in lieu thereof that said condemned goods be delivered to the Secretary of the Treasury of the United States, to be disposed of as he shall direct, and, as so amended, the decree affirmed; and it is so ordered.

WHITED et al. v. JOHNSON. (Circuit Court of Appeals, Fifth Circuit. January 24, 1917.) No. 2896. Appeal from the District Court of the United States for the Western District of Louisiana; Aleck Boarman, Judge. W. D. Gordon and Henry G. Russell, both of Beaumont, Tex., for appellants. James W. Parsons, of Mansfield, La., and J. A. Thigpen and S. L. Herold, both of Shreveport. La., for appellee. Before PARDEE and WALKER, Circuit Judges, and GRUBB, District Judge.

PER CURIAM. To reform the contract on the ground of mutual mistake complainant's bill shows no case for equitable relief. To rescind the contract and recover the amounts paid, complainant has an adequate remedy at law. Decree affirmed.

WOLLAEGER MFG. CO. v. DALLAS COUNTY. (Circuit Court of Appeals, Fifth Circuit. December 18, 1916.) No. 2930. In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge. Robert V. Davidson, of Dallas, Tex., for plaintiff in error. Jed C. Adams and R. L. Stennis, both of Dallas, Tex., for defendant in error. Before PARDEE and WALKER, Circuit Judges, and FOSTER, District Judge.

PER CURIAM. We find none of the assignments of error well taken. Judgment affirmed.

W. W. HATCH & SONS CO. et al. v. CITY OF MT. CLEMENS, MICH. (Circuit Court of Appeals, Sixth Circuit. November 10, 1916.) No. 2946. In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge. Erskine & Lungerhausen, of Mt. Clemens, Mich., and Donnelly, Lyster, Brennan & Munro, of Detroit, Mich., for plaintiffs in error. John A. Weeks, of Mt. Clemens, Mich., for defendant in error. Dismissed on stipulation of counsel.

END OF CASES IN VOL. 237

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