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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.
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Hon. GEO. H. BINGHAM, Circuit Judge.....Concord, N. H.
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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.
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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

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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. 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. ROBERT T. ERVIN, District Judge. S. D. Alabama[4] .....Mobile, Ala.
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Hon. EDWARD R. MEEK, District Judge, N. D. Texas.....Dallas, Tex.
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Hon. LOYAL E. KNAPPEN, Circuit Judge.....Grand Rapids, Mich.
Hon. ARTHUR C. DENISON, Circuit Judge.....Grand Rapids, Mich.
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Hon. WALTER EVANS, District Judge, W. D. Kentucky.....Louisville, Ky.
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Hon. CLARENCE W. SESSIONS, District Judge, W. D. Michigan.....Grand Rapids, Mich.
Hon. JOHN M. KILLITS, District Judge, N. D. Ohio.....Toledo, Ohio.
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Hon. HOWARD C. HOLLISTER, District Judge, S. D. Ohio.....Cincinnati, Ohio.
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Hon. JOHN E. McCALL, District Judge, W. D. Tennessee.....Memphis, Tenn.

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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] Appointed March 16, 1917.
[6] Appointed March 14, 1917.

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 I. SMITH, Circuit Judge.....Council Bluffs, Iowa.
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Hon. JACOB TRIEBER, District Judge, E. D. Arkansas..... Little Rock, Ark.
Hon. F. A. YOUMANS, District Judge, W. D. Arkansas.....Ft. Smith, Ark.
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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.
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Hon. JOSEPH W. WOODROUGH, District Judge, Nebraska .....Omaha, Neb.
Hon. COLIN NEBLETT, District Judge, New Mexico[1].....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.
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Hon. FRANK S. DIETRICH, District Judge, Idaho.....Boise, Idaho.
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Hon. EDWARD S. FARRINGTON, District Judge, Nevada.....Carson City, Nev.
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Hon. ROBERT S. BEAN, District Judge, Oregon.....Portland, Or.
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Hon. EDWARD E. CUSHMAN, District Judge, W. D. Washington.....Seattle, Wash.
Hon. JEREMIAH NETERER, District Judge, W. D. Washington.....Seattle, Wash.

[1] 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

FIFTH CIRCUIT.

Sandoval v. Pfeuffer, 237 F. 1020. Rehearing denied March 20, 1917.

EIGHTH CIRCUIT.

Broatch v. Boysen, 236 F. 516. Rehearing denied March 30, 1917.

Chambers v. United States, 237 F. 513. Rehearing denied March 30, 1917.

NINTH CIRCUIT.

Hardy, The, 229 F. 985. Rehearing denied March 6, 1916.

C. S. Holmes, The, 237 F. 785. Rehearing denied Jan. 8, 1917.

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE DISTRICT COURTS

SAALFIELD PUB. CO. et al. v. G. & C. MERRIAM CO.

G. & C. MERRIAM CO. v. SAALFIELD PUB. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 13, 1917.)

Nos. 2855, 2856.

1. COURTS ⟸406(1)—APPEAL—WAIVER OF ERRORS—FAILURE TO ARGUE.
Errors assigned but not insisted upon nor argued, as required by Court Rule 20 (202 Fed. xiv, 118 C. C. A. xiv), are treated as waived.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1103; Dec. Dig. ⟸406(1).]

2. APPEAL AND ERROR ⟸1201(6)—PROCEEDINGS AFTER APPEAL—CHANGE OF THEORY.
Where the original bill for injunction against unfair competition was framed, and the case was tried, and an appeal determined, on the theory that certain dictionaries published by defendants were revisions of a dictionary the copyright of which plaintiff had owned before its expiration, plaintiff could not, after a decree permitting the use of the title to the copyrighted dictionary under certain restrictions, and after more than four years of litigation, change the theory of the case by alleging that defendants' dictionaries were in fact revisions of a different dictionary so as to show fraud in the use of the title of plaintiff's dictionary.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4683; Dec. Dig. ⟸1201(6).]

3. APPEAL AND ERROR ⟸1099(3)—EFFECT OF DECISION—PERMISSION TO AMEND.
Permission granted by the appellate court to file in the court below a supplemental bill does not bind the court as to the validity of the new claims sought thereby to be presented.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4372; Dec. Dig. ⟸1099(3).]

4. TRADE-MARKS AND TRADE-NAMES ⟸70(3)—UNFAIR COMPETITION—TITLE OF BOOK.
Where plaintiff, who had succeeded to the rights of the author of Webster's dictionary, the copyright to which had expired, had published for several years a smaller dictionary which it called Webster's Collegiate Dictionary, and which had a large sale among the class of purchasers for whom it was intended, a publication by defendants of a dictionary known as Webster's Intercollegiate Dictionary, which was similar in size and style and intended for the same class of purchasers, was unfair com-

petition which can be restrained, though plaintiff had lost its exclusive right to the use of the title Webster's Dictionary.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 81; Dec. Dig. ⟸70(3).]

5. TRADE-MARKS AND TRADE-NAMES ⟸3(3)—RIGHT TO TRADE-MARK—DESCRIPTIVE WORD—SECONDARY MEANING.

It is not essential to the right to the exclusive use of a descriptive word in a trade-mark, on the theory that it had acquired a secondary meaning as designating a particular product, that the personal identity of the maker of that product should be known.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 6; Dec. Dig. ⟸3(3).]

6. TRADE-MARKS AND TRADE-NAMES ⟸85(1)—RIGHT TO TRADE-MARK—DESCRIPTIVE WORD.

Where the original title of a dictionary had been used by plaintiff, who had the right to publish it, to designate numerous subsequent editions and revisions, so that, notwithstanding the expiration of the original copyright, the title had acquired a secondary meaning as designating the series of dictionaries published by plaintiff, the fact that the latest of those dictionaries bore little resemblance to the original does not establish such deception as will deprive plaintiff of his right to protection in the use of the descriptive word.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 94; Dec. Dig. ⟸85(1).]

7. TRADE-MARKS AND TRADE-NAMES ⟸97 — INFRINGEMENT — DESCRIPTIVE WORD—DISTINGUISHING NOTICE.

Where a descriptive word has acquired a secondary meaning as designating plaintiff's product, and the use of defendant's name on his product bearing the same descriptive word will distinguish it, that is sufficient; but, where the use of his name will not sufficiently distinguish the product as defendant's, he can be required to use a notice indicating that it is not plaintiff's product.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⟸97.]

8. TRADE-MARKS AND TRADE-NAMES ⟸97—DESCRIPTIVE WORD—SECONDARY MEANING—NOTICE.

Though the title of a dictionary, the copyright on which had expired, had acquired a secondary meaning as designating the series of dictionaries published by plaintiff, one reprinting the original dictionary after the expiration of the copyright, and long after plaintiff had ceased publishing and selling that edition, need only insert his name as publisher on the title page; but where defendant publishes a dictionary departing from the original as much as plaintiff's latest dictionary, which had acquired an extensive reputation of its own, and resembling the latter in appearance, defendant can be compelled to use a notice that its dictionary is not published by the original publishers, or their successors.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⟸97.]

9. TRADE-MARKS AND TRADE-NAMES ⟸97—INFRINGEMENT—NOTICE—PLACE OF PUBLICATION.

Where a descriptive word has acquired a secondary meaning as designating a series of dictionaries published by plaintiff, defendant can be compelled to publish a notice of its dictionaries designated by that word, not only on the title page, but wherever as on the cover back, front

cover, or in its advertisements, it uses the descriptive word in connection with the designation of its dictionary.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⊂=97.]

10. TRADE-MARKS AND TRADE-NAMES ⊂=97—INFRINGEMENT—DECREE—COMPLIANCE.

A decree requiring defendant to publish such notice in connection with the descriptive name is sufficiently complied with, where the notice is published on the cover back and at the top of the title page, though the notice on the title page is not particularly prominent and there was no similar notice on the front cover, where, however, the descriptive word was not used.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 110, 111; Dec. Dig. ⊂=97.]

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

Suit by the G. & C. Merriam Company against the Saalfield Publishing Company and another for an injunction to restrain defendants from using the same name in the title of their dictionaries as was used by plaintiff. From a decree permitting the use of the name under certain restrictions, both parties appeal. Modified and affirmed.

No. 2855:

Wade H. Ellis and Challen B. Ellis, both of Washington, D. C., for appellants.

Wm. B. Hale, of New York City, for appellee.

No. 2856:

Wm. B. Hale, of New York City, for appellant.

Wade H. Ellis and Challen B. Ellis, both of Washington, D. C., for appellees.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

DENISON, Circuit Judge. These are, respectively, appeal and cross-appeal from the decree of the District Court, entered in purported compliance with our mandate on the former appeal. 190 Fed. 927, 111 C. C. A. 517, and 198 Fed. 369, 117 C. C. A. 245. By our second opinion, certain details, both as to the form of the injunction and as to the accounting liability, were committed to the trial court for decision. In the court below there was then a reference to a master, who made findings of fact bearing upon these special questions so reserved, as well as upon the amount of the profits or damages to be paid. Exceptions to the master's report embodying these findings were overruled and the findings confirmed. The controversy as to profits and damages was compromised and settled, but a decree determining the precise scope of the injunction was entered, against the objection of plaintiff that it did not go far enough, and the protest of defendants that it went too far.

[1] Upon these appeals the plaintiff urges only the two points hereafter discussed, and the defendants, although assigning a large number

of errors, have insisted upon and argued only one general proposition. All other errors assigned are therefore to be treated as waived. Rule 20 (202 Fed. xiv, 118 C. C. A. xiv); Ironton v. Harrison (C. C. A. 6) 212 Fed. 353, 357, 129 C. C. A. 29; Gibson v. Ry. (C. C. A. 6) 215 Fed. 24, 27, 131 C. C. A. 332.

[2] 1. The complaint prosecuted in the First circuit was against the single form of dictionary then published by Ogilvie, which was of the exhaustive or unabridged class, and was called "Webster's Imperial" or "Webster's Universal." After the purchase of Ogilvie's business by the defendants here, and before the filing of this bill, they had published three other dictionaries of abridged type, which they called, respectively, "Webster's Intercollegiate," "Webster's Adequate," and "Webster's Sterling." The bill in this case complained also of these three small dictionaries, and grouped them with the "Imperial." Our opinion and the decree of the court below, pursuant to the mandate, adopted this classification and awarded against them the same relief as given against the Imperial. Pending the accounting below, the plaintiff applied to this court for leave to file in the court below a supplemental bill, resting upon the theory that these three small dictionaries were not, in truth, revisions of the original, copyright-expired Webster, but were mere reprints of an English dictionary, the "Twentieth Century." We gave this permission, the bill was filed, and the master, by his confirmed report, found the facts to be in accordance with the plaintiff's claim. Upon this basis plaintiff now urges that defendants should not be allowed to use the name "Webster" as to these dictionaries at all, because they are not Webster's dictionaries; that the foundation of the modified right to use the word awarded to the defendants as to the Imperial was the fact of sufficient identity between the Imperial and the 1847 copyrighted book; and that, with this support removed, nothing remains save the fraud accomplished by using the name to deceive the public which is familiar with that secondary meaning of "Webster's," indicating plaintiff's publications—the result stated by Judge Dallas, in Singer v. Hipple (C. C.) 109 Fed. 152, where he says:

> "Consequently the defendant's employment of the word * * * can have but one result, and that is not to correctly identify the thing itself, but to mislead the public as to its source."

We are satisfied to dispose of the error alleged in this respect without examining the sufficiency of the argument just stated. Plaintiff's effort to reshape the litigation as to these three small dictionaries is belated. No satisfactory reason appears why the fact that these dictionaries are so nearly identical with the "Twentieth Century" and so far removed from the 1847 Webster's was not observed long before. With ample opportunity for knowing this fact, plaintiff was satisfied to file this bill, resting on the inconsistent theory that these dictionaries were like the Imperial, which had been adjudged to be a revision of the 1847 Webster's, and to prosecute the case on that theory through our courts for four years. The new theory is so obviously an afterthought, designed to overcome the partially disappointing construction which we gave to the decree in the First circuit, that only an extraordinary

case of thwarted diligence in making an earlier discovery and of sharp injustice otherwise resulting would justify upsetting the formerly accepted basis of litigation. Applying this principle, and without going further, the decree below in this respect should be affirmed.

[3] It is quite obvious that our mere permission to file a supplemental bill in the court below did not, in any way, commit us or bind that court as to the rightfulness of the new claims sought to be presented.

[4] 2. A distinct question exists as to one small dictionary published by defendants, "Webster's Intercollegiate." The original bill in this circuit asked an absolute prohibition of the use of this composite name, as being a manifestly fraudulent imitation of the long-established name of one of plaintiff's publications, "Webster's Collegiate Dictionary." The issue made on this point is one of the things expressly reserved in our former opinion; and, upon this issue, the master found and reported:

"That the name 'Intercollegiate' was adopted by defendants as a name for this dictionary, with the intention of using it to mislead and deceive purchasers. I find therefore the name 'Intercollegiate,' as used by defendants, is, of itself, a violation of complainant's rights."

Upon exceptions, this finding was confirmed; but, in the final decree, completely formulating the injunction, this subject was not mentioned.

Not only would we be strongly inclined to accept the concurrent finding of the master and the district judge, but we think they were right. "Webster's Collegiate Dictionary" was published under that name by the Merriam Company, in 1898. In its special field it became well known and largely used. The defendants' "Webster's Intercollegiate Dictionary" was published in 1907. It was of the same general size, form, and style, and intended for the same class of purchasers. It is true enough that "Collegiate" is inherently descriptive; but whatever doubts there might be about the propriety of attributing a secondary meaning to "Webster's Dictionary" alone cannot extend to the collocation of the three words, "Webster's Collegiate Dictionary." It is the natural inference, as it is the finding of the master, that during the period of nine or ten years this phrase would come to be taken as referring to the Merriam book. It was the only one of that name, and it was one upon which—though this is probably not important—the copyright had not expired; and it is a fair assumption that defendants could have only one purpose in rejecting the many names appropriate for a book of this particular size and utility and adopting the one which so clearly would produce an impression that it was the well-known book of almost identical name. Such difference as there is between "Collegiate" and "Intercollegiate" only indicates the desire to vary without distinguishing. We think the injunction should forbid the defendants from using the title "Webster's Intercollegiate Dictionary" upon or in connection with any book of the general class of the Merriam "Webster's Collegiate Dictionary."

3. The defendants' appeal is based on the position that they performed their full duty by printing their names in the ordinary manner

upon the title page of their book as its publishers, and that they ought not to be required to employ any notice affirmatively calling attention to the fact that their book is not the Merriam book. Since it was expressly adjudged in the suit in the First circuit that this very notice must be used, and we have held that all things covered by that judgment are res judicata in this suit, and since, by our two previous opinions, the notice has been required in this case, we might well pass this subject (as to the Imperial) without further discussion, although our power to reach a different conclusion at this time may be conceded. Chesapeake, etc., Co. v. McKell (C. C. A. 6) 209 Fed. 514, 516, 126 C. C. A. 336. However, defendants' present counsel have elaborately argued the meritorious question, relying especially upon recent decisions adverse to the Merriam Company (Merriam Co. v. Syndicate Co. [D. C. and C. C. A. 2] 207 Fed. 515, 125 C. C. A. 177; Id., 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148); and we think proper to consider it somewhat further.

We reached the conclusion (198 Fed. 375, 117 C. C. A. 245) that the decree in the First circuit rests at last on the theory that the name "Webster's Dictionary" not only had its primary meaning of reference to the edition of 1847, upon which the copyright had expired in 1889, and to earlier ones, but that, as early as 1904, when defendants' publication began, the term had acquired a secondary meaning as indicating the line of dictionaries then published by the Merriam Company. The tenability of this theory has been doubted; and, although the requirements of the present situation are fully met when we again find, as we must, that this is the theory which was adopted in the First circuit as the basis of the decree there rendered, and which decree we are, in this suit, enforcing—only with such constructions as the additional facts make necessary—yet we are by no means satisfied that the theory is wrong in fact or in law. There are certain undisputed facts as well as inferences therefrom which have not been mentioned in the later decisions, and which, possibly, have escaped consideration—as indeed they did in our opinion in 198 Fed.

This First circuit litigation did not pertain, nor does this—except in rather a negligible degree, if at all—to that particular book upon which the copyright expired in 1889. There is much force in the thought that a publisher who has enjoyed the monopoly of a book during a copyrighted period, and who, for that reason alone, is directly reached when the public thinks of the book, ought not to be allowed to prolong his monopoly in the same thing by immediate resort to the secondary meaning theory; but although the exact reproduction of the edition of 1847 is covered by the language of both decrees, there and here, it is not the substantial thing in controversy. That edition disappeared from the market in 1864, or immediately thereafter, and for the next 25 years the revision of 1864 and its modifications exclusively held the field. This was followed by the revision of 1890, the "International." These revisions of 1864 and 1890 produced books very different in general form and appearance from the edition of 1847. They —and especially that of 1890—compared with the 1847 edition as an adult with a child. The defendants' 1904 Imperial (or Universal) Dic-

tionary was of the same class as the Merriam 1890 revision; it was intended to compete with that revision, and not with that of 1847; no one bought the defendants' Imperial supposing that he was buying a Merriam 1847; one sold for $6 or $8, the other for $1 or less; the misleading and deception of the public, which has been found as a fact by a decree to which the defendants are privies, was with reference to the actual competitive dictionaries and with reference to that type and style of Webster's Dictionary which—alone of that type—had been on the market under that name for 14 years. The Merriam Company was not seeking to protect itself against unfair competition and the public against misleading in the matter of a book upon which the copyright had expired, but in the matter of a book—the revision of 1890—to which the Merriam Company had a rightful monopoly. The simulation of size, shape, general appearance, title, title page, etc., of which defendants were found guilty, all related to and constituted unfair competition against the Merriam "Webster's International." This is confirmed by the fact, already mentioned, that the copyrighted book of 1847 was withdrawn from the market in 1864 and never again was put on sale, until this was done by others than the Merriams in 1890; and is further confirmed by the fact that "Webster's Dictionary" was not the registered copyrighted title of the 1847 book, as seems to have been taken for granted, nor was it ever the registered title of any other book, the copyright upon which has expired. The edition of 1847 was itself published after the death of Dr. Webster, and was based upon earlier editions, the first of which was published in 1806 and the copyright upon which expired in 1834. It is an entire mistake to suppose that "Webster's Dictionary" was a copyrighted title which first became free to public use in 1889; so far as concerns any copyright upon these words themselves, they have always been just as free to the public as they are now.[1] The registered title of the 1847 edition, as of that of 1828, was "American Dictionary," and it was called, as its predecessors since 1806 had been called, "Webster's Dictionary" only because that was an appropriate and descriptive name of the thing. If it be said that freedom to use the title was unavailing while the book was covered by copyright, the reply is that the copyright upon the original "Webster's Dictionary" expired in 1834, and ever since that date any one has had a right to publish that book, or his own revision of it, and call his publication "Webster's Dictionary." Up to the beginning of this suit no one had done so, if we except defendants. The right to publish editions after that of 1806, and copyrighted by Dr. Webster in his lifetime or by his executors shortly after his death, remained outstanding in different publishers until the last such right was purchased by the Merriams in 1858. How long, if at all, any of these editions continued to be actually published after 1847 under the name "Webster's Dictionary," is not clear; but certain it is that from

[1] The right of a publisher to restrain others from using the title of his book or magazine is independent of any copyright law, and sufficiently rests upon the law of trade-marks or unfair competition. Estes v. Worthington (C. C.) 31 Fed. 154; Gannert v. Rupert (C. C. A. 2), 127 Fed. 962, 62 C. C. A. 594; Corbett v. Purdy (C. C.) 80 Fed. 901.

1858 until 1890, no one, except the Merriams or their licensees, used the title in question, although, as above stated, the public was free to do so.[2] After 1890, and until 1904, if there was any use of the title by others, except in connection with mere reprinting of the 1847 edition (or with additions from the edition of 1859), it has not been pointed out to us.

Even if it should be said that the edition of 1806, although unabridged, was such a different type of book that the expiration of the copyright in 1834 did not leave the public at liberty to use the name upon the book of an unabridged type, like defendants' Imperial, it must be seen that the 1828 revision was of the same class as that of 1847, and the defendants' book, the Imperial, is presumably related to that edition in the same way that it is to the 1847 edition, except, perhaps, in less degree. This 1828 copyright expired in 1870, so that, if we confine ourselves to a book of this specific class, we find that when defendants entered the field, the public had possessed full right to publish such a book under that name for 34 years, but had acquiesced in the exclusive occupancy of the field by the Merriams.

So far as our opinion in 198 Fed. assumed that there had been a period of only 15 years before defendants' appearance, in which a new and qualified right might be accruing to plaintiff on the secondary meaning theory, we overlooked the fact that the public right in this respect had been perfect ever since 1834, and that the bill of complaint did not plant plaintiff's right solely upon the short recent period of use after the 1847 copyright expired, but rather upon the continued use ever since 1864 when the 1847 edition was withdrawn from the market.

These considerations tend to persuade that the life or death of the copyright monopoly in the contents of the book does not necessarily control the right to use the name by which the book was known, but that, when protection is sought against unfair competition with books which plaintiff has the sole right to publish, the case for the secondary meaning theory stands on the same basis as with regard to any other descriptive word.

[5] It is not of controlling importance to the true application of the secondary meaning theory that the public should appreciate the personal identity of the manufacturer. The deception involved in every such case, as in a trade-mark case, is said to be a deception as to the origin of the goods; but this is a formula for expressing the ultimate result. With reference to articles which have trade-names, it is the article itself and its good qualities which the public appreciates and which cause it to desire to get the genuine article made by the manufacturer who has established its reputation, rather than something made by some one else. Particularly under present-day conditions, the purchasing public may have a fixed purpose to buy a given article and not a sub-

[2] There have been large sales of some of the smaller forms by the American Book Company and by Ivison, Blakeman, Taylor & Co., but these were printed under the Merriam copyrights of date later than that of 1847, and from the Merriam plates; they carried the Merriam name on the title page and the Merriam copyright marks; and they were, in substance, published by the Merriams in partnership with the others named. They do not negative public acquiescence in an assumption of exclusive right.

stitute therefor, and yet be quite ignorant whether the genuine article is made by one or another manufacturer. Even under earlier conditions, the purchaser of "Stone Ale" or "Camels' Hair Belting" or "Glenfield Starch" very likely knew as little as he cared about the personal identity of the maker.[3]

[6] Nor, if it is true, is it inconsistent with recognition of the secondary meaning of "Webster's Dictionary" in this case, that, in the now competitive books, the plaintiff departs as far as defendants do from the 1847 edition. The bearing of this proposition upon the other proposition—that in 1904 "Webster's Dictionary" had come to mean, prima facie, the Merriam editions—is not obvious. If the case were confined to the right to reproduce the 1847 edition precisely, the question would be different; but that same latitude of construction which enabled the defendants partly to escape the charge of fraud in the use of the name and to convince the courts in the First circuit that the defendants' dictionary contained enough of the 1847 edition to justify using the title which had become the common name of that book, extends, also, to the protection of plaintiff and acquits it of defrauding or deceiving the public by continuing to call its books by that name. Plaintiff's conduct is also characterized, not by the use of the title as the name of one particular book, but by the consistent use of the name for its series of books for 60 years before this litigation began, covering three general revisions and very numerous editions of the large book, and covering a great variety of abridgements and including sales of over 10,000,000 copies of the different forms, after the 1847 edition was withdrawn. "Webster's Dictionary" never was the name of the 1847 book and of that alone so exclusively that for that sole reason it became inherently fraudulent to call by that name any other edition or revision. From 1847 to 1864, the five editions, published from 1806 to 1840, were doubtless in circulation, though they did not continue to be published (unless, perhaps, to some extent, until 1858). From 1864 to 1890 the name was rightly applied to the edition of 1847 and to that of 1864, and from 1890 to 1904 it properly designated at least three editions. It cannot be said that the use of this term by the Merriams in 1904 tended to deceive the public into thinking that the book the

[3] Where an article is put out under a trade-name which, although it must be called descriptive, is yet also something more than merely descriptive, and where the public is free to compete in the same article and in the same name, but for a long period refrains from both, this seems to the writer the ideal soil in which the secondary meaning may grow into effective existence. The name points to one maker only, without confusion or uncertainty, and it is a sure "badge of origin." One of the opinions in the Cellular Clothing Case, [1899] Appeal Cases, pp. 326, 343, cited with some approval in the Malted Milk Case, 85 L. J. R. 338, and by this court in Kellogg Co. v. Quaker Co., 235 Fed. 657, 666, — C. C. A. —, disparages the effect of that use which is associated with noncompetitive goods. In the Kellogg Case, at least, the words in question were so far the obviously apt words for concise description as to require the strongest case of deliberate acquiescence in exclusive appropriation in order to maintain the theory of secondary meaning, and in such a case the strictest rule may well be applied. In the present case, adopting defendants' definition of "Webster's Dictionary," there has long been competition in the article itself, and even the rule of the Cellular Case would not reach it.

Merriam Company was then publishing was the edition of 1847 or that of 1864; and unless this use of the term by the Merriams, in 1904, when defendants came on the field, was deceptive, then the Merriams were entitled to the full benefit of the secondary meaning, as far as the facts may otherwise justify.

We are not considering this question as an original one, nor undertaking its decision. We have so far reviewed it only to be satisfied that the decision in the First circuit was not so obviously wrong or unjust that we should confine the enforcement of that decree most strictly and not allow its operation beyond its very letter. After such review, we see no reason to doubt that the decree in the First circuit against the "Imperial" stands as the ordinary one against a defendant who has used a trade-name which, though descriptive, has, by long acquiescence, come to be identified only with plaintiff's product, and which therefore, on well-settled principles, the defendant may use only if he effectively distinguishes, nor to doubt that we should enforce the decree in the First circuit according to its fair meaning and effect, as being an application of this principle.

[7] This brings us directly to the contention regarding the special notice prescribed by the former decree, "This dictionary is not published by the original publishers of Webster's Dictionary, or by their successors." It is urged that such a notice unfairly disparages defendants' books and imposes a greater burden than the law justifies. It is said that the Singer Case required only that the article should be marked with the name of the defendant as manufacturer, and that all other cases in the Supreme Court, like the Hall Case and the Waterman Case, in which a "not made by" notice has been required or sanctioned, were cases involving the use of a personal name, and reaching directly instead of indirectly the personal identity of the manufacturer. In the Hall Case and in the Waterman Case the plaintiff and defendant had the same name, and marking the article with the name of the defendant as manufacturer would not distinguish, but would become a mark of confusion and misleading instead of a mark of differentiation; and it is clear that, in such cases, the defendant must positively distinguish by something beyond his own name. The cases below the Supreme Court, where such notices have been required, are very numerous. Some of them can be justified upon the ground that the use of defendant's name alone was itself misleading; others, like Jenkins v. Kelly (C. C. A. 3) 227 Fed. 211, 142 C. C. A. 11, and Ludlow v. Pittsburgh (C. C. A. 3) 166 Fed. 26, 92 C. C. A. 60, are quite inconsistent with any such distinction and stand upon broad grounds which would require a negative notice in all the secondary meaning cases. It may be true that in the Singer Case no such notice was compelled,[4] but it is to be observed, first, that the propriety of such requirement was not

[4] In the June Case, 163 U. S. 169, 204, 16 Sup. Ct. 1002, 41 L. Ed. 118, the order required the notice to show that the article was "made by defendant, as distinguished from" plaintiff, or was "the product of defendant, and therefore not the product of" the plaintiff; but in the companion case (Singer Mfg. Co. v. Bent, 163 U. S. 205, 207, 16 Sup. Ct. 1016, 41 L. Ed. 131) the order required notice that the machine was "the product of the defendant and not the manufacture of" the plaintiff.

considered, and the case arose before the later common practice on that subject had grown up; and, second, that the case may well be classified as one involving direct deception concerning the identity of the manufacturer rather than mere misleading as to the identity of the article. So far as there is a distinction between these two things, the Singer Case is near the line. It may well be that the Supreme Court would have deliberately held that to mark the machine labeled "Improved Singer" with the name of the June Company as maker would sufficiently distinguish, and yet it may also well be that if the Singer machine had become known on the market by some other name, even a descriptive one, e. g., "Perfection," and the June Company had used the same name, "Perfection," the Supreme Court would have required it to say, "This machine is not made by the makers of the original 'Perfection,' nor by their successors."

If, then, we assume that, where the plaintiff's "secondary meaning" mark is his own name, and defendant is entitled to use that same name, the defendant must negatively distinguish, and that where plaintiff's mark is of the same character, but defendant's name is wholly different, the use of defendant's name will be a sufficient distinction, it is clear that the cases where plaintiff's mark consists in a descriptive word must fall into one or the other class according to the circumstances of each case. Sometimes defendant's name will sufficiently distinguish; at other times, and perhaps generally, it will not, but will even aggravate the misleading, as in Menendez v. Holt, 128 U. S. 514, 521, 9 Sup. Ct. 143, 32 L. Ed. 526, and in Jacobs v. Beecham, 221 U. S. 263, 272, 31 Sup. Ct. 555, 55 L. Ed. 729. The present case is not of the class directly reaching personal identity like the Hall Case; it is distinctly of the descriptive word class, and, while it has been said that the name had come to indicate that a book called thereby was published by the Merriams, this is largely true only in an indirect way. It had come to mean that the book was one of the regular series then being published by the house which alone, for at least 50 years, had been publishing current revisions called by that name; but what the name of that house might be would be known only to a part of the public that received the broader impression.

[8] When we apply these principles to defendants' books, we are compelled to think there is a vital distinction between the mere reprinting of the edition of 1847 and the putting out of the other books which were competitive with the various forms of Merriam books being published in 1904. This results not only from the fact that the Merriams had withdrawn this 1847 edition from the market in 1864, and that there could not very well be unfair competition in an article which plaintiff was not selling in 1890 when these reprints first appeared, but also from the logical difficulty of predicating unfair competition upon the mere reproduction of a book on which the copyright has expired, if that reproduction by others begins, as here, promptly on the expiration of the copyright, and is continued by one or another of the public until the defendant appears. A reputation for good paper, durable binding, good press work, etc., might constitute a basis upon which the public could intelligently wish to buy from the original

publishers and not from others; but nothing of the kind is alleged here. The case against the defendants, in this particular, stands solely upon a photographic reproduction of the 1847 book; a reproduction perfect in every detail, save for the substitution of defendants' name on the title page as publisher and save for an appendix. Upon this foundation only there is scant room to support the theory of misleading the public. The public gets the precise article indicated by the name, and—lacking any question as to the quality of the publishers' work—the general public will be rightly indifferent as to who the publishers may be. It follows that, in our judgment, the notice should not be required on the reprints of the 1847 book; the defendants' name on the title page, as publisher, is a sufficient distinction; and, though the letter of the decree in the First circuit is broad enough to cover this specific matter, we see no reason to think it was so intended. It is apparent from all the opinions in that circuit, as it is from our own two former opinions, that the only subject-matter actually considered was the alleged unfair competition involved in the attempts by defendants to sell defendants' series of revised dictionaries as against the series which the Merriam Company was publishing and selling in 1904. Whatever is said in those opinions regarding the rightful standing of the secondary meaning theory has reference to this state of facts.

Different considerations govern the Imperial (or Universal). This was put out to compete with plaintiff's International which (with its variations) had been the only Webster's Dictionary of this class, in quarto form and unabridged, upon the market for fourteen years. It had been produced by plaintiff at great expense, and it had very high reputation for its literary merit, distinct from and beyond anything contained in former revisions. As applied to this subject-matter—the only substantial thing there involved—we interpret the judgment of the First circuit as a finding that the portion of the public which constituted prospective purchasers for that class of dictionary had come to understand that "Webster's Dictionary" meant Webster's International, published by the Merriams, and desired to buy that book, and was liable to be deceived if it was offered anything else, superficially similar, dressed with the same distinguishing name—even though it would not know the difference between the Merriams and Ogilvie as publishers, or get any effective warning by seeing Ogilvie's name on the title page. From this point of view the case is the typical one where the special notice is necessary, to the same extent and for the same reasons as in the Hall and Waterman Cases.

The same reasons which justify the notice upon the Imperial (or Universal) apply to the smaller dictionaries. For a long period before the defendants put these out, the special class of dictionary users, to whom they appeal, had been familiar with the several abridgements of the same class published by plaintiff and called "Webster's Collegiate," "Webster's High School," etc. The value of these books depended upon their reputation for the skill with which they had been prepared for their intended use; and, by giving to their own books the name by which the others were known, the defendants appropriated a part of the reputation of plaintiff's books. The periods of ex-

clusive use of the name after the name was free to the public, etc., will be different with respect to the abridgements and with respect to the unabridged; but we see no substantial distinction in the right of the matter.

[9] 4. Included in defendants' main contention is the subordinate one that, if the specific notice is to be used at all, its presence on the title page is sufficient, and it ought not be to required, as by the decree below it is, in every place where the defendant displays the name "Webster's Dictionary." This has special reference to the back of the book and the outside front cover of the book, in each of which places this name was conspicuously stamped, and to advertisements. This subject, also, was reserved by our former opinion, and we thought that, though the decree in the First circuit did not specifically reach to these details, it had general language that we might so read. As to all these competitive books, we may take plaintiff's "Webster's International" and defendants' "Webster's Imperial" as typical. The adjudicated reason why defendants may not use the name without any limitation is that its unrestricted use tends to make the purchaser think he is geting the Webster's International with which he had been familiar for 14 years. This false impression will be produced by the cover or advertisements as well as by the title page; indeed, the careless and hasty purchaser—for whose aid decrees of the kind are mainly necessary—is more apt to be misled by the cover or by advertising than by the title page. If the presence of such a notice on the outside back or cover is an intolerable burden, the remedy is in defendants' hands. The burden exists only because defendants are trying to mislead as to what the book is; and if there is any motive leading them to insist upon prominently displaying the name "Webster's" on their Imperial dictionary, except the desire to sell to purchasers familiar with the superficially almost identical Webster's International, that motive has not been pointed out.[5]

We find in Merriam v. Syndicate, 237 U. S. 618, 35 Sup. Ct. 708, 59 L. Ed. 1148, nothing inconsistent with these considerations. It is there held that "Webster's Dictionary" was so descriptive a term that it could not be registered as a trade-mark under the law of 1881; whether it could be registered under the law of 1905 by virtue of an acquired secondary meaning was held to be a question not within the appellate jurisdiction of the Supreme Court. It is not to be supposed that the Supreme Court intended to decide indirectly the very question it refused to consider.

[10] Upon the oral argument, plaintiff's counsel produced what appeared to be one of defendants' Imperial dictionaries, bearing the copyright mark of 1914 and the imprint of 1915. We think it is in compliance with the decree. It carriers the notice upon the back; there

[5] The Century and the Standard, though "Wester's Dictionaries" (defendant's brief), have not found it necessary to take that name. The Imperial Dictionary was first published by Dr. Ogilvie, and claiming to be a revision of Webster's 1847, in 1859. Forty-five years later, the defendant Ogilvie's revision, no more but rather less "Webster's" than the Imperial always had been, became "Webster's Imperial."

is none upon the front cover, but the word "Webster's" does not there appear; and, while the notice on the title page is not overprominent, yet it is not confused with the body of the title page, but is at the top, and, aided as it is by the notice on the cover back, it is sufficient.

It results that the decree below will be modified by extending the injunction so as absolutely to prohibit on defendants' books the name "Webster's Intercollegiate" or any other name so similar to "Webster's Collegiate" as to tend to deceive the public concerning the identity of the book, and by narrowing the injunction so as wholly to exempt from its operation any mere reprint of the 1847 edition which bears the name of the defendants on the title page as publisher in the usual form; and the decree in all other respects will be affirmed. No costs will be awarded in this court, on either appeal.

CHICAGO, B. & Q. R. CO. v. GELVIN.

(Circuit Court of Appeals, Eighth Circuit. November 10, 1916. Rehearing Denied January 13, 1917.)

No. 4580.

1. DAMAGES ⟸113—PERSONAL PROPERTY—MEASURE OF DAMAGES.

Where plaintiff's cattle were injured through the alleged negligence of defendant, the measure of damages is the difference between the value of the cattle at the place of the injury immediately before and after it.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 90, 91, 279, 280; Dec. Dig. ⟸113.]

2. DAMAGES ⟸174(2)—EVIDENCE—SPECULATIVE DAMAGES.

Sparks escaping from defendant's locomotive ignited brush and weeds on its right of way, which fire was communicated to plaintiff's pasture and meadow land, where it destroyed about 150 acres of grass and frightened defendant's 391 head of high grade fat cattle, which he was feeding for the market. The cattle stampeded by reason of the smoke and roar of the fire, and one of them was killed, and all received bruises, becoming overheated. Thereafter the teeth of the cattle became sore from eating short grass and weeds raised on the burnt land, and they would not eat. There was evidence that, by reason of the soreness of their teeth and their fright, the cattle did not put on weight at the customary rate, and that when they were marketed in Chicago, a city in another state, they were not heavy enough to bring the top price; heavy cattle being in demand. *Held* that, as the measure of damages for injuries from the fire was the difference in the value of the cattle immediately before and after the fire at the place of injury, evidence that the cattle did not put on weight as fast as was customary for cattle being so fed, and that they did not bring the top price because they were not heavy, was inadmissible, as relating to speculative matters.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 463, 467; Dec. Dig. ⟸174(2).]

3. APPEAL AND ERROR ⟸1053(3)—REVIEW—HARMLESS ERROR.

In such case, error in admitting evidence as to the failure of the cattle to put on weight, and the market price, was not cured by an instruction that nothing could be allowed on account of injuries resulting from illness and sore teeth, caused when the cattle ate short grass and weeds on the burnt parcel.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180–4182; Dec. Dig. ⟸1053(3).]

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4. DAMAGES ⟸163(4)—EVIDENCE—SUFFICIENCY.
Where the evidence showed that some of the injuries to plaintiff's cattle were not caused by defendant's alleged negligence, and there was nothing to show what proportion of the injuries resulted from such negligence, the jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which defendant was liable.

[Ed. Note.—For other cases, see Damages, Cent. Dig. § 459; Dec. Dig. ⟸163(4).]

5. NEGLIGENCE ⟸58—PROXIMATE CAUSE—LIABILITY.
If the wrong and resulting damage are not known by common experience to be natural and usual in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the damage is not sufficiently shown to be the result of the wrong to support an action.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 71; Dec. Dig. ⟸58.]

6. NEGLIGENCE ⟸56(1)—ACTIONS—PROXIMATE CAUSE.
That the injury might possibly result from a wrong does not show that it was the proximate result of such wrong, and the wrongdoer is not liable.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 69; Dec. Dig. ⟸56(1).]

7. RAILROADS ⟸464—FIRES—PROXIMATE CAUSE.
Where fire escaped from defendant's locomotive, ignited weeds and brush on its right of way, and was communicated to plaintiff's pasture, wherein he was feeding cattle, and the cattle, by reason of the smoke and roar, stampeded and were injured, the wrong must, as a matter of law, be held not the proximate cause of the injury to the cattle; such injury not being one in the common experience of mankind known to be likely to result from the fire.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1687–1689; Dec. Dig. ⟸464.]

8. NEGLIGENCE ⟸59—PROXIMATE CAUSE—WHAT CONSTITUTES.
A wrongdoer is not liable for an injury which could not be reasonably foreseen or anticipated as the probable result of the wrong.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 72; Dec. Dig. ⟸59.]

9. NEGLIGENCE ⟸136(25)—JURY QUESTION—PROXIMATE CAUSE.
Where the facts concerning defendant's negligence and the resulting injuries were undisputed, the court may, the resulting injuries not being such as might have been anticipated, declare as a matter of law that the negligence was not the proximate cause.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. §§ 326–332; Dec. Dig. ⟸136(25).]

10. RAILROADS ⟸464—FIRES—INJURIES—FRIGHT.
Bodily ailments to human beings, due to fright caused by negligence, are not actionable; and the same rule applies to dumb brutes. Therefore, where through defendant's negligence fire escaped from one of its locomotives, ignited brush and weeds on its right of way, and spread to plaintiff's pasture, where it gained great headway, frightening plaintiff's cattle grazing in the pasture, but not reaching them, damages for injuries received by the cattle in their stampede as a result of the fright cannot be recovered.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 1687–1689; Dec. Dig. ⟸464.]

11. APPEAL AND ERROR ⊜1033(9)—HARMLESS ERROR—MEASURE OF DAMAGES.
Where defendant negligently allowed fire to escape from its locomotive and destroyed plaintiff's blue grass pasture, plaintiff is entitled to recover the fair rental value for the season or part of the season in which the destruction occurred, together with such time as is essential to restore the pasture by the process of reseeding; and when the time for reseeding was limited to a single year, defendant cannot complain.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4061; Dec. Dig. ⊜1033(9).]

In Error to the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Action by David A. Gelvin against the Chicago, Burlington & Quincy Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed in part, and in part affirmed.

M. G. Roberts, of St. Joseph, Mo. (Culver & Phillip, O. M. Spencer, and E. M. Spencer, all of St. Joseph, Mo., on the brief), for plaintiff in error.

John E. Dolman, of St. Joseph, Mo. (B. R. Martin, of St. Joseph, Mo., on the brief), for defendant in error.

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

ELLIOTT, District Judge. This is an action brought by the defendant in error, David A. Gelvin (hereinafter referred to as the plaintiff), against the plaintiff in error, Chicago, Burlington & Quincy Railroad Company (hereinafter referred to as the defendant), upon a petition containing two causes of action, set forth in counts numbered 1 and 2 of the petition.

Count 1 of the petition contained proper averments as to the incorporation of the defendant railway, its ownership and operation of a railroad line in and through the county of Holt, state of Missouri, adjoining lands therein referred to, belonging to the plaintiff, over which it ran and operated locomotive engines and trains of cars; that plaintiff's said lands, consisting of about 800 acres, were pasture lands, heavily set in blue grass of the finest quality; that on the 10th day of August, 1912, the defendant, its servants and employés, were operating a locomotive over and along defendant's said line of railway, through and adjoining plaintiff's lands, and so carelessly and negligently managed and operated said engine as to allow fire to escape therefrom, and that defendant and employés were negligent and careless in using and operating on its said line of railway a defective engine, improperly equipped and out of repair, so that fire was permitted and allowed to escape and did escape, setting fire to the dry weeds, grass, and dead vegetation which defendant carelessly and negligently permitted to grow and accumulate and remain on its right of way, adjoining plaintiff's said pasture and meadow land, which fire was communicated to plaintiff's meadow and pasture and spread over and burned and totally destroyed 146.87 acres of said blue grass meadow and pasture, and totally destroyed the roots and setting of said blue grass, which was alleged

to have been firmly set, rooted, and imbedded in the soil; that at the time of the setting of said fire plaintiff was the owner of 391 head of high grade fat cattle, feeding and fattening upon said blue grass meadow; that the fire, consuming and destroying said blue grass meadow, pasture, and mulch, caused immense volumes of smoke, flames, and sparks to rise upward therefrom, causing a rumbling and roaring noise, by reason whereof plaintiff's cattle were "caused to become and did become scared, terrified, and frightened, and then and there stampeded in their efforts to escape from said fire, smoke, and noise, and said entire herd, containing 391 head of fat cattle, as aforesaid, ran and stampeded in a body over and through said pasture lands, and through timber then and there growing thereon, and over and through deep ravines and streams which then and there extended and meandered through said pasture lands, and over logs and fallen trees and stumps then and there being and lying upon said pasture lands, and said fat cattle in said frightened, terrified, and feverish condition ran and stampeded for a distance of three miles; that the weather on said date was excessively hot, humid, and oppressive, and that said cattle, by reason of the aforesaid conditions, were caused to become and did become excessively heated, feverish, nervous, and excitable, and many of them were bruised, maimed, and crippled by reason of their aforesaid stampede, and one steer died as a result of injuries received therefrom; that because and on account of the aforesaid conditions said cattle lost heavily in weight, became sick, distempered, nervous, uncontrollable, and excitable, and they became frightened and terrified thereafter at slight noises, and upon six different occasions within ——— days thereafter stampeded together over said lands, because and on account of all the aforesaid conditions resulting directly from the negligent setting out of the aforesaid fire in plaintiff's said pasture by defendant, * * * said cattle were caused to and did lose large quantities of flesh and weight, and refused to eat and take food, water, and nourishment of any kind, to the great damage of plaintiff in the sum of $10,000," with a prayer for judgment in that sum.

The second count contained similar allegations as to the incorporation of the railway defendant, its ownership and management of trains over and across the blue grass pasture owned by the plaintiff, the setting of the fire, the carelessness and negligence of the defendant, and it was further alleged that said pasture lands were heavily set in blue grass of finest quality, and that there was produced from the roots thereof large crops of pasture and grass seed annually, without reseeding; the roots of said grass at all times being thoroughly fertilized and enriched from many years usage as pasture lands for many thousand head of cattle; that said fire spread over and burned and totally destroyed 146.87 acres of said blue grass meadow and pasture, destroying the roots and setting of said blue grass, so firmly set, rooted, and imbedded in said soil as aforesaid, and burning, consuming, and totally destroying said mulch being formed upon, covering, and forming a part of said soil, as aforesaid, by reason whereof plaintiff averred he had sustained damages in the sum of $7,000, and demanded judgment for that sum.

To this petition the defendant filed its answer, consisting of a gen-

eral denial. Thereafter, at the September, 1914, term, this cause was heard, and on September 29, 1914, the jury returned the following verdicts:

"We, the jury, find the issues for the plaintiff and assess his damages at $5,400 on the first count of the petition.
"[Signed] J. P. Tucker, Foreman."
"We, the jury, find the issues for the plaintiff and assess his damages at $2,115.65 on the second count of the petition.
"[Signed] J. P. Tucker, Foreman."

Judgment was thereafter, on January 8, 1915, entered in favor of the plaintiff and against the defendant upon the two verdicts, for the aggregate sum of $7,515.65, together with his costs. Defendant had theretofore moved for a new trial, the same having been denied, and defendant prosecutes this writ of error.

[1] Assuming that there is a cause of action stated in the first count of the petition for damages to personal property, to wit, the cattle of the plaintiff, there is little dispute between the parties as to the proper measure of damages and the law applicable in the ascertainment of the damage in such cases. It seems to be conceded by all parties that the true measure of damage to personal property that has not been entirely destroyed, as applicable to the plaintiff's cattle in this case, is the difference between the value of the cattle in the plaintiff's pasture on the 10th day of August, 1912, immediately before the fire, and their value on the farm there at Maitland after the fire, if there was any such difference.

[2] The controversy presented here arises upon the objections of the defendant to the method employed by the plaintiff in proving this damage. The plaintiff, having established the fire, the negligence of the defendant, and the injury to the cattle, the simple issue for determination by the jury was the amount of damage suffered by the plaintiff by reason of the injury shown, and that damage should have been measured by the difference in value immediately preceding the fire and immediately after the fire, at the place where the cattle were kept. Instead of confining the proof to the value of the cattle before the fire and the value of the cattle after the fire, the plaintiff was permitted, over the objection of the defendant, to testify, in substance, the kind and quantity of feed he fed the cattle both prior and subsequent to the fire, and was permitted to state his opinion, based upon the conditions surrounding the feeding of the cattle, as they existed prior to the fire, and if there had been no fire, and upon his experience and observation in previous years as a cattle feeder, as to the amount of weight or flesh that these cattle would each have put on per day if fed continously on the same feed and pasture from the date of the fire until he sold them, in October of the same year.

He was further permitted to testify that skilled and experienced cattlemen can tell, with a reasonable degree of accuracy, the amount of weight a steer will put on and ought to put on when fed a given amount of corn or other feed; then to describe the kind, character, size, and weight of these cattle when he put them in this pasture the February before the fire; that they were large-framed cattle; and that, taking into consideration the kind of cattle, the breed of

cattle, the frame of the cattle, and the character of the cattle that he had in his pasture, and the kind and quantity of feed that he fed them both before and after the fire, he was permitted to state that they would *probably* have put on and ought to have put on 2½ pounds of flesh each per day; that he sold the cattle in Chicago in October upon four different dates, from the 5th to the 23d, inclusive.

He was further permitted to testify to the weight of the cattle in Chicago, that the selling price averaged $9.16 per hundredweight, and then to testify to what, in his opinion, those cattle would have weighed in Chicago at the time of the sale, if fed as he had fed them, the amount that he specified that he did feed them per day per head, had the fire not occurred. He was permitted to testify, in substance, that the class of cattle that these cattle were rated with, as they actually were, when he sold them in Chicago, was a different class from that which they would have been in, had they not suffered the damage claimed by plaintiff; that they would have been heavier, if it had not been for this damage, by taking on a greater quantity of flesh, and, using plaintiff's language:

"These cattle, if they had had the proper handling, would have come right up the length of time they were fed; they didn't have to be fine; they had the weight and feed. They couldn't get heavy cattle. They were scarce, and they commanded a high price. Their contracts were out for heavy cattle, and they couldn't get them. These cattle would have brought $10.75 per hundred quick, if they had had the weight that they would have had, if they hadn't been in the fire."

There was other testimony of expert cattle feeders, corroborating the estimates as to the amount of flesh these cattle would and should have put on under the conditions under which they were fed, if there had been no fire, and also testimony supporting the testimony of the plaintiff that the entire herd of cattle sold in a different classification than they would if they had taken on this extra flesh more than they did, and that they sold for a price of more than $1.50 per hundredweight less than they would if they had put on the additional flesh, and thereby had been subject to classification with the heavier cattle, and that the plaintiff, therefore, was damaged on every hundredweight of cattle that he sold, the difference between what they did sell for and what it was alleged they would have sold for if they were heavier.

The plaintiff, on cross-examination, stated that the one steer that it was alleged in the petition had died was tramped by the other cattle on the 6th day of September; that the cattle were never treated for injuries; that all of the cattle were fed right along after the fire, and that immediately after the fire the cattle did not go off their feed; that the time the cattle went off their feed was when they got to nipping the short grass that grew in the pasture where it was burned over, and that made their teeth sore, and they went to scouring, and then they went off their feed; that he didn't notice anything about their eating after the fire, and before they got to scouring from eating the short grass, which was some weeks after the fire; that

the cattle ate well up to the time of their eating the short grass, making their teeth sore and scouring them.

Upon cross-examination of the plaintiff, the record discloses the following questions and answers:

"Q. And that is what made them lose flesh? A. Well, first they was overheated, and all of it coupled together. Q. Well, you say that their feed was normal up to the time they went on this burned spot? A. They ate; but they can eat, and still not do any good. Q. I say that they ate normally from the time of the fire up to the time they went back to eat on this burned spot? A. I understand you now. I didn't notice anything but what they ate what they needed. Q. You didn't notice anything out of the ordinary? A. No, sir; I didn't. Q. But when they went back on this burned spot, then you noticed that they were off their feed, and that they were scouring? A. Yes, sir. Q. And from that time on they didn't take on any more flesh? A. No, sir. Q. And in your opinion as a stockman that was what caused it; their going back on that burned spot and getting off their feed? A. No, I don't say that; I say that from getting overheated and that together, both of them together."

There was other testimony of this character, but this is sufficient to show the application by the court, upon the trial of the case, of the law governing the ascertainment of damages sustained by the plaintiff. In instructing the jury the court said:

"The court instructs the jury that, if you find for the plaintiff on the first count of the petition, then your verdict should be for the difference in the value of the cattle immediately before the fire and their value immediately after the fire, if there was any such difference. Of course, that is taken in connection with what the court has already said as to what the value of the cattle *would have been*, according to rules which you must deduce from the evidence, whatever you may deduce from the evidence as to their value *at the time they were placed upon the market*, the place of their value, of course, being at the pasture at Maitland, in Holt county, Mo., and governed by such other rules respecting the ascertainment of value as the court has stated and as appear from the evidence."

We think the inquiry as to the probable gain of these cattle in the event there had been no fire, and therefore the probable weight at the time of their sale in Chicago, in the fall succeeding the fire, the classification of the cattle as to weight, placing them in the lighter class, the fact that heavy cattle, in the fall, at the time of marketing the cattle, were in better demand, and therefore brought a higher price at that time and place, without even a suggestion that the heavier cattle were in better demand than lighter cattle, at the time of the fire, or that heavier cattle had a greater value, at Maitland, either before or after the fire, are not proper elements to be considered by the jury in determining the value of the cattle just prior to the alleged injury and the value just subsequent thereto; the damage being the difference, if any.

The alleged damage to the cattle, through failure to take on flesh, consequent loss of profits by reason thereof, the fact that heavier cattle sold for more than light cattle at Chicago some months subsequent to the fire, the price received for these cattle at that time and place, in the absence of anything like definite proof that even if the cattle did not take on as much flesh as it was thought by the owner and others that they should, that this was caused solely by reason of any injury sustained by the cattle as a direct consequence of the

fire, are uncertain, conjectural, and purely speculative, and in our judgment the jury should not have been permitted to consider either of these elements in the ascertainment of the value of the cattle in the pasture at Maitland after the fire. Davidson v. Mich. Cent. Ry. Co., 49 Mich. 428, 13 N. W. 804; St. Louis, I. M. & S. Ry. Co. v. Biggs, 50 Ark. 169, 6 S. W. 724; Lewis v. Burlington Ins. Co., 80 Iowa, 259, 45 N. W. 749.

[3] It is admitted by the plaintiff in his cross-examination that the cattle went off their feed, not immediately after the fire, but some weeks later, when they were permitted to feed upon the strip that had been burned over. The weeds and fresh grass made their teeth sore, scoured them, and they went off their feed. It is true the court instructed the jury that nothing could be allowed the plaintiff by reason of this fact, but that does not relieve the record of the fact, nor does it deprive the defendant of the benefit of the self-evident fact that injury must have followed this throwing them off their feed and scouring.

There is no contention in this record that if these cattle ate this new grass and weeds some weeks after the fire, and were damaged thereby, that the fire was the proximate cause of the injury, and therefore that plaintiff can recover from the defendant. That such an alleged damage would be too remote is conceded, and the fact that these cattle did eat this new grass and weeds, that it did affect them, with nothing in the record to determine the amount of the effect, or the relative bearing that this effect had to the original injury, if any, nothing upon which a jury could predicate the definite and certain determination of the injury as it originally existed, demonstrates, we think, the necessity for the rule that we here invoke, that all of this evidence of value in Chicago, and estimated weight and estimated price of heavy cattle in excess of light cattle, some months later than the date of the fire, constitutes no basis upon which to predicate such damage, is conjectural and purely speculative.

There was not only no attempt to show just how much of this damage occurred from the fire, but in addition to the eating of this grass and the sore teeth and scouring of the cattle, the fact that they would not eat, testified to by the plaintiff, one of the expert witnesses qualified his statement as to what they should have gained per day per head, upon the statement "if the flies didn't bother them." There was no evidence as to whether or not the flies did bother them. All of this simply illustrates the uncertainty of this class of testimony, and the impossibility of determining therefrom with any reasonable degree of certainty the value at a time immediately succeeding the fire.

In addition to the foregoing, we may add that it is alleged in the pleading of the plaintiff, as a part of its issue, that at other times, subsequently and before the sale in October, these cattle repeatedly stampeded. These facts, too, are too remote to be considered as elements of damage, and the court so instructed the jury; but that does not alter the situation as to the uncertainty of the proofs that were

received, and is an additional fact in the light of which they must necessarily be considered.

On the face of this record, then, the cattle stampeded at various times at a date some time subsequent to the fire, these cattle suffered damage from scouring through eating green grass, their teeth became sore, and they refused to eat. Yet no damage is predicated by the plaintiff upon these incidents. The plaintiff, however, seeks to recover for the loss of flesh, attributing it to the one cause, and to prove it by testimony of values, first, at a time other than immediately succeeding the injury; second, by showing the prices received for the cattle at a place different and at a date long succeeding the date of the injury; third, by showing the gain of these cattle succeeding the fire, and, by expert testimony, attempting to show what they ought to have gained, and therefore a loss of the difference; fourth, by showing the prices of heavy cattle at Chicago at a time long subsequent to the date of the injury in question, with no showing as to comparative market conditions, and showing that these cattle were actually light, assuming that they would have been heavy if they had not been injured, and therefore that a loss of more than $1.50 per hundred was sustained by the plaintiff upon the entire herd of cattle.

[4] Instead of this record, it was incumbent upon the plaintiff to show, with reasonable certainty, what damage flowed from the alleged injury, by showing the value of the cattle immediately before and immediately after the injury, at the farm of the plaintiff. The record showing different conditions, occurring subsequent to the fire, naturally affecting the gain in weight of these cattle, for which it is conceded the defendant could not be held responsible, without any proof of how much of the damage resulted from these conditions as distinguished from the damage resulting from the alleged injury, with nothing in the way of testimony of any witness pretending to even estimate the proportion of the damage resulting from either of the causes, is far short of that reasonable certainty required by law, and upon such a record a jury cannot arbitrarily apportion a part, or all, of the proven damages to the cause for which the defendant is responsible (Knowlton v. C. & N. W. Ry. Co., 115 Minn. 71, 131 N. W. 858), and the verdict of the jury upon the first cause of action, predicated upon a consideration of this evidence, is erroneous.

[5] This record presents a further question upon this first cause of action, upon which decisions in various courts have not been uniform. It is whether, in an action to recover damages for an injury sustained through the negligence of another, there can be a recovery for an alleged injury caused by mere fright. It will be noted that the cause of recovery alleged in the petition in this case is for damages sustained by the plaintiff by reason of—

"fire * * * spreading over the * * * pasture and meadow lands, * * * caused immense volume of smoke, flame, and sparks to arise upward therefrom, causing a rumbling and roaring noise, by reason whereof plaintiff's said cattle * * * were caused to become and did become scared, terrified and frightened, and then and there stampeded in their efforts to escape from said fire, smoke, and noise, and said entire herd, containing 391 head of

fat cattle, as aforesaid, ran and stampeded in a body over and through said pasture lands and through timber then and there growing thereon, and over and through deep ravines and streams which then and there extended and meandered through said pasture lands, and over logs and fallen trees and stumps, then and there being and lying upon said pasture lands, and said fat cattle in said frightened, terrified, and feverish condition ran and stampeded for a distance of three miles; that the weather on said date was excessively hot, humid, and oppressive, and that said cattle, by reason of the aforesaid conditions, were caused to become and did become excessively heated, feverish, nervous, and excitable, and many of them were bruised, maimed, and crippled by reason of their aforesaid stampede, and one steer died as a result of injuries received therefrom; that because and on account of the aforesaid conditions said cattle lost heavily in weight, became sick, distempered, nervous, uncontrollable, and excitable, and they became frightened and terrified thereafter at slight noises and upon six different occasions within ——— days thereafter stampeded together over said lands, because and on account of all the aforesaid conditions resulting directly from the negligent setting out of the aforesaid fire in plaintiff's said pasture by defendant," etc.

It is contended by the defendant that this damage alleged to have been sustained by the plaintiff is not the natural and probable consequence of the act of negligence on the part of defendant in setting out the fire complained of; that the alleged injury is not one that could have been foreseen or reasonably anticipated as the probable result of the alleged act of negligence on the part of the defendant in setting out the fire. It will be observed that the cause of action alleged in the first count of the petition is predicated upon the fright of the cattle by reason of the negligence of the defendant, and in this class of cases it has been held that if the wrong and resulting damage are not known by common experience to be natural and usual in sequence, and the damage does not, according to the ordinary course of events follow from the wrong, then the wrong and the damage are not sufficiently conjoining and concatenated as cause and effect to support an action. Teis v. Smuggler Mining Co., 158 Fed. 260, 85 C. C. A. 478.

[6] Things or results which are only possible cannot be spoken of as either probable or natural, for the latter are those things or events which are likely to happen, and which, for that reason, should be foreseen. Things which are possible may never happen, but those which are natural or probable are those which do happen, and happen with such frequency and regularity as to become a matter of definite inference. To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared. S. S. Pass. Ry. Co. v. Trich, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672.

[7] Was the fright of the plaintiff's cattle, from the roar of the fire, and their stampede caused thereby, and their consequent failure to take on flesh as they otherwise should have done, the natural and probable consequence which a reasonable man might have foreseen, as engineer of this engine that set the fire, as a probable result of such negligence? That such results are not usual, not the common experience, is evidenced by the suggestion that able counsel, appearing

for both plaintiff and defendant in this case, have been unable to cite a single case of the report of a fire having such results, and no testimony whatever was offered upon the trial to prove that such results were the natural consequence of the alleged negligence of the defendant, or that the injury complained of by the plaintiff was the probable consequence of the alleged negligence of the defendant or that it was likely to occur, according to the usual experiences of mankind. That this is the true test which must be applied to the pleadings and record as it appears here, and that such test of responsibility is applicable to a case like this, has been held, and that such wrongdoer is not responsible for a consequence which is merely possible according to occasional experience, but only for a consequence which is probable according to ordinary and usual experience. Teis v. Smuggler Mining Co., supra; Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

[8] If this alleged injury to the cattle of the plaintiff was one that could not have been foreseen or reasonably anticipated as the probable result of the alleged act of negligence on the part of the defendant, it is not actionable, being either the remote cause or no cause whatever of the injury. Cole v. German Savings & Loan Society, 124 Fed. 113, 59 C. C. A. 593, 63 L. R. A. 416.

[9] The facts in this case are not in dispute, and we think the court is able upon this record to say that the injury is the remote and not the proximate result of the defendant's acts, and therefore it would have been proper for the trial court to so direct the jury. Stone v. Boston & A. R. Co., 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; St. Louis Cattle Co. v. Gholson (Tex. Civ. App.) 30 S. W. 270; S. S. Pass. Ry. Co. v. Trich et ux., 117 Pa. 390, 11 Atl. 628, and citations; Brandon v. Mfg. Co., 51 Tex. 121.

Considering this last question from another angle, no claim is made by the plaintiff in his proof that these cattle were burned by the fire, or came into physical contact therewith, or received physical injury as a result of the negligent act of starting the fire. The alleged damage is predicated upon the claim that the cattle were frightened, suffered nervous shock from the roar and noise of the flames, and as a consequence of such nervousness ran and became overheated, and subsequently, during the period of 80 days, gained about a pound a day, instead of 2½ to 3 pounds a day. Is this consequence too remote from the carelessness of the engineer in allowing the sparks to escape, and the carelessness of the section men in failing to burn the weeds along the right of way?

[10] It has been held that redress for nervous shocks and fright, and their consequent bodily ailments, is not permitted, for the reason that such damages are too remote, and to hold a defendant liable for failure to guard against fright, and the consequences of fright, would open a wide door for unjust claims which could not be successfully met. Courts practically universally hold that bodily ailments to human beings, due to fright caused by negligence, are not actionable, and it has been held that no exception should be made to dumb brutes—on the contrary, that the same rule applies to them. Lee v.

City of Burlington, 113 Iowa, 356, 85 N. W. 618, 86 Am. St. Rep. 379. To the same effect, see Mitchell v. Rochester Ry. Co., 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604.

Assuming, therefore, the negligence of the defendant in the management of its train, and failure to burn the dry grass upon its right of way, and that the fire was set negligently, is the plaintiff entitled to recover for such negligence which occasioned the fright and alarm on the part of plaintiff's cattle, resulting in the injury above mentioned? Though the authorities are not entirely harmonious on this question as applied to persons, we think the more dependable and better considered cases, together with public policy, unite to sustain us in holding that the plaintiff cannot recover for injury occasioned by fright. Mitchell v. Rochester Ry. Co., supra; Western Union Tel. Co. v. Wood, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706.

The foregoing cases apply the rule to persons, but we can see no good reason for failure to apply the same rule to animals. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is exceedingly difficult for us to understand how a defendant would be liable for its consequences. If an action cannot be predicated upon fright, it would seem that it necessarily follows that a recovery cannot be had for injuries resulting from such fright. That the result may be a real damage does not change the principle. That results might be serious merely shows the degree of fright or the extent of the damage. It seems to us clear that the right of action must still depend upon the question whether a recovery may be had for fright. If it cannot, then an action ought not to be maintained whether the consequences are grave or trivial. It seems to us the logical result is that no recovery can be had for mere fright, and further that none can be had for injury which is the direct consequence of it. In Mitchell v. Rochester Ry. Co., supra, the court said:

> "If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection, *and where the damages must rest upon mere conjecture or speculation.*"

We think this suggestion of this court meets the situation as we find it upon the record in this case—a verdict resting upon proofs largely founded upon conjecture and speculation. We are therefore of the opinion that no recovery can be had under the first cause of action set forth in plaintiff's petition herein, and therefore that the judgment upon the first count of the petition should be reversed.

We now come to a consideration of the assignments of error upon the cause of action stated in the second count of the petition. Defendant objects to the measure of damages adopted by the court for the determination of the issue of the amount of damage sustained by plaintiff by reason of the destruction of the grass in the pasture.

[11] We have carefully examined the record of the trial, together with the instructions of the court upon this count, and especially with reference to the law as to the measure of damage. This is a question that is not open to discussion, in the light of the repeated decisions of

the courts of the state of Missouri, cited and relied upon by counsel for both plaintiff and defendant; and an examination of the court's instructions, together with a careful reading of all of the testimony, convinces us that no error appears in the record. We find that the trial court stated the general rule in conformity with decisions of the courts of that state, in substance, that for the destruction of the pasture the measure of damages must be the fair cash rental value of the land for the season or part of season during which the destruction took place, together with such time as was essential to restore the pasture by process of reseeding, and then the court qualified this general instruction as follows, in substance:

"Beyond the year 1913 you are not permitted to extend any estimate of damages. It may be that, because of injury to the soil, the crop during the succeeding years would not be as strong; but as you have seen from what I have stated, and from what I have read, the law contemplates that the process of reseeding in the usual course restores a crop of this kind, where there is no damage or injury to the land itself, and that, as I have said to you, we are not considering in this case. * * *"

Remembering that this fire occurred in August, 1912, we think the court, in these instructions, and during the entire conduct of the trial of the issue, gave to the defendant the utmost it could ask, consistent with said decisions of the courts of Missouri, cited by both parties to the record, there being no disagreement as to what these decisions hold. There is therefore no necessity for citing them here. The established rule of damage having been properly applied by the trial court, we find no error in the record upon the trial of the issue set forth in the second count of the petition. The judgment upon the second count of the petition is affirmed.

The case is remanded for proceedings consistent herewith, and with the opinion of the Supreme Court of the United States in Slocum v. New York Life Insurance Co., 228 U. S. 364, 33 Sup. Ct. 523, 57 L. Ed. 879, Ann. Cas. 1914D, 1029.

HOOK, Circuit Judge, concurs in the result.

WESTERN UNION TELEGRAPH CO. v. LOUISVILLE & N. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1917.)

No. 2897.

1. TELEGRAPHS AND TELEPHONES ⊂⊃11—RIGHT OF WAY—DEED—CONSTRUCTION.

A deed from a railroad company, which had theretofore owned the telegraph lines along its right of way, conveying to a telegraph company that property, together with a right and license to operate, repair, and renew the lines along the right of way, to have and to hold unto the telegraph company, its successors and assigns, forever, conveyed a perpetual right to the use of the railroad right of way for the telegraph line.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

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2. CONTRACTS ⟸164—CONSTRUING INSTRUMENTS TOGETHER—CONTRACT AND DEED.

Where a contract between the parties to a deed conveying telegraph property, and an easement along a railroad right of way was dated one week later than the date of the deed, but recited that the telegraph company had, by a conveyance of even date therewith, purchased from the railroad company its telegraphic lines, the purchase having been made on condition that a working agreement between the parties be entered into, the contract and deed will be construed as parts of one transaction.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 746-748; Dec. Dig. ⟸164.]

3. TELEGRAPHS AND TELEPHONES ⟸11—RIGHT OF WAY—CONTRACT—CONSTRUCTION.

The fact that the recital spoke of the conveyance as a conveyance of the telegraph property, without mentioning the easement, does not indicate that the parties intended to change the plain provisions of the deed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⟸11.]

4. TELEGRAPHS AND TELEPHONES ⟸11—RIGHT OF WAY—CONTRACT—CONSTRUCTION.

Nor did a provision of that contract that it should extend to all roads owned, leased, or operated by the railroad company, and should continue for a term of 25 years, and that, so far as it legally could, the railroad company granted and agreed to assure to the telegraph company an exclusive right of way on its lines, limit the absolute conveyance of the right of way, since it applied to property other than that conveyed.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⟸11.]

5. TELEGRAPHS AND TELEPHONES ⟸11—RIGHT OF WAY—AGREEMENT—SUBSEQUENT ACQUISITION BY ANOTHER COMPANY.

Where the railroad affected by that conveyance and contract was subsequently acquired by another company, with which the telegraph company had a similar, but earlier, agreement for the use of its right of way for a telegraph line for 25 years, which agreement provided that it should supersede a named agreement between the same parties, and all other agreements between parties or their respective predecessors in ownership or control of the respective properties, the latter agreement superseded the contract, but not the deed of conveyance.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⟸11.]

6. INJUNCTION ⟸118(2)—BILL—CONCLUSIONS OF LAW.

In a bill to restrain a railroad company from interfering with plaintiff's telegraph lines along its right of way, allegations that plaintiff was seised of an irrevocable, perpetual, and assignable easement are mere statements of legal conclusions, which furnish no support for plaintiff's claims, except as they are sustained by facts alleged.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 233; Dec. Dig. ⟸118(2).]

7. TELEGRAPHS AND TELEPHONES ⟸11—RIGHT OF WAY—CONTRACT—DURATION.

In a contract giving a telegraph company the right to maintain its lines along a railroad right of way for 25 years, a provision that it was understood that the wires covered by the company should form a part of the general system of the telegraph company, and as such in the department of commercial or public business should be regulated by the tele-

graph company, will not be construed as giving the telegraph company a perpetual right to use the railroad right of way.

[Ed. Note.—For other cases, see Telegraphs and Telephones, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

8. TELEGRAPHS AND TELEPHONES ⊂⊃11—RIGHT OF WAY—ACT OF CONGRESS.

Rev. St. § 5263 et seq. (Comp. St. 1913, § 10072 et seq.), giving telegraph companies the right to construct and operate their lines along military or post roads, do not purport to divest property rights without purchase or condemnation, and therefore do not give a telegraph company the right, without purchase or condemnation, to maintain its lines along a railroad right of way.

[Ed. Note.—For other cases, see Telegraph and Telephones, Cent. Dig. § 7; Dec. Dig. ⊂⊃11.]

9. INJUNCTION ⊂⊃113—INJURY—DELAY OF PLAINTIFF.

Where a railroad company had given a telegraph company notice to remove its wires from the railroad right of way in accordance with the terms of a contract between them, and had waited three years without attempting to enforce its notice, during which time the telegraph company had taken no steps to condemn the right to maintain its wires, the telegraph company cannot have the railroad enjoined from interfering with its wires, since the necessity for such injunction is due solely to its own want of diligence.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 198–201; Dec. Dig. ⊂⊃113.]

10. INJUNCTION ⊂⊃199—INCIDENTAL RELIEF—CONDEMNATION.

Where a telegraph company, which has been maintaining its line along a railroad right of way under a contract which has expired, is threatened by the railroad company with the removal of its wires, which would prevent the operation of its business, a court of equity can protect such business from disturbance on payment of full compensation to the railroad company, and in the same suit can make a complete and final disposition of the entire controversy and the relations of the parties.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 419; Dec. Dig. ⊂⊃199.]

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

Suit by the Western Union Telegraph Company against the Louisville & Nashville Railroad Company. Decree dismissing the bill (229 Fed. 234), and plaintiff appeals. Reversed.

Arthur Heyman, of Atlanta, Ga., and W. L. Clay, of Savannah, Ga., for appellant.

Henry L. Stone, of Louisville, Ky., and Henry C. Peeples, of Atlanta, Ga., for appellee.

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

WALKER, Circuit Judge. The bill in this case was filed by the appellant, the Western Union Telegraph Company, against the appellee, the Louisville & Nashville Railroad Company, on the 15th day of April, 1915. Its averments showed that at the time the bill was filed, and for a number of years prior to that date, the plaintiff had telegraph lines on the rights of way of specified railroads in Georgia which were owned or controlled by the defendant, and used such rights of way and

buildings, offices, stations, and premises of the defendant in the conduct of its telegraph business, and that on or about August 5, 1912, the defendant notified the plaintiff that on and after August 17, 1912, the use and occupation of its railroad rights of way or any part thereof, and its stations, buildings, and offices by the plaintiff for a telegraph line would be without the permission and against the consent of the defendant, and notified the plaintiff to vacate the defendant's railroad rights of way, buildings, offices, stations, and premises, and to commence to remove therefrom immediately after August 17, 1912, and not later than September 1, 1912, all of the plaintiff's telegraph lines, and all poles, wires, cross-arms, batteries, instruments, appliances, and fixtures appurtenant and belonging thereto, and to complete the removal thereof prior to December 1, 1912, and that in the event of the plaintiff's failure to comply with this demand the defendant would take possession, appropriate, and use said poles, cross-arms, wires, batteries, instruments, appliances, and other fixtures, or so much thereof as may on and after December 1, 1912, be or remain on defendant's rights of way or premises, and would use, operate, maintain, or otherwise dispose of the same as defendant's own property, and refuse to longer permit the plaintiff to remove or use the same in any manner or for any purpose.

The bill asserted that on and prior to August 5, 1912, the plaintiff was, and at the present time is, seised and possessed of irrevocable, perpetual, assignable easements or rights for the construction, maintenance, and operation of said telegraph lines upon, along, or over the mentioned railroad rights of way of the defendant, and to continue to use the defendant's rights of way in the operation of its telegraph business, and prayed that the defendant be restrained and enjoined from interfering with, obstructing, or impeding the enjoyment by the plaintiff of the rights and easements so claimed by it, and prayed further that, if the court should determine that the plaintiff's rights and easements in the defendant's rights of way were not irrevocable and perpetual, and that the defendant is entitled to compensation therefor, a decree be rendered in this cause determining the amount of compensation the defendant is entitled to receive from the plaintiff therefor, or, in the event that it should be adjudged that such compensation should not, or cannot, be fixed and decreed in this cause, that the plaintiff be permitted to institute appropriate proceedings for the purpose of fixing and determining such compensation, and that, pending such proceedings, the defendant be restrained and enjoined from interfering with, obstructing, or impeding the enjoyment by the plaintiff of the use for its telegraph business of the defendant's rights of way and premises. The bill also contained a prayer for such other or further relief as the nature of the case may require or that equity may afford. On motion of the defendant the bill was dismissed, and a restraining order which had been made was vacated. The appeal is from the decree to this effect.

The railroads of the defendant, which the plaintiff claims are subject to the easements and rights in its favor asserted by the bill are the lines in Georgia which the defendant, in the year 1902, purchased from

the Atlanta, Knoxville & Northern Railway Company, being lines extending from Marietta, Blue Ridge, and Cartersville northwardly in the direction of Knoxville, Tenn., and northeastwardly to the Tennessee state line, in the direction of Murphy, N. C., and also the line extending from Junta, in Bartow county, northwardly through the counties of Bartow, Gordon, and Murray to the northern boundary line of Georgia, on or along the right of way of which line the plaintiff constructed a telegraph line in 1905.

[1] The averments of the bill show that the Atlanta, Knoxville & Northern Railway Company, several years prior to the sale of its properties to the defendant, acquired the ownership of telegraph lines which had been constructed on its railroad rights of way extending from Marietta northwardly through Blue Ridge to the state line, and from Blue Ridge northwestwardly to the state line, and that in the year 1898 it sold and by deed, a copy of which is made an exhibit to the bill, duly conveyed to the plaintiff that telegraph property "together with full right and license to maintain, operate, repair, and renew the said lines upon and along the right of way of said Railway Company, to have and to hold the same unto said Western Union Telegraph Company, its successors and assigns, to and for its and their use and behoof forever." The grantor in this deed was the owner of the telegraph property described in it, and also of the railroad rights of way upon which that property was then located and used. The deed as plainly embraced and conveyed, without reservation or limitation of time, the right to make the specified use of the grantor's described railroad rights of way as it did the telegraph lines and properties enumerated. That deed sufficiently supports the plaintiff's claim that it is the owner of such an easement as is asserted to exist in its favor with reference to the railroad rights of way described in it, unless that instrument has been deprived of the effect which its terms import as a result of one or both of two contracts, copies of which are made exhibits to the bill, which the plaintiff entered into, one between the plaintiff and the grantor in that deed, and the other between the plaintiff and the defendant in this case, which subsequently purchased from the grantor in that deed.

[2] The mentioned deed to the plaintiff was executed on the 9th day of February, 1898, and the contract between the plaintiff and the grantor in that deed purports to have been made on the 16th day of February, 1898; but that contract contains this recital:

"That whereas, the telegraph company has by conveyance of even date herewith purchased the telegraph lines along the railway company's railroads from Knoxville, Tenn., to Marietta, Ga., and from Blue Ridge, Ga., to Murphy, N. C., said purchase having been made on condition that a working agreement be entered into between the parties hereto, covering said railroads and said telegraph lines, and any extensions or branches of said railroads, and any railroads hereafter owned, leased, or controlled by the railway company party hereto."

While the two instruments bear different dates of execution, yet as the recital quoted shows that the parties to them treated them as contemporaneously executed, and that the one was made on the condition that the other would be made, it may be assumed that they should be

treated and construed as parts of one transaction. The contract provided that:

"The provisions of this agreement shall extend to all railroads now owned, leased, controlled, or operated, and to all railroads hereafter owned, leased, controlled, or operated, by the railway company, or by any company or corporation in which the railway company may own a majority of the stock, or whose action it may be able to control, by the ownership of stock or otherwise; and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from the twelfth (12th) day of February, 1898, and shall continue after the close of said term until the expiration of one (1) year after written notice shall have been given after the close of said term by either party to the other of an intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions, the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen, and the decision of such arbitrators, or of a majority thereof, shall be final and conclusive."

It contained sundry provisions to govern the rights and obligations of the respective parties in the transaction of the business provided for, among them the following:

"The railway company, so far as it legally may, hereby grants and agrees to assure to the telegraph company the exclusive right of way on, along, and under the line, lands, and bridges of the railway company, and any extensions and branches thereof, for the construction, maintenance, operation, and use of lines of poles and wires and underground or other lines for commercial or public telegraph and telephone uses or business, with the right to put up or construct, or cause to be put up or constructed, from time to time, such additional wires and such additional lines of poles and wires and underground or other lines as the telegraph company may deem expedient."

[3] It is not deemed necessary to set out other provisions contained in that contract. The fact that in its recital above quoted the deed was mentioned as a conveyance of "the telegraph lines along the railway company's railroads" named is not enough to show an intention of the parties to change or modify in any respect the deed as it was written and executed, or to cancel it or render it inoperative in so far as it was a conveyance, without limitation as to time, of a "full right and license to maintain, operate, repair and renew the said lines upon and along the right of way of said railway company."

[4] Nor is an intention of the parties to change in any respect the effect which the plain language of the deed imports to be inferred from the provisions of the contract by which the railway company granted, and obligated itself to assure, to the plaintiff, so far as it legally could do so, the exclusive right of way, for the construction, maintenance, operation, and use of lines of poles and wires for telegraph and telephone uses or business, along and under the line, lands, and bridges of all railroads owned, leased, controlled, or operated by the railway company at the time the contract was entered into, and of all railroads that thereafter might be owned, leased, controlled, or operated by it, or by any company or corporation whose action it might be able to control. These provisions are not at all inconsistent with the retention by the telegraph company of the easement in or over specified lines of railroad which was conveyed to it by the railway company's deed.

As to the lines of railroad described in the contract, the railway com-

pany thereby undertook, so far as it legally could do so, to make the telegraph company's right an exclusive one during the period covered by the contract, and also enlarged its right to use and occupy by making it cover telephone as well as telegraph uses or business. The provisions of the contract specifying the rights of use and occupation to be enjoyed by the telegraph company were general ones, intended to apply to all lines of railroad owned or controlled by the railway company during any part of the period covered by the contract, and to facilitate the performance by the telegraph company of the obligations which the contract imposed upon it. The granting by the railway company for the limited period of the contract of a right to make use of its property of a broader scope than that which its deed had conveyed in perpetuity cannot be given the effect of divesting any interest or estate which passed by that deed. The conclusion is that nothing contained in the bill shows that the plaintiff's right to occupy and use railroad property conferred by that deed had been relinquished or divested prior to the acquisition by the defendant of the properties of the Atlanta, Knoxville & Northern Railway Company.

[5] An effect of this purchase by the defendant was to make applicable to the property purchased the provisions of a contract entered into between the plaintiff and the defendant on the 18th day of June, 1884, which by its terms was to cover and embrace all the railroad lines owned, leased, controlled, or operated by the defendant at the time the contract was entered into, and any branch or branches that might be constructed by the defendant, and any other railroad or railroads acquired by it by lease or purchase, or that might be controlled or operated by it during the existence of the contract, should it be lawfully competent to include it or them. That contract commenced with this recital:

"Witnesseth, whereas, the operation of the telegraph company's lines along the various railroads owned, controlled, or operated by the railroad company has been conducted under the provisions of an agreement between the parties hereto, dated May 14, 1880, which agreement provides that it may be terminated on one year's written notice after July 1, 1885."

And it contained the following provision:

"The provisions of this agreement shall supersede said agreement hereinbefore mentioned and all other agreements between the parties hereto, or their respective predecessors in ownership or control of their respective properties; and the provisions of this agreement shall be and continue in force for and during the term of twenty-five (25) years from and after the first (1st) day of July, eighteen hundred and eighty-four (1884), and thereafter until the expiration of one year after written notice shall have been given by one of the parties hereto to the other of a desire or intention to terminate the same, and in case of any disagreement concerning the true intent and meaning of any of said provisions the subject of such difference shall be referred to three arbitrators, one to be chosen by each party hereto, and the third by the two others chosen, and the decision of such arbitrators, or a majority thereof, shall be final and conclusive."

It also contained, with other provisions governing the relations of the contracting parties in the conduct of the business provided for, not claimed or considered to have any bearing on any question involved in this case, the following:

"The railroad company, so far as it legally may, hereby grants and agrees to assure the telegraph company the exclusive right of way on and along the line, lands, and bridges of all roads now owned, leased, controlled, or operated by said railroad company, or which it may hereafter own, lease, control, or operate, for the construction and use of such lines of poles and wires or underground wires for commercial or public uses or business as the telegraph company may require, together with the exclusive right to maintain offices in its depots for commercial telegraph business. * * *"

In the District Court, as is shown by the opinion rendered by Judge Newman (Western Union Telegraph Co. v. Louisville & Nashville R. Co., 229 Fed. 234), the view prevailed that the question of the right of the plaintiff to remain upon or use any rights of way or other property of the defendant was controlled solely by the contract just quoted from, and that the rights conferred by that contract had expired by the lapse of the time during which they were to be enjoyed. We infer that the opinion was entertained that the above-quoted stipulation, that "the provisions of this agreement shall supersede said agreement heretofore mentioned and all other agreements between the parties hereto, or their respective predecessors in ownership or control of their respective properties," by itself, or in connection with the provision of the contract specifying the rights of use and occupation to be enjoyed by the plaintiff, had the effect of annulling or destroying the right and license conveyed to the plaintiff by the Atlanta, Knoxville & Northern Railway Company's deed to it. For reasons sufficiently indicated by what has been said above in discussing a quite similar provision of the plaintiff's contract with the defendant's grantor, we are not of opinion that the provision for an exclusive right of way contained in its contract with the defendant operated to impair any interest conveyed by that grantor's deed to the plaintiff. The stipulation in the contract that "the provisions of this agreement shall supersede said agreement hereinbefore mentioned, and all other agreements between the parties hereto or their respective predecessors in ownership or control of their respective properties," plainly had the effect of superseding the above-mentioned agreement between the plaintiff and the Atlanta, Knoxville & Northern Railway Company, the defendant's predecessor in the ownership of part of the railroads in question; but that stipulation would bring about a result which the language used in it does not indicate was contemplated by the contracting parties, if it is allowed to operate to deprive the telegraph company, not only of such rights as were conferred by a previous contract, but of a property interest bought, paid for, and duly conveyed to it before either the superseded or the superseding agreement was made.

Nothing was purported to be superseded except certain "agreements" which were referred to. The only agreements, the terms of which are disclosed, are the two already mentioned, copies of which are made exhibits to the bill, one between the plaintiff and the defendant, and the other between the plaintiff and a grantor of the defendant. The only other agreement mentioned is one between the plaintiff and the defendant, dated May 14, 1880, the terms of which are not disclosed further than by a recital above quoted from the agreement which superseded that one. It may be inferred from that recital that that agreement was

similar in its general scope and purpose to the two which are set out, in that each of them defined and governed the respective rights and obligations of the parties to an arrangement between a railroad company and a telegraph company for the conduct during a defined period of time of a telegraph business over the rights of way and upon the premises of the railroad company. A stipulation in one agreement that other previously existing agreements are superseded does not, in the absence of other language indicating that such was the intention of the parties, deprive a contracting party of property or the use of it not acquired or conferred by any agreement referred to, but vested and owned by a purchase and conveyance which no agreement referred to purported to disturb or impair. The above-mentioned deed to the plaintiff is an instrument distinctly different from the "agreements" referred to in the stipulation, and it cannot be supposed that it or its operation was intended to be affected by that stipulation. Our conclusion is that that stipulation cannot properly be given the effect of defeating or divesting any property interest conveyed to the plaintiff by the deed mentioned, and that nothing contained in the bill shows that that interest has been relinquished or divested.

[6] With reference to all the railroad rights of way and other properties claimed to be subject to an easement in favor of the plaintiff, both those described in the above-mentioned deed and those not covered by that deed, the bill contains assertions to the effect that the plaintiff was and is seized and possessed of irrevocable, perpetual, and assignable easements or rights for the construction, maintenance, and operation of telegraph lines and the conduct of a telegraph business. These assertions are no more than statements of the pleaders' opinions or legal conclusions, and, except in so far as they are sustained by facts and circumstances set forth, they furnish no support for the claims made by the bill. Fogg v. Blair, 139 U. S. 118, 11 Sup. Ct. 476, 35 L. Ed. 104; Gould v. Evansville, etc., R. R. Co., 91 U. S. 528, 536, 23 L. Ed. 416.

[7] The contract of June 18, 1884, is relied on to support the claim made, especially the provision of it conferring rights to use and occupy railroad property, taken in connection with the provision that:

"It is mutually understood and agreed that the telegraph lines and wires covered by this contract shall form part of the general system of the telegraph company, and as such in the department of commercial or public telegraph business shall be controlled and regulated by it, the telegraph company fixing and determining all tariffs for the transmission of messages and all connections with other lines."

The nature of the contract creates a presumption against the correctness of a construction of any provision of it under which such provision would remain effective beyond the period during which the contract was to be in existence. The contract is one between a railroad company and a telegraph company for the conduct of a telegraph business on the railroad company's property for a limited period of time. Presumably any right conferred by such a contract on the telegraph company to use or occupy railroad property was given only in order to promote the purposes of the contract, and was intended to last only so long as the relations between the parties established by the contract

existed. In the absence of a clear expression of a different meaning, no provision of such a contract can be regarded as being still effective after the whole of it has ceased to be in existence. The provision to the effect that the telegraph lines and wires covered by the contract between the plaintiff and defendant shall form part of the general system of the plaintiff was completely executed, if such lines and wires were, during the period covered by the contract, permitted by the defendant to be so used on or in connection with its property by the plaintiff as to form part of the general system of the plaintiff. Nothing contained in that provision, or in any other provision of the contract indicates an intention to confer a right or impose a burden that would outlast the contract itself.

No facts stated in the bill, other than what is disclosed by the above-mentioned deed to the plaintiff, support a conclusion that any right to occupy or use the defendant's property which had been conferred on the plaintiff by contract or conveyance, or by the conduct of the parties, or their respective predecessors, was in existence at the time the bill was filed.

[8] With reference to the feature of the bill which shows that the act of Congress of July 24, 1866 (Rev. Stat. § 5263 et seq. [Comp. St. 1913, § 10072 et seq.]), giving telegraph companies the right to construct and operate their lines through, along, and over the public domain, military or post roads, and navigable waters of the United States was relied on as a support for the claims asserted, it is not deemed necessary to say more than that we concur in the conclusions as to the operation of that statute which were expressed by Judge Newman in the opinions rendered in this case and in another case in which that statute was relied on to support a similar claim. Western Union Telegraph Co. v. Louisville & Nashville R. Co. (D. C.) 229 Fed. 234; Western Union Telegraph Co. v. Atlanta & W. P. R. Co. (D. C.) 227 Fed. 465. That statute does not purport to effect a divestiture of property rights or interests without purchase or condemnation or in some other recognized way by which one lawfully may acquire what had belonged to another.

[9] As above stated, the notice to the plaintiff to vacate the defendant's premises and remove its properties therefrom was given on August 5, 1912, and the terms of the notice indicated the absence of any intention on the part of the defendant to take action itself to remove or use any property of the defendant prior to December 1, 1912. It is not made to appear that the defendant took any such action during the period of nearly three years which elapsed between the time the notice to remove was given and the date of the filing of the bill. Nor is it made to appear that the plaintiff was without legal remedy to acquire by condemnation rights in and over the defendant's properties necessary or appropriate for the conduct of a telegraph business thereon, or that that remedy was in any respect incomplete or inadequate, or that within the time it has been suffered to remain upon and use the defendant's properties the plaintiff could not, by exercising due diligence, have completely effected the acquisition of the desired and required easements and rights.

[10] If in any case where the relations of the parties are such as are shown to have existed between the plaintiff and the defendant, it is competent for a court of equity, upon full and adequate compensation being made, to protect from disturbance such possession as the plaintiff has, and, in the suit in which this is done, make complete and final disposition of the entire controversy arising out of the situation and the relations of the parties (see New York City v. Pine, 185 U. S. 93, 22 Sup. Ct. 592, 46 L. Ed. 820, and Western Union Telegraph Co. v. Ann Arbor R. Co., 90 Fed. 379, 30 C. C. A. 113), the facts averred in the bill in the pending case fall short of showing that it is such a one. It well may be inferred from the averments of the bill, and its lack of averments, that, if the plaintiff had exercised any diligence at all, it could, long before the bill was filed, have acquired by legal proceedings available to it the required rights and easements in the defendant's properties which it has continued to occupy and use after all rights it had therein had ceased to exist. Equitable remedies are not open to a party where the occasion or necessity of his resort thereto is attributable to his own unexplained failure diligently to pursue complete and adequate legal remedies available to him.

The execution by the defendant of its expressed purpose to exclude the plaintiff from the occupation or use of any of its railroad rights of way or other premises, and to appropriate properties of the plaintiff not removed by the latter, would involve an invasion of rights conferred on the plaintiff by the above-mentioned deed to it, and cause an interruption of the plaintiff's business and a probable consequent loss of profits, the injury and damage from which it is not to be supposed could fully and adequately be compensated for at law. The part of the bill which disclosed the existence and threatened invasion of the rights just referred to was enough to make the motion to dismiss it not properly grantable.

It follows that the decree appealed from should be reversed; and it is so ordered—the plaintiff to have leave to amend its bill, as it may be advised, to make a further and better statement of the nature of part of the claim relied on.

WESTERN UNION TELEGRAPH CO. v. ATLANTA & W. P. R. CO.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1917.)

No. 2850.

COURTS ⟸347—EQUITY RULES—PLEADING—AMENDMENT.

Where a bill to restrain a railroad company from removing the line of a telegraph company from its right of way claimed that the telegraph company had an irrevocable, perpetual easement to maintain its line, but the only facts alleged in the bill showing that the telegraph company's rights were under contracts for a limited period which had expired, plaintiff will be given an opportunity to amend its bill under equity rules 19 and 20 (198 Fed. xxiii, xxiv, 115 C. C. A. xxiii, xxiv), providing for amendments in furtherance of justice and for more specific statements of

the nature of claims, so as to set forth the facts which are the basis of its claim of a perpetual easement.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⇐347.]

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

Action by the Western Union Telegraph Company against the Atlanta & West Point Railroad Company. Decree dismissing the bill (227 Fed. 465), and plaintiff appeals. Decree modified, by making the order of dismissal conditional upon plaintiff's failure to amend its bill within the time allowed, and, as modified, affirmed.

William L. Clay, of Savannah, Ga., for appellant.

R. E. Steiner and Leon Weil, both of Montgomery, Ala., and Sanders McDaniel, of Atlanta, Ga., for appellee.

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

WALKER, Circuit Judge. The claim was made by the bill in this case that the appellant, which was the plaintiff in that bill, at the time the suit was brought, was seised and possessed of irrevocable, perpetual, assignable easements or rights for the construction, maintenance, and operation of telegraph lines, and for the conduct of a telegraph business upon, along, or over specified railroad rights of way and other properties of the defendant railroad company. It appears to us that the facts and circumstances averred in the bill do not show the existence of the asserted rights or easements. There are no averments of facts which are inconsistent with a presumption, which, not being rebutted, may be indulged, that the alleged former occupation and use by the plaintiff, or any predecessor to whose rights it has succeeded, of the whole or any part of the railroad rights of way or other properties of the defendant were under contracts or arrangements for such use and occupation for limited periods of time, which had expired prior to the date of the filing of the bill, and that at that time the plaintiff was without right to continue such use or occupation. See Western Union Telegraph Company v. Louisville & Nashville Railroad Co., 238 Fed. 26, — C. C. A. — (U. S. Circuit Court of Appeals, 5th Circuit, present term), and the opinion of Judge Newman in the pending case (Western Union Telegraph Co. v. Atlanta & W. P. R. Co. [D. C.] 227 Fed. 465). The bill as it was framed was rendered substantially defective by its failure to state facts relied on to support the claims made. It may be that facts exist which are sufficient to support such claims in whole or in part. If so, no harm would result, and it appears probable that it would be in furtherance of justice, to afford to the plaintiff the opportunity to disclose such facts by granting leave to it to amend its bill by making a better statement of the nature of its claim. Equity rules 19 and 20 (198 Fed. xxiii, xxiv, 115 C. C. A. xxiii, xxiv).

Therefore the decree appealed from will be modified, by adding thereto an order that the appellant have leave to amend its bill of complaint, as it may be advised, within 30 days after the date of the

filing in the District Court of the mandate of this court, and by making the order for the dismissal of the bill conditional upon the plaintiff's failure to amend its bill within the time allowed. As so modified, the decree appealed from is affirmed; the court costs of the suit to be taxed against the appellant.

WESTERN UNION TELEGRAPH CO. v. NASHVILLE, C. & ST. L. RY.

(Circuit Court of Appeals, Fifth Circuit. January 3, 1917.)

No. 2971.

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

Suit by the Western Union Telegraph Company against the Nashville, Chattanooga & St. Louis Railway. Decree dismissing the bill (233 Fed. 605), and plaintiff appeals. Decree modified, by making the order of dismissal conditional on plaintiff's failure to amend its bill within the time allowed, and, as modified, affirmed.

Arthur Heyman, of Atlanta, Ga., and W. L. Clay, of Savannah, Ga., for appellant.

John L. Tye and Henry C. Peeples, both of Atlanta, Ga., and Claude Waller, of Nashville, Tenn., for appellee.

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

PER CURIAM. Following rulings made in the case of Western Union Telegraph Co. v. Louisville & Nashville R. Co., 238 Fed. 26, — C. C. A. — (present term, U. S. Circuit Court of Appeals, 5th Circuit), and Western Union Telegraph Co. v. Atlanta & West Point R. Co., 238 Fed. 36, — C. C. A. — (present term, U. S. Circuit Court of Appeals, 5th Circuit), the decree appealed from in the above-entitled case will be modified, by adding thereto an order that the appellant have leave to amend its bill of complaint, as it may be advised, within 30 days after the date of the filing in the District Court of the mandate of this court, and by making the order for the dismissal of the bill conditional upon the appellant's failure to amend its bill within the time allowed. As so modified, the decree appealed from is affirmed; the court costs of the suit to be taxed against the appellant.

WESTERN UNION TELEGRAPH CO. v. WESTERN RY. OF ALABAMA.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1917. Rehearing Denied February 9, 1917.)

No. 2883.

Appeal from the District Court of the United States for the Middle District of Alabama; Henry D. Clayton, Judge.

Suit between the Western Union Telegraph Company and the Western Railway of Alabama. From the decree, the Telegraph Company appeals. Modified and affirmed.

Ray Rushton and William Williams, both of Montgomery, Ala. (Albert T. Benedict and Francis R. Stark, both of New York City, and Rushton, Williams & Crenshaw, of Montgomery, Ala., on the brief), for appellant.

R. E. Steiner and Leon Weil, both of Montgomery, Ala. (Steiner, Crum & Weil, of Montgomery, Ala., on the brief), for appellee.

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

PER CURIAM. Following rulings made in the cases of Western Union Telegraph Co. v. Louisville & Nashville R. Co., 238 Fed. 26, — C. C. A. — (present term, U. S. Circuit Court of Appeals, 5th Circuit), and Western Union Telegraph Co. v. Atlanta & West Point R. Co., 238 Fed. 36, — C. C. A. — (present term, U. S. Circuit Court of Appeals, 5th Circuit), the decree appealed from in the above-entitled cause is modified, by adding thereto an order that the appellant have leave to amend its bill of complaint, as it may be advised, within 30 days after the filing in the District Court of the mandate of this court. As so modified, the decree appealed from is affirmed, with costs against the appellant.

ARNOLD v. HORRIGAN.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1916.)

No. 2810.

1. ELECTION OF REMEDIES ⟸3(1)—WHAT CONSTITUTES—TROVER.

Shortly before bankruptcy the bankrupt converted into cash part of his assets, and thereafter certificates of deposit for the amount of the cash realized were issued, payable to the order of the bankrupt's attorney. Subsequently the bankrupt absconded, and the certificates, indorsed in blank by the attorney, were cashed by the bankrupt in Canada. The trustee claimed that the proceeds were invested in land, title to which was taken in the name of the bankrupt's wife, and through the aid of the Canadian courts undertook to reach the land, but nothing was realized. Thereafter the trustee sued the attorney. Some of the counts in the complaint in the action against the attorney were counts in trover, alleging the attorney's conversion of the certificates of deposit to his own use, or to that of the bankrupt; but another count alleged no technical conversion, averring that the attorney, with intent to hinder, delay, and defraud the rights of the bankrupt's creditors and trustee, caused money in the possession of the bankrupt to be converted into negotiable instruments payable to him, and, with intent to defraud, hinder, and delay, indorsed the instruments over to the bankrupt to the trustee's damage. *Held* that, as such count must be deemed one on the case, seeking recovery of damages for the diversion, rather than one of trover, recovery on such count cannot be denied upon the theory that, as an action of trover, under the Michigan practice, in which state bankruptcy occurred and in which state was located the District Court wherein action was begun, vests good title in the defendant, the attempt to follow the proceeds of the certificates of deposit was an election to pursue an inconsistent remedy.

[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 3; Dec. Dig. ⟸3(1).]

2. APPEAL AND ERROR ⟸206(1), 216(1)—REVIEW—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW—NECESSITY.

In such case, where defendant did not object that evidence of the Canadian proceedings was not admissible under some of the counts of the complaint, and requested no charge that the election of remedies applied only to some of the counts, the question of the limited bar by election of remedies, and limited purposes for which evidence might be introduced, cannot be reviewed on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1283–1285; Dec. Dig. ⟸206(1), 216(1); Trial, Cent. Dig. § 630.]

3. BANKRUPTCY ⟸279—TRUSTEE—RIGHTS OF.

In such case, though the diversion occurred before adjudication in bankruptcy, and although Bankr. Act July 1, 1898, c. 541, 30 Stat. 544,

merely declares that the trustee, when appointed, takes title as of the date of adjudication, nevertheless for many purposes such title relates back to the filing of the petition, and so, the suit being in effect one against two tort-feasors, whose action has taken property out of the bankrupt's estate, and put it beyond the reach of the trustee, it may be maintained, notwithstanding any want of power of the trustee to sue for a tort antedating the bankruptcy proceedings.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂⊃279.]

4. BANKRUPTCY ⊂⊃279—TRUSTEE—RIGHTS OF.

After the filing of a petition in bankruptcy the bankrupt consented to the appointment of a receiver, but subsequently, with the assistance of defendant, he diverted money belonging to his estate. *Held*, on appointment of a trustee after adjudication, the title of the trustee and the possessory right of the receiver merged, so that the trustee's right will be considered as if the diversion had occurred after appointment.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 419–424; Dec. Dig. ⊂⊃279.]

5. BANKRUPTCY ⊂⊃101—DIVERSION OF ASSETS OF ESTATE—LIABILITY OF THIRD PERSONS.

An attorney of a bankrupt, who had received cash belonging to the bankrupt, after the petition was filed and the bankrupt had consented to appointment of a receiver, procured certificates of deposit payable to his order, which he indorsed in blank to the bankrupt. *Held* that, as the receiver had possessory right to the bankrupt's estate, the attorney, notwithstanding the filing of the petition, did not change his relation and authorize him in withholding the money from the bankrupt, and is liable to the trustee in bankruptcy for his delivery of the certificates to the bankrupt, enabling him to defraud his creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 163; Dec. Dig. ⊂⊃101.]

6. BANKRUPTCY ⊂⊃304—PROPERTY OF ESTATE—EVIDENCE—SUFFICIENCY.

In an action against an attorney for assisting a bankrupt to divert moneys from his estate, the question of the attorney's participation in the scheme *held* for the jury; the evidence being conflicting.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 463; Dec. Dig. ⊂⊃304.]

7. APPEAL AND ERROR ⊂⊃1050(1)—HARMLESS ERROR.

In an action against the attorney of a bankrupt for his participation in the conversion by the bankrupt of money belonging to his estate, the admission of evidence that in one case the bankrupt, who was seeking to obtain currency, was persuaded to take a draft, was harmless, if erroneous; there being abundant evidence that the bankrupt had converted much of his property into money.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1068, 1069, 4153, 4157; Dec. Dig. ⊂⊃1050(1).]

8. TRIAL ⊂⊃244(3), 260(6)—INSTRUCTIONS—REFUSAL—DISCRETION OF TRIAL COURT.

In an action against the attorney of a bankrupt for participation in the bankrupt's fraudulent diversion of funds, the denial of requested instructions that fraud of defendant could not be inferred from particular items of the evidence, and must be shown by clear evidence, was not error; the matter resting in the discretion of the trial court, and the requests not presenting any distinct theory of defense not covered by the general charge.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 579, 656; Dec. Dig. ⊂⊃244(3), 260(6).]

9. APPEAL AND ERROR ⇐1078(1)—REVIEW—WAIVER OF ERROR.
In an action against the attorney of a bankrupt to recover amounts which the bankrupt diverted from his estate, defendant excepted, and assigned error, to the denial of his request that no interest could be allowed until after action was begun. The assignment was not argued on appeal; the whole contention on appeal being that the action was one of trover, and was barred on the theory of election of an inconsistent remedy. *Held*, that waiver of the assignment of error will, where it is determined that the action was not one wholly of trover, but included one on the case, be overlooked, and the propriety of the allowance of interest considered.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4256; Dec. Dig. ⇐1078(1).]

10. DAMAGES ⇐208(9)—INTEREST—TORTS—QUESTIONS FOR JURY.
In an action for tort, interest, as such, cannot be recovered as of right, but is discretionary with the jury; plaintiff only being entitled to have the jury consider the delay in reaching the verdict and judgment as one of the elements determining the amount of damage.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 144, 145, 533, 534; Dec. Dig. ⇐208(9).]

11. DAMAGES ⇐208(9)—INTEREST—UNLIQUIDATED CLAIMS.
In an action against the attorney of a bankrupt to recover damages arising out of the attorney's participation in a scheme whereby the bankrupt diverted from his trustee certificates of deposit, the damages cannot, on the theory that they were the face of the certificates of deposit, be deemed liquidated, so as to warrant the allowance of interest as a matter of law.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 144, 145, 533, 534; Dec. Dig. ⇐208(9).]

12. APPEAL AND ERROR ⇐1064(2)—REVIEW—HARMLESS ERROR.
In a tort action for damages, where the facts were such that it could not be certain that the jury would have allowed interest as part of the damages, no demand before suit being shown, an instruction that interest should be allowed is prejudicial error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4221, 4222; Dec. Dig. ⇐1064(2); Trial, Cent. Dig. § 528.]

13. APPEAL AND ERROR ⇐750(1)—ASSIGNMENTS OF ERROR—SCOPE.
The appellate court is limited in its review to the scope of assignments of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3074, 3075, 3082, 3083; Dec. Dig. ⇐750(1).]

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

Action by Michael Horrigan, trustee in bankruptcy for the estate of one Reitz, against George H. Arnold. There was a judgment for plaintiff, and defendant brings error. Affirmed, on condition that plaintiff enter remittitur; otherwise, reversed and remanded for new trial.

C. E. Ward, of Grand Rapids, Mich., for plaintiff in error.

B. B. Selling, of Detroit, Mich., for defendant in error.

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

DENISON, Circuit Judge. Reitz was a dealer in agricultural implements, and a petition in bankruptcy was filed against him October 12, 1908, in the Western district of Michigan. This was followed by a petition for the appointment of a receiver. A written consent to such appointment, signed by Reitz and by his attorney, Arnold, was filed October 17th, the order of appointment was made on the 19th, and the receiver qualified on the 20th. Shortly before the bankruptcy, Reitz had turned into cash certain of his assets, and had thus received more than $7,000. On October 21st and 22d, different banks in Chicago issued certificates of deposit, payable to Arnold, or his order, aggregating $7,000. At about this time Reitz absconded. An adjudication in bankruptcy, and the election of Horrigan as trustee, followed in due time. Several months later, these certificates of deposit, indorsed by Arnold in blank, were presented by Reitz to a bank in Canada, where they were cashed, and the money received by Reitz was (as it is thought) invested, in his wife's name, by him in lands in Alberta. Horrigan, the trustee, undertook in one way and another, through the aid of the Canadian courts, to reach these lands, but, at last accounts, nothing had been realized. After such effort had been in progress for two or three years, the trustee brought this action in the court below against Arnold, alleging that Arnold was responsible for the diversion of this $7,000 from the bankrupt estate. After a trial upon the merits, verdict and judgment were rendered against Arnold for the full amount of the certificates and interest, and he brings this writ of error.

[1, 2] 1. It is claimed on behalf of Arnold that the legal proceedings taken by the trustee against the Canadian lands amounted to an election to pursue the money or proceeds of the certificates, as being and remaining the property of the bankrupt, rather than to pursue Arnold as for a conversion to his own use; and it is said that the two remedies are inconsistent, because the action against Arnold in trover looks toward the affirmance of his act in taking title to himself, while the proceeding in Canada involves disaffirmance. This inconsistency is developed entirely from the fact that (at least in Michigan—Kenyon v. Woodruff, 33 Mich. 310) a judgment recovered in trover vests good title in the defendant, and the plaintiff cannot thereafter question the title which this defendant has conveyed to others. The point that there had been an election of remedies which would bar this action was raised by objections to evidence and by requests to charge; but we are saved the consideration of the point because we think this action is not to be treated as one solely in trover. The first, third, and fourth counts allege merely the conversion of the certificates by Arnold to his own use, or to that of Reitz, and each is fully and technically a count in trover; but the second count is not so, in form or in substance. It alleges no technical conversion by Arnold or by Reitz, but says that Arnold, with intent to hinder, delay, and defraud the rights of creditors and the rights of the trustee in bankruptcy, caused the money to be converted into negotiable instruments payable to Arnold, which he turned over to Reitz, with intent to keep the same from the trustees, and so deprive plaintiff, as trustee, of the said negotiable instruments, "all to the plaintiff's damage in the sum of $20,000." This is a claim of damages for

diversion, rather for value upon conversion, and we consider it to be what, in Michigan practice, is called an "action on the case," to recover the damages, more or less, which the estate suffered by reason of Arnold's alleged tort. So interpreted, the action is not inconsistent with mere efforts to recover the property itself or to collect damages from other tort-feasors.

If the defendant had pointed out that the evidence of the Canadian proceedings was not admissible under the three specified counts, or had requested the court to charge that there had been an election of remedies which barred recovery under these three counts, it would have been necessary to decide the question which we have passed; but defendant's offers and requests were all on the theory that the action was wholly one of trover, that the evidence was admissible for all purposes, and that the action could not be maintained at all. The limited admissibility of the evidence, and the limited bar which might result, were in no wise brought to the attention of the court.

We are content to rest upon these grounds our conclusion that there was no reversible error in this subject-matter, because it is highly artificial to treat this cause of action as technically in trover. Arnold's substantial offense (if he committed any) was to aid Reitz in the concealing of and running away with this money; the inferred conversion by Arnold to his own use, which could make him liable in trover, was incidental, and did not really characterize his wrong against the estate. We think it the fair interpretation of the language hereafter quoted, in which the issue was submitted to the jury, and of the finding of the jury thereon (both interpreted with reference to the facts involved), that the real thing in controversy was not that kind of conversion by a wrongdoer to his own use which supports the typical trover action, and which is the basis of holding that the title of his transferee becomes good against the plaintiff. For these reasons this defense, as attempted in this case, should have been presented and preserved with distinct reference to that partial application which we think was the only application which in any event could be permissible here; and this was not done.

[3] 2. Treating the suit as being an action against one of two joint tort-feasors, whose action has taken property out of the bankrupt estate and put it beyond the reach of the trustee, we see no reason why it will not lie. It is not merely an action for a tort antedating the bankruptcy proceedings. For such a tort, participated in by the bankrupt, very likely an action by the trustee could not be maintained, at least, if the transaction occurred, as here, before the amendment of 1910; and it may be assumed that, before that amendment, or perhaps even since, the trustee's rights resulting from conveyances made before the petition is filed, and which are in fraud of creditors, are limited to pursuing and recovering the property. That concession does not reach this case. Although the statute says that the trustee, when appointed, takes title as of the day of adjudication, the Supreme Court has held that, for many purposes, this title relates back to the filing of the petition. Acme Co. v. Beekman Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57

L. Ed. 927, 46 L. R. A. (N. S.) 154. And we have applied this rule. Toof v. City Nat. Bank, 206 Fed. 250, 124 C. C. A. 118.

By virtue of such relation, the trustee, on October 21st and 22d, had a title to these funds which was good as against Reitz and his agents and attorneys. Upon familiar principles, all who are bound to admit the trustee's title, and who actively participate in depriving him of his property, must respond for the damages, and nothing short of collection from one will bar proceedings against another. It is not controlling that counsel have not found, nor have we, precedents for recovery by a trustee under such facts as these. To hold that the trustee cannot sue for tortious injuries inflicted upon the estate property intermediate the petition and the adjudication is to say that during this period the estate may be destroyed with impunity. We think his right to bring such an action is clear.

[4, 5] 3. As to the particulars of the so-called conversion or diversion, the evidence is consistent with either one of two states of fact. It may be that, at various times before October 21st, Arnold had received this money and was holding it as attorney and agent for Reitz, and that on October 21st and 22d, or thereafter, he turned it over to Reitz by delivering these certificates; or it may be that the receipt by him of money from Reitz, the taking of certificates in Arnold's name, and the delivery of them to Reitz, were practically simultaneous, and part of one transaction. One or the other of these things must be true, if the verdict of the jury was right. Defendant insists that each theory, alike, is inconsistent with any right to recover; so they must be examined separately.

Defendant says that if Arnold had possession of Reitz's money, and held it only as attorney for Reitz, it was Arnold's duty to pay it over to Reitz upon demand, and that this duty was not terminated by the filing of the petition in bankruptcy; that this filing may create a lien, or rights in the nature of a lien, in favor of creditors, but it does not change the relations between the bankrupt and his attorney; that the bankrupt's title continues perfect as against his attorney, and the latter cannot refuse to recognize the title because it may eventually turn out to be subject to the claims of a third party. These contentions might be granted without affecting this case; and this is because of the effect of appointing a receiver. Reitz and Arnold cannot be heard to claim ignorance of such an appointment. They had consented thereto, they knew that the order had been made or would be made, and they were bound to know what the real fact was. This appointment vested in the receiver a possessory right superior to that of the bankrupt and all his agents, and it became the duty of Arnold to deliver this money to the receiver and not to Reitz. The title of the trustee by relation and the possessory right of the receiver merge, and we see no reason why, for the purposes of this action, the trustee's right is not the same as if the acts in question had been committed after his appointment.

If we turn to the other supposition of what may have occurred, we find it claimed that Arnold's action would have been that merely of a messenger for Reitz, who went to the bank and changed the form of securities as requested; that for Reitz to change his funds from

small bills to large bills, or from currency to certificates, was not a material change; and that, to aid him in so doing, even to the extent of taking a momentary title to certificates, was neither conversion, nor diversion, nor participating therein. In view of the relation of attorney and client, it is at least true that there would be nothing necessarily wrongful in such action by the attorney, and if there were nothing else, we might hesitate to affirm a judgment which had only such a foundation; but it appears that, a few days later, Arnold, as attorney for Reitz, made out the schedules in bankruptcy, and did not include these funds nor their proceeds in any form. If the assumption of fact which we are now considering—i. e., that Arnold took Reitz's money and obtained the certificates and gave them back to Reitz—is correct, this omission of them from the schedules was an active and a certain participation in the fraudulent diversion, and it would tend to characterize the previous taking of the certificates in Arnold's name as a thing done in order that there should be no record of them in the name of Reitz. Upon this theory, also, we must hold that there was evidence sufficient to support the submission.

[6] 4. The ultimate issue of fact is very simple. The plaintiff's theory we have stated. Arnold utterly denied having anything to do with Reitz in connection with these certificates. He testified that the money had been received by him (Arnold) from other sources; that it was to be turned over to one Howard, with whom Arnold had had long-standing business relations: that Arnold followed Howard's directions in obtaining the certificates and in taking them in his own name; that he indorsed them in blank and delivered them to Howard at Howard's request; and that he never suspected that Reitz had or would have anything to do with them until he learned, a few months later, they had been found in Reitz's possession. There was (perhaps) a family relationship between Howard and Mrs. Reitz, and only by the aid of that suggestion could Arnold imagine how the certificates reached Reitz. This dispute was submitted to the jury, as the determinative issue, by this language in the charge:

"These are the claims of the parties, respectively, and, by these claims are presented the important questions for you to determine, and those questions are these: Did the defendant purchase the five certificates of deposit, aggregating $7,000 from the banks in Chicago with funds which belonged to Mr. Reitz, or his estate in bankruptcy? And did this defendant, acting with Mr. Reitz, conceal such moneys and convert them to their use, or to the use of either of them, with the intent to hinder, delay, and defraud the creditors of Mr. Reitz? If you answer those questions in the affirmative, your verdict will be in favor of the plaintiff in this case. If you answer those questions, or either of them, in the negative, your verdict will be in favor of the defendant."

Arnold's story was considerably supported by documentary evidence and by testimony of others, and we are asked to say that a jury had no right wholly to reject it, and to find against him a verdict based solely on inferences drawn from circumstances. Howard was dead; two other witnesses who could have supported Arnold in vital particulars were dead; and Mr. and Mrs. Reitz were beyond the reach of the court, and neither testified. On one side was Arnold's testimony; on the other side were inferences from the conceded facts and improba-

bilities in his story. The whole issue was one of credibility; and this is peculiarly for the jury. Reading the record, and giving due weight to Arnold's good standing as a business man, an attorney, and a public officer, we might hesitate to say that the preponderance of evidence indicated that his whole testimony was a fabrication; but we certainly cannot say that a jury had no right to make this finding. It is unnecessary to consider details; the jury utterly disbelieved him; and the several suspicious facts tending to discredit him furnish sufficient legal support for the verdict.

[7] 5. Many assignments of error are directed to the admission of evidence. In a case where the sole issue is as to defendant's fraud, and where that issue depends upon his credibility as a witness, there must be a broad latitude in the admission of evidence. It is enough to say of these assignments that we have examined the record as to all of them, and do not find anything which calls for reversal. Only one needs special mention. A bank cashier was allowed to testify that Reitz, shortly before bankruptcy, in withdrawing funds from the bank, asked for currency, and was persuaded to accept a draft. This conversation was not in Arnold's presence, and it was claimed to be admissible as a declaration of one of two conspirators, made in furtherance of their object. We need not pass upon this ground of support. It appeared beyond question that about this time Reitz did turn a considerable amount of his assets into cash, and the jury had the right to draw from this fact any proper inference. That he asked for currency as a step in getting it, or that he asked in one instance where he did not get it, could not add enough to the existing basis for such inference to make the addition of substantial prejudice.

[8] 6. Defendant requested a series of special instructions bearing upon the inferences of fact which should be or should not be drawn from certain items of evidence. Most of them were to the effect that the condemnatory fraud of the defendant should not be inferred from this or that item of evidence introduced or specific conclusion reached by the jury, and most of them might well have been given; but it is largely within the discretion of the trial judge in this way to emphasize specific facts. It may be that each item of evidence may rightly be pronounced insufficient of itself to support a conclusion of fraud, and yet that conclusion may well rest upon the composite effect of all the evidence. Not one of the requests was necessary to be given, as presenting a distinct theory of defense, not covered by the general charge, as in Hendrey v. United States, 233 Fed. 5, —— C. C. A. ——. In the refusal of these requests, and in determining rather to submit the issue in the sharp and clear way shown by the above quotation from the charge, the trial court did not exceed its proper discretion.

There is also an assignment of error because the court refused to instruct the jury that fraud must be shown by clear and satisfactory proof, that honesty, not dishonesty, is presumed, and that the plaintiff's evidence must exclude the probability that the transaction was honest. Instructions of this general tenor have often been approved (Walker v. Collins [C. C. A. 8] 59 Fed. 70, 73, 8 C. C. A. 1); but we find no controlling or persuasive authority holding that

it is error not to give the jury this rule, unless such holding is in cases where circumstantial evidence was to be considered, and where the inference to be drawn therefrom was doubtful. Where the primary facts are not in dispute, the jury may well be warned against drawing a condemnatory inference from premises which will support also an exculpatory conclusion; but there is little, if any, reason for applying this rule where the issue is whether one or another set of primary facts is in accord with the truth. In the present case, if the Howard story was false, the inference that the certificates were bought with Reitz's money and turned over to him by Arnold would be most natural, and if it was true that Arnold bought the certificates with Reitz's money, took them in his own name, turned them over to the absconding bankrupt, omitted them from the schedules, and then tried to conceal the whole thing by his false testimony, the presumption of an intent to defraud creditors would be so violent as to be almost conclusive, and such a warning to the jury would not be worth while. Arnold does not claim that he supposed the money belonged to Mrs. Reitz, or thought that it became Reitz's after the petition was filed, or had no reason to think that Reitz would run away. The instructions would have been appropriate to some such situation; as the case was, the refusal was not error.

[9] 7. There remains the subject of interest. Defendant requested the court to instruct that no interest could be allowed, except after suit commenced, the request was refused, and defendant excepted and assigned error. The court directed the jury, if it found for plaintiff, to include interest at the legal rate in Michigan, from and after October 31, 1908. In this court the defendant has planted his whole argument on the theory that the action was one of trover, and, perhaps for this reason, has not argued the assignment of error relating to interest; since in an action of trover the allowance of interest, under one name or another, after conversion, and at least after demand, has been sometimes approved. We have found that, for the purposes of this review, the action should not be treated as one really standing on a conversion by Arnold to his own use, but rather as one for general damages for a tortious injury to property rights; and, under these circumstances, we think we should overlook such waiver of this assignment of error as would otherwise result from the fact that it was not argued.

[10] The general rule is clear that in an action for tort interest, as such, cannot be recovered of right. The allowance of what corresponds to interest is discretionary with the jury, and the extent of plaintiff's right in that respect is to have the jury consider the delay in reaching the verdict and judgment as one of the elements in determining the amount of damages to be stated by the verdict. "In cases of tort, its allowance as damages rests in the discretion of the jury." Justice Field, in Lincoln v. Claflin, 74 U. S. (7 Wall.) 132, 139, 19 L. Ed. 106. "Undoubtedly the rule, in cases of tort, is to leave the question of interest as damages to the discretion of the jury." Justice Shiras, in Eddy v. Lafayette, 163 U. S. 456, 467, 16 Sup. Ct. 1082, 41 L. Ed. 225. And see District of Columbia v. Robinson, 180 U. S.

92, 107, 21 Sup. Ct. 283, 45 L. Ed. 440, and Brent v. Thornton (C. C. A. 5) 106 Fed. 35, 38, 45 C. C. A. 214.

[11, 12] The damages were not so surely liquidated as to require interest by analogy to the rule which in some jurisdictions awards interest, upon the conversion of property. 8 R. C. L. p. 537. Prima facie, the damages were the face of the certificates; but they would have been reduced by anything which the trustee recovered in Canada before the trial or by anything which might have affected the face value of the certificates, and they might well have been increased by expenses or other losses suffered by the trustee, as the direct result of the diversion. That defendant was unable to prove anything in mitigation, and that plaintiff did not claim by his bill of particulars any damages in excess of the certificates, does not affect the original character of the damages. Nor is it certain that the jury, in its discretion, would have given damages to the same amount. The fact that no demand was made from Arnold before suit brought might have convinced the jury that such award would be unjust. White v. United States (C. C. A. 5) 202 Fed. 501, 502, 121 C. C. A. 33.

[13] Whatever view should be taken of interest after the suit was begun, the assignment of error does not reach that question, and we are confined to the earlier period. We must conclude that it was error to require the jury to include in the verdict the interest accruing before the date of suit, and for that reason the judgment must be reversed, unless the trustee remits this excess. If, before the mandate goes down, the trustee makes this remittitur in the court below, and files with the clerk here a certified copy thereof, the judgment so modified will be affirmed, but with costs to the plaintiff in error. Lacking such remittitur, the judgment will be reversed, and a new trial awarded.

SMITH et al. v. JENNINGS et al.

(Circuit Court of Appeals, Fifth Circuit. December 11, 1915.)

No. 2928.

1. COURTS ⇐489(13)—FEDERAL COURTS—JURISDICTION.
The federal courts sitting in equity have no general jurisdiction in matters of probate and the administration of decedents' estates.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1325; Dec. Dig. ⇐489(13).]

2. COURTS ⇐489(13)—FEDERAL COURTS—JURISDICTION.
Where the state courts have not taken jurisdiction, a federal court sitting in equity may, on the ground of diversity of citizenship of the parties, take jurisdiction of proceedings involving a decedent's estate only for the purpose of preserving the same and determining the rights of creditors and others to share in the estate.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1325; Dec. Dig. ⇐489(13).]

3. COURTS ⇐200—GEORGIA COURTS OF ORDINARY.
The court of ordinary of Georgia is a court of competent jurisdiction to administer the estate of decedents.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 441, 442, 454, 469–471; Dec. Dig. ⇐200.]

4. EXECUTORS AND ADMINISTRATORS ⊜29(4)—RIGHT OF ADMINISTRATOR—COLLATERAL ATTACK.

Where temporary administrators were appointed by the court of ordinary of Georgia for the county in which the estate of decedent lay, the federal court cannot take jurisdiction of a bill involving the administration of the estate, on the theory that such temporary administrators were not officers of the court because of irregularities and fraud in their appointment, for, the court of ordinary being a court of competent jurisdiction, its appointment could not thus be collaterally attacked.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 180; Dec. Dig. ⊜29(4).]

5. COURTS ⊜505—AUTHORITY OF ADMINISTRATORS—APPOINTMENT.

Though administrators are acting under temporary letters, which might have been issued by the clerk, but were issued by the ordinary, they are nevertheless officers of the court of ordinary, and a contrary claim, as a basis for the federal court's taking jurisdiction of a suit involving the estate, cannot be supported.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⊜505.]

6. COURTS ⊜505—COURT OF ORDINARY—CONFLICTING JURISDICTION.

Where a petition for the administration of an estate was filed with the court of ordinary, such court, though not in actual possession of the estate, is entitled to possession, and has such jurisdiction over the administration proceedings that the federal court cannot entertain jurisdiction of a bill involving the estate on the theory that no administration was pending.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⊜505.]

7. COURTS ⊜505—JURISDICTION—GROUNDS OF.

A court of equity cannot take jurisdiction over an estate to prevent waste and dissipation, unless the administration is vacant and the danger of loss imminent, and so, where administration was pending, the federal court cannot take jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⊜505.]

8. EXECUTORS AND ADMINISTRATORS ⊜29(4)—TITLE—RIGHT TO COLLATERAL ATTACK.

Where temporary administrators had given adequate bond, and additional temporary administrators, who were qualified to act, had been appointed, the right of the original temporary administrators cannot be questioned in a suit where it was sought to secure the appointment of a receiver by the federal court on the ground that such administrators had received their appointment through fraud and irregularities.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 180; Dec. Dig. ⊜29(4).]

9. COURTS ⊜505—ADMINISTRATION—APPOINTMENT OF RECEIVER.

Temporary administrators were appointed by the ordinary pursuant to the Georgia practice. Thereafter a bill was filed in the federal court seeking the appointment of a receiver, it being contended that the administration was vacant, because the temporary administrators had no right to carry on the business of the decedent. *Held* that, as it did not appear that there was any necessity for the carrying on of any business except the conduct of decedent's plantation, and his farming operations were in the hands of his tenants, a receiver, who would have no greater power to carry on the business, cannot be appointed on the theory that the administration was vacant.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⊜505.]

10. COURTS ⊂=505—RECEIVERS—WASTE.
Where temporary administrators had given sufficient bonds in the amount of $1,000,000, and a number of them were persons of property, a receiver cannot be appointed by the federal court on the ground of waste or dissipation of assets, though the administrators were claimed to have exceeded their authority.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1410; Dec. Dig. ⊂=505.]

11. COURTS ⊂=506—FEDERAL COURTS—JURISDICTION.
The federal courts have no authority to stay proceedings in the state court, while they are in progress and before they are concluded by the final judgment or decree, save in the aid of bankruptcy proceedings or their own previously acquired jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊂=506.]

12. COURTS ⊂=509—FEDERAL COURTS—JURISDICTION.
A bill for the appointment of a receiver to conserve the estate of a decedent cannot be maintained, on the ground that the decree of the ordinary appointing temporary administrators was obtained through fraud of the parties, for, while the federal courts may relieve against a judgment of the state court induced by fraud, such judgment must be final, and it cannot be presumed that, upon the granting of the permanent letters of administration, injustice will be done.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364–1371; Dec. Dig. ⊂=509.]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Bill by Zadock Smith and others against Mrs. M. S. Jennings and others. From interlocutory orders appointing receivers, etc., defendants appeal. Reversed and remanded, with directions.

For opinion below, see 232 Fed. 921.

This is an appeal by the defendants in the court below from two interlocutory orders, made by the District Court on May 1, 1916, appointing receivers for the estate of James M. Smith, deceased, and enjoining interference with the possession of the receivers of the property and assets of the estate when acquired. James M. Smith died a resident of Oglethorpe county, Ga., intestate, on the 11th day of December, 1915. At the time of his death he was possessed of a large amount of personal and real property, and was operating a large plantation in the county of his residence. He was unmarried and had no direct heirs. Upon the night of the day of his death application was made by his manager, his bookkeeper, a neighbor and the judge of the superior court to the ordinary for temporary letters of administration upon the estate of the intestate. The ordinary granted the temporary letters upon the applicants' giving bond in the sum of $50,000, double the amount of the personal estate, as represented to the ordinary by them. The applicants made their application upon the basis of being creditors of James M. Smith. Their status as creditors is, however, disputed by the plaintiffs in this cause. Subsequently, on December 14, 1915, two additional temporary administrators were appointed by the ordinary, on the request of certain of the defendants, who alleged themselves to be heirs and next of kin to the decedent. Upon their appointment and qualification, the temporary administrators took possession of the assets of the estate, and were in possession at the time of the filing of the bill of complaint in this cause, and are in possession still. Subsequently, and before the making of the orders appealed from by the District Court, the temporary administrators gave a new bond in the sum of $1,000,000, with sufficient surety. The personal assets of the estate were many times in excess of what they were represented to the ordinary as being, when he first appointed the temporary administrators. Application was made by three of

the temporary administrators for permanent letters to the court of ordinary of Oglethorpe county, and on this application a citation was issued and published, returnable on the first Monday of February, 1916. Various caveats were thereafter lodged with the ordinary against this application. The hearing on the citation and the caveats was pending and undisposed of when the bill of complaint in this case was filed. Certain claimants filed a bill in the superior court of the Cherokee circuit of Georgia on February 23, 1916, asking the appointment of receivers of the estate, and seeking to enjoin the temporary administrators from interference with the assets, and an order to that effect was made by that court. After this order had been modified by a newly appointed judge of the superior court, by directing the receivers not to take possession, the complainants dismissed their bill in the state court. Various irregularities and acts in excess of their legal powers are charged in the bill of complaint in this cause to have been committed by the temporary administrators in the administration of their office, but it is not shown by the record that the assets of the estate were being wasted or dissipated by the temporary administrators.

This was the situation of the estate when the bill of complaint in this cause was filed by the plaintiffs on March 2, 1916. The plaintiffs claimed to be the children of Nancy Smith, by her husband, William H. Kimbrell, and that James M. Smith was an illegitimate child of Nancy Smith, born before her marriage to Kimbrell. The purpose of the bill, as shown by its prayer, was to enjoin the applicants for permanent letters of administration and the caveators from proceeding in the court of ordinary of Oglethorpe county, and the ordinary from making such appointment; for appointment of receivers under the bill, to take charge of the estate and hold it under the orders of the District Court; that the temporary administrators be enjoined from interfering with the receivers, when appointed; that all persons claiming any demand against the estate be required to intervene and set up such demand; that all persons claiming to be heirs at law of James M. Smith be required to intervene in the bill and set up their respective claims, so that one final decree might be rendered settling all questions; that the receivers be authorized by orders of the District Court to pay debts due by the estate; that the plaintiffs be decreed to be the true heirs and next of kin of James M. Smith and entitled to the assets, after payment of debts; and for general relief. Upon the filing of the bill, the District Judge made an order temporarily restraining the administrators from changing the status of the estate, except to collect and preserve the assets, until further order of the court, and directing the defendants to show cause on the first Monday of April, 1916, why an injunction should not be granted and a receiver appointed as prayed in the bill. Pending the hearing the defendants answered the bill, and numerous other claimants intervened therein and filed cross-bills, for the purpose of asserting their alleged interests in the estate. When the rule to show cause came on to be heard, evidence was submitted by all parties, and the court thereupon entered the orders, from which this appeal is taken, appointing receivers of the estate and assets of the intestate and enjoining the temporary administrators from interfering with their possession. From these orders an appeal was allowed by this court, and a supersedeas granted by it on application of the defendants to the bill, in May, 1916, after a hearing. The appeal now comes on for final disposition.

Alex C. King and John L. Tye, both of Atlanta, Ga., Samuel H. Sibley, of Union Point, Ga., Horace M. Holden, Howell C. Erwin, and Hamilton McWhorter, all of Athens, Ga., E. F. Noel, of Lexington, Miss., and King & Spalding, of Atlanta, Ga., for appellants.

J. S. James and J. R. Bedgood, both of Atlanta, Ga., E. H. Calloway, of Augusta, Ga., John J. Strickland, E. K. Lumpkin, and Stephen C. Upson, all of Athens, Ga., F. H. Colley, of Washington, Ga., H. H. Perry and W. A. Charters, both of Gainesville, Ga., Wm. M. Howard, of Augusta, Ga., Thomas J. Shackelford and Henry S. West, both of

Athens, Ga., Homer Sutton, of Cornelia, Ga., and Stanhope Erwin, of Clarksville, Ga., for appellees.

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

GRUBB, District Judge (after stating the facts as above). [1, 2] The solution of the question presented by the appeal depends upon the extent of the jurisdiction of a United States District Court, sitting in equity, over the general administration of the estates of decedents, in cases where a state court of general jurisdiction in matters of probate has already acquired jurisdiction of the estate. That the courts of the United States, sitting in equity, have no general jurisdiction in matters of probate and the administration of the estates of decedents, is well settled. In the case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599, the Supreme Court denied jurisdiction to the Circuit Court of the United States to set aside the probate of a will for fraud. In the case of Byers v. McAuley, 149 U. S. 608, 13 Sup. Ct. 906, 37 L. Ed. 867, the Supreme Court held that:

"The federal courts have no original jurisdiction in respect to the administration of decedents' estates, and they cannot by entertaining jurisdiction of a suit against the administrator, which they have the power to do in certain cases, draw to themselves the full possession of the res, or invest themselves with the authority of determining all claims against it."

Again, in the same case (149 U. S. on page 619, 13 Sup. Ct. 910, 37 L. Ed. 867), the Supreme Court said:

"If original jurisdiction of the administration of estates of deceased persons were in the federal court, it might by instituting such an administration and taking possession of the estate, through an administrator appointed by itself, draw to itself all controversies affecting that estate, irrespective of the citizenship of the respective parties. But it has no original jurisdiction in respect to the administration of a deceased person. It did not in this case assume to take possession of the estate in the first instance, and it cannot, by entertaining jurisdiction of a suit against the administrator, draw to itself the full possession of the estate, or the power of determining all claims against or to it."

And (149 U. S. on page 620, 13 Sup. Ct. 910, 37 L. Ed. 867) the court said:

"Our conclusion, therefore, is that the federal court erred in taking any action or making any decree looking to the mere administration of the estate, or in attempting to adjudicate the rights of citizens of the state, as between themselves. The state court had proceeded so far as the administration of the estate carries it forward to the time when distribution may be had. In other words, the debts of the estate had been paid, and the estate was ready for distribution, but no adjudication had been made as to the distributees, and in that exigency the Circuit Court might entertain jurisdiction, in favor of all citizens of other states, to determine and award their shares in the estate. Further than that it was not at liberty to go."

In the case of Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054, the Supreme Court held that:

"A court of equity will not entertain jurisdiction to set aside the granting of letters of administration upon a succession in Louisiana on the ground of fraud, and will not give relief by charging purchasers at a sale made by the administrator under order of the court, and those deriving title from them, as trustees in favor of alleged heirs or representatives of the deceased."

Referring to the case of Broderick's Will, 21 Wall. 503, 22 L. Ed. 599, the court said (138 U. S. 460, 11 Sup. Ct. 376, 34 L. Ed. 1054):

"With the single exception that that case was brought to set aside the probate of a will, and this was brought to set aside the granting of letters of administration upon a succession, the two cases are as much alike as two photographs of the same person, the lineaments of * * * fraud being more distinctly brought out in the bill in the Broderick Case than in the bill in this case. Both were bills in equity, brought by the alleged heirs at law of a decedent to set aside and annul a decree of a court of probate, and all the subsequent proceedings, including the order of sale and the sale itself. Both alleged fraud in the procurement of the respective decrees, and knowledge of the fraud by the defendants—actual knowledge in the Broderick Case, and constructive knowledge in this case. * * * We think the decision in that case is applicable to the whole of this case upon the question of fraud, and thus obviates the necessity of adverting any further to the question of the establishment of a trust, as against the defendant, in favor of the complainants."

In the case of Garzot v. De Rubio, 209 U. S. 283–302, 28 Sup. Ct. 548, 556 (52 L. Ed. 794), the Supreme Court said:

"But this does not tend in any way to establish that it was the purpose of Congress, in creating the District Court of the United States for Porto Rico, to endow that court with an authority, not possessed by the courts of the United States (Farrell v. O'Brien, 199 U. S. 89 [25 Sup. Ct. 727, 50 L. Ed. 101]) to exercise purely probate jurisdiction to administer and settle estates in disregard of the authority of the local court as created and defined by law."

In the case of Goodrich v. Ferris, 214 U. S. 71–80, 29 Sup. Ct. 580, 583 (53 L. Ed. 914), the Supreme Court said:

"Manifestly, that case (Roller v. Holly, 176 U. S. 398 [20 Sup. Ct. 410, 44 L. Ed. 520]) is not in any particular analogous to the one under consideration, which is a case involving the devolution and administration of the estate of a decedent, a subject peculiarly within state control. Case of Broderick's Will, 21 Wall. 503–519 [22 L. Ed. 599]."

These citations make it plain that, even in cases where the state court of proper probate jurisdiction has not acquired prior jurisdiction, the jurisdiction of a federal court in equity has well defined limitations. It cannot draw to itself the general administration of the estate of a decedent, nor can it adjudicate the claims of parties thereto, unless there is present the necessary diversity of citizenship and the requisite amount to confer jurisdiction. When the jurisdictional requirements are present, the court stops with the adjudication as between such of the parties as have the jurisdictional qualification. Having determined their claims to a share in the estate, the parties are remitted to enforce their claim to the state jurisdiction where the estate is being administered. So that in this case, if there had been no question of prior jurisdiction in the court of ordinary of Oglethorpe county, it would still not have followed that the District Court could have drawn to itself the full administration of the estate of the decedent, James M. Smith, as it attempted to do by the appointment of receivers of the assets of the estate, and the direction to the temporary administrators to surrender the assets in their hands to the receiver of the District Court. The bill also sought to enjoin the appointment of permanent administrators by the ordinary, and to require all persons having claims against or an interest in the estate of the decedent to propound their

claims in the District Court. The relief sought was the settlement of decedent's estate in the District Court, and the appointment of receivers was to effectuate that end. Our conclusion in this respect is that the jurisdiction of the District Court could have been properly invoked, even had the state court of ordinary not first acquired jurisdiction, but for two purposes: (a) To preserve the assets of the estate, pending administration in a state court of competent probate jurisdiction, when they were shown to be in danger of waste or dissipation; and (b) to adjudicate claims of creditors or next of kin or heirs to share in the estate, where the necessary parties were citizens of different states, and the amount involved conferred jurisdiction in the federal court.

[3] However, when the bill was filed in the District Court, the court of ordinary of Oglethorpe county had already taken jurisdiction of the administration of the estate of James M. Smith. The court of ordinary was a court of competent jurisdiction to administer the estates of decedents. It had jurisdiction of the estate of James M. Smith, who was a resident of and died in Oglethorpe county, leaving assets therein.

[4] We think the record shows that the court of ordinary was in the actual possession of the assets of the estate when the bill was filed, through its temporary administrators. That they were in actual possession is clear. It is claimed that, owing to irregularities and fraud in their appointment, they should not be considered officers of the court which appointed them, and hence that their possession was not its possession. It is claimed that to procure their appointment and qualification they misrepresented to the ordinary their status as creditors of the intestate and the amount of the personal assets of the estate. We do not think that such irregularities, if proven, would divest the temporary administrators of their official character in a collateral proceeding in a court of concurrent jurisdiction, though it might subject them to removal by the court of their appointment.

In the case of Simmons v. Saul, 138 U. S. 439–457, 11 Sup. Ct. 369, 375 (34 L. Ed. 1054), the Supreme Court, speaking approvingly of the case of Duson v. Dupre, 32 La. Ann. 896, in which the right of a personal representative to maintain a suit was collaterally denied by the trial court for irregularities in his appointment, said:

"The case was tried on those exceptions, and the district court held them sufficient, and thereupon dismissed the actions. Upon appeal, the Supreme Court [of Louisiana] reversed the judgment and held: 'In our opinion the district judge erred in allowing this collateral attack on the judgment of the probate court. The late parish court of St. Landry had probate jurisdiction, and was exclusively competent to grant and issue letters of administration in all successions properly opened in that court. Defendants contend that this succession was not properly opened in that court, for the reasons urged in their exceptions. This denial presents a question of fact, that the deceased was not a resident of this parish, and that, having left heirs who were residents of this state, his succession was not vacant, so as to necessitate or justify the appointment of a curator. These questions can be looked into and adjudicated upon only in a direct action before the same court, or before the tribunal now vested with original probate jurisdiction in the parish of St. Landry. No principle of our jurisprudence is more firmly established than the following: "Letters of administration make full proof of the party's capacity until they be revoked. They must have their effect, and the regularity of the proceedings on which they issue cannot be examined collaterally." This rule

was laid down in early days, * * * and has been sanctioned, confirmed, and consecrated by an unbroken line of decisions of this court down to the present day.' "

We think the District Court, while the temporary letters of administration were outstanding and unrevoked by the court granting them, should have recognized the official character of the temporary administrators, and that their possession of the assets of the estate of James M. Smith was by virtue of their office as temporary administrators, and hence was that of the court of ordinary. In the case of Byers v. McAuley, 149 U. S. 608, 615, 13 Sup. Ct. 906, 908 (37 L. Ed. 867), the Supreme Court said:

"An administrator appointed by a state court is an officer of that court; his possession of the decedent's property is the possession taken in obedience to the orders of that court; it is the possession of the court, and it is a possession which cannot be disturbed by any other court. Upon this proposition we have direct decisions of this court."

[5] Nor do we think that the fact that the administrators were acting under temporary letters, which might have been issued by the clerk, though they were not, makes them less the officers of the court granting the letters, or their possession of the assets of the estate they represented less than of the court appointing them.

[6] However, it is not necessary that the court of ordinary should have been in the actual possession of the res, when the bill was filed, to give it the prior right to possession of the res. It is enough that it first acquired jurisdiction of the administration of the estate of James M. Smith, and that the possession of the assets of the estate was necessary to its proper administration in the court of ordinary. This is the settled rule of the federal courts. Adams v. Mercantile Trust Co., 66 Fed. 617, 15 C. C. A. 1; Empire Trust Co. v. Brooks, 232 Fed. 641, 146 C. C. A. 567; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Farmers' Loan Co. v. Lake St. R. Co., 177 U. S. 51, 20 Sup. Ct. 564, 44 L. Ed. 667; Wabash R. R. Co. v. Adelbert College, 208 U. S. 38, 28 Sup. Ct. 182, 52 L. Ed. 379; Palmer v. Texas, 212 U. S. 118, 29 Sup. Ct. 230, 53 L. Ed. 435.

Citation had issued upon the application of L. K. Smith, N. D. Arnold, and A. C. Erwin for permanent letters of administration before the bill of complaint was filed in the District Court, and the hearing upon the citation and certain caveats, subsequently interposed to it, was then set in the court of ordinary. This gave the court of ordinary prior jurisdiction of the administration of the estate, without regard to the actual possession of the temporary administrators. That possession of the assets of the estate by the court of ordinary was necessary to its administration in that court goes without argument. Having first acquired jurisdiction of the res, and the possession of the res being essential to the exercise of its jurisdiction, the court of ordinary was entitled to such possession as against the District Court. With reference to the administration of estates of decedents, the court of ordinary was a court of competent general jurisdiction.

[7] It is said that, conceding the right of the court of ordinary to retain its prior jurisdiction of the administration of the estate and to

the possesssion of the assets thereof after the appointment of an administrator, yet the interposition of a court of equity was necessary, pending the granting of permanent letters, to preserve the assets from waste and dissipation, and to be surrendered to the personal representative when appointed. The jurisdiction of a court of equity to protect the assets of an estate from loss is settled. There are, however, two conditions to its exercise: The administration must be vacant, and the danger of loss imminent.

In the case of Underground Electric Railway Co. v. Owsley, 176 Fed. 26, 99 C. C. A. 500, the Court of Appeals for the Second Circuit held that:

"A Circuit Court of the United States, as a court of equity, has no jurisdiction of a purely probate proceeding, which is not a matter of equity cognizance, nor has it the power to undertake the general administration of the estate of a deceased person, but it may, as a court of equity, having the full jurisdiction of the English Courts of Chancery, as they existed at the time of the adoption of the Constitution, in a suit where it has jurisdiction of the parties, appoint a receiver of an estate pending the probate of a will, in the absence of the appointment of a custodian by the probate court, and this although proceedings for the probate of the will and the appointment of an executor are pending in such court, which have been delayed by reason of litigation between parties in interest."

In that case, no temporary administrators had been appointed in New York, where ancillary letters had been applied for, the primary administration pending in Illinois, though the New York statute authorized such appointment. Of that statute the court said (176 Fed. 38, 99 C. C. A. 512):

"In our opinion, the appointment of a temporary administrator under this statute would adequately protect the interest of the complainant and other creditors."

The court appointed a receiver to hold the assets until a temporary administrator was applied for and appointed by the Surrogate's Court, and then to turn the assets over to him; if none was appointed, then to hold the assets till the permanent letters issued and surrender them to the permanent administrator. Circuit Judge Coxe, dissenting, expressed the view that the pendency of the administration in the Surrogate's Court gave that court jurisdiction of the assets of the estate, and no receiver should for that reason have been appointed by the Circuit Court.

[8] The appellees contend that (a) the administration was vacant, and (b) the assets in danger of dissipation and loss.

(a) The contention in this respect is that the appointment of the temporary administrators was a nullity because of fraud in the representations made as to the qualifications of the applicants and the amount of personal property of the estate. At the time the receivers were appointed by the District Court, the temporary administrators were acting as such and in possession of the assets of the estate; they had then given bond adequate in amount and surety, and additional temporary administrators had been appointed, who were qualified to act. Under these circumstances, we do not think that the administration of the estate should have been treated as vacant, so as to justify the in-

terposition of a court of equity, through a receivership, for its protection. Until removed in a direct proceeding, in the court of their appointment, we think the temporary administrators were to be regarded as officers of that court, upon collateral attack.

[9] It is said, however, that the Georgia statute authorizing courts of ordinary to issue temporary letters of administration, as construed by the Georgia courts, confers such limited authority on temporary administrators as to make them inadequate to manage an estate like that in controversy. The statute states the purpose of the appointment to be "for the purpose of collecting and taking care of the effects of the deceased." It has been held that a temporary administrator has no power to continue the business of the intestate, though the permanent administrator is given that power. Irvine v. Wiley, Ordinary (Ga.) 90 S. E. 69. The record does not show the necessity for the continuance of any of intestate's businesses, except the conduct of his plantation. His other enterprises were not being conducted by intestate at the time of his death. His farming operations were conducted by tenants. Some latitude is to be allowed the temporary administrator. His general duty is to take care of and collect the effects of the deceased. He has the implied authority to do what is necessary to accomplish the duty imposed, and the extent of his authority will vary with the character of the estate. We think the powers conferred on temporary administrators should be held adequate to accomplish the purpose of their appointment, viz., the collection and taking care of the effects of the intestate, and in the usual and customary way. A receiver, appointed as a mere custodian, could do no more.

[10] (b) The appellees also contend that the record makes out a case of waste and dissipation of the estate, calling for the appointment of a receiver. The bill contains some general averments with relation to danger of loss and dissipation. When examined, the facts show no more than acts alleged to have been done in excess of the authority of temporary administrators in the management of the estate. There is no sufficient showing of a wasting or destruction of assets. At least two of the temporary administrators are men of property; they are all under a bond in the sufficient amount of $1,000,000, in addition to their personal responsibility. Any irregularities committed by them should be redressed by the court which appointed them. If waste and dissipation is ever a ground of interference by a court of equity, where the administration is not vacant, but subsisting, no such case is made out by the record here. It is also to be observed that while the superior court of Georgia, exercising chancery jurisdiction, is given superintending power over the court of ordinary in matters of the administration of estates, no such supervisory jurisdiction is vested in the federal courts. They are courts of concurrent, not of superior, jurisdiction to the state courts of ordinary. The superior court might, therefore, well interfere in cases where a federal court would not.

[11, 12] The appellees also contend that the District Court had jurisdiction to entertain the bill for the purpose of setting aside a judgment of the state court, obtained by fraud of the parties, citing Simon

v. Southern Ry. Co., 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492. Such relief can only be had, as against a final judgment of the state court, when there is an attempt to enforce it. The federal courts have no authority to stay proceedings of state courts, while they are in progress and before they are concluded by final judgment or decree, except in aid of bankruptcy proceedings or of their own previously acquired jurisdiction. In the case of Simmons v. Saul, 138 U. S. 439, 11 Sup. Ct. 369, 34 L. Ed. 1054, the Supreme Court held that:

"A court of equity will not entertain jurisdiction to set aside the granting of letters of administration upon a succession in Louisiana on the ground of fraud."

Much less will it arrest the state court in proceeding to grant permanent letters of administration because of a possibility that the state court will not do justice. The presumption is just the other way. Nor will it move to set aside the grant of mere temporary letters of administration because of alleged irregularity or fraud in their procurement, and appoint receivers to supplant the temporary administrators. Alleged irregularities or fraud in the appointment of receivers by a federal court would be no ground of interposition by a state court of equity, where the federal court had first obtained jurisdiction.

For these reasons, we think the District Court erred in appointing receivers of the estate of the decedent, and in enjoining and directing the temporary administrators to surrender the assets of the estate in their hands as administrators to the receivers.

The District Court, in a proper case, under the bill filed, if the necessary parties can be brought into court without defeating its jurisdiction by reason of there being no diversity of citizenship, has jurisdiction to entertain and determine the respective rights of citizens of different states, claiming an interest in the estate of the intestate. Whether, even for that purpose, the bill can be maintained successfully, in the absence of the permanent administrators as parties defendant to represent the estate, and, if not, whether they can be made parties to the pending bill, upon their appointment are questions that may require consideration. For these reasons, we will not direct the dismissal of the bill, but leave counsel to take such further steps, if any, as they may be advised.

The orders appealed from will be reversed, and the cause remanded for further proceeding not inconsistent with this opinion.

In re MULLINGS CLOTHING CO.

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

No. 70.

1. CORPORATIONS ⇐617(2)—LANDLORD AND TENANT ⇐49(1)—DISSOLUTION—EFFECT.

Where a corporation, after entering into a contract of lease, was dissolved before the commencement of the term, such dissolution did not terminate the lease and exonerate the corporation from liability for

rent; the dissolution being in the nature of an anticipatory breach, warranting the lessor in suing for damages.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2449; Dec. Dig. ⊂⊃617(2); Landlord and Tenant, Cent. Dig. § 117; Dec. Dig. ⊂⊃49(1).]

2. LANDLORD AND TENANT ⊂⊃109(1)—SURRENDER—NATURE OF SURRENDER.
Surrender may be by express agreement of the parties or by operation of law.

[Ed. Note.—For other cases, see Landlord and Tenant, Dec. Dig. ⊂⊃109(1).]

3. RECEIVERS ⊂⊃91—LEASES—AUTHORITY OF RECEIVER.
Upon insolvency of a corporation and appointment of a receiver, the latter may reject a lease previously entered into by the corporation, and a protest to the receiver is unnecessary to protect the lessor's right of action for breach.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 167, 168; Dec. Dig. ⊂⊃91.]

4. LANDLORD AND TENANT ⊂⊃109(4)—SURRENDER—OPERATION OF LAW.
After a corporation entered into a contract of lease, the directors voted for dissolution, and on petition therefor, and for the winding up of the corporation, a receiver was appointed by the state court. The receiver repudiated the lease, and, after paying the rent due for the last month under the old tenancy, he delivered the keys to the purchaser of the corporate property, which remained in the demised premises. The purchaser retained the premises for one month, paying the old rental, and then vacated the same, delivering the keys to the lessor, who entered and took possession. Thereafter the corporation was adjudicated a bankrupt, whereupon the lessor presented a claim in bankruptcy for breach of contract of lease. The claim was disallowed by the referee, a petition to liquidate the same being dismissed, and a supplemental petition, setting forth the loss on a subsequent lease contract for the same term entered into by the lessor, was also dismissed. *Held* that, as the lessor was bound to minimize the damages, and as the question of surrender by operation of law usually depends on the intention of the parties, there was no surrender by operation of law, for, as such protest to the receiver is unnecessary, it would be useless to protest to the corporation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. § 364; Dec. Dig. ⊂⊃109(4).]

5. DAMAGES ⊂⊃62(4)—BREACH OF TENANCY—MITIGATION OF DAMAGES.
Where a tenant breaches an executory contract of lease, the lessor should make efforts to minimize the damage, and may relet the property for a less amount.

[Ed. Note.—For other cases, see Damages, Cent. Dig. §§ 128–131; Dec. Dig. ⊂⊃62(4).]

6. BANKRUPTCY ⊂⊃20(1)—JURISDICTION OF FEDERAL COURTS.
The bankruptcy law (Act July 1, 1898, c. 541, 30 Stat. 544) is paramount, and the jurisdiction of the federal courts in bankruptcy is exclusive, supplanting all proceedings under state insolvency laws.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃20(1); Courts, Cent. Dig. § 1331.]

7. BANKRUPTCY ⊂⊃20(2)—TRUSTEE—POWERS.
Where, after a receiver had been appointed in the state court to wind up the affairs of an insolvent corporation, on petition for dissolution, the corporation was adjudged a bankrupt, and a trustee was appointed, the trustee is entitled to the assets in the hands of the receiver, and is not

bound by the receiver's repudiation of a lease entered into by the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 23; Dec. Dig. ⟸20(2).]

8. BANKRUPTCY ⟸314(1)—CLAIMS—CONTINGENT CLAIM.

Contingent claims, which are those that at the time of the filing of the petition in bankruptcy it is uncertain whether the bankrupt will ever become liable to pay, are not provable under the Bankruptcy Act of 1898.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 469, 471, 478, 483, 485; Dec. Dig. ⟸314(1).]

9. BANKRUPTCY ⟸318(2)—CLAIMS—PROVABLE CLAIMS—BREACH OF CONTRACT OF LEASE.

By reason of dissolution a corporation breached an executory contract for the lease of premises and thereafter was adjudged a bankrupt. Bankr. Act July 1, 1898, c. 541, § 63b, 30 Stat. 563 (Comp. St. 1913, § 9647), declares that unliquidated claims against a bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate. *Held* that, notwithstanding a covenant to pay rent creates no debt until the time for payment arrives, yet as the corporation was guilty of an anticipatory breach, rendering it liable in damages, a claim therefor might be proven against the estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 482; Dec. Dig. ⟸318(2).]

10. BANKRUPTCY ⟸314(2)—CLAIMS PROVABLE—RENT.

A covenant to pay rent creates no debt until the time stipulated for payment arrives, so that rent accruing under a lease after filing of a petition in bankruptcy, ordinarily, is not provable against the estate as a fixed liability owing at the time of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 470; Dec. Dig. ⟸314(2).]

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

In the matter of the bankruptcy of the Mullings Clothing Company. From an order (230 Fed. 681) dismissing the petition of John B. Mullings for a review of the rulings of the referee, petitioner appeals. Order vacated and set aside, with directions.

This cause comes here on appeal from a decree of the United States District Court for the District of Connecticut. The Mullings Clothing Company is a Connecticut corporation, and on December 30, 1914, filed a voluntary petition in bankruptcy, and on the same day was adjudicated a bankrupt. A trustee of the estate was elected and qualified, filing a bond in the sum of $40,000. John B. Mullings, as a creditor of the Mullings Clothing Company, presented a claim against the bankrupt's estate in the sum of $20,000 for breach of contract of lease. Objection to the allowance of the claim was made by the trustee of the bankrupt and by some of the creditors, and the objection was sustained by the referee, who dismissed the petitions to liquidate the claim. A petition to review was heard in the District Court, and an order was entered and the claim disallowed, and the petition for liquidation was dismissed.

Lawrence L. Lewis, of Waterbury, Conn., for appellant.

Terrence F. Carmody, William J. Larkin, Jr., and Walter E. Monagan, all of Waterbury, Conn., for appellee.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The question for this court to determine is whether a lessor has a provable claim in bankruptcy when the corporation to which he has leased votes to wind up and dissolve and secures the appointment of a receiver in proceedings for dissolution who has repudiated the lease prior to the beginning of the term and prior to the proceedings in bankruptcy.

The claimant, John B. Mullings, was the owner of a building in the city of Waterbury, in the state of Connecticut. On July 25, 1913, Mullings entered into a contract of lease with the Mullings Clothing Company by the terms of which the latter leased a portion of the building for the term of five years from the 1st day of October, 1914, for an annual rental of $12,000, which was payable in monthly installments of $1,000 each month. At the time of the execution of this lease the Clothing Company was in possession of the premises under a prior lease, which was to expire on October 1, 1914, and for which a rental of $800 a month was agreed to be paid.

On August 19, 1914, the directors of the Clothing Company voted to wind up its affairs, and two days later all the stockholders of the company petitioned the state court in Connecticut to appoint a receiver, as authorized under the statutes of the state, and prayed for the dissolution and winding up of the corporation, and such a receiver was appointed. The receiver, acting under instructions of the court which appointed him, repudiated the lease, which was to begin October 1, 1914. The lease provided that, in case the rent should remain unpaid for 10 days after the same became payable under the terms of the lease, the lease would thereby terminate, and the lessor might then recover possession in the manner prescribed by the Connecticut statute relative to summary process, and the necessity of demand on the part of the lessor for the rent and for re-entry for condition broken, as at common law, as well as to that of the actual notice to quit as required by the statute, were expressly waived by the lessee.

The receiver continued in occupation of the premises until the end of October, 1914, and paid $800 rent for that month, which was accepted by the landlord as payment in full for that month. The receiver then turned over the premises to a Mr. James, who had purchased from him the stock and fixtures of the company, and James occupied during the month of November, and paid the landlord $800 rent for the month. The keys were then turned in to the landlord, who entered and took possession. A new tenant was found for the premises, and the landlord executed a lease to him on January 28, 1915. This lease was to begin on March 1, 1915, and to run for a term of five years at an annual rental of $9,000. The rental thus obtained was $3,000 a year less than that which was to be paid under the repudiated lease.

At the first meeting of creditors after the Clothing Company was adjudicated a bankrupt, the lessor offered for proof his claim against the estate in the sum of $20,000 for breach of the contract of lease; the premises at that time not having been relet. It was objected to on the ground that the lease had been rejected by the receiver and that the claim was unliquidated. The referee disallowed the claim, on the

ground that it was for rent to accrue, and therefore a contingent claim, and on the ground that there had been a surrender. Subsequently, and after the lessor had re-leased the premises for the balance of the term for $3,000 a year less rent, a supplemental petition was filed, by the permission of the referee, stating the fact of the re-lease, and asking damages in the sum of $15,000, that amount representing the difference between the rental as fixed by the original lease and the amount which the lessor was able to secure in re-leasing. The District Judge has sustained the rulings of the referee, and has dismissed both petitions for the liquidation of the claim.

[1] The dissolution of a corporation does not terminate a lease under the modern law. In People v. National Trust Company, 82 N. Y. 283 (1880), the court, referring to the claim that the dissolution of a corporation terminated the lease and that the covenant to pay rent ceased to be obligatory, said:

"We do not regard the dissolution as having any such effect. Under the statutes of this state, on the dissolution of a corporation, its assets become a trust fund for the payment of its debts, and these include debts to mature as well as accrued indebtedness, and all engagements entered into by the corporation, which have not been fully satisfied or canceled. These cannot be canceled without the consent of the party holding them, and receivers of dissolved corporations are authorized to retain out of their assets a sufficient amount to cancel and discharge such open and subsisting engagements."

And in 10 Cyc. 1313, speaking of the duty of a receiver of a dissolved corporation, it is said:

"He is not therefore bound, if to do so will be prejudicial to the interests of the creditors, to comply with the covenants of the lease made to the corporation by paying rent in full; but he may allow the lease to be forfeited, and allow the lessor to intervene pro interesse suo to recover his distributive share of any rents accruing prior to the date of the forfeiture."

In Schleider v. Dielman, 44 La. Ann. 462, 10 South. 934 (1892), judgment was claimed against defendants as liquidators of the Louisiana Brewing Company for the sum of $97,209.18, which it was claimed should be paid out of the assets in the hands of the liquidators. It appears that the plaintiff had a contract with the Louisiana Brewing Company, whereby the latter agreed to furnish him with all the beer he required for bottling purposes, and to furnish bottling beer to no one else for and during a term of five years, with the right in him at his option to continue the contract in force for an additional period of five years; but prior to the expiration of the term of five years the corporation by a vote of its stockholders resolved to dissolve, and its affairs were placed in the hands of the defendants as liquidators. The plaintiff claimed the obligation of the contract remained unbroken, notwithstanding the dissolution of the corporation. In the course of its opinion the Supreme Court said:

"It cannot be doubted that the liquidation of a corporation has the immediate effect of terminating all of its purely personal obligations, and of relegating the beneficiaries thereunder to an action in damages in keeping with its covenants."

For reasons, however, not material to the case before us, the judgment of the court below was reversed.

In Roehm v. Horst, 178 U. S. 1, 20 Sup. Ct. 780, 44 L. Ed. 953 (1899), the court held that where a contract is renounced before performance is due, and the renunciation goes to the whole contract and is absolute and unequivocal, the injured party may treat the breach as complete and bring his action at once. The year before this decision was rendered this court had announced the same principle in Marks v. Van Eeghen, 85 Fed. 853, 30 C. C. A. 208 (1898), in an opinion written by Judge Wallace. The doctrine had been announced in England in 1853 in Hochester v. De la Tour, 2 El. & Bl. 678. And before its adoption by the Supreme Court of the United States it had been almost universally accepted by the courts of this country.

In voting to wind up, and in taking steps to dissolve and securing the appointment of a receiver in the state court for that purpose, the corporation lessee renounced the lease and at the same time disabled itself from performing it. It put it out of its power to occupy before the time arrived for the new term to begin. And the law is well settled that, where a party to an executory contract puts it out of his own power to perform it, there is an anticipatory breach, which gives the other party an immediate right of action for the damages. Black on Rescission and Cancellation, volume 1, § 210 (Ed. 1916), and the cases there cited. Hence in Lovell v. St. Louis Life Insurance Co., 111 U. S. 264, 4 Sup. Ct. 390, 28 L. Ed. 423, the Supreme Court held that, where a life insurance company had terminated its business and transferred its assets and policies to another company, this in itself authorized the insured to treat the contract as at an end, and to sue to recover back the premiums already paid, although the time for the performance of the obligation of the company had not arrived. And Mr. Justice Bradley, speaking for the court, said:

"Where one party to an executory contract prevents the performance of it, or puts it out of his own power to perform it, the other party may regard it as terminated and demand whatever damage he has sustained thereby."

In Pennsylvania Steel Co. v. New York City Ry. Co., 198 Fed. 721, 744, 117 C. C. A. 503 (1912), this court held that, where a party to a contract puts it out of his power to perform it, there is an anticipatory breach, which gives the other party an immediate right of action for the damages which he sustains thereby, and that where one party is a corporation, its insolvency and the appointment of a receiver, who refuses to further perform, is such a disablement, and the breach dates from the receiver's appointment.

In the case at bar when the directors voted to dissolve the corporation, and all the stockholders united in asking the state court to appoint a receiver under the statute to wind up its affairs, and the receiver was appointed by the court for that purpose, and he repudiated and abandoned the lease, there was in all this such a repudiation of the lease as amounted to an anticipatory breach, and such a putting it beyond the power of the corporation to perform its agreement as gave to this plaintiff an immediate right of action for damages. As this court said in Pennsylvania Steel Co. v. New York City Ry. Co., supra:

"The situation is the equivalent either of an out and out repudiation or of a complete disablement, and in either case the contract is broken."

In such a case the lessor has a right to sue for the anticipatory breach, and a right to be paid his damages out of the assets in the hands of the liquidating receiver. If that were not true, he would be remediless; the corporation being insolvent and determined to cease business and go out of existence.

In Kalkoff v. Nelson, 60 Minn. 284, 62 N. W. 332 (1895), the corporation had entered into a lease for a term of 10 years at a reserved rent of $6,000 a year. Proceedings were instituted to dissolve the corporation, which had become insolvent, and a receiver was appointed, and the corporation dissolved. The receiver repudiated the lease, which had about 7 years still to run. The lessors claimed the right to damages growing out of the abandonment of the lease and that their claim was provable against the assets of the corporation. This was opposed on the ground that it was contingent and unliquidated. The court held that the lessors had a right to prove their claim and to share in the distribution of the assets. The court said:

"Now, the corporation, by its voluntary dissolution, disabled itself from ever performing the obligations of the covenant in the lease to pay the stipulated rent; and, the receiver having declined to accept the benefits of the lease, abandoned it as an asset of the corporation, and vacated the demised premises, the breach of the contract to pay rent for the unexpired term became total and final. Thereupon a cause of action immediately accrued to the appellants for the recovery of their damages, present and prospective, for the loss of their contract. * * * In the case at bar the corporation has, by its voluntary dissolution, practically committed suicide, and when its estate is administered it ceases to exist. Therefore, if the corporation cannot be held liable for a total breach of its executory contracts, the law has armed it, and all other domestic corporations, with the power to repudiate all the obligations of their executory contracts, by simply instituting proceedings by its stockholders for a voluntary dissolution. It is clear that the corporation must be held liable in damages for this total breach of its executory contract to pay the rent reserved in the lease for the full term. It is true the damages are unliquidated, and that it cannot be shown with absolute certainty that the appellants, except for the breach of the contract by the corporation, would have completely executed the contract on their part, so as to become entitled to its full benefits; but the same difficulties are presented in a greater or less degree in all actions for the recovery of damages for the breach of executory contracts. Any difficulties, real or supposed, in ascertaining the damages in this case, cannot defeat the action."

In People v. St. Nicholas Bank, 151 N. Y. 592, 45 N. E. 1129 (1897) a corporation leased for a term of 5 years at a rental of $12,000 a year. The corporation during the term became insolvent, and proceedings were instituted for its dissolution, and a receiver was appointed. Shortly after his appointment he vacated the premises, whereupon the lessor leased to a third party at a rental of $9,000 a year for the balance of the term. The lessor then presented a claim to the receiver for the difference between the amount of rental reserved under the original lease and the amount reserved in the subletting, which was $9,000. The claim was rejected by the receiver, and this the Court of Appeals held was error. The court declared that the lessor's claim "was definite and without any element of contingency."

In McGraw v. Union Trust Co., 135 Mich. 609, 98 N. W. 390 (1904), a bank had made a lease for 5 years, and before the expira-

tion of the term the premises became vacant because of the insolvency of the bank and the appointment of a receiver. The question was whether the lessors were entitled to have their claim for damages arising from the breach of the covenant allowed by the receiver as a claim against the bank's estate. It was claimed that rent which became due after the appointment of the receiver, he having repudiated the lease, did not constitute a claim within the general banking act. The lessors insisted that the claim was not contingent, but absolute, and therefore provable against the assets. The court adopted that view of the matter and said:

"The bank had the right to make the lease when it did, and had it continued in business and abandoned the premises, and the lessor, in accordance with the terms of the lease, had re-entered and relet the premises at a loss, there could be no question but the lessor would have a remedy over against the bank. The following cases—and we think they are in accord with the weight of authorities—recognize the same right in the lessor where the premises are vacated because of the insolvency of the corporation and the appointment of a receiver"—citing a number of cases.

[2] From what has been said it is evident that the lessor had a claim for breach of the lease, which could be enforced against the assets in the hands of the receiver, unless he had lost his right by an acceptance of a surrender of the premises, which extinguished any liability for rent accruing thereafter. Surrender may be by express agreement of the parties or by operation of law. That there was no surrender by express agreement is certain. Was there any by operation of law?

[3] The District Judge was of the opinion that the lessor accepted the surrender of the premises, and he says that the lessor had not protested the repudiation of the lease. But there is nothing in the record which shows that he did not protest. It does not appear whether he protested or did not protest. As the law gives the receiver the legal right to reject the lease, there was no reason why the lessor should protest against the receiver's action. The action of the corporation in voting to go out of business and to dissolve amounted to an abandonment of the lease, subject to the right of the receiver to elect to adopt it, should such a course seem desirable. We do not understand that under such circumstances the lessor is any more bound to make a protest to the corporation than he is bound to make it to the receiver.

[4] In cases of surrender by operation of law the rule is that whether or not a surrender had been effected ordinarily depends upon the intention of the parties. 24 Cyc. 1162; Miller v. Dennis, 68 N. J. Law, 320, 53 Atl. 394; Schulenburg v. Uffelmann, 106 Mich. 453, 64 N. W. 460; Oldewurtel v. Wiesenfeld, 97 Md. 165, 54 Atl. 969. There is nothing in this case indicating that either party understood that the lessor was releasing a claim for $20,000 when he took the keys after the corporation had voted to go out of business and the receiver had repudiated the lease, and it is not reasonable to suppose that he intended to do it, or that it was supposed he intended to do it. The mere acceptance of the keys is not in itself sufficient to show an acceptance of a surrender. Stern v. Thayer, 56 Minn. 93, 57 N.

W. 329; Lucy v. Wilkins, 33 Minn. 441, 23 N. W. 861; Bowen v. Clarke, 22 Or. 566, 30 Pac. 430, 29 Am. St. Rep. 625; Sully v. Schmidt (Super. Ct. Buff.) 11 N. Y. Supp. 694, reversed on other grounds in 147 N. Y. 248, 41 N. E. 514, 49 Am. St. Rep. 659. It has been held, too, that an attempt to relet after abandonment does not in itself show an acceptance of a surrender. Castler v. Henderson, 2 Q. B. D. 575; Redpath v. Roberts, 3 Esp. 225; Joslin v. McLean, 99 Mich. 480, 58 N. W. 467; Gaines v. McAdam, 79 Ill. App. 201. And the doctrine has been announced in a number of cases that an actual reletting of the premises does not show an acceptance of a surrender, and does not release a tenant from his liability. Marshall v. John Grosse Clothing Co., 184 Ill. 421, 56 N. E. 807, 75 Am. St. Rep. 181; Meyer v. Smith, 33 Ark. 627; Miller v. Benton, 55 Conn. 529, 13 Atl. 678; Crown Manufacturing Co. v. Gay, 9 Ohio Decis. (Reprint) 420.

[5] In a number of cases, it is true, it has been held that under certain circumstances a reletting shows an acceptance of the surrender. Gray v. Kaufman, etc., Co., 162 N. Y. 388, 56 N. E. 903, 49 L. R. A. 580, 76 Am. St. Rep. 327; Buckingham Apartment House Co. v. Dafoe, 78 Minn. 268, 80 N. W. 974; Pelton v. Place, 71 Vt. 430, 46 Atl. 63. But, whatever may be the general rule as to the effect of retaining the keys and reletting the premises without making objection, we are satisfied that under the circumstances of this case it did not as a matter of law have the effect of releasing the lessee from its liability for the damages caused by the breach. When a corporation votes to cease business, and institutes proceedings in the courts for its dissolution, and is in default on the rent under a lease which provides that, if the rent remains unpaid for 10 days after the same becomes payable, the lease would thereby terminate and the lessor might re-enter for condition broken as at common law, and thereafter the keys are left with the lessor, and he relets the premises for the balance of the term, these facts, without more, do not show an acceptance of the surrender and a release of the lessee from the obligation to make good whatever loss results from the breach of the lease. The landlord was in duty bound to make reasonable effort to mitigate the damages arising from the breach and this was what he did, and all that he did, in reletting the premises.

[6] But, as before noted, while the winding up proceedings were in the state court, the corporation filed its voluntary petition in bankruptcy. This makes it necessary to consider whether the lessor had the right to prove his claim in bankruptcy.

[7] The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy is exclusive. In re Watts & Sachs, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933 (1903). The appointment of the trustee superseded the jurisdiction of the state court, and the trustee was entitled to the assets in the hands of the receiver and took the property of the bankrupt. That he was not bound by the repudiation of the lease by the Connecticut receiver is clear. He was free to adopt or repudiate the lease within a reasonable time as he might deem for the best interest of the estate. He did not see fit to adopt

it and expressly repudiated it. The breach of the contract remained as before, and the landlord still had his right of action. Was it a provable claim in bankruptcy? The District Court, as already stated, thought not because it was a contingent claim.

[8, 9] The Bankruptcy Act of Aug. 19, 1841 (5 Stat. 440, c. 9), and that of March 2, 1867 (14 Stat. 517, c. 176), provided for the allowance of contingent claims. The present act, however, makes no provision for the proof of such claims, and it is well understood that they are not provable. We have no doubt that, while in this case the lessor's claim was unliquidated at the time the petition in bankruptcy was filed, it was not contingent. The cases already discussed show that it was not contingent. A contingent claim is one as to which it remains uncertain, at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it. If it is certain that he is liable to pay it, although it may be uncertain how much he will have to pay, the claim is unliquidated, but it is not contingent. And if one party to an executory contract renounces it without cause, or disables himself from performing it, the other party may consider the contract as broken and bring an action immediately to recover the damages. The liability in such cases is therefore not contingent, but absolutely fixed.

The Bankruptcy Act in section 63a specifies the debts which may be proved and allowed against the bankrupt's estate. There are five classes of debts so specified. We are not now concerned with any of them except the fourth, which reads:

"Those founded upon an open account, or upon a contract express or implied."

It is true that section 63b provides that:

"Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

This, however, relates merely to procedure, and does not define an additional class of debts which are provable. In Dunbar v. Dunbar, 190 U. S. 340, 350, 23 Sup. Ct. 757, 761 (47 L. Ed. 1084) (1903) the Supreme Court declared that:

"That paragraph * * * adds nothing to the class of debts which might be proved under paragraph 'a' of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of section 63a, to be liquidated as the court should direct."

Is the claim which the landlord is seeking to assert one which arises upon a contract? We have no doubt that it is. A claim for damages for the breach of an executory contract is a claim "founded upon a contract," within the meaning of the statute, and is provable in bankruptcy. This court so held in Re Frederick L. Grant Shoe Co., 130 Fed. 881, 66 C. C. A. 78 (1904), and in Re Stern, 116 Fed. 604, 54 C. C. A. 60 (1902). A claim for damages for the breach of an executory contract of lease, where the lessee is a corporation and has voted to wind up and its stockholders have applied to the court for the appointment of a receiver to wind up its affairs and dissolve the corporation, is, in our opinion, a claim founded upon a contract and prov-

able in bankruptcy. The provable debts are those which existed at the time of the filing of the petition in bankruptcy. Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664 (1913). In this case the obligation incurred by the repudiation of the lease existed at the time of the filing of the petition.

[10] We do not overlook the doctrine that a covenant to pay rent creates no debt until the time stipulated for the payment arrives, and therefore that rent accruing under a lease after the filing of a petition in bankruptcy against the lessee is not provable against his estate as a fixed liability absolutely owing at the time of the filing of the petition. Such a claim we have held to be contingent, and not provable in bankruptcy. That doctrine was applied by this court in Re Roth & Appel, 181 Fed. 67, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270 (1910), and we have no doubt that it was correctly applied. But that doctrine is not at all relevant to the facts of this case. This is an action for breach of contract, occasioned by the steps taken to wind up and dissolve a corporation, which breach occurred prior to the bankruptcy. It has no analogy to a case of ordinary bankruptcy of an insolvent tenant. The filing of the petition in bankruptcy in such a case does not terminate the relation of landlord and tenant, but the tenant remains liable for the future rent as it accrues. It does not end the capacity of the tenant to engage in future business and to acquire other assets which can be reached by the lessee in subsequent proceedings for the payment of the rent which subsequently accrues. It does not involve an abandonment of the lease, and does not disable the tenant from afterwards performing its covenants.

The order dismissing the petition for liquidation of claim, as supplemented and amended, is vacated and set aside, with directions to reinstate the petition, and to take such further steps as may be necessary in accordance with this opinion.

LOUIE DAI v. UNITED STATES.

(Circuit Court of Appeals, Third Circuit. December 23, 1916.)

No. 2146.

1. ALIENS ⟸32(8)—EXCLUSION OF CHINESE—DEPORTATION PROCEEDINGS—EVIDENCE.

In proceedings to deport a Chinese person, evidence *held* insufficient to show that defendant had been recently smuggled into the United States, notwithstanding his contradictory statement that a Canadian certificate, showing his recent arrival there, was his.

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

2. ALIENS ⟸32(8)—EXCLUSION OF CHINESE—BURDEN OF PROOF—MERCANTILE STATUS—"SATISFACTORY EVIDENCE."

Under Chinese Exclusion Act May 5, 1892, c. 60, § 3, 27 Stat. 25 (Comp. St. 1913, § 4317), providing that any Chinese person, or persons of Chinese descent, shall be adjudged to be unlawfully within the United States, unless he shall establish by affirmative proof to the satisfaction of the judge

or commissioner his right to remain, when construed in the light of the intent manifested by the Chinese exclusion legislation, one claiming to be a merchant must prove that fact, not merely prima facie, but beyond a reasonable doubt; "satisfactory evidence" being that which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt.

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

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

3. ALIENS ⊂⊃21—EXCLUSION OF CHINESE—STATUTE—MERCHANTS.

The Chinese Exclusion Act, though not excluding merchants, embraces all Chinese within its terms, and imposes on all, including merchants, certain requirements as a condition to the privilege of remaining in this country.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 74; Dec. Dig. ⊂⊃21.]

4. ALIENS ⊂⊃23(2)—EXCLUSION OF CHINESE—MERCHANT—CHANGE OF STATUS.

A Chinese person, who was a merchant during the period of registration, does not lose his right to remain in the country by thereafter becoming a laborer.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⊂⊃23(2).]

5. ALIENS ⊂⊃32(8)—EXCLUSION OF CHINESE—EVIDENCE—MERCHANT.

In proceedings for the deportation of a Chinese, who was a laborer when he was arrested, evidence *held* to show, notwithstanding the finding of the commissioner and of the lower court to the contrary, that he was a merchant during the registration period.

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

6. ALIENS ⊂⊃32(8)—EXCLUSION OF CHINESE—EVIDENCE—WEIGHT.

The language of the Chinese Exclusion Act, prescribing the character of the testimony required of defendant in deportation proceedings, does not authorize a judicial officer arbitrarily to disregard it; but it must be weighed, accepted, reconciled, or rejected, like other testimony.

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

7. ALIENS ⊂⊃32(12, 13)—EXCLUSION OF CHINESE—DEPORTATION PROCEEDINGS —REVIEW—FINDINGS OF FACT.

A finding of the commissioner and the District Court against the claim of a Chinese person that he was a merchant can be inquired into and reversed by the appellate court, though that court will be very slow in disturbing such a finding.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 95; Dec. Dig. ⊂⊃32(12, 13).]

8. ALIENS ⊂⊃32(6)—EXCLUSION OF CHINESE—ADMISSIBILITY OF EVIDENCE— TESTIMONY OF CHINESE.

The provision of Chinese Exclusion Act May 5, 1892, § 6, as amended by Act Nov. 3, 1893, c. 14, § 1, 28 Stat. 7 (Comp. St. 1913, § 4320), relating to a Chinese laborer who fails to produce his certificate of registration, which requires him to prove his residence by at least one credible witness other than Chinese, does not extend to section 3 (section 4317), relating to proof by other Chinese of their right to remain; and one claiming to have been a merchant during the registration period may prove that fact by Chinese witnesses.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 94; Dec. Dig. ⊂⊃32(6).]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Proceeding by the United States against Louie Dai, alias Mar Ginn, for his deportation as a Chinese laborer unlawfully within the United States. From an order of deportation, defendant appeals. Reversed.

James Mercer Davis, of Camden, N. J., for appellant.

Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. This is an appeal from an order of deportation. The appellant (defendant below) was charged with being a Chinese laborer unlawfully within the United States, in violation of the Chinese Exclusion Act. 27 Stat. 25; 28 Stat. 7. At the hearing he admitted that when arrested he was a laborer, but offered evidence tending to show that he came to this country in 1890; that then and throughout the registration period following, he was a merchant; that subsequently he became a laborer, and therefore was lawfully in this country. The government rested its case (1) upon evidence that the defendant was smuggled into the country in 1908; and, failing in that, (2) upon the ground that the defendant had failed to establish his right to remain in the country by affirmatively and satisfactorily proving his mercantile status.

[1] It was testified that the defendant's business name is Louie Tai. When arrested, there was found in his house a head tax certificate, issued by the Dominion of Canada, at Vancouver, on April 2, 1908, to one Louie Dai. The government maintained that the certificate identified the defendant and proved that at or subsequently to its date, he had been smuggled into the United States.

The defendant met the inference of the government's evidence of smuggling, by producing four white witnesses and one Chinese witness, who testified that they had known him as a resident of Lansdowne, Pennsylvania, engaged in the laundry business, long before the date of the head tax certificate and continuously throughout periods beginning respectively in 1901, 1902, 1903 and 1904.

In reply, the government introduced statements of the defendant made when arrested, that he arrived in Vancouver in 1908, crossed into the United States, and that the head tax certificate was his. These admissions are diametrically opposed to the defendant's testimony given before the Commissioner, and would end the case, were it not for the positive and wholly convincing testimony of the four white witnesses to the effect that the defendant had been a laundryman at Lansdowne, Pennsylvania, for a period beginning long before the date of the certificate. The testimony of these witnesses is of a character that simply compels belief. The admissions of the defendant, in opposition to their testimony and in conflict with his own subsequent testimony, are incomprehensible, except that such conflict quite customarily occurs in cases of this character and is some-

times properly explained, by the theory that the defendant, frightened by arrest and answering through an interpreter, does not wholly understand the question, or does not tell the exact truth. We cannot allow these admissions, damaging as they are upon their face, to overcome the uncontroverted and very convincing testimony of five unimpeached witnesses to the contrary. We are therefore of opinion, as evidently was the District Court, that the government had failed to sustain its contention that the defendant had been smuggled into the country, and that the case resolved itself solely into an issue of the defendant's status at the time he arrived here.

Upon this issue the defendant testified, that before leaving China in 1890, he procured a "merchant's certificate," and that upon arriving in this country he went into partnership with his uncle in the grocery business in San Francisco; that he continued in that business until 1895, when, involving the partnership by gambling, he ran away and left his certificate with his uncle; that his uncle has since died and the certificate has disappeared. The defendant's testimony was supported by that of two Chinese witnesses. One was a Chinese doctor who spent six months of 1891 in San Francisco settling the affairs of a deceased relative, to whom the uncle of the defendant was indebted. He testified that his business with the defendant's uncle repeatedly brought him in contact with the defendant and that the defendant was in partnership in the grocery business with his uncle in San Francisco. The other Chinese witness testified that he was employed in a store in San Francisco just around the corner from the place where the defendant conducted the grocery business. He could not say that the defendant was in partnership with the uncle, but knew that the defendant was working in the store.

Opposed to this, the government produced only informal testimony, that is, a letter of the American Consul General at Canton, China, stating that in the somewhat uncertain records kept by his office in 1890, there is no entry that a "passport" in the nature of a merchant's certificate of the defendant was viséed at that office or fees received therefor; and a letter of the Commissioner of Immigration at San Francisco to the effect that his records fail to disclose the defendant's arrival at San Francisco at the time he stated. The government thereafter relied mainly upon the failure of the defendant's testimony to sufficiently establish his right lawfully to remain in the country.

While the question of the defendant's status is one solely of fact, two questions of law are raised concerning the evidence required by the statute to establish the fact. These are: (1) On whom is the burden of proving that the defendant was a merchant during the registration period? and (2) by the testimony of what class of witnesses may that fact be established?

[2] Upon the first question the defendant maintains that all that is required of him is some proof that he was a merchant during the registration period; that having no statutory presumption to overcome, as in the case of a laborer failing to produce a certificate of residence, that proof may be merely prima facie, and that such prima

facie proof is sufficient to establish his right to remain in the country until the government, like any public prosecutor, proves the contrary by evidence beyond a reasonable doubt. We do not believe this is a correct statement of the rule.

An inquiry into the scheme of the Chinese Exclusion Act discloses what the Congress intended was the restriction of Chinese labor in this country by the exclusion of Chinese laborers; that in carrying out this purpose, the Congress recognizing treaty obligations, very carefully preserved the right of all Chinese (whether laborers or others) then lawfully in the country to remain here thereafter. Being directed against laborers as a class, the act required every Chinese laborer to register within a certain time and procure a certificate that he was a resident of the United States at the time of the passage of the act, and to further effectuate its purpose, the act provided that "Any Chinese laborer * * * found within the jurisdiction of the United States without such certificate shall be deemed and adjudged to be unlawfully within the United States," and accordingly deported. 28 Stat. 7, § 1 (sec. 6). There were in the country at the time Chinese of favored classes, notably merchants, who were not subjected to the requirement of registration. They were permitted to register if they chose, but were not required to do so, and were entitled to remain without registration. In re Chin Ark Wing (D. C.) 115 Fed. 412; United States v. Lee You Wing, 211 Fed. 939, 128 C. C. A. 437.

[3] While not burdened with the duty of registering or with the consequences of deportation for failure to produce a certificate of registration imposed upon laborers, Chinese merchants are not wholly free from the operation of the act. Though treating merchants as a favored class exempt from its penalties, the act nevertheless initially embraces all Chinese of whatever class, and places upon all certain requirements as the price to be paid for the privilege of remaining in this country. The inclusion of all classes was the means adopted to accomplish the exclusion of the labor class. With respect to laborers, these requirements are registration, and, when arrested, the production of a certificate or other prescribed evidence of residence, and upon failure, deportation. With respect to Chinese generally, including merchants and other favored classes, as we have said, registration was not required, but a duty was nevertheless imposed upon each, when arrested, to "establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." 27 Stat. 25, § 3. Thus under the scheme of the statute, the burden of proving in one way or another their lawful right to remain in the country is placed upon all Chinese arrested. The statute offered Chinese merchants an easy way of meeting the requirement to affirmatively and satisfactorily establish their lawful right to remain in the country because of their mercantile status by permitting them to register, not as laborers but as merchants, and to receive certificates of residence as merchants, which, when authentic, were of course the highest type of affirmative proof required. If a Chinese merchant failed to avail himself of the opportunity to secure evidence of this type, then the statute says he may still prove by other evidence his right to remain in the

country. With respect to such other evidence, the statute does not prescribe a particular kind, as in the case of a laborer, but it does require that it be of a particular strength, and it also requires that it be produced by the one asserting or defending under it. 27 Stat. 25, § 3.

This evidence must be affirmative, for the statute so says, and it must be of a force sufficient to establish the fact, which it is intended to prove, to the satisfaction of the tribunal. "By satisfactory evidence, which is sometimes called sufficient evidence," says Greenleaf on Evidence, volume 1, section 2, "is intended that amount of proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt." This we believe to be the quality of evidence prescribed by the statute to establish the right to remain in the country. Mere prima facie evidence failing to sustain the burden of convincing is manifestly not what the statute intends. Moy Gusy Lum v. United States, 211 Fed. 91, 127 C. C. A. 515; U. S. v. Chum Hoy, 111 Fed. 899, 50 C. C. A. 57.

The statute not only prescribes the character or probative force of the evidence necessary to be produced, but it defines who shall produce it by saying "that *any* Chinese person, * * * arrested under the provisions of this act," shall produce such evidence or be adjudged to be unlawfully within the United States. As the statute places upon Chinese persons generally the burden of proving their lawful right to be in the country, it is entirely logical that when a Chinese person relies upon his mercantile status for his right to be here, the burden is upon him to prove it. United States v. Lung Hong (D. C.) 105 Fed. 188; United States v. Lee You Wing, 211 Fed. 939, 128 C. C. A. 437. The government may controvert that evidence in the customary way, or because of the particular burden placed upon the defendant, the government may rest and at times succeed upon his failure to produce evidence of the affirmative and satisfactory character required. Whether by his evidence the Chinese person has placed himself beyond the statute or has failed to do so, then becomes a question to be determined by the tribunal before which the case is tried.

[4-6] What was before the two tribunals below? When the defendant was arrested he was engaged as a laborer. This he concedes, but maintains that this was an after-acquired status and that at the time of the test of his right to remain in the country, namely the registration period, he was not a laborer but was a merchant. If the court should so find, then under the authorities the change of status does not work a forfeiture of his right lawfully to remain in the country. In re Chin Ark Wing (D. C.) 115 Fed. 413; United States v. Lee You Wing, 211 Fed. 939, 128 C. C. A. 437; United States v. Leo Won Tong (D. C.) 132 Fed. 190; In re Yew Bing Hi (D. C.) 128 Fed. 319; United States v. Louie Juen (D. C.) 128 Fed. 522; United States v. Sing Lee (D. C.) 71 Fed. 680; United States v. Moy Yim (D. C.) 115 Fed. 652. But under the circumstances, especially the circumstance of his arrest as a laborer, there devolved upon the defendant the necessity of overcoming the natural presumption arising from his status when arrested. This was that of a laborer, and being a laborer when arrested, he was bound to produce a laborer's certificate or show a reason why such certificate

could not or need not be produced by him. This the defendant attempted to do by producing evidence that he was a merchant at the registration period, and that therefore he could not have a laborer's certificate, also that he did not have an optional merchant's certificate. The testimony of the defendant upon the question of his mercantile status was disregarded by the court below because of inconsistencies in his two statements, and the testimony of the other two witnesses upon the subject of his occupation was disregarded without reasons given. As we look at the record, the testimony of the three witnesses was consistent one with the other, was positive, and was only slightly disturbed by the negative testimony produced by the government. The inconsistencies in the two statements of the defendant did not affect the consistency of the testimony of the other two witnesses, and it may not be amiss to say that the testimony of the other two witnesses, being wholly consistent with that of the defendant, reduced somewhat the inconsistencies of the defendant's testimony. It is sometimes difficult to know how to treat testimony which is positive in character, yet concerning which doubts are entertained. Much is necessarily and very properly left to the trial tribunal, which has the advantage of seeing the witness and hearing the spoken testimony. But it has been held that the language of the act prescribing the character of testimony required of a defendant in a case like this, does not invest the judicial officer with arbitrary power to disregard it. Moy Guey Lum v. United States, 211 Fed. 91, 127 C. C. A. 515. It must be weighed, accepted, reconciled or rejected like other testimony. When disregarded, there must be some reason for such action, and in this case we are very much at a loss to find a reason for disregarding the testimony produced by the defendant concerning his mercantile status.

[7] But it is urged that upon this subject we need not trouble ourselves, for on the authority of Moy Guey Lum v. United States, 211 Fed. 91, 94, 127 C. C. A. 515, and Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70, an appellate court is without power to inquire into or disturb the findings of the Commissioner and the District Court upon questions of fact in these cases. We do not find this proposition correct. Being conscious of the difficulties incident to the administration of the Chinese Exclusion Act, our views are of course in entire harmony with those very generally expressed by other federal courts, that an appellate court should be slow, very slow, in disturbing the findings of fact of the Commissioner and the District Court, but that appellate courts have jurisdiction to inquire into and to reverse such findings is, in our judgment, beyond question. We are constrained to believe that in this case error was committed in failing to accord to the testimony its natural probative force, and in failing to find that it was of the force required by the statute.

[8] The second question of law relates to the persons who, as witnesses, are competent to prove the defendant's mercantile status, or, stated differently, do the provisions of section 6 of the act, which require a laborer, upon failing to produce a certificate, to establish his residence by "at least one credible witness other than Chinese," extend to the provisions of section 3, which require "any Chinese

person" to establish his right to remain in the country by "affirmative proof to the satisfaction" of the judge? The authorities on this question are not numerous. United States v. Louie Juen (D. C.) 128 Fed. 522; United States v. Sing Lee (D. C.) 71 Fed. 680. Unless disqualified by provisions of the act, Chinese persons are competent witnesses. The statute in no place disqualified them. They may testify in any number to any fact. The law simply limits their number as witnesses to one fact, and provides, that as to that fact, testimony shall not be conclusive unless it include the testimony of a witness other than Chinese. That fact is the residence of laborers, and does not, by expression or necessary implication, extend to the fact of the occupation of merchants. We are therefore of opinion that the evidence of the defendant's mercantile status is not insufficient because it consisted wholly of the testimony of Chinese witnesses.

The order of deportation is reversed.

LOUIE LIT v. UNITED STATES.

LOUIE FONG v. SAME.

(Circuit Court of Appeals, Third Circuit. December 23, 1916.)

Nos. 2139, 2140.

1. CITIZENS ⟸3—NATIVE-BORN CITIZENS—CHINESE PERSONS—"CITIZEN."
   A child born in the United States of Chinese parents domiciled here becomes at birth a "citizen" of the United States, under the first clause of the Fourteenth Amendment to the Constitution.
   [Ed. Note.—For other cases, see Citizens, Cent. Dig. §§ 2, 13; Dec. Dig. ⟸3.
   For other definitions, see Words and Phrases, First and Second Series, Citizen.]

2. ALIENS ⟸20—CHINESE EXCLUSION ACT—CONSTITUTIONALITY—APPLICABILITY TO CITIZENS.
   It was competent for Congress, by Chinese Exclusion Act May 5, 1892, c. 60, 27 Stat. 25, amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 (Comp. St. 1913, §§ 4315–4323), to empower a United States commissioner to determine the facts on which citizenship of a person of Chinese descent depends.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 73; Dec. Dig. ⟸20.]

3. ALIENS ⟸32(8)—EXCLUSION OF CHINESE—SUFFICIENCY OF EVIDENCE—NATIVE BIRTH.
   In proceedings for the deportation of two Chinese laborers, evidence *held* to show that they were born in the United States, and therefore not liable to deportation.
   [Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

Appeals from the District Court of the United States, for the Eastern District of Pennsylvania; Oliver B. Dickinson, Judge.

Separate proceedings by the United States against Louie Lit and Louie Fong for their deportation as Chinese laborers unlawfully with-

in the United States. From orders of deportation, the defendants appeal. Reversed.

Marshall A. Coyne and David J. Smyth, both of Philadelphia, Pa., for appellants.

A. Warner Parker, Francis Fisher Kane, U. S. Atty., and Robert J. Sterrett, Asst. U. S. Atty., both of Philadelphia, Pa., for the United States.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. [1, 2] These cases were argued together. They are appeals from two orders of deportation separately entered after a joint hearing. Chinese Exclusion Act, 27 Stat. 25; 28 Stat. 7. Two questions are raised. The first is one of law, "Does the Chinese Exclusion Act apply to a Chinese person who claims American citizenship by birth?" We dispose of this question by mere reference to the adjudged cases, which conclusively establish that a child born in the United States of Chinese parents domiciled in the United States, becomes, at the time of his birth, a citizen of the United States by virtue of the first clause of the Fourteenth Amendment to the Constitution; and that it was competent for Congress, by the Chinese Exclusion Act, to empower a United States Commissioner to determine the various facts on which citizenship depends. United States v. Wong Kim Ark, 169 U. S. 649, 18 Sup. Ct. 456, 42 L. Ed. 890; United States v. Lee Yen Tai, 185 U. S. 213, 22 Sup. Ct. 629, 46 L. Ed. 878; Chin Bak Kan v. United States, 186 U. S. 193, 22 Sup. Ct. 891, 46 L. Ed. 1121; Moy Suey v. United States, 147 Fed. 697, 78 C. C. A. 85; Moy Guey Lum v. United States, 211 Fed. 91, 127 C. C. A. 515; Lee Ah Yin v. United States, 116 Fed. 614, 54 C. C. A. 70.

[3] The second question is one of fact. It is whether the defendants, arrested and charged with being unlawfully within the United States in violation of the Chinese Exclusion Act and defending upon the ground that they are American citizens, have sustained the burden imposed by the act of establishing their citizenship by proving their birth in this country.

The defendants are brothers, and at the time of the hearing, were of the age of twenty and twenty-four years respectively. They were arrested as laborers and defended upon the ground that they were native-born citizens of this country. They testified that they were born in San Francisco, and produced two Chinese witnesses who corroborated them by testifying that they were present at their Shaving Feasts a few weeks after their birth. The defendants further testified that their parents having died, they came to Philadelphia with their uncle in 1897, being then of the age of seven and three years respectively. From 1897 to 1902, there is no testimony of their whereabouts. A white physician testified that he had attended the defendants when children for various ailments for about twelve years, embracing the period from 1902 to 1914. His testimony was supplemented by other testimony as to residence covering a period of a

year or two prior to the hearing. Here the defendants rested. The government then presented its case, basing it upon the testimony of an Immigration Inspector, who identified the defendants as young men he had seen on a train coming from Canada in November, 1913, and also upon the failure of the defendants to establish the fact of their citizenship by affirmative and satisfactory proof. In rebutting the government's evidence of smuggling, the defendants brought a number of witnesses who testified that they had known the defendants for periods running back two, three and four years, thereby, in the estimation of the Commissioner and the District Court, wholly disposing of the government's case of smuggling. Thereafter, this case, like the case of Louie Dai v. United States, 238 Fed. 68, — C. C. A. —, recently decided by this court, resolved itself into the question whether the defendants had sustained the burden of proof imposed by the statute.

There is in the main a singular resemblance of the facts of these cases to those of the case of Louie Dai v. United States, supra, and the observations we there made upon the subject of the burden of proof and the quality of evidence required of a Chinese person, arrested as a laborer, to avoid the penalties of the act, apply with equal force to this case and will not be repeated.

This case does not present inconsistencies in the statements of the defendants, as in the case of Louie Dai, but, as indicated in the opinion of the District Court, presents a state of facts of too great consistency. This is another not unusual and perplexing phase of cases of this character, in passing upon which appellate courts are slow to disturb the conclusions of trial courts. But here, as in the case of Louie Dai, there is testimony which is affirmative and satisfactory, and which, if true, clearly establishes the nativity of the defendants. May we ignore that testimony because of its superlative accuracy?

The trial court admitted that if there had been testimony of the defendant's residence in this country close in point of time to the dates of birth, it would have given credence to the testimony of nativity, but that there was a wide and fatal gap between the testimony as to birth and the testimony as to residence in Philadelphia. There was, however, the testimony of another witness, which appeals to us to be not only important, but controlling, in that it meets the very defect pointed out. That witness was the white physician, who testified that he had attended the defendants as children for various ailments for about twelve years. That testimony was discarded by the Commissioner and likewise by the District Court, and yet it goes a good way to bridge the very gap complained of and a great way towards connecting the lives of these young defendants in point of time with birth in this country. This witness was not impeached and his testimony was not attacked, and there was nothing in the testimony itself that weakened its force. We do not believe the testimony of this white physician can be ignored, especially when we consider that in carrying the defendants back from youth to childhood, it carries them to a time so close to their birth that the testimony of birth acquires a force which, in turn, cannot be disregarded without reason.

True, this testimony, like the testimony of birth, is suspiciously exact in detail, but not so much so as to cast upon it the color of untruth. Weighing all this evidence by the standards which control us in this case, namely the proof of a fact by affirmative and satisfactory evidence, producing conviction beyond a reasonable doubt, we are of opinion that these two defendants have sustained the burden imposed upon them by the statute and that the two orders should be reversed.

DELAWARE, L. & W. R. CO. v. PERROTTA.

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

No. 22.

1. MASTER AND SERVANT ⟸107(8)—NEW YORK EMPLOYERS' LIABILITY ACT—CONSTRUCTION—"PLANT."

Under the New York Employers' Liability Act (Consol. Laws, c. 31, §§ 200–204), as amended by Laws 1910, c. 352, which gives an employé a right of action for an injury received while in the exercise of due care "by reason of any defect in the ways, works, machinery or plant" of the employer, owing to the negligence of the employer, or of any one in his service intrusted with the duty of seeing that his ways, works, machinery, and plant are in proper condition, as such statute is construed by the state courts, a skid or gangplank furnished by a railroad company for use in unloading freight cars, one end of which is placed on the floor of the car and the other on the platform or pier, is a part of the "plant" of the company.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸107(8).

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

2. MASTER AND SERVANT ⟸107(8)—NEW YORK EMPLOYERS' LIABILITY ACT—CONSTRUCTION.

An employer cannot avoid the liability imposed by such act by his omission to supervise the condition of his ways, works, machinery, and plant, and by imposing upon its employés the responsibility which the act imposes upon him.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⟸107(8).]

3. MASTER AND SERVANT ⟸107(8)—MASTER'S LIABILITY FOR INJURY TO SERVANT—DEFECTIVE PLANT.

Plaintiff, with other longshoremen, under a foreman, was employed by defendant railroad company in loading and unloading its cars at a pier to which the cars were brought on floats. His gang was directed by the foreman to finish unloading a car, which had been partly unloaded by another gang. The latter had left the door open, with a skid in place, reaching from the car door to the pier, over which the goods were moved on trucks. As plaintiff was passing down with his truck, the skid fell, and he was severely injured. Owing to the action of the tide, which varied the height of the floats, it was necessary to safety that the skids should be made fast to the car, and for that purpose they were in general equipped with ropes. Defendant kept a number of skids on the pier for the use of the workmen, who made their own selections and put them in place. There was evidence warranting a finding that the skid in question was not so equipped, and was not fastened to the car, and that plaintiff, whose gang did not make the selection, did not know such

facts. *Held* that, under the statute, defendant was not relieved from liability by the fact that it supplied skids in good condition, and that a judgment for plaintiff was sustained by the evidence.

[Ed. Note.—For other cases, see Master and Servant, Dec. Dig. ⊂⇒107(8).]

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

Action at law by Carmine Perrotta against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The action was commenced originally in the Supreme Court of the state of New York for the county of Kings. The case was, however, removed by the plaintiff in error to the United States District Court for the Eastern District of New York, on the ground of diversity of citizenship.

A. J. McMahon, of New York City, for plaintiff in error.

Adolph Ruger, of Brooklyn, N. Y., for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. This is an action by an employé against an employer. It is brought under the Employers' Liability Act of the state of New York (Consol. Laws, c. 31, §§ 200–204), and is for the recovery of damages for personal injuries incurred by the plaintiff and alleged to have been caused solely by reason of the negligence of the defendant.

[3] The plaintiff is a longshoreman, who was employed by the defendant in loading and unloading cars at its pier in the North River in the borough of Manhattan, city of New York. The cars were brought to the pier on lighters or floats holding 10 or 12 cars according to their size. The plaintiff had been working for defendant on the dock prior to this accident for about 4 or 5 months. He was so engaged trucking freight out of the cars on the day of the accident, December 24, 1913. On the afternoon of that day the plaintiff and his gang were directed by the foreman who had charge of the loading and unloading of the freight at this pier, and who had general superintendence of the plaintiff and his gang, to go to work and remove the freight from the car where the accident occurred. According to the testimony of some of the witnesses they found the door of the car open and the car partially unloaded by another gang which worked there in the morning. The skid was in place and the men went to work as ordered.

The cars were unloaded by means of ordinary two-wheeled hand trucks. The plaintiff was the first one of his gang to start from the car across the skid with a load, and it was his first trip across it. There was quite a steep incline from the car to the floor of the pier, and plaintiff was pulling the hand truck behind him; that being the only way the truck could be handled under the conditions. He started down the skid, and as his truck got upon it the skid fell, and with it the truck, box, and plaintiff. The box, which weighed about 600 pounds, fell upon his leg and inflicted a severe and painful injury. As a result he was confined to his bed for 58 days, and was unable to work for about 4

months. At the time of the trial, which was nearly 2 years after the accident, he claimed he still suffered pain from the injuries he received.

The plaintiff claims that the injuries he suffered were due solely to the negligence of the defendant in failing to provide him with a safe place in which to work. It is said that the skid was not provided with ropes, and so was not fastened either to the pier or lighter, with the result that, when the lighter rose by reason of the rise of the tide, the skid slid from the lighter to the pier.

The defendant claims that it is not responsible for the fact that a defective skid was used, if an unfit one was in fact used, as it was selected and put in place by the men who used it, and that if its position changed after it was placed in position, it was because the tide had risen, and that the plaintiff should have known of the situation, and if he went to work without having the skid so secured that it would not fall when the tide rose it was his own fault, and that he is, therefore, not entitled to recover.

The plaintiff denies that he or his gang selected or put in place the skid, or that he had at the time he used it any knowledge of its defective condition. He asserts that it was selected by and put in place by a different gang in the forenoon, and that in the afternoon he and his gang were instructed to use it in unloading, and that he was obeying that instruction, given by a superior, when the accident happened.

There was a conflict in the testimony as to whether the skid in use by the plaintiff at the time of the accident was or was not provided with ropes. Two witnesses testified that it was equipped with the ropes, and that they were fastened to the car. This testimony was contradicted by the plaintiff, who said the skid had no ropes, and in this he was corroborated by three other witnesses, who were certain that there were none. The question was for the jury, and we must accept their verdict as conclusive of the fact that this particular skid had no ropes. The evidence shows that there were some 35 or more skids on the pier, and that all of them except the one in question were provided with ropes from 4 to 5 feet in length, by which they could be tied fast to the beams and the cross-bars under the car to keep the skid in position.

The evidence also shows that when a gang was instructed to unload a car they went and got a skid from among those the defendant had provided, and that they took any one they thought suitable, and fastened it by the ropes to the car, so that it would not be made insecure by the changes in the tide.

[1] The New York Liability Act provides that:

"When personal injury is caused to an employé who is himself in the exercise of due care and diligence at the time:

"1. By reason of any defect in the condition of the ways, works, machinery, or plant, connected with or used in the business of the employer which arose from or had not been discovered or remedied owing to the negligence of the employer or of any person in the service of the employer and intrusted by him with the duty of seeing that the ways, works, machinery, or plant, were in proper condition;

"2. By reason of the negligence of any person in the service of the employer intrusted with any superintendence or by reason of the negligence of any person intrusted with authority to direct, control or command any employé

in the performance of the duty of such employé. The employé * * * shall have the same right of compensation and remedies against the employer as if the employé had not been an employé of nor in the service of the employer nor engaged in his work."

If the injury was due to a defect in the condition of the ways, works, machinery, or plant furnished the plaintiff by the defendant, and the defect was not discovered or remedied owing to the carelessness and negligence of the defendant, or of a person in its employ intrusted with the duty of seeing to it that the ways, works, machinery, or plant were in proper condition, then the plaintiff was entitled to recover under the act provided he was not guilty of contributory negligence.

The New York Court of Appeals in Nappa v. Erie R. R. Co., 195 N. Y. 176, 182, 88 N. E. 30, 21 L. R. A. (N. S.) 96 (1909), held that a skid used in unloading freight cars, one end of which was placed on the floor of the car and the other on the platform which opened onto the floor of the freight house, was no part of the ways, works, or machinery under the Employers' Liability Act of 1902 (Laws 1902, c. 600).

The words "ways, works and machinery" were not inclusive of everything furnished to the employé for use in the business of the employer. But in 1910 the act was amended (Laws 1910, c. 352), and the word "plant" was added, making the provision read "ways, works, machinery or plant." As thus amended the act was construed in Wiley v. Solvay Process Co., 215 N. Y. 584, 590, 109 N. E. 606, 608 (1915), the court saying:

"The word 'plant' in its ordinary acceptation, when used in connection with and relating to a business, includes everything other than supplies and stock in trade necessary and requisite to the carrying on of the business. It includes in the language of Lindley, L. J. (Yarmouth v. France, L. R. 19 Q. B. Div. 647, 658): 'Whatever apparatus is used by a business man for carrying on his business—not his stock in trade which he buys or makes for sale; but all goods and chattels, fixed or movable, live or dead, which he keeps for permanent employment in his business.'"

Then the court added:

"A plant without tools and appliances would be useless as such. A plant is defective when any part of it is not in a proper condition for the purpose for which it was intended, and it is also defective when it is so incomplete that the use of the plant is dangerous by reason of the failure to furnish reasonably necessary parts for the purpose for which it is used."

And in Drury v. American Fruit Product Co., 163 App. Div. 509, 513, 148 N. Y. Supp. 675, decided after the amendment of the act above referred to, a skid, placed with one end on a railroad car and the other end on a platform by the sidewalk and used for unloading barrels, was held to be a part of the "plant."

The skid being a part of the plant owned by the employer the question was for the jury to say whether its defective condition arose from or had not been discovered or remedied owing to the negligence of such employer, or of some person in his service intrusted with and exercising superintendence. The question was submitted accordingly, and the jury charged that:

"If he had the right, on the facts as I have stated the issues, to suppose that the defendant had been keeping track of that gangway, or if from past

experience he should not have expected that it had been left there for the men to take care of themselves, and if, therefore, it was the defendant's duty either to take that gangplank down, have it inspected or see that it was safe before longshoremen were allowed to go and use that gangplank without further instructions, why then he would make out a case, and you would have to consider how much would compensate him for the accident which occurred to him on this day."

It is sufficient for the purpose of this case to say of this instruction that it contains nothing of which the defendant has a right to complain. The New York act expressly provides that the contributory negligence of the injured employé is a defense to be pleaded and proved by the defendant.

The defendant pleaded contributory negligence as a defense, and the charge of the court made it plain that if the plaintiff had been guilty of contributory negligence there could be no recovery. The jury were charged that there could be no recovery "if this accident occurred through any fault or negligence on the part of the plaintiff, from some matter as to which he might have been careless or negligent, and the accident have been prevented, then the plaintiff cannot recover." The court could not upon the testimony have decided that the plaintiff was guilty of contributory negligence as matter of law. And the action of the jury is conclusive upon the question of fact.

It has been held in New York that the Employers' Liability Act has no application when the servant himself prepares the place to work. Pratt v. McKee, 147 App. Div. 72, 131 N. Y. Supp. 763; Mattson v. Phœnix Const. Co., 135 App. Div. 234, 120 N. Y. Supp. 566. But the jury in the case at bar was instructed that if the skid was placed in position by the plaintiff, or any of the gang in which he was working, the plaintiff could not recover. The verdict of the jury has determined, therefore, that the plaintiff did not prepare the place to work. And there is testimony in the record which justifies the conclusion which the jury reached. The plaintiff testified, as before stated, that the skid had been placed in position in the morning by another gang which had worked there in unloading freight. In this he was corroborated by other witnesses, who testified that none of the plaintiff's gang had had anything to do with putting the skid in place.

No action can be maintained under the act unless notice of the time, place, and cause of the injury is given to the employer within a time specified, and unless action is commenced within a time specified. That notice was given and action commenced within the time required is not disputed. The purpose of the Employers' Liability Acts in general, as we understand them, is to make the master absolutely responsible for the proper discharge of certain personal duties which he owes to servants entering his employment, and from which he cannot relieve himself except by performance. Atchison, T. & S. F. R. Co. v. Seeley, 54 Kan. 21, 37 Pac. 104.

[2] Under these acts "the injured servant is given a right to recover damages in the cases enumerated, although the abnormal conditions which caused his injury may have been created or suffered to continue through the negligence of a fellow servant." Labatt's Master and Servant, volume 5, page 5147. It is true that under the New York

act, as we have seen, the contributory negligence of the employé will defeat his recovery. But we cannot assent to the proposition that, because the defective plank was put in place by a gang to which the plaintiff did not belong, and because it was taken out of a number of others not defective, the practice being to allow the men to select their own skid and put it in position, therefore the employer is relieved from the duty imposed by the act. The employer cannot, in our opinion, avoid the liability which the act imposes by its omission to supervise the condition of its ways, works, machinery, or plant, and by imposing upon its employés the responsibility which the act imposes upon it. This skid was a part of the defendant's plant, and was out of order, and its condition was unknown to the plaintiff at the time. That another gang had selected it, and put it in place, and used it cannot relieve the employer from his responsibility to this plaintiff for a defective condition of which he had no knowledge, and which a jury had found was due to the employer's negligence.

The assistant foreman who had the immediate supervision of the plaintiff testified that he left it to the gangs to get the skids from among those the defendant provided, and to put them in place, but he admitted that it was a part of his duty to see that the men used them properly. He was asked whether, if he saw anything about a gangplank that looked dangerous and might endanger the freight, it was his business to see it made straight; and he said that it was, and that it was the duty of the men to obey his instructions. He was asked, "Did you ever inspect this particular gangplank?" and he replied, "I don't think I ever did." He also testified that he made no examination of it after the accident. If the skid had been provided with ropes, and the plaintiff and his gang had been instructed to fasten it by the ropes to the car, and had failed to do so, the omission would have been a detail of the work, and not an act of superintendence. See Pratt v. McKee, supra. But such was not this case.

If the plaintiff is entitled to recover, and we think he is, the verdict, which is only for $500, certainly cannot be deemed excessive.

Judgment affirmed.

FEARON et al. v. BANKERS' TRUST CO. et al. (two cases).

(Circuit Court of Appeals, Third Circuit. December 19, 1916.)

Nos. 2165, 2172.

RAILROADS ⇐196—RECEIVERSHIP—REORGANIZATION.

An order confirming a master's sale of railroad property, which had been in the hands of receivers for eight years, affirmed, where the sale was pursuant to a plan of reorganization approved by the holders of $25,000,000, out of a total of $30,000,000, of first mortgage bonds, and opposed only by the holders of the remaining bonds of the same issue, such bondholders being the only persons having any practical interest in the property, and where the plan, while involving a heavy assessment on the bondholders, was open to all alike, and commended itself to the

court as the only practicable one by which any considerable part of their investment might be saved.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 659–661; Dec. Dig. ⊜196.]

Appeals from the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Suits in equity by the Bankers' Trust Company to foreclose mortgages of the Wabash Pittsburgh Terminal Railway Company and the Wabash Pittsburgh Railway Company. Charles Fearon and others, composing a bondholders' committee, appeal from an order refusing them permission to intervene, and from an order confirming a sale of the property. Affirmed.

Gifford K. Wright, of Pittsburgh, Pa., Frank B. Bracken, of Philadelphia, Pa., and Charles J. Bonaparte, of Baltimore, Md., for appellants.

William W. Green and Arthur H. Van Brunt, both of New York City, for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This case concerns the winding up of what may be called the Pittsburgh Wabash Railroad receivership. It comes before us in two phases: One is an appeal by certain first mortgage bondholders, represented by the Fearon committee, from an order of the court below refusing to allow them to become interveners; the other, their appeal from an order of said court dismissing their exceptions to, and confirming, a master's sale of the receivership property. The two cases were presented and heard separately, but as the parties are the same, and as they in substance involve the same matters, we consider and dispose of them both in the present opinion.

In the final analysis the question before us is whether the master's sale should be set aside. This fact makes it needless for us to discuss the alleged error of the court in denying the Fearon committee's petition to intervene, for in the full hearing of the cause, which this court has invited and has given, we have for all practical purposes afforded that committee as broad rights, status, and judicial consideration as though their petition to intervene had been granted and they had all the rights of a party litigant.

Addressing ourselves, therefore, to the crux of this controversy, let us inquire whether ground has been shown of such moment as to constrain this court to set aside a sale at the instance of a committee representing approximately some $5,000,000 of bonds, when two other committees, representing approximately some $25,000,000 of bonds of the same issue, are urging such sale, and where such majority bondholders, by assessing themselves and paying in practically $300 on each $1,000 of their bonds, have thus given earnest of their conviction that in no other way than the sale made can this property be disposed of and this receivership terminated.

A patient study and full consideration of the subject has irresistibly led us to agree with the view taken by this large majority of the

bondholders, and we may further say we are satisfied that, without the furnishing of some such substantial sum as has been raised by this heavy bond assessment, no effective reorganization of this property could be made by any future plan. Moreover, it will be observed that this case is not one between the usual conflicting classes of creditors, bondholders of different issues, stockholders, etc., whose contentions and relative rights in foreclosure proceedings make the balancing of their relative class rights a matter of grave difficulty. The situation is here different. This is wholly a question between those of a single class, viz., the first mortgage bondholders, for it has now become clear that they, and they alone, have any practical interest in this property, and the question is: How shall the interest of that whole class of such bondholders be worked out by themselves? For it is also manifest that, being the sole parties in interest, they must work out that outcome themselves. The question, therefore, narrows itself to the business proposition: First, is this majority plan of reorganization, of which this sale is a step, fair to the minority; and, secondly, if this plan of reorganization is rejected, and the bondholders supporting it in effect disorganized and scattered, what other and better plan is possible, probable, or suggestible?

That the plan proposed may be taken advantage of and participated in by all the bondholders, including these exceptants, and that, in the event of the confirmation of this sale, every such outstanding bondholder, every second mortgage bondholder, and, indeed, any person who desires, can avail themselves of the privilege of participating in it on the same footing as the majority bondholders, in itself shows that the plan proposed is fair and equitable, in that it treats alike all parties interested therein. In other words, the majority bondholders in effect have afforded the minority an equality of participation, conditioned on the fair and equitable condition that the minority equitably share the financial burden that alone makes any reorganization practical. To this answer is made that a $300 assessment on a $1,000 bond is a burden which no bondholder ought to have imposed on him, and is one which probably some of them cannot meet. We recognize the hardship of the situation, but the court is here dealing, not alone with the disappointed expectations of these minority bondholders in their original investment, but with the present practical question: What can be done to work out as much salvage as possible for all the bondholders from the property they hold as security, which is now in the court's charge?

When a great majority of such bondholders, dealing fairly with all others, say to a court: This is our only possible salvage plan; the necessity of salvage is such that, to save our original investment, we have felt constrained to add $9,000,000 to our original $30,000,000—a court which denies to such self-assessing bondholders the right in their own way to conserve and salvage their own security is assuming a grave responsibility. To warrant it rejecting such proposed plan, a court should have a clear and reasonable probability of some other plan or course which would bring better results to these bondholders as a whole. And when it is considered that the minority bondholders

practically indicate their unwillingness or inability to pay a rate of assessment which is made lower by its being shared by over $20,000,000 bondholders, what reasonable hopes can they hold out to the court that they themselves will consent to any plan that calls for any assessment? But that this property can be reorganized, that other property, the very links required to its being made a dependable workable whole, can be acquired, and other necessary steps taken, without the substantial contribution of the new capital which the majority bondholders have assessed themselves to provide, is so clear that any other theory of reorganization may be dismissed as impractical.

Seeing, then, that the plan proposed is fair and equitable, and that it is open to all bondholders, and carries no exclusive privileges to those urging its adoption, we turn to the next question: What other and better plan is possible?

The fact that after the many years of this protracted receivership no other workable plan has been suggested is in itself persuasive that no other was possible. And why this is so will be clear, when the situation confronting these bondholders and the court as the administrative guardian of their property is rightly understood. Without entering into minor details, we confine ourselves to the more substantial features. This receivership was begun in 1908. Seven years later, in August, 1915, this Fearon committee was formed; eight years later, in May, 1916, it sought to intervene. During these intervening eight years, none but the present plan has taken practical form, although during all those years large numbers of the first mortgage bondholders have been active in an effort to protect their interests. There were outstanding $30,000,000 of first mortgage bonds, and a protective committee, called the Wallace committee, was formed shortly after the receivership, with which was deposited somewhat over $28,000,000 of such bonds. Subsequently some of these Wallace bondholders withdrew their bonds, and with some outstanding bondholders formed, in 1910, the Chaplin committee, which represented $10,000,000 in bonds. These two committees worked separately, with different ends in view, for several years, when the inevitable logic of the situation drove the two committees to unite and form the joint reorganization committee, which is now carrying out the plan of reorganization, of which the present sale is a step.

On June 28, 1915, this joint committee made public a proposed reorganization plan which called for an assessment of $300 on each accepting $1,000 bond, and required for its consummation the raising by such assessment to the extent of $9,000,000. This plan, it will be observed, required the participation of $30,000,000, or the whole of the bondholders. It was not successful, for the manifest reason that the $30,000,000 bondholders would not or could not pay the assessment required to provide the $9,000,000 necessary, and it was therefore followed, January 10, 1916, by an amended plan which provided for an underwriting to the extent of $5,000,000, whereby the underwriters were to subscribe for and get securities of a new organized company, with commissions of $500,000. The effort of these committees to evolve some plan was, as it will appear, done under constraint of a

constant effort of the court to wind up this long-protracted receivership. As early as January 3, 1913, that court entered a decree in foreclosure on the mortgage securing these bonds, and directed that a sale be made by the master at a time to be appointed by him. By this sale order an upset price of $6,000,000 was required. It left the date of sale open until such time as the bondholders could agree on a plan of sale. This order of sale was delayed more than three years by the inability of the bondholders to work out any plan of reorganization. In the meantime, and during these long delays of the bondholders, the court had at their instance granted to its receivers the right to issue receivership certificates for substantially $3,100,000. In the course of time these certificates became overdue, and some of their holders were, by petition, urging their payment.

It will be noticed the upset price of $6,000,000 had been made in the decree of sale; but as no time was set for a sale, and no plan had been formulated for reorganization, it would seem that such figure was not set on the basis of any then existing plan of sale, but rather as a proposed basis on which a plan might be worked out, and was made in view of the price at which the bonds were then selling. Treating it as such, the court below, by a modifying order of May 15, 1916, reduced the upset price from $6,000,000 to $3,000,000. This action by the court below clearly fell within the range of the discretion vested in courts in such matters, for it will be manifest that, while the net result of the payment of the upset price of $3,000,000 was that non-participating bondholders would realize approximately 10 per cent. of their bonds, and that assenting bondholders were willing to allow what is conceded to be an extraordinarily heavy assessment to be applied to that extent, it was no doubt apparent to the court that, if the upset price was fixed at double that sum, a large number of bondholders who were content to assess themselves up to $300 per bond would refuse to join in a plan which, to provide for such increased payment to non-participating bondholders, must correspondingly provide for a larger assessment on the participating ones. Moreover, it must not be overlooked that this order of May 15, 1916, by the lowering of the upset price to $3,000,000, made it possible for the Fearon committee, the exceptants, to qualify as a bidder at the sale, and prevented such committee from being shut out as a bidder, which it would have been, had the $6,000,000 price been allowed to stand.

Turning, now, to the Fearon committee, we find it was formed in August, 1915. It represented $450,000 free bonds and $3,500,000 of certificates issued to bondholders who had previously deposited their bonds with either the Wallace or Chaplin committees. The year thereafter intervening before the sale was made afforded reasonable time for the development of some plan, but the year passed without the submission of any plan whatever by that committee. And in that connection an inspection of the instrument creating the committee shows that no provision was therein made for carrying into effect any plan of reorganization, or, indeed, formulating one for submission to the court. True, the suggestion is made by the exceptants that this property could be sold in separate parcels; but, apart from such plan not commend-

ing itself to the court below nor to us, it does not commend itself to the large majority of the bondholders, who feel that the best course is not only to hold the property covered by their bonds intact, but by the assessment to provide for the acquisition of such other properties as will round out and link up with the mortgaged part. Indeed, we may here say that, in so doing, this reorganization plan is in a general way now doing what, if it had been originally done, would have tended to make a more stable security for these bondholders. To do that now the heavy assessments made or underwritten are required and are being applied. Without entering into minor details, it suffices to say that, after applying some $3,500,000 to receivers' certificates and obligations, which, of course, had to be met in advance of bondholders' rights, substantially $4,000,000 more in cash were necessary to acquire property not covered by the mortgage, but which was required to round up and make of unitary value the property secured by the mortgage. The lack of this property is what, in part, weakened the supposed security of the original investment; its ownership is necessary to any stable scheme of reorganization suggested.

Viewing the case as a whole, and in all its broad aspects, we are of opinion the court below committed no error in confirming this sale and taking steps to wind up this receivership. The present unfortunate situation was created by the bondholders in their original investment, and the duty of the court below was to now dispose of the insufficient security they had taken to the best possible advantage. This task we are satisfied it has done with great patience and with business ability. At the instance of different parties, ample time was given for taking full testimony, and everything bearing on the properties was brought to light. At the suggestions of the committees representing the bondholders, additional equipment and transportation facilities were from time to time provided by receiver's certificates. Leeway of time for the formation of plans of reorganization was afforded to a point when the holders of receiver's certificates became clamorous for their money. In insisting on a sale now, the court has deferred action to a time when credit was not strained and the financing of a reorganization was feasible. There is no certainty that any future time would be more opportune; there may be danger that if this sale were set aside, and months, if not years, elapse before another plan was evolved, the last state of the bondholders might be worse than the first.

In view of all these considerations—that the great majority of the bondholders favor this sale; that all bondholders, whether in favor of the sale or objecting to it, will have an opportunity of sharing on equal terms in the reorganization—we are of opinion the court below committed no error.

The decrees below are therefore confirmed, and the cause remitted to the court below for further proceedings.

STEPHANO BROS., Inc., v. STAMATOPOULOS et al.

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

No. 9.

1. TRADE-MARKS AND TRADE-NAMES ⊂=79—SOURCE OF EXCLUSIVE RIGHT—REMEDIES FOR INFRINGEMENT.

The right to an exclusive trade-mark is not one created by act of Congress, but the owner of a trade-mark has a property right in it at common law, the violation of which will be enjoined by a court of equity, and the civil remedies which might be invoked before Congress legislated still remain in full force.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 89, 90; Dec. Dig. ⊂=79.]

2. TRADE-MARKS AND TRADE-NAMES ⊂=7, 59(5)—NAMES SUBJECT OF APPROPRIATION—INFRINGEMENT.

The name "Rameses" may constitute a valid trade-mark for a brand of cigarettes, and when so used is infringed by the name "Radames," used for a similar purpose, which is so similar in both sound and appearance as to be likely to deceive ordinary purchasers.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 11, 71; Dec. Dig. ⊂=7, 59(5).]

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

Suit in equity by Stephano Bros., Incorporated, against Stamatis D. Stamatopoulos and Peter D. Stamatopoulos, Stamatis D. Stamatopoulos, and George Papageorges, copartners trading under the firm name of Stamatopoulos & Co. Decree for complainant, and defendants appeal. Affirmed.

See, also, 199 Fed. 451.

Hatch & Clute, of New York City (Edward S. Hatch, Vincent P. Donihee, and Walter F. Welch, all of New York City, of counsel), for appellants.

Wise & Lichtenstein, of New York City (Henry M. Wise, of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The complainants are citizens of the United States residing in the state of Pennsylvania. They are copartners in the business of manufacturing and selling cigarettes. They claim the ownership of the trade-mark "Rameses" as applied to the cigarettes they manufacture. The defendants, also copartners, are manufacturers of cigarettes. Their place of business is in New York City, and their sales are made, not only in New York, but in other parts of the United States. They have adopted as their trade-mark the name "Radames," and the complainants seek to enjoin its use in connection with the sale of cigarettes. They claim that this use of the word is unlawful and misleading and constitutes an infringement upon their trade-mark rights. Undoubtedly every manufacturer has a

right to distinguish his goods from similar goods manufactured by another, and to this end may adopt a trade-mark. It is an invasion of rights for one manufacturer to deceive the public by placing upon his goods an imitating trade-mark calculated to lead would-be purchasers into the belief that the goods are those of another.

Congress first attempted to regulate the right of trade-marks in Act July 8, 1870, c. 230, 16 Stat. 198, which provided for their registration. By the common law the exclusive right to a trade-mark grew out of its use. By the act of Congress the exclusive right was to attach upon registration. The power of Congress to pass the act was considered by the Supreme Court in 1879 in the Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550. The court in that case decided that the act of 1870 was unconstitutional, inasmuch as it was not restricted to trade-marks in commerce with foreign nations, or among the several states, or with the Indian tribes.

Congress thereafter passed Act March 3, 1881, providing for the registration of trade-marks used in commerce with foreign nations or with the Indian tribes. The complainant, however, acquired no right under the terms of that act, which in express terms provided that the application to be filed must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration that such trade-mark "is used in commerce with foreign nations or Indian tribes." Act March 3, 1881, c. 138, 21 Stat. p. 503. If the complainant's application contained such a declaration, there is no proof that he uses it in trade with foreign nations or Indian tribes.

Act Feb. 20, 1905, c. 592, 33 Stat. 724, authorized the registration of trade-marks used in commerce among the several states, as well as in commerce with foreign nations and the Indian tribes. That act in section 5 (Comp. St. 1913, § 9490) provided:

"That no mark which consists merely in the name of an individual, firm, corporation, or association, not written, printed, impressed, or woven in some particular or distinctive manner or in association with a portrait of the individual, or merely in words or devices which are descriptive of the goods with which they are used, or of the character or quality of such goods, or merely a geographical name or term, shall be registered under the terms of this act."

As the trade-mark in this case is the name of an individual it was not entitled to registration under the act unless printed in some particular or distinctive manner as it was not in association with a portrait of the individual. Whether this trade-mark was printed in "a particular or distinctive manner" within the meaning of the act was discussed somewhat upon the argument, the defendants claiming that the name "Rameses" was not "written, printed, impressed, or woven" in any particular or distinctive manner as the act required, and so was not entitled to be registered, as it was simply printed in type having nothing about it that can be called particular or distinctive, unless the fact that it is somewhat more black-faced than the type usually employed in ordinary printing can be regarded as a sufficient compliance with the requirement that it be printed in a particular or distinctive manner. We shall not pass upon that question at this time, as the complainant's rights in this case are not dependent upon the legislation of

Congress. Even though the complainants in what they did failed to comply with the requirements of the act of 1905, a question upon which we do not pass, they would still be entitled to the relief they seek.

[1] The right to an exclusive trade-mark is not one created by act of Congress. It is a right which the common-law courts recognized at an early day. Southern v. How, Popham, 143 (1582). And in course of time the courts of equity extended their protection over the right by issuing injunctions to restrain infringements. The owner of a trade-mark has a property right in it at common law, the violation of which will be enjoined by a court of equity, and the civil remedies which might be invoked before Congress legislated remain in full force still. See Trade-Mark Cases, 100 U. S. 82, 25 L. Ed. 550. Inasmuch as a diversity of citizenship exists, the right of the complainants to sue the defendants in the Southern district of New York for the protection of their common-law right in their trade-mark is not to be questioned.

That the complainants have a common-law right to the trade-mark "Rameses" is evident. The record shows they began manufacturing cigarettes in 1895. At that time they stamped the word "Ramees" on the boxes and printed it on the cigarette paper. In 1897 they changed the spelling to "Rameses," and have ever since continuously used the word to designate the cigarettes which they manufacture. They claim, and the evidence does not contradict them, that they were the first persons to use the word, or any word similar thereto, as a trade-mark for cigarettes. The defendants in this court do not dispute this fact, although in the court below they sought to introduce evidence to show that the word "Rameses" on cigarettes had been used in Germany. Objection was made to the admission of the testimony, and the trial court excluded it. No attempt was made upon the argument in this court to show that that testimony was not properly excluded.

[2] This brings us to inquire whether the name "Rameses" can be employed as a trade-mark. There are numerous instances in which the courts have said that the name of a person is the subject of exclusive appropriation as a trade-mark. Among them are the following: Cooke & Cobb Co. v. Miller, 169 N. Y. 475, 62 N. E. 582 (1902); H. A. Williams Mfg. Co. v. Noera, 158 Mass. 110, 32 N. E. 1037 (1893); Shaw v. Pilling, 175 Pa. 78, 34 Atl. 446; Medlar, etc., Shoe Co. v. Delsarte Mfg. Co. (1900) 68 N. J. Eq. 706, 46 Atl. 1089, affirmed in 68 N. J. Eq. 706, 61 Atl. 410; Spieker v. Lash, 102 Cal. 38, 36 Pac. 362; Wm. Rogers Mfg. Co. v. Simpson, 54 Conn. 527, 565, 9 Atl. 395 (1887). But these cases simply establish the proposition that the law permits a manufacturer to use his own name as a trade-mark. The rule is that while, as against persons bearing a different name, a manufacturer's right in his name trade-mark is absolute and exclusive, as against persons bearing the same name no such exclusive right can be set up. If the public have confidence in a man's skill and integrity, his name may be on that account the most advantageous trade-mark he can adopt. But such a trade-mark has the disadvantage that it is exposed to the possibility that some other person bearing the same name may be the manufacturer of similar articles, and have the consequent right to affix his name upon such articles, thereby creating a possibility of mis-

take on the part of consumers as to the manufacture of the goods they are about to buy.

In the case at bar the complainant manufacturers have not taken their own name and affixed it to the cigarettes as a trade-mark, and that fact raises a somewhat different question.

In Barnett v. Leuchars, 13 Law Times (N. S.) 495 (1865), an injunction was issued to protect the complainant's trade-mark in fireworks called "Pharaoh's Serpents"; the court remarking that the owner had "an exclusive right to a trade-mark or label, and that right is to be regarded as his property."

In Barrows v. Knight, 6 R. I. 434, 78 Am. Dec. 452 (1860) the right to use the name Roger Williams as a trade-mark on cotton cloth was sustained. The court said:

"'Roger Williams,' though the name of a famous person long since dead, is, as applied to cotton cloth, a fancy name, as would be, so applied, the names of Washington, Greene, Perry, or of any other heroes, living or dead."

In Merserole v. Tynberg, 36 How. Prac. (N. Y.) 14 (1868), the right to use the name "Bismarck" as a trade-mark for a particular style of collar was involved and the court declared that the complainants had the right to appropriate the name for a new purpose, and, having done so, "were entitled to avail themselves of all the advantages of their superior diligence and industry." The defendant had insisted (4 Abb. Prac. [N. S.] 412) that, as "Bismarck" was the name of a distinguished German citizen, Bismarck being then alive, no such exclusive right to the name could be successfully claimed by the complainants, for the reason that the law did not permit the use by one man of the name of another to the exclusion of the right to all others to use it.

In Goldstein v. Whelan (C. C.) 62 Fed. 124 (1894), the name "Napoleon" was used as a trade-mark. There was no intimation that the name could not be used for that purpose, but the preliminary injunction was refused because the affidavits disclosed that the name had been previously used by another, long prior to the use made of it by the complainant, and for precisely the same purpose, to indicate a brand of cigars.

In Medlar & Holmes Shoe Co. v. Delsarte Manufacturing Co., 68 N. J. Eq. 706, 61 Atl. 410 (1905), the New Jersey Court of Errors and Appeals affirmed a decree of the Court of Chancery reported in 46 Atl. 1089, sustaining the right to adopt as a trade-mark for shoes the name of "Delsarte." The name was that of a French artist who became celebrated for his theory of the method of exercise of developing bodily grace and strength and the power of dramatic expression. The Chancellor, in holding the complainants entitled to an injunction, said:

"I conclude that * * * the complainants have, as against the defendants, the exclusive right to the word 'Delsarte' as a trade-mark."

In Saxlehner v. Eisner & Mendelson Co., 179 U. S. 19, 21 Sup. Ct. 7, 45 L. Ed. 60 (1900), the right to use the name "Hunyadi" as a trademark seems to have been taken for granted. The court held that the plaintiff had lost her right to the individual appropriation of the name because of 20 years of inaction, in which the use of the word had been permitted to numerous other importers. The use of the name by

proprietors of similar articles for many years had made it public property, and it was too late to resuscitate her original right.

In Castner v. Coffman, 178 U. S. 168, 20 Sup. Ct. 842, 44 L. Ed. 1021 (1900), the Supreme Court held that the name "Pocahontas" could not be used as a trade-mark in the sale of coal. This was not because "Pocahontas" was a distinguished historical personage, but because prior to its use there was a well-known Pocahontas coal region, and that fact made it impossible for the complainants to obtain an exclusive right to use the name as against other parties mining and selling coal from the same region.

In the Court of Paris in Dalbanne & Petit v. Coleuille & Co., 7 Annales, 414, both parties used the name "Lamartine" for a certain elixir. The court on appeal said:

"There is no doubt that proper names, other than those of the manufacturer, can be employed like any other sign, as a distinct mark of industrial products, and thus become veritable property, not as a title or mode of appellation, but as a commercial mark."

In Brown on Trade-Mark (Ed. 1885) § 216, the author declares there are many instances of fancy names of men becoming valid trademarks.

In Hesseltine on Trade-Marks and Unfair Trade (Ed. 1906) p. 15, it is said that:

"The proper name of a distinguished historical personage may be a valid trade-mark."

In 28 American & English Encyclopedia of Law, p. 361, it is said:

"A trade-mark may consist of a fictitious or celebrated name, as that of a famous person or thing, or some character or thing of history, fiction, or fancy. Such names, thus used, are in truth arbitrary or fancy names. Where, however, the name of a historical or celebrated person is also a geographical name, such name is not a good trade-mark, because, as is seen in another section, geographical names cannot be monopolized by any one as trade-marks, though they will receive a measure of protection as trade-names, under the doctrine of unfair competition.

In 38 Cyc. p. 721, it is said that:

"Names of characters in fiction or mythology, or of celebrated imaginary or historical persons, or things, constitute valid trade-marks, when used as such, because they are arbitrary or fanciful and nondescriptive, unless, as may be the case they have become generic and descriptive of quality, owing to the manner of use and the general understanding."

The law permits the adoption as a trade-mark of the name of a person who has achieved fame and distinction, provided the name is not descriptive of the quality or the character of the article or a geographical name. In this case the name adopted is a famous Egyptian historical character, who lived at least 1,000 years before the Christian era. The name is one not generally in use in the United States, and we can see no objection to its adoption as a trade-mark. If the word ever had a geographical significance, it has none now in the United States. In Old Testament geography there may have been a city of lower Egypt called "Rameses"; but no such place is found on the map of Egypt in the Century Atlas, and no reason exists for de-

nying to these complainants their right to the protection of the trade-mark.

Is the use of the name "Radames" by the defendant an infringement? Similarity, not identity, is the test of infringement of a trade-mark. Saxlehner v. Eisner & Mendelson Co., supra. If the words sound alike, there is an infringement. 38 Cyc. 744. In the matter of trade-mark infringement, each case must depend on its own peculiar circumstances and other authorities are of little help. Still it is some service to note the holding of the courts in analogous cases. In Lambert Pharmical Co. v. Kalish (C. C.) 219 Fed. 323, "Listerine" was held infringed by "Listerseptine." In Fairbanks v. Ogden Company (D. C.) 220 Fed. 1002, "Cottolene" by "Chefolene." In United Lace Co. v. Barthels Mfg. Co. (D. C.) 221 Fed. 456, "Beaded" by "Imbeaded." In American Lead Pencil. Co. v. Gottlieb (C. C.) 181 Fed. 178, "Knox-all" by "Beats-all." In Florence Mfg. Co. v. Dowd (C. C.) 171 Fed. 122 and 178 Fed. 73, 101 C. C. A. 565, "Keepclean" by "Sta-Kleen." In Enoch Morgan v. Whittier Coburn Co. (C. C.) 118 Fed. 657, "Sapolio" by "Sapho." In Little v. Kellam (C. C.) 100 Fed. 353, "Sorosis" by "Sortoris." In Celluloid Co. v. Cellonite Co. (C. C.) 32 Fed. 94, "Celluloid" by "Cellonite." In Actien, etc., v. Somborn, 14 Blatch. 380, Fed. Cas. No. 496, "Appolinaris" by "Appolinus." In Hostetter v. Vowinkle, 1 Dill. 329, Fed. Cas. No. 6,714, "Hostetter" by "Hostetler."

The word "Rameses" is commonly pronounced by the purchasing public with the accent on the first syllable. And the ordinary pronunciation of the word "Radames" by the purchasing public in like manner is with the accent on the first syllable. It is possible that a small portion of the public may give to "Radames" the Italian pronunciation of the opera and put the accent on the last syllable. However that may be, clearly we must be governed by the natural and ordinary pronunciation given to the two words by the purchasing public. Governed by that test, the similarity in sound is such as might very easily result in confusion. There is similarity in appearance as well as in sound. "Rameses" and "Radames" certainly resemble each other in appearance as closely as, if not more closely than, do some of the names which were held to infringe in the above cited cases. To amount to an infringement it is not necessary that the resemblance should be sufficient to deceive experts, or persons specially familiar with the trade-mark or goods involved. The cases show that it is immaterial that a critical inspection and comparison discloses differences, or that persons seeing the two trade-marks side by side would not be deceived. It is enough that upon the whole there is a deceptive similarity sufficient to deceive ordinary purchasers giving such attention as such purchasers usually give to purchasing one article thinking it is the other. In our opinion such a deceptive similarity exists between "Rameses" and "Radames."

Decree affirmed.

KELLY v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Third Circuit. December 26, 1916.)

No. 2157

COMMERCE ⟸27(8)—INJURIES TO SERVANT—EMPLOYERS' LIABILITY ACT—"EMPLOYED IN INTERSTATE COMMERCE."

Proof that a railroad carpenter had been sent to repair a chute which supplied coal to engines engaged both in interstate and intrastate commerce, the nature of the repairs not being shown, and that after waiting a time at the yardmaster's office to get a car of lumber shifted to the chute, he started to walk toward the chute, and was run over by the lumber car while it was being moved by a work train not then engaged in any particular task, does not show that the carpenter was employed in interstate commerce, or in work so closely connected with it as to be practically a part of it, and therefore does not establish a right to recover under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657-8665).

[Ed. Note.—For other cases, see Commerce, Dec. Dig. ⟸27(8).

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

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by Clara Kelly, as executrix of Elmer J. Kelly, deceased, against the Pennsylvania Railroad Company. Judgment refusing to take off a compulsory nonsuit, and plaintiff brings error. Affirmed.

Kincaid & Kincaid, of Corry, Pa., and Brooks & English, of Erie, Pa., for plaintiff in error.

Thompson & Rossiter, of Erie, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. The plaintiff is the widow and executrix of Elmer J. Kelly, and is suing the Pennsylvania Railroad Company under the amended Act of 1908 to recover damages for her husband's death. On January 23, 1914, he was run over and instantly killed in the company's yard at Corry, Pa. The defendant is an interstate carrier, and operates (among other branches) a line from Buffalo to Pittsburgh, this line running through the city of Corry.

The deceased was a foreman of carpenters on the Chautauqua division, which extends from Buffalo to Oil City, Pa., and had gone to Corry for the purpose of making repairs of some kind to the coal chutes and roundhouse in that city; these structures being used for both kinds of business, interstate and intrastate. So far as appears, Kelly did no work on the roundhouse, but sent one of his men to the roof of that building, while he himself went to a signal tower in the neighborhood, where he waited for an hour or two until he had arranged with the yardmaster to move a car of lumber to a track near the chutes. This arrangement having been made, and the car having been taken hold of by a work train consisting of an engine, a tool car,

and a caboose, he walked from the tower toward the chutes in the middle of the track, or close alongside, and while on the way was run over by the train, which was backing toward him without a man on the end thus presented. As the trial judge entered a nonsuit, we assume the defendant's negligence.

Kelly's general duty required him to go over the division from time to time in order to repair bridges, chutes, roundhouses, and other structures. The chutes in question were used for coaling the defendant's engines, of which some were used in the yard, and some on the road. The tools on the work train were used wherever needed on the division, but at the time of the accident they were not in use, and their immediate employment was not in contemplation. The plaintiff's contention is, of course, that both her husband and the defendant were engaged in interstate commerce at the time he was killed, and the nonsuit is put on the ground that the evidence did not establish the fact that Kelly was so engaged. The opinion of Judge Orr is as follows:

> This matter comes before the court upon a motion to take off a compulsory nonsuit.
>
> This action was brought under the Employers' Liability Act of Congress, and if there be jurisdiction in this court to entertain the suit, then such jurisdiction must rest solely upon said act, because there is no diversity of citizenship between the parties.
>
> The facts, as they were developed by the testimony on the part of the plaintiff are as follows:
>
> The decedent was in the employ of the defendant company, which is a common carrier, operating, among others, a line of railroad from Buffalo, in the state of New York, to Pittsburgh, in the state of Pennsylvania.
>
> Decedent's title and duties were those of a master carpenter or master foreman of carpenters. He was required to engage in and oversee carpenter work at different points along the line of railroad aforesaid, both in the state of New York and in the state of Pennsylvania. On the day when he was killed, he went from Titusville to Corry, where he met with his death. On that day, therefore, he was wholly within the state of Pennsylvania. After his arrival at Corry, he directed, and perhaps engaged in, certain work upon the roof of a roundhouse which was used for the storage of engines, and intended not only, perhaps, to carry on the work upon the roof of the roundhouse, but to repair a coal chute by means of which coal would be delivered to the engines. Lumber was needed for this purpose. He went some distance from the place where he was working to the office of the yardmaster at Corry to have the latter cause a certain car of lumber, which was then upon the storage track in the yard, to be moved from such storage track up to the point where the repairs were to be made. Owing to the fact that the shifting engine used in the yard was then in use at another point, there was considerable delay in the execution of the service which the decedent required. During such period of delay, he remained in or near the yardmaster's office. A tool or repair train having come into the yard, the yardmaster caused the same to shift the car of lumber from the storage track up to the point where the lumber was required. The decedent walked back in the direction of the place where he intended to work on or along the track, and in some way was struck by the car which contained the lumber.
>
> After the plaintiff's evidence had closed, the defendant made a motion to dismiss the case for want of jurisdiction, alleging what may be briefly divided into two grounds: That the evidence did not show that the deceased was engaged in interstate commerce; or that the defendant was engaged in interstate commerce at the time of the accident. The court sustained the defendant's motion. The trial judge, because of some knowledge of Pederson v. D., L. & W. R. R., 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C,

153, and yet not distinguishing that case from the case at hand, expressed the view that the second reason in support of the motion was the stronger: the opportunity for distinguishing that decision from subsequent decisions of the Supreme Court being limited. Upon careful consideration, however, the court is of the opinion that the first reason is perhaps the more substantial, and that because the plaintiff's evidence did not show that the decedent was, at the time of the accident, engaged in interstate transportation, or work so closely related to it as to be practically part of it, that therefore the plaintiff was not entitled to maintain her action.

The case of Shanks v. D., L. & W. R. R. Co., 239 U. S. 556, 36 Sup. Ct. 188, 60 L. Ed. 436, L. R. A. 1916C, 797, is helpful. The test there laid down is expressed in the following language:

"Having in mind the nature and usual course of the business to which the act relates, and the evident purpose of Congress in adopting the act, we think it speaks of interstate commerce, not in a technical legal sense, but in a practical one, better suited to the occasion (see Swift & Co. v. United States, 196 U. S. 375, 398, 25 Sup. Ct. 276, 49 L. Ed. 518), and that the true test of employment in such commerce in the sense intended is: Was the employé at the time of the injury engaged in interstate transportation, or in work so closely related to it as to be practically a part of it?"

That test is applied in that opinion to the facts of previous cases in that court. That portion of the opinion relating to previous decisions where the application of the test shows that the employé was not engaged in interstate commerce is as follows:

"Without departing from this test, we also have held that the requisite employment in interstate commerce does not exist where a member of a switching crew, whose general work extends to both interstate and intrastate traffic, is engaged in hauling a train or drag of cars, all loaded with intrastate freight, from one part of a city to another (Ill. Cent. R. R. v. Behrens, 233 U. S. 473 [34 Sup. Ct. 646, 58 L. Ed. 1051, Ann. Cas. 1914C, 163]), and where an employé in a colliery operated by a railroad company is mining coal intended to be used in the company's locomotives moving in interstate commerce (Del., Lack. & West. R. R. v. Yurkonis, 238 U. S. 439 [35 Sup. Ct. 902, 59 L. Ed. 1397]). In neither instance could the service indicated be said to be interstate transportation, or so closely related to it as to be practically a part of it."

The facts of the case itself are quite analogous to the facts in the case now before the court. Shanks was employed in taking down and putting up fixtures in a machine shop conducted by the railroad company for repairing locomotives used in interstate and intrastate transportation. It was held that he could not maintain his action under the Employers' Liability Act, although on other occasions his employment related to interstate commerce. In a later case (Chicago, Burlington & Quincy R. R. v. Harrington, 241 U. S. 177 [36 Sup. Ct. 517, 60 L. Ed. 941], decided May 1, 1916) the Supreme Court again emphasizes the test to be applied in determining the nature of the employment in interstate commerce at the time of the injury to the employé. In that case the railroad company insisted that the employé was engaged in interstate commerce, and that therefore the Employers' Liability Act applied, rather than the law of the state in which the action arose. In that case, at the time the employé was killed he was engaged in causing the removal of coal from storage tracks to the coal shed or chutes by which the same would be delivered to locomotives in interstate hauls. The Supreme Court held that the act of Congress did not apply, because there was no close or direct relation to interstate transportation in the taking of the coal to the coal chutes. What is there, then, in the case at bar from which it can be inferred that Kelly was, at the time he was killed, engaged in interstate transportation? His engagement in causing the transfer of the lumber from the storage tracks to the place where it was to be used does not connect him more closely with transportation than Harrington's engagement in taking coal from the storage tracks to the coal chutes. In neither case was there such close direct relation to interstate transportation as would require the application of the provisions of the law.

Plaintiff's decedent, therefore, not being engaged in interstate transportation, plaintiff could not maintain an action for his death in this court. It is unnecessary to consider whether the railroad, at the time of Kelly's death, was engaged in interstate commerce. There were movements in interstate commerce along the line of its railroad at other points than at Corry, but the defendant, at that place, was not engaged in such transportation at that time.

Motion to take off the nonsuit is refused.

Not much need be added to what is thus said. The recent decision of Railroad Co. v. Harrington, 241 U. S. 177, 36 Sup. Ct. 517, 60 L. Ed. 941, seems to be clearly in point. Indeed, the present case is perhaps the stronger, for beyond the fact that something was to be done to the chutes we know nothing of its character or extent. It may have been some inconsiderable matter, related only remotely to interstate transportation, and, as the plaintiff was bound to show that it was "so closely related to it as to be practically a part of it," we think it plain that in any aspect of the question the District Court was right in holding that the case broke down for lack of proof.

The judgment is affirmed.

FLEITMAN v. McKINNON.

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

No. 68.

1. BILLS AND NOTES ⟸456—RIGHT OF ACTION—REPRESENTATIVE CAPACITY.

Plaintiff may sue, in his representative capacity as agent for the shareholders of a bank, on a note payable to plaintiff, "agent for the shareholders" of that bank, though those words would be construed as merely descriptio personæ in a suit by plaintiff as an individual.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 1377–1380, 1382–1392, 1394–1420½; Dec. Dig. ⟸456.]

2. PLEADING ⟸245(3)—AMENDMENT AT TRIAL—STATUTE.

Under Rev. St. § 954 (Comp. St. 1913, § 1591), authorizing a court at any time to permit either party to amend any defect in the pleadings, the court can at the trial of a suit by plaintiff, as agent for shareholders, on a note payable to him as such agent, permit plaintiff to amend the complaint, so as to allege delivery to, presentation, notice, and demand by, indebtedness to, and prayer for judgment in favor of plaintiff in his representative capacity, instead of as an individual; those amendments, if necessary, being merely matters of form, which could not have surprised defendant.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 658, 659; Dec. Dig. ⟸245(3).]

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

Action by John W. McKinnon, as agent for shareholders of the National Bank of North America in New York, against Lida M. Fleitman, as administratrix of the estate of F. Augustus Heinze, deceased. Judgment for plaintiff, and defendant brings error. Affirmed.

This cause comes here on writ of error to the United States District Court for the Southern District of New York in respect of a judgment entered therein on December 30, 1915, in favor of the defendant in error, hereinafter called plaintiff, in the sum of $91,682.04.

The National Bank of North America in New York is a national banking corporation, organized under the laws of the United States. On October 21, 1908, the plaintiff was duly elected the agent for shareholders to wind up the affairs of the bank. He duly qualified as such agent and became possessed of all the assets. It appears that one F. Augustus Heinze made and delivered to plaintiff a note, the essential part of which, so far as the questions here involved are concerned, is as follows:

"$80,000.00 New York, Mar. 10, 1909.

"Six months after date I promise to pay to J. W. McKinnon agent for shareholders Nat. Bank of North Am. or order, eighty thousand $^{00}/_{100}$ dollars for value received, with interest at 6 per cent per annum, having deposited with ——— as collateral security

15,000 shares Ohio Cop. Co stock

$20,000 par Ohio 1st Mort Bonds

with authority to sell the same, or other security subsequently substituted, at the Board of Brokers, or at public or private sale, at their option, on the performance of this promise and without further notice, applying the net proceeds to the payment of this note, including interest, and accounting to me for the surplus, if any. In case of deficiency, I promise to pay to said J. W. McKinnon the amount thereof, forthwith after such sale, with legal interest.

"F. Aug. Heinze."

Thereafter, and on November 4, 1914, Heinze died, and the plaintiff in error, hereinafter called defendant, was appointed administratrix by the Surrogate's Court of Saratoga County, in the state of New York. The plaintiff duly presented to the defendant a claim on account of the above note, for $87,444.84, the whole of which claim was rejected.

Thereupon this action was brought to recover the amount due and owing on the note after deducting certain payments, which had been made at divers times between October 5, 1910, and March 3, 1913, and which left a balance unpaid of $71,946.67. The judgment recovered was for that amount, together with the interest, $20,145.07, less $450, and costs in the sum of $40.30.

Rockwood & Haldane, of New York City (Charles A. Winter, of New York City, of counsel), for plaintiff in error.

Van Vorst, Marshall & Smith, of New York City (Arthur B. Brenner, of Brooklyn, N. Y., and John Howard Keim, of New York City, of counsel), for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). [1] The first question which this case presents is whether the plaintiff suing "as agent for shareholders of the National Bank of North America," can maintain an action on a note payable to "J. W. McKinnon, Agent for Shareholders Nat. Bank of North Am." The defendant's contention is that the words "Agent for Shareholders Nat. Bank of North Am." are mere descriptio personæ, which may be disregarded as without legal significance, that the legal title to the note is in McKinnon individually, and that therefore the action is not maintainable. We are not able to take this view of the matter.

The courts have held that where a note is payable to the order of a named person, with the official designation written after his name, as "A. B., President," his designation as officer may be disregarded as merely descriptio personæ, and that he may sue in his own name individually on the note. And they have also held that the note may in such a case be sued on by the corporation, and that

without any indorsement having been made to it by the officer. In 8 Corpus Juris, page 840, the rule is stated as follows:

"A bill or note made payable to a corporate officer or agent may be sued on by the corporation as the real party in interest, although an action by the officer in his own name has been sustained, he having the legal interest and his designation as officer being regarded as merely descriptio personæ; and this rule has been applied so as to authorize suits by the officers of unincorporated associations or joint-stock companies. So an officer of a corporation may sue in his own name on a negotiable instrument transferred to the corporation by an indorsement in blank."

It seems to be established law that, when the name of a payee is followed by words showing the payee's connection with a banking institution, as where a note runs to "A. B., Cashier," the obligation is payable to the bank as a matter of law, and the bank may sue upon it. In Bank of New York v. Bank of Ohio, 29 N. Y. 619, the instrument was payable to the order of "D. C. Converse, Esq., Cashier," and the court declared that "a bill drawn to D. C. Converse, cashier, is in judgment of law payable to the bank of which he is the officer."

In First National Bank v. Hall, 44 N. Y. 395, 4 Am. Rep. 698, a draft was payable to the order of "J. E. Robinson, Cashier." The draft had not been indorsed by Robinson to the bank, and yet the bank was allowed to maintain an action upon it. The court declared that the position of the parties is the same as if the draft had been made payable to the plaintiff by name instead of its cashier, and no indorsement was necessary to give it the position of a bona fide holder or to enable it to sue.

In Baldwin v. Bank of Newbury, 1 Wall. 234, 17 L. Ed. 534 (1863), the court held that a bank could maintain an action on a note payable to the order of "O. C. Hall, Esq., Cashier." The principle is, the court said, that the promise should be understood according to the intention of the parties. If the undertaking was to the corporation, it should be declared on and treated as a promise to the corporation, and parol evidence would be admissible to show that the person designated "cashier" was in fact at the time the cashier, and that he acted as such in taking the note, it being intended as a promise to the corporation. And the court added:

"Mr. Parsons, says, if a bill or note is made payable to 'A. B., Cashier,' without any other designation, there is authority for saying that an action may be maintained upon it, either by the person therein named as payee or by the bank of which he is cashier, if the paper was actually made and received on account of the bank; and the authorities cited by the author fully sustain the position."

The cases are numerous which hold that a bank may sue upon paper made payable to its cashier by his official title although he has not indorsed the paper. Commercial Bank v. French, 21 Pick (Mass.) 486, 32 Am. Dec. 280; Stamford Bank v. Ferris, 17 Conn. 259; Nave v. Lebanon First National Bank, 87 Ind. 204; Garton v. Union City National Bank, 34 Mich. 279; Pratt v. Topeka Bank, 12 Kan. 570; 7 Cyc. 559. And in a number of cases it is held that the government may bring suit in its own name on a bill or note belonging to it, although it is made payable to the treasurer of the United States or other public

officer. Dugan v. U. S., 3 Wheat. 172, 4 L. Ed. 362. The same principle has been applied to a state. People v. Bank of North America, 75 N. Y. 547; Esley v. Illinois, 23 Kan. 510. And also a county. See 11 Cyc. 607.

In the case at bar, the note, having been made to "J. W. McKinnon, Agent for Shareholders Nat. Bank of North Am., or order," belonged to J. W. McKinnon as agent for shareholders, and might be sued upon by him as such agent; it being alleged and proved that he had been appointed and qualified as the agent for the shareholders and was acting in that capacity at the time of suit. The same principle is to be applied to the case as would be applied to a note made "to A. B., Cashier." As such a note would be the property of the bank, and could be sued on by it, so this note belongs to the office which McKinnon occupies.

[2] This brings us to a second question, which was argued at some length, and which involves the right of the court to allow amendments to the complaint to be made at the trial. At the close of the testimony counsel for plaintiff asked to be allowed to amend his complaint to conform to the proof. The original complaint declared that Heinze had delivered his promissory note to the plaintiff. The amendment proposed was that it be made to read that the note was delivered "to the plaintiff as such agent for shareholders." It was also proposed to add the following paragraph:

"Said note was given in settlement of certain claims against said F. Augustus Heinze, which at the time of the appointment of Charles A. Hanna as receiver of the National Bank of North America in New York were assets of said bank, which claims were later duly transferred to said Charles A. Hanna as such receiver, and by him as such receiver were duly transferred to plaintiff as agent for shareholders of the National Bank of North America in New York. Plaintiff has at all times since the delivery of said note held it, and still holds it, as agent for shareholders as aforesaid."

The original complaint stated that "the plaintiff duly presented to the defendant a claim on account of the said promissory note," etc. This it was proposed to amend to read "the plaintiff *as such agent* duly presented," etc. The original complaint read, "The defendant served notice in writing upon plaintiff that she rejected the said claim," etc. This it was proposed to amend to read, "The defendant served notice in writing upon plaintiff *as said agent* that she rejected said claim." The original complaint read, "There is now due and owing on said note to the plaintiff from the defendant." This it was proposed to amend to read, "There is now due and owing on said note to the plaintiff *as said agent* from the defendant." The original complaint read, "Plaintiff demands judgment against the defendant." This it was proposed to amend to read, "Plaintiff *as said agent* demands judgment against the defendant."

All these amendments the court allowed to be made over the objection of the defendant. And their allowance has been assigned for error. If we assume for the purposes of the case that the original complaint was defective in the particulars in which the above amendments were made, we should nevertheless have no difficulty in holding that the court was not in error in allowing the amendments to be made. The amend-

ments were within the discretion of the court. See United States Revised Statutes, § 954 (Comp. St. 1913, § 1591). In allowing them to be made the court served the ends of justice. To have refused their allowance under the circumstances would have been to adhere to a practice no longer in favor which sacrificed justice to technical rules. The original pleading did not mislead the defendant to her prejudice, as the amendments did not in any way change the note upon which the action was brought. The evidence clearly showed that the plaintiff was suing in a representative capacity.

In this case there was no abuse of discretion in allowing amendments to be made which conformed the pleadings to the proof. No doubt it might be reversible error in some cases to amend a complaint to conform to evidence not admissible under the original complaint, and which was objected to and admitted under exceptions. But the cases in which that would be true would be confined to amendments which affected substantial rights going to the actual merits of the case. The right to make amendments which do not affect substantial rights and go to the actual merits of the case should not be denied upon the theory that it involves an invasion of the other party's right to the benefit of his exception.

Judgment affirmed.

HUDSON NAV. CO. v. JOYCE.

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

No. 51.

1. LANDLORD AND TENANT ⇐88(1)—LEASE—"RENEWAL."

Defendant, through plaintiff's efforts, secured a ten-year lease of a pier from a city, with the privilege of renewing it for a similar period on giving notice of its desire before the expiration of the lease, and sublet one-half of the pier to another company with a like privilege of renewal. Defendant agreed to pay plaintiff as compensation for his services a certain sum annually during the term of the lease and during the renewal thereof, if renewed. At the end of the term, defendant did not desire to renew, but its sublessee did, and secured a mandatory injunction requiring defendant to give notice of the exercise of its option to renew. While an appeal from that injunction was pending, the parties compromised by defendant assigning its lease to the other company, to whom the city then gave a new lease for ten years on the same terms. *Held*, that the new lease was a renewal of the original lease; a "renewal" being a revival or rehabilitation of an expiring subject.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 279, 280; Dec. Dig. ⇐88(1).

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

2. PRINCIPAL AND AGENT ⇐81(4)—COMPENSATION—RENEWAL OF LEASE.

Though that renewal was not with defendant, so as to entitle plaintiff to his compensation during the extended term, a renewal with defendant was effected when it gave the notice of exercising its option for renewal,

though stating that it was given in obedience to the injunction, and plaintiff's rights to his compensation were thereby established.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 196–198; Dec. Dig. ⇐81(4).]

Ward, Circuit Judge, dissenting.

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

Action by Henry L. Joyce against the Hudson Navigation Company. Judgment for the plaintiff, and defendant brings error. Affirmed.

A corporation, to whose rights the Hudson Navigation Company (plaintiff in error and defendant below) succeeded, received from the city of New York, through the commissioner of docks, a lease dated May 9, 1904, of the wharfage, etc., of certain pier on Manhattan Island for the term of ten years. This lease provided that "if at any time not less than three months before the expiration of the term [of ten years, the lessee] shall give to the [city of New York] notice in writing by service thereof on the commissioner of docks of its desire that this present lease and grant shall be renewed * * * [the city of New York] shall and will again lease, assign, and farm let [the property aforesaid] for a further term of ten years."

This lease had been negotiated by Joyce (defendant in error and plaintiff below) for the purpose of dividing the pier or the use thereof between the predecessor of the Hudson Company and the Central Railroad of New Jersey. Accordingly, and on or about August 5, 1904, the Hudson Company's predecessor, with the consent of the city, subleased (by instrument dated May 11, 1904) one-half of the said pier to the Central Railroad, and in the same document covenanted with that railroad company "that if at any time before the expiration of the term of these presents [i. e., the sublease which was coterminous with the lease by the city] the [Central Railroad] shall give to the [Hudson Company] notice in writing of its desire that this present lease and grant shall be renewed, then and in that case the [Hudson Company] shall and will again lease, demise, and farm let unto the [Central Railroad], for a further term of ten years, the said one-half of said pier."

The pier in question having thus been secured, one-half to the Hudson and one-half to the railroad company, for the same period of ten years, with a covenant on the part of the city to renew at the request of the Hudson Company, and a similar covenant on the part of the latter company to renew at the request of the railroad company—all in accordance with the intent of both corporations in employing Joyce to secure the lease—an agreement was executed between the Hudson Company and Joyce, reciting the substance of the foregoing statement and binding the Hudson Company to pay Joyce, in consideration of his services, $2,200 a year "during the term of said lease of ten years," and further agreeing "that in the event of a renewal of said lease by the city of New York with the [Hudson Company] for a further term of ten years to pay to [Joyce] the sum of $2,200 a year * * * in each and every year during the term of said renewal lease of ten years."

In due time, and in accordance with its contract with the Hudson Company, the Central Railroad notified that corporation that it desired to renew its sublease. The Hudson Company, however, did not wish to use the pier any longer, and declined to exercise the option which it held from the city of New York. Thereupon the Central Railroad began an action in the Supreme Court of this state against the Hudson Company and the city, and therein obtained a preliminary mandatory injunction requiring the Hudson Company to exercise the option aforesaid, upon the ground that by the sublease of 1904 the Central Railroad had an absolute right to enjoy the premises for the period of a renewal lease and the Hudson Company had covenanted to procure for it such right or estate.

In pursuance of this mandate the Hudson Company on July 22, 1914, served upon the then commissioner of docks a formal notification that it did desire

and request "a renewal of its said lease, dated on or about May 9, 1904, * * * under the terms and conditions provided in the said lease." It was stated in this document that the notification was given in pursuance of the injunction aforesaid and under compulsion thereof.

The cause in question then proceeded to trial, and a judgment was entered declaring that the Central Railroad, by its notification of a desire for a renewal of the sublease, had become "absolutely entitled" thereunto, and requiring the Hudson Company to "make, execute, and deliver" to the Central Railroad "such renewal lease for such renewal term." The judgment further required the city of New York to make, execute, and deliver to the Hudson Company a renewal lease for the whole pier in pursuance of the notification or request heretofore referred to and executed under compulsion of the mandatory injunction aforesaid.

This judgment or decree having been entered, and an appeal taken therefrom by the city, the matter was settled between all the parties thereto, and the appeal abandoned. By written stipulation the Hudson Company agreed to assign the lease of 1904, affecting the entire pier property in question, to the Central Railroad, specifically including in such transfer or assignment "all rights which have accrued to the [Hudson Company] under the said lease, including the right or privilege of a renewal term of ten years."

Thereupon Joyce brought this suit, setting forth in substance the proceedings aforesaid, alleging an absolute refusal on the part of the Hudson Company to make any payments to him after the expiration of the original ten-year lease, and demanding judgment for the whole amount of his commission or recompense for the ten-year renewal period, at $2,200 a year. At the close of the testimony both parties moved for a directed verdict. Such verdict was directed for so much of Joyce's annual payment as was due when suit was brought, together with interest. This writ was taken to the judgment entered in accordance with said direction.

Stuart G. Gibboney, of New York City, for plaintiff in error.

Abraham S. Gilbert, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] This action is not on any lease, but solely upon an agreement between the Hudson Company [1] and Joyce, whereby, for good consideration, the latter was to receive certain money annually "in the event of a renewal of said lease by the city of New York with [Hudson Company] for a further term of ten years." The sole question presented is whether *such* renewal ever took place. That there was *a* renewal we do not doubt. The meaning of that word has been considered in Carter v. Brooklyn Life Ins. Co., 110 N. Y. at page 22, 17 N. E. 396, and held to signify the revival or rehabilitation of an expiring subject; a description most appropriate in this case, where the leasehold estate finally vested in the Central Railroad was exactly that created by the lease of 1904, with the reddendum clause changed as contemplated in the original contract. The "renewal" contemplated was something that was to grow out of the original lease, and be governed by its terms, and that is exactly what was finally executed and delivered to the Central Railroad. Equally, if not more, persuasive is the fact that in the terms of settlement of the action promoted by the railroad company all parties thereto called the lease that should be and was

[1] The agreement was with the predecessor of this corporation, but for convenience the defendant is named as having been concerned in the matter from the beginning.

delivered a "renewal" of the original; and they must be held to have accurately described their own act.

[2] There remains, however, the objection that such renewal was never made with or to the Hudson Company, and therefore a condition precedent vital to Joyce's claim was never fulfilled. As between the city and the Hudson Company the one thing needful to produce a renewal was the timely service of notice and demand. This was given; and that it required a mandatory injunction to produce it is immaterial, for it is elementary that what was done under the valid and unreversed order of a competent court must be held to have been rightly done, and to be such an act as any well-disposed and honest citizen would be glad to do.

The rights of all parties to the old lease, including the Central Railroad, were fixed when the Hudson Company served the notice of July 22, 1914. Doyle v. Hamilton Fish Corp., 144 App. Div. 135, 128 N. Y. Supp. 898; Mattlage v. McGuire, 59 Misc. Rep. 28, 111 N. Y. Supp. 1083; Underhill, L. & T. p. 1365. But it is said that Joyce was no party to that instrument, and his claim was not advanced by this res inter alios acta. It is true that Joyce's rights depend, not on any estate carved out of the leasehold for him, but on a separate agreement to pay him for procuring the lease; his remuneration to be increased if such estate continued in being beyond the term originally conveyed by the city of New York. There is nothing in the contract with Joyce to the effect that he shall be paid for the renewal term (which grew out of his efforts as truly as out of the original lease) only if the Hudson Company wanted it or enjoyed it. His compensation depends on whether there ever was a renewal of lease *"by the city of New York with the [Hudson Company]."*

It is plain that there was such renewal in legal contemplation the moment the Hudson Company exercised its option, i. e., served the notice of July 22, 1914, for nothing further was necessary to secure the formal paper called a renewal lease. The relations of all parties would thereafter have been the same had no further paper writings ever been executed. Under the contract in suit, Joyce need not care whether the Central Railroad ever got a lease or not, nor whether the Hudson Company assigned anything; it is enough for him that on July 22, 1914, the defendant lawfully assumed the position of the city's tenant for another ten years; that of itself was a "renewal with" the Hudson Company, because then and there the relation of landlord and tenant for the new term sprang into existence. The subsequent apparatus of papers merely made a record of an existing legal relation.

As Joyce's claim became ripe, by the exercise (under lawful and righteous compulsion) of the Hudson Company's option, the judgment below was right, and is affirmed, with costs.

WARD, Circuit Judge (dissenting). The material provision of the agreement of August 4, 1904, between the Citizens' Steamboat Company of Troy and the plaintiff, Henry L. Joyce, is as follows:

"Now, therefore, this indenture witnesseth: That, the said party of the first part, in consideration of the services rendered by the said party of the second part in and about securing said lease from the city of New York, and

in securing the said Central Railroad Company of New Jersey as a tenant for said part of said pier, hereby covenants and agrees to pay to the said party of the second part, the sum of two thousand two hundred dollars ($2,200) a year, during the term of said lease of ten years, in equal quarterly payments in each and every year; *and* the said party of the first part further covenants, in the event of a renewal of said lease by the city of New York with the said party of the first part for a further term of ten years, to pay to the said party of the second part the sum of two thousand two hundred dollars ($2,200) a year, in equal quarterly payments, in each and every year during the term of said renewal lease of ten years."

The plain meaning of the foregoing language seems to me to be that in case of a renewal of the lease to the Citizens' Company it will make the quarterly payments to Joyce. This is also the reasonable construction, because it is difficult to see why the Citizens' Company should agree to pay after it had, by assignment or otherwise, lost all enjoyment of or interest in the premises. At the expiration of the original lease, the Citizens' Company had been wound up and dissolved, so that no renewal ever was made or could have been made to it. Therefore I think no cause of action ever accrued to the plaintiff under the agreement.

The Hudson Navigation Company, however, had by virtue of an independent agreement assumed all obligations of the Citizens' Company, and as assignee of the original lease was bound to renew the sublease of the south half of the pier to the Central Railroad Company of New Jersey. It could not do this without getting a renewal from the city. Assuming, for the purposes of argument, that it would have been liable to Joyce if it ever did get such a renewal, it never did get one Its notice to the city of intention to renew, or its liability to the Central Railroad Company to renew, the sublease, or the judgment in the state court that the city should renew, do not constitute a renewal. So it is equally beside the point that the state court might eventually have compelled a renewal. It never did. The parties to the suit, notwithstanding the judgment, could agree upon a wholly different settlement without consulting the plaintiff, Joyce, and pending the appeal of the city from the judgment, they did so; the Central Railroad Company of New Jersey taking from the city a lease of the whole pier at the agreed advance of rent and upon certain other different considerations, while the Hudson Navigation Company stepped out entirely.

As there never was a renewal of the lease to the Citizens' Company, or to the Hudson Navigation Company, I think the plaintiff had no cause of action, and that his complaint should have been dismissed.

TOWLE et al. v. PULLEN et al.

(Circuit Court of Appeals, Seventh Circuit. August 29, 1916. On Petition for Rehearing, December 4, 1916.)

No. 2344.

1. PARTITION ⊂⊃39—SUIT—FORFEITURE.
As the Illinois statutes require complainants in a partition suit to make all parties defendant who have any interest or alleged interest in the land in controversy, defendants, who were joined and claimed a leasehold in the property sought to be partitioned, cannot defeat partition on the ground that, as complainants asserted their leasehold had been forfeited for nonperformance of covenants, the suit was one to enforce a forfeiture; for equity, having taken jurisdiction of the proceeding for partition, could dispose of that portion of the suit involving the forfeiture.
[Ed. Note.—For other cases, see Partition, Cent. Dig. §§ 93–96; Dec. Dig. ⊂⊃39.]

2. LANDLORD AND TENANT ⊂⊃157(1)—CONDITIONS—WAIVER OF CONDITIONS.
Where a lease, which reserved an annual rental of $3,000, required the lessees to erect before 1893 a temporary building on the demised premises, costing not less than $7,000, and to erect a permanent building by 1898, costing not less than $50,000, and the two covenants were wholly separate, the lessor being given different remedies for breach, the fact that the lessor received rent after 1898, though the lessee had not complied with the building covenant, does not establish a waiver precluding the lessor from subsequenty asserting a forfeiture on the lessee's failure, after notice pursuant to the lease, to erect the permanent building according to the covenant.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572; Dec. Dig. ⊂⊃157(1).]

3. LANDLORD AND TENANT ⊂⊃157(1)—COVENANTS—ENFORCEMENT—LACHES.
In such case, where the building covenant provided that, in event of failure, the lessors might declare forfeiture at any time upon the lessees' failure to comply therewith after having received 90 days' notice, the fact that the lessors delayed demanding enforcement for nearly 15 years does not show that the lessors were guilty of laches precluding subsequent enforcement, particularly where the demised premises did not at the outset show such availability for renting purposes as was contemplated.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572; Dec. Dig. ⊂⊃157(1).]

4. LANDLORD AND TENANT ⊂⊃157(1)—COVENANTS—INSISTENCE UPON ESTOPPEL.
In such case, notwithstanding the lessors for a considerable time did not demand the full amount of the reserved rent, they are not estopped from subsequently insisting upon performance of the building covenant; the tenant having been in no wise injured by delay, not having changed his position after erecting the first temporary building.
[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 571, 572; Dec. Dig. ⊂⊃157(1).]

On Petition for Rehearing.

5. APPEAL AND ERROR ⊂⊃169—REVIEW—PRESENTATION OF GROUNDS IN COURT BELOW.
A contention not urged in the trial court cannot be considered on appeal.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1018–1034; Dec. Dig. ⊂⊃169.]

6. LANDLORD AND TENANT ⟸94(3)—LEASES—TERMINATION.
Where lessees breached a covenant entitling the lessors to terminate, notice to terminate is sufficient, though not signed by one of the lessors, who was also a lessee, for any other rule would render the lessors powerless to enforce a compliance with the covenant.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 318–319; Dec. Dig. ⟸94(3).]

7. LANDLORD AND TENANT ⟸152(3)—COVENANTS—CONDITIONS.
Where a lease reserving an annual rental required the lessees to erect before the year 1893 a temporary building on the demised premises, costing not less than $7,000, and to erect a permanent building by 1898 costing not less than $50,000, which building should be maintained, the lessor being entitled in case of default in such covenant to terminate the lease, should the default continue 90 days after notice, the provisions for a building and the maintenance of the same, as well as the clause protecting the lessor, constitute a continuing obligation.

[Ed. Note.—For other cases, see Landlord and Tenant, Cent. Dig. §§ 540, 547, 551; Dec. Dig. ⟸152(3).]

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

Bill by George Pullen and Mary F. Antes, as surviving trustees under the will of Lloyd T. Pullen, deceased, and others, against John R. Towle and others. From decree for complainants, defendants appeal. Affirmed.

Appellees, being the plaintiffs in the court below and herein so termed, brought this action against the appellants, herein termed the defendants, to secure a partition of land of which they were part owners and to remove as a cloud upon the title a certain outstanding and recorded lease which it was claimed had been terminated by prior notice for breach of its conditions. From a decree entered in accordance with the prayer of the complainants' bill, defendants appeal.

The chief controversy in this court arises over that portion of the decree which adjudged the lease to be terminated.

On December 12, 1892, the then owners of the land in controversy, being vacant Chicago property, executed a lease to John R. Towle and Herbert A. Morse for 99 years, which lease contained a provision for the erection of a $50,000 building on the lot on or before January 1, 1898. The annual rental was $3,000.

The lease read, in part, as follows:

"Said parties of the second part, in consideration of the granting of this lease, and as security for the payment of the rents herein reserved, and the performance of the covenants and agreements herein contained on their part to be kept and performed, further covenant and agree to cause to be erected upon said demised premises, and to pay therefor so that the same shall be free of all mechanic's liens, on or before the first day of January, in the year 1898, a building covering the entire frontage of said demised premises, having a height of not less than three stories, and costing not less than $50,000.00, which building shall be completed and ready for occupancy on or before the first day of January in the year 1898.

"And said parties of the second part covenant and agree that they will on or before the first day of May, in the year 1893, expend upon said demised premises in the construction of a temporary building to be erected thereon, covering the whole frontage thereof, not less than $7,000.00."

Instead of erecting a temporary building to cost not less than $7,000, a two-story building, somewhat more permanent in character and costing about $16,000, was erected thereon. The three-story building to cost not less than

$50,000 and to be erected by January 1, 1898, was never placed upon the premises.

The lease further provided as follows:

"It is expressly agreed that no notice or demand shall be necessary in case of default in the payment of rent, but that default for ninety days in the payment of any installment of rent hereunder, shall entitle said lessors to terminate this lease, without any demand therefor or notice to said lessees."

The lease further provided as follows:

"And the said parties of the second part further covenant and agree * * * that * * * if default shall be made in the covenants herein, as to rebuilding, repairing, insuring, or in any of the other covenants herein contained to be kept, observed and performed, by the parties of the second part, or their assigns, and such default shall continue 90 days after notice thereof in writing to the parties of the second part, it shall and may be lawful for the parties of the first part, at their election, to declare the said term ended, etc., etc."

On May 20, 1910, lessors made written demand upon lessees that the building called for in the lease be constructed, and by the same instrument notified lessees that the lease would be terminated if the demand was not complied with, in 90 days. Lessors, on February 29, 1912, notified lessees that they declared the lease terminated and demanded possession of the property. Lessees offered no excuse for their failure to construct the $50,000 building called for in the lease.

Defendants, in seeking to reverse that part of the decree denying to the leaseholders any and all interest in the premises, rely upon waiver, estoppel, and laches. Defendants also contend that the bill should be dismissed because the plaintiffs are asking a court of equity to enforce a forfeiture.

Edwin M. Ashcraft, of Chicago, Ill., for appellants.

Horace Kent Tenney, of Chicago, Ill., and Edgar L. Wood, for appellees.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Defendants' first contention, that the District Court erred in refusing to dismiss the bill because the plaintiffs in this action sought to enforce a forfeiture in a court of equity, is untenable.

This action is not one to enforce a forfeiture, but is an ordinary partition suit brought by certain landowners against defendants, also landowners, or claiming an interest in the property. The chief purpose of the action being to partition the land or, in case of failure to do so, to sell the property, the court is empowered to fix the rights of the parties interested, as well as those claiming to have an interest therein.

The statutes of Illinois, like the statutes of nearly all other states, require plaintiffs in a partition action to make all parties defendants, who have any interest or alleged interest in the real estate in controversy, and also empower the court which has jurisdiction of such partition suit to determine the rights and claims of all such parties in and to the real estate. Many questions are thus determined in the ordinary partition action. 30 Cyc. 238; Rann v. Rann, 95 Ill. 433; Crowley v. Byrne, 71 Wash. 444, 129 Pac. 113.

A court of equity having jurisdiction for the main purpose of the bill will exercise it generally, and will dispose of all questions arising between the parties, whether such questions are legal or equitable. It

might well be said that such jurisdiction of the court of equity to dispose of the legal questions is an incidental one. Courts of equity in actions other than partition suits have frequently determined legal issues, including forfeitures, when such issues were incidental to the determination of the main issue, which was purely equitable. Gunning v. Sorg, 214 Ill. 616, 73 N. E. 870; Pendill v. Union Mining Co., 64 Mich. 172, 31 N. W. 100; Big Six Development Co. v. Mitchell, 138 Fed. 279, 70 C. C. A. 569, 1 L. R. A. (N. S.) 332; Brewster v. Lanyon Zinc. Co., 140 Fed. 803, 72 C. C. A. 213.

[2] Defendants' contention that plaintiffs waived their right to terminate the lease for failure to construct the building by the acceptance of accrued rent after January 1, 1898, is also untenable. The payment of rent was an obligation which the lessees assumed entirely separate and distinct from their obligation to build the three-story building referred to in the lease. The requirement that the lessees construct a permanent building was a continuing obligation. It was inserted for the purpose of furnishing additional security to the landlords. The acceptance of rent would not waive plaintiffs' right to terminate the lease for subsequent failure to comply with the terms of the lease. Mulligan v. Hollingsworth, 99 Fed. (C. C.) 216; Robbins v. Conway, 92 Ill. App. 173; Gluck v. Elkon, 36 Minn. 80, 30 N. W. 446.

The correspondence between the lessees and the representative of the landlords shows conclusively that no waiver was ever intended to result from the acceptance of the rent. On the other hand, the only fair inference that could be drawn from the correspondence was that the right to insist upon the enforcement of the building clause in the lease was at all times recognized by all parties.

[3, 4] Defendants' claims that plaintiffs were guilty of laches, and were estopped to insist upon a forfeiture of the lease for failure to comply with this clause, are without merit. The plaintiffs were not guilty of laches. They may have been overindulgent. But tenants cannot set up such leniency as a bar to the landlord's rights.

No estoppel can result therefrom because the record fails to show any prejudice which the tenants suffered by reason of the landlords' leniency in extending time of payment or in their failure to insist upon an earlier termination of the lease.

The testimony shows that the tenants did not receive in the early nineties the amount of rent that they expected would come from the subleasing of the property. During those years of hardship the landlords temporarily accepted a part of the amount fixed in their lease, instead of the whole thereof. They likewise did not insist upon the prompt expenditure of $50,000 for the construction of the three-storied building. The defendants were certainly not injured by this indulgence. The essential element to make a case of estoppel is lacking.

Moreover, the lease which the parties made did not require landlords to act immediately upon a breach of any of the covenants. An examination of that portion of the lease heretofore quoted clearly indicates that, any time after breach of the covenant to build, the land-

lords might serve demand that the covenant be performed. Failure to comply with this demand within 90 days after such notice authorized the landlords to terminate the lease. Power to avoid termination of the lease therefore rested at all times with the defendants and was not lost or impaired by the plaintiffs' failure to serve the notice at an earlier date.

The defendants also complain because the District Court decreed that the defendant Harriet E. Morse pay to the plaintiffs the sum of $597.25 on an accounting. Harriet E. Morse was interested in the lease and she was also interested in the fee. The amount thus found to be due from Harriet E. Morse on this accounting is supported by the evidence and by admissions made upon the trial.

The decree is affirmed.

On Petition for Rehearing.

In support of a petition for a rehearing appellants contend that the notice to terminate the lease was not signed by all of the landlords and that as to those not signing there was no desire to terminate it.

[5] This contention was not made in the lower court. The sufficiency of the notice terminating the lease was not disputed. It might well be dismissed under the rule that a question not presented to the lower court will not be considered upon appeal. Morrill v. Jones, 106 U. S. 466, 1 Sup. Ct. 423, 27 L. Ed. 267; Harding v. Giddings, 73 Fed. 335, 19 C. C. A. 508; Adams v. Shirk, 117 Fed. 801, 55 C. C. A. 25.

[6] The legal question thus presented is one for which few precedents may be found. One of the landlords is interested also as a lessee. Evidently she considers her interest under the lease more valuable than her interest as a landlord. In the conflict of interest between the landlords and tenants she has cast her lot with the tenants. If it is necessary that the notice terminating the lease be signed by all the landlords or their duly authorized agent, it will be impossible to terminate this lease unless one of the lessees should sign the notice.

There seems to be a conflict of opinion as to the right of some, but not all, the landlords, joint tenants or tenants in common, to terminate the lease. Supporting the right are: Foa on Landlord and Tenant (4th Ed.) 614; Woodfall on Landlord and Tenant (19th Ed.) 409; Tiffany on Landlord and Tenant, § 198, p. 1438; 1 McAdam on Landlord and Tenant, § 181; 1 Underhill on Landlord and Tenant, § 121; Doe v. Summerset, 1 B. & A. 135; Alford v. Vickery, Carrington & Marshman, 280. Contra: Pickard v. Perley, 45 N. H. 188, 86 Am. Dec. 153; Right v. Cuttall, 5 East, 491; 24 Cyc. 1332.

We conclude that in a case like the present, where one of the landlords secured an interest as lessee and refused to join in the notice of termination, notwithstanding the breach of covenant on the part

of the tenants, such landlord's consent is not necessary to terminate the lease. To hold otherwise would be to create a most intolerable condition. For if a person interested both as a landlord and as a tenant withheld his consent to the termination of a lease the tenancy could be continued indefinitely. Even when the tenants failed to pay rent the tenancy could not be terminated when the lease required a preliminary notice, if the appellants' position is sound.

[7] Appellants also complain of the following language in the opinion filed:

"The requirement that the lessee construct a permanent building was a continuing obligation. It was inserted for the purpose of furnishing additional security to the landlords. The acceptance of rent would not waive the plaintiff's right to terminate the lease for subsequent failure to comply with the terms of the lease."

The above-quoted language, correctly construed and limited, was not erroneous, but, standing by itself, may be subject to criticism. The court intended to express the conclusion that, in view of all the terms of the contract under consideration, which was too long to set forth in extenso, the provision for the erection of a building was a continuing obligation. It would have been more accurate to say that the provision for a building and the maintenance of the same, as well as the clause inserted in the said contract to protect the lessor in his right to insist *at all times* upon the *erection* and *maintenance* of such a building, constituted a continuing obligation. It must be conceded that the provision for the construction of a building in a long-term lease may be so drawn that the court would not hold it to be a continuing obligation. The contract under consideration was not of such a character.

This conclusion having been reached, it was unnecessary to set forth the long correspondence and the other facts which the appellee contends showed that the payment of rent was never intended in the instant case to operate as a waiver of the landlords' right to insist upon the erection of the building. Nor did we consider it necessary to pass upon the appellees' further claim that the money was never paid as rent nor was it paid to the landlords.

No other question is presented that is not fully covered by the former opinion. The petition for a rehearing is denied.

In re CONTINENTAL COAL CORP.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1916.)

No. 2930.

1. BANKRUPTCY ⟸18—ADJUDICATIONS—EFFECT OF.

After the filing of a petition for involuntary bankruptcy, defendant filed a petition in voluntary bankruptcy in another district, and by such court was adjudicated a bankrupt; it not appearing that the second court was notified of the involuntary petition. *Held* that, as the trustee appointed under the involuntary petition would take title as of the date of the filing of the petition, and as the property of the bankrupt by reason of the filing of such petition passed in custodia legis, though actual possession was not taken, the adjudication by the second District Court is not conclusive against the continuance of proceedings under the involuntary petition; the case not falling within Bankr. Act July 1, 1898, c. 541, § 32, 30 Stat. 554 (Comp. St. 1913, § 9616), and General Order No. 6 (89 Fed. v, 32 C. C. A. ix), providing for transfer of proceedings where one or more petitions in bankruptcy are filed in courts having concurrent jurisdiction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 22; Dec. Dig. ⟸18.]

2. BANKRUPTCY ⟸152—TRUSTEE—TITLE OF.

The title of the trustee in bankruptcy will relate back and be treated as of the time of the filing of the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 194; Dec. Dig. ⟸152.]

3. BANKRUPTCY ⟸47, 51—PETITION—SECOND PETITION.

Where, after a petition in involuntary bankruptcy is filed in one district, a petition for voluntary bankruptcy is filed in a second district, notice of the filing of the voluntary petition should be given to the petitioning creditors before proceedings are had thereon, to afford them opportunity to determine the course most likely to conserve the assets of the estate; and, where no such notice is given, it will, the record being silent, be presumed that the court making the adjudication under the voluntary petition was not notified of the filing of the involuntary petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 41, 42, 49; Dec. Dig. ⟸47, 51.]

Petition to Revise an Order of the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

Petition in the District Court for the Eastern District of Kentucky for involuntary bankruptcy by Roszelle Bros. and others against the Continental Coal Corporation, to which the trustee in voluntary bankruptcy of the defendant in the District Court for the Eastern District of Tennessee and others filed answers. Defendant's motion to stay proceedings were denied (235 Fed. 343), and they petition to revise. Petition denied, and case remanded for further proceedings.

On May 5, 1916, an involuntary petition in bankruptcy was filed in the United States District Court for the Eastern District of Kentucky, by Roszelle Bros. et al., against the Continental Coal Corporation, a citizen of the state of Wyoming (hereinafter called the Corporation), charging it with having committed certain acts of bankruptcy, and that its principal place of business was in the Eastern district of Kentucky, for the greater part of six months

next preceding the filing of said petition. Service of the petition was had on May 8, 1916. On the same day and about two hours after service, the Corporation filed its voluntary petition in bankruptcy, in the United States District Court for the Eastern District of Tennessee, and was adjudicated a bankrupt. Immediately thereafter C. M. Preston was appointed receiver of all the assets of the bankrupt Corporation, accepted the trust, executed bond, and qualified in compliance with the orders of the court. The receiver took possession of the property of the Corporation, both in Tennessee and in Kentucky, and continued in possession thereof until his election as trustee. On May 12, 1916, the Corporation and C. M. Preston, as receiver, filed their sworn answers to the petition of Roszelle Bros. et al., pending in the Eastern district of Kentucky. The Corporation in its answer denied it had its principal place of business in the Eastern district of Kentucky for the greater part of six months next preceding the filing of said petition, denied the acts of bankruptcy charged against it, and pleaded the filing of its voluntary petition in the Eastern district of Tennessee and the adjudication of bankruptcy made thereunder. C. M. Preston, as receiver, denied jurisdiction of the United States Court for the Eastern District of Kentucky, and also pleaded the filing of said voluntary petition in the United States District Court for the Eastern District of Tennessee. Thereupon the Corporation and C. M. Preston, receiver, moved to stay the proceedings under the involuntary petition. On May 20, 1916, the United States District Court for the Eastern District of Kentucky entered an order in the involuntary proceedings, overruling the motions to stay, and directed a reference to a special master, "to hear proof and report to the court as soon as may be his findings on the evidence that may be adduced as to where the principal place of business of the respondent is located." On May 23, 1916, and within the time allowed by law in which to plead to the said involuntary petition, C. M. Preston, who in the meantime had been appointed trustee in the voluntary proceedings in Tennessee, and a committee representing a majority of the indebtedness of the Corporation, filed their answers to the involuntary petition. They denied the acts of bankruptcy charged, denied the jurisdiction of the court, and pleaded the adjudication of bankruptcy under the voluntary petition in the Eastern district of Tennessee, as res adjudicata, as to the location of the principal place of business of the bankrupt, until set aside or reversed in a direct proceeding, and as a bar to the further prosecution of the involuntary petition in the Eastern district of Kentucky, and filed their joint motion to vacate the order entered on May 20, 1916, and to stay the said involuntary proceedings. On August 12, 1916, the District Court entered an order denying said motion to vacate its previous order and stay further proceedings and overruling certain exceptions to the report of the special master.

C. C. Moore and D. L. Grayson, both of Chattanooga, Tenn., for petitioner.

C. L. Williamson, of Lexington, Ky., for respondent.

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

McCALL, District Judge (after stating the facts as above). [1] Under the petition for revision, the question for decision is: Did the court below err, as a matter of law, in denying the motion by petitioners to stay the involuntary proceedings pending in that court?

If it be true that the principal place of business of the Corporation had been in the Eastern district of Kentucky, for a period of six months next preceding the filing of the involuntary petition, then that court would have exclusive jurisdiction of the case; otherwise, it would not have jurisdiction. The petitioners seek to deprive the court of the Eastern district of Kentucky of the right to determine that jurisdic-

tional fact for itself, and for that purpose they assert and show that, after the involuntary petition had been filed in the federal court in Kentucky, and service had, the Corporation filed a voluntary petition in the federal court at Chattanooga, Tenn., and was adjudicated a bankrupt. This action, it is insisted, ex necessitate adjudicated the principal place of business of the Corporation for six months next preceding the date of the filing of the petition to have been in Tennessee, and, the judgment not having been set aside or appealed from, that question is res adjudicata. This, perhaps, would be true, if the petition in involuntary bankruptcy had not been previously filed in the federal court in Kentucky. That having been done, and both courts exercising jurisdiction of the case, it becomes necessary to determine the nature and extent of the jurisdiction of the federal court in Kentucky, upon the filing of the involuntary petition.

In Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405, Mr. Chief Justice Fuller, speaking for the Supreme Court, said:

"It is as true of the present law as it was of that of 1867 that the filing of the petition is a caveat to all the world, and in effect an attachment and injunction (Bank v. Sherman, 101 U. S. 403 [25 L. Ed. 866]); and on adjudication, title to the bankrupt's property became vested in the trustee (sections 70, 21e), with actual or constructive possession, and placed in the custody of the bankruptcy court."

In so far as we are advised, the doctrine of the Nugent Case, supra, has not been materially modified. It is thus clear that the filing of the petition in bankruptcy in the District Court for the Eastern District of Kentucky, and the issuing of process thereon, was an assertion of the jurisdiction of the court over the bankrupt's estate, and gave that court prior jurisdiction over the subject-matter, which jurisdiction was exclusive during the pendency of such proceedings for adjudication. It may be true that the court below did not have actual possession, through its officers, of the property of the bankrupt estate, but it cannot be denied with reason that the court had such possession of the bankrupt estate, as placed it in custodia legis.

In Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 307, 32 Sup. Ct. 96, 56 L. Ed. 208, Mr. Justice Day, speaking for the court, said:

"An attachment of the bankrupt's property after the filing of the petition and before adjudication cannot operate to remove the bankrupt's estate from the jurisdiction of the bankruptcy court for the purpose of administration under the act of Congress. It is the purpose of the bankruptcy law, * * * to place the property of the bankrupt under the control of the court, wherever it is found, with a view to its equal distribution among the creditors. The filing of the petition is an assertion of jurisdiction with a view to the determination of the status of the bankrupt and a settlement and distribution of his estate. The exclusive jurisdiction of the bankruptcy court is so far in rem that the estate is regarded as in custodia legis from the filing of the petition. It is true that under section 70a of the act of 1898 the trustee of the estate, on his appointment and qualification, is vested by operation of law with the title of the bankrupt as of the date he was adjudicated a bankrupt, but there are many provisions of the law which show its purpose to hold the property of the bankrupt intact from the time of the filing of the petition, in order that it may be administered under the law if an adjudication in bankruptcy shall follow the beginning of the proceedings."

[2] The title of the trustee in bankruptcy, appointed under the involuntary proceedings so first begun, would be fixed as of the time of filing the petition. Acme Harvester Co. v. Beekman Lumber Co., supra; Everett v. Judson, 228 U. S. 474, 33 Sup. Ct. 568, 57 L. Ed. 927, 46 L. R. A. (N. S.) 154; Bailey v. Baker Co., 239 U. S. 268, 36 Sup. Ct. 50, 60 L. Ed. 275; Toof v. City National Bank (C. C. A. 6) 206 Fed. 250, 251, 124 C. C. A. 118. And therefore the federal court in Kentucky, upon the filing of the involuntary petition, took such possession of the bankrupt's estate, as placed it in custodia legis, and it had jurisdiction to retain the case to ascertain the facts, for the purpose of determining its own jurisdiction, that question having been raised by the pleadings. Mr. Justice Moody, in speaking for the court in the case of Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327, said:

"Where a court of competent jurisdiction has taken property into its possession, through its officers, the property is thereby withdrawn from the jurisdiction of all other courts."

And again:

"The jurisdiction in such cases arises out of the possession of the property and is exclusive of the jurisdiction of all other courts, although otherwise the controversy would be cognizable in them."

In that case, the court had the actual possession of the property, through its officers; but we can see no valid reason why the same principle should not apply with equal force, where the possession is merely potential. Orinoco Iron Co. v. Metzel (C. C. A. 6) 230 Fed. 40, 44, 144 C. C. A. 338.

If this were a case of concurrent jurisdiction on the part of the federal courts in Kentucky and Tennessee, then the question would be disposed of under section 32 of the Bankruptcy Act and General Order No. 6 (89 Fed. v, 32 C. C. A. ix); or if the two courts had concurrent jurisdiction, and section 32 and General Order No. 6 did not exist, then it would perhaps be held that the court first acquiring jurisdiction would retain the case for the purpose of adjudging the defendant corporation a bankrupt, and settling and distributing its estate; but here one or the other of these courts has exclusive jurisdiction to entertain this case. The jurisdiction of the federal court in Kentucky first having been asserted on the filing of the involuntary petition, in the absence of any statute or general order in bankruptcy, we think, both upon principle and authority, that the court in which jurisdiction was first asserted took constructive possession of the property of the bankrupt estate, and should retain the case for the purpose of determining the question of its own jurisdiction. Lazarus v. Prentice, 234 U. S. 263, 34 Sup. Ct. 851, 58 L. Ed. 1305; Robertson v. Howard, 229 U. S. 254, 33 Sup. Ct. 854, 57 L. Ed. 1174; Acme Harvester Co. v. Beekman Lumber Co., 222 U. S. 300, 32 Sup. Ct. 96, 56 L. Ed. 208; Murphy v. John Hofman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405; Bank v. Sherman, 101 U. S. 403, 25 L. Ed. 866. The cases cited and relied on by the attorneys

for petitioner, in our opinion, are distinguished from the case at bar, and our conclusion is not in conflict with them.

[3] It does not appear that notice of the filing or intention to file the voluntary petition in the federal court in Tennessee was given to the petitioning creditors in the involuntary proceedings pending in the federal court in Kentucky, nor that the pendency of the involuntary proceedings was brought to the attention of the referee in bankruptcy in the Eastern district of Tennessee, who made the adjudication; and we assume, therefore, that the adjudication under the voluntary proceedings was had without the referee's knowledge of the pendency of the involuntary case, or else he would have required such notice, following the holding of this court in International Silver Co. et al., v. New York Jewelry Co. et al., 233 Fed. 945, —— C. C. A. ——, wherein it was said:

"Notice of the filing of the voluntary petition should have been given to the petitioning creditors, and opportunity thus afforded to determine the course most likely to conserve the interests of the estate."

This we think the better practice.

The petition to revise must be denied, with costs, and the case remanded for further proceedings.

JACKSON et al. v. CRAVENS, Supervising Inspector of Naval Stores, et al.

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

No. 2916.

1. STATUTES ⟸225½—CONSTRUCTION—SUBSEQUENT STATUTE.
The general terms of a prior statute are not to be construed as covering the particular terms of a subsequent statute, but the latter are to be construed as withdrawn from the operation of the former.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. ⟸225½.]

2. STATUTES ⟸225½—CONSTRUCTION—REMEDIES.
Where a statute provides a new, specific, and complete remedy, fully covering the subject-matter, its provisions will alone be looked to, and resort cannot be had to prior existing general remedies.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 305; Dec. Dig. ⟸225½.]

3. COURTS ⟸407(1)—FEDERAL COURTS—APPELLATE JURISDICTION—INJUNCTION ORDERS.
Judicial Code (Act March 3, 1911, c. 231) § 129, 36 Stat. 1134 (Comp. St. 1913, § 1121), originating in Act March 3, 1891, c. 517, 26 Stat. 826, creating the Circuit Court of Appeals, provides that where, upon a hearing in equity in a District Court or by a judge thereof in vacation, an injunction shall be granted, continued, refused, or dissolved by an interlocutory order or decree, an appeal may be taken from such interlocutory order or decree to the Circuit Court of Appeals, notwithstanding an appeal in such case might upon a final decree be taken directly to the Supreme Court. Judicial Code, § 266 (Comp. St. 1913, § 1243), originating in Act June 18, 1910, c. 309, 36 Stat. 539, authorizes a District Judge, upon presentation of an application for a temporary injunction, suspending or restraining the enforcement, operation, or execution of any state

statute, to call to his assistance a Circuit Judge and another District Judge, before whom the application shall be heard. The section further declares that an appeal from the order may be taken direct to the Supreme Court of the United States. *Held* that, as the later section provided an entirely new remedy, and provided for a hearing before a court composed practically in the same manner as the Court of Appeals, a litigant, denied a temporary injunction by a District Court so organized, cannot appeal to the Circuit Court of Appeals, and can only appeal to the Supreme Court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1100; Dec. Dig. ⊂=407(1).]

Appeal from the District Court of the United States for the Southern District of Florida; Emory Speer, Judge.

Suit by J. W. Jackson and others against E. S. Cravens, Supervising Inspector of Naval Stores or purporting to be Supervising Inspector of Naval Stores, and others. An application for preliminary injunction (235 Fed. 212) being denied, complainants appeal. Appeal dismissed.

Chas. M. Cooper and Chas. P. Cooper, both of Jacksonville, Fla., for appellants.

Thomas F. West, Atty. Gen., John C. Cooper, of Jacksonville, Fla., and W. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for appellees.

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

GRUBB, District Judge. This cause was submitted upon the motion of the appellees to dismiss the appeal. The order appealed from was an order of the District Court for the Southern District of Florida, denying an interlocutory injunction applied for by the plaintiffs. The bill was filed to restrain the supervising inspector of naval stores for the state of Florida from taking steps to enforce an alleged unconstitutional statute of that state. As provided by section 266 of the Judicial Code, the District Judge, upon presentation of the application for a temporary injunction, called to his assistance a Circuit Judge and another District Judge, before whom the application was heard, and by whom it was denied. Thereupon the plaintiffs took an appeal from the order of the District Court, composed of the three judges, to this court. Section 266 provides that:

"An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

The contention of the plaintiffs (appellants) is that this provision is permissive only, and does not provide an exclusive remedy for an appeal, but that resort may be had, at the election of the plaintiffs, to the remedy provided in section 129 of the Judicial Code by appeal to this court. The defendants (appellees) contend that the appellate remedy provided by section 266 is exclusive.

[1-3] It is conceded by appellees that the terms of section 129

are broad enough to cover this appeal, unless they are to be restricted by the effect of section 266. The appellants also concede the rule of construction that where an earlier statute provides a remedy covering all cases, and a subsequent statute creates a specific remedy for a particular case, the latter is to be construed to be exclusive, unless the purpose of the Legislature or the convenience of the public demand a different rule of construction, and that this is true, though the language of the subsequent act is permissive, rather than mandatory. The appellants contend that the purpose of Congress in the enactment of the legislation now contained in section 266 was twofold: To expedite the hearing of appeals from orders granting or denying interlocutory injunctions, injunctions involving the unconstitutionality of a state statute in the federal courts, and to relieve the Supreme Court of the burden of litigation. The appellants contend that these controlling objects of the legislation require that it be given a construction that would most expedite the hearing of the appeal from the order on the application for the interlocutory injunction, and have the greater tendency to relieve the Supreme Court of litigation under it. If these were the controlling objects of Congress in enacting the statute, it may be that their accomplishment would best be subserved by a construction that gave the plaintiffs an elective appeal to the Circuit Court of Appeals under section 129, with an expedited hearing, and at the same time relieve the Supreme Court of the hearing of the appeal. We do not think that these were the controlling purposes of Congress. The effect of section 266 is to increase the jurisdiction of the Supreme Court, not to diminish it; and this is true, even if it be construed as appellants contend it should be. Before its enactment, the Supreme Court was burdened with no appeals from interlocutory orders. The inevitable effect of section 266 is, therefore, to add to its jurisdiction, and there is no room for the inference that the aim of Congress in passing the act was to reduce the volume of litigation that went to the Supreme Court. Again, if the purpose of Congress was to relieve the Supreme Court, it would not have attempted to accomplish that purpose by leaving to the litigants the option to go to the Supreme Court or to the Court of Appeals, and so put in the power of the litigants, rather than in that of Congress, the accomplishment of that purpose. We therefore think that the act, codified into section 266, was not passed by Congress with the purpose of relieving the Supreme Court, as was the act of 1891, creating Circuit Courts of Appeals, and other similar acts, and should not be so construed.

Nor do we think that the expedition of the hearing of appeals from orders on applications for temporary injunctions involving the unconstitutionality of state statutes was so much the object of Congress as to provide against the issue of a temporary injunction that should remain in force till final decree upon the mandate of a single judge. The main purpose of Congress was to provide a hearing, before the granting of a temporary injunction, before a court that, numerically and by rank, should approach in authority the Courts of Appeals of the various circuits. It was rather to safeguard the original grant-

ing of the order than to expedite the hearing of an appeal from the order when granted. It was considered that the new remedy provided would satisfy litigants by reason of the character of hearing accorded by it, and thus make them willing to abide the final hearing without discontent. Section 266 provides for the expediting of the original hearing before three judges, largely, doubtless, because of the power vested in the District Court to grant a restraining order pending that hearing. There is nothing in its language to indicate an intention to expedite the hearing of the appeal. The parties were by it accorded a full hearing before a court of three members before any order could be made, and Congress doubtless felt that this and the right of the Supreme Court to advance the hearing afforded a full measure of protection against the incidental delay in a final hearing of the appeal.

For these reasons we see no reason for departing from the settled rule of statutory construction, recognized by the Supreme Court, that the general terms of a prior statute are not to be considered as covering the particular terms of a subsequent statute, but, on the contrary, the latter are to be considered as withdrawn from the operation of the former, unless for good reason. United States v. Chase, 135 U. S. 260, 10 Sup. Ct. 756, 34 L. Ed. 117; Townsend v. Little, 109 U. S. 504, 3 Sup. Ct. 357, 27 L. Ed. 1012; Cook County National Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537. At the time of the enactment of the act of March, 1891, now represented in part by section 129 of the Judicial Code, and at the time of the adoption of its amendments, no such remedy as that now provided for by section 266 of the Judicial Code was in existence, and Congress could have had no express intention of making the appeal given by section 129 applicable to the new remedy. Section 294 of the Code (Comp. St. 1913, § 1271) prevents giving the re-enactment of section 129, when the Code was adopted, a different construction from that which it originally had.

We think the contention of appellants also conflicts with the rule of construction that where a statute provides a new, specific, and complete remedy, and fully covers the subject-matter, the provisions of the statute will be looked to alone, and resort will not be had to prior existing general remedies as cumulative. It is true that section 266 does not create a new tribunal. Applications under it are addressed to the District Court, and orders are then made by that court. However, it clearly creates a new remedy through an enlarged tribunal. Ex parte Metropolitan Water Co., 220 U. S. 539, 31 Sup. Ct. 600, 55 L. Ed. 575. Outside of its provisions, no authority would exist for the District Judge to call to his assistance other Circuit or District Judges. The new remedy created by it is not limited to the original hearing of the application, but the appeal is also provided for by its terms, and, instead of providing that appeals should be taken as provided by law or by section 129 of the Code, a new remedy for the appeal is created direct to the Supreme Court, which thereby first acquired jurisdiction of appeals from interlocutory orders. We think Congress thereby intended to fully cover the subject-matter of appeals from such orders, and that the remedy so

provided was exclusive, not cumulative. The rule was laid down by the Supreme Court in the cases of Brown v. United States, 171 U. S. 631, 19 Sup. Ct. 56, 43 L. Ed. 312, and Laurel Oil Co. v. Morrison, 212 U. S. 291, 29 Sup. Ct. 394, 53 L. Ed. 517, that:

"Where a statute provides for an appeal or a writ of error to a specific court, it must be regarded as a repeal of any previous statute providing for an appeal or a writ of error to another court."

We think the practical objects to be accomplished are better subserved by the construction we have given the section. In matters where the constitutionality of a state statute is involved, the desiderata are a speedy final decision of the question and the maintenance of the statu quo, as far as may be, pending its decision. The former is the more important. The latter is provided for by section 266, through the means of a hearing of the application for an interlocutory injunction by "an enlarged tribunal" different from the court of equity mentioned in section 129. The former is accomplished by providing for a direct appeal to the Supreme Court from the order granted on the hearing of the application for the interlocutory injunction. An appeal to an intermediate appellate court would serve to delay the final and authoritative decision of the question. The decision of the interlocutory appeal in a large majority of cases of this character is determinative of the question as to the constitutionality of the state statute, if rendered by a court of last resort. To expedite a final settlement of the constitutionality of the state statute, a direct appeal to the Supreme Court provides the quickest method. The Supreme Court has the authority to advance the hearing when justice demands it. The importance of a speedy final settlement of the question is not confined to the litigants before the court, and their interests are not alone concerned. The state and its citizens are also concerned, and this makes a speedy and authoritative settlement of the question of more importance even than the preservation of the status in the instant case. Giving to the litigants the election to delay such authoritative decision by an appeal to an intermediate court would defeat this purpose.

Because of the views expressed, we are constrained to hold that the appeal provided by section 266, direct to the Supreme Court, is exclusive, and that the appeal to this court should be dismissed, at appellants' costs; and it is so ordered.

In re HAWLEY DOWN-DRAFT FURNACE CO.

NATIONAL TRUST & CREDIT CO. v. CHIDSEY.

(Circuit Court of Appeals, Third Circuit. December 15, 1916.)

No. 2149.

1. ASSIGNMENTS ⊂⊃86—RIGHT OF ATTACHING CREDITOR.
Where the bankrupt conveyed to petitioner certain of its accounts, receiving a substantial payment thereon, and petitioner made the bankrupt its agent for collection, creditors of the bankrupt could not, under the Pennsylvania law, levy upon the proceeds received on collection of the account, for the levy could be made only under attachment execution, and creditors could not acquire any greater rights than those of the bankrupt.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 152–154; Dec. Dig. ⊂⊃86.]

2. BANKRUPTCY ⊂⊃172—RIGHTS OF TRUSTEE—STATUTE.
Under Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), declaring that the trustee, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with the rights, remedies, and powers of a judgment creditor holding an execution returned unsatisfied, the trustee of the bankrupt corporation cannot, as against petitioner, who purchased accounts payable to the corporation, deny petitioner's right to collections made by the corporation as petitioner's agent, where, under the state laws, such moneys could not be levied on by the bankrupt's creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 220; Dec. Dig. ⊂⊃172.]

3. ASSIGNMENTS ⊂⊃57—VALIDITY—NOTICE TO DEBTORS.
Where a bankrupt transferred to a third person accounts due from debtors, the validity of such transfer as between the parties is not affected because the several debtors were not notified.

[Ed. Note.—For other cases, see Assignments, Cent. Dig. §§ 116–120; Dec. Dig. ⊂⊃57.]

4. BANKRUPTCY ⊂⊃440—PROCEEDINGS TO REVIEW—PETITION TO REVISE.
Where the facts were not in dispute, but the decision in a controversy arising in bankruptcy depended upon a question of law, the matter should be reviewed by petition to revise.

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

Petition to Revise and Review 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 the Hawley Down-Draft Furnace Company. The petition of the National Trust & Credit Company for delivery of a particular fund, opposed by A. D. Chidsey, trustee of the estate of the bankrupt, was denied by the District Court, and petitioner files petition to revise. Order reversed.

See, also, 233 Fed. 451.

John W. Creekmur, of Chicago, Ill., for petitioner.
Edward J. Fox, of Easton, Pa., for respondent.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a petition to revise and review an order in bankruptcy made by the court below which reversed a referee's order. Referring to the proceeds of certain accounts in the hands of the trustee in bankruptcy, the order of the referee was:

"There being no insolvency, no fraud, and no usury, and no intent to create a preference, the transfer should be declared valid, and the trustee directed to turn over the 'ear-marked' fund which reached him, viz. $4,138.79."

On review of such order the decree of the court below was:

"And now, July 25, 1916, the order of the referee in bankruptcy in the above matter awarding the fund of $4,138.79 to the National Trust & Credit Company is vacated and reversed in accordance with the opinion of this court filed March 7, 1916, and the petition of the National Trust & Credit Company for the allowance of said claim is hereby dismissed."

Confining ourselves to the facts pertinent to the present question we note that on May 19, 1910, the National Trust & Credit Company, an Illinois corporation engaged in the business of buying open, active book accounts, contracted with the Hawley Down-Draft Company to purchase on terms stipulated, such of the latter's acceptable accounts receivable as were tendered it for purchase. By this contract the Down-Draft Company was made agent of the Trust Company to collect such purchased accounts and to transmit to it the proceeds. Under this contract purchases of accounts were made and the same collected and remitted until July 20, 1912, when a change of officers of the Down-Draft Company took place. Thereafter the new officers of the latter company collected the then remaining transferred accounts and retained the proceeds thereof in a separate bank account which amounted in August, 1912, when a receiver was appointed for the Down-Draft Company by the state court, to $4,431.75. The Down-Draft Company having been later adjudged a bankrupt, this fund was paid to its receiver in bankruptcy. Thereupon the National Trust & Credit Company petitioned the court in bankruptcy to order its receiver to pay to it the same. After hearing the parties, and finding no insolvency, fraud, usury, or attempt to create a preference were involved, the referee to whom the matter had been referred upheld the transfer of the accounts, and directed the trustee, by the order above recited, to pay the fund to the Credit Company. The court below reversed the referee's order. It adopted his findings as above stated, but made an additional one, and stated its views of the question before it as follows:

"The findings of the referee have left little in the case beyond the question (purely one of law) which is next discussed. However plausible and forceful the argument in favor of the inference that the relation between the claimant and the bankrupt, established by the dealings of the parties, was one of creditor and debtor, and not of vendee and vendor, the referee has found the latter relation to have existed. We accept this finding. We accept also his further finding that, at the time the assignments were made, the claimant did not know, nor had it reasonable cause to believe, that the assignor was

then insolvent, or in contemplation of insolvency, or that the transactions had would be detrimental in any way to its creditors, or work out any situation in the nature of an unlawful preference. This is the extent to which we understand his findings to go. To find that this bankrupt was in fact at the time solvent, or even the negative finding that it was not insolvent, is flatly inconsistent with the admitted situation and the admissions made at the argument. The fact is, and is so found, that it was then insolvent. We require only the additional fact that the assignments made were secret, and that not only was no notice given at the time, but no notice was ever given, and no claim of ownership was made until after the debtors had made payment of the accounts, and the moneys had passed into the keeping of the receiver. We are therefore brought to face the plain proposition which will be later stated. It is preceded by this question: Is a secret, but otherwise unimpeached, written assignment of choses in action, made when the assignor is insolvent, good as against a trustee in bankruptcy, where there has been no delivery of the property assigned other than that of the written assignment itself?"

After further discussion the court decided the question of law involved against the petitioner, saying:

"All, however, which the claimant acquired by his paper, was the right to demand and receive payment of these accounts from the debtors. When he permitted them to pay without notice of his title, his right to collect was gone. He cannot, without the aid of a chancellor, transfer his claim to the money, and the chancellor must refuse his aid to one whose title is not favored by the policy of the law. In other words, the sole right of the claimant was to sue the debtors of the bankrupt. If it has lost that right through its own act, equity will not provide a substitute, which it can only supply at the expense of creditors. The reason is the legal title to these moneys is in the trustee. The claimant can confront this at the most with an equitable title to accounts, which was good only against the bankrupt, and even this it has lost. It would require a stronger equity than the claimant has shown to create for it another title."

[1] Herein we think the court was in error. The accounts in question were bought by the Credit Company. At the time of doing so it paid for them in substantial part, and agreed to pay the balance of the purchase money thereafter. As between the Down-Draft and the Credit Companies, ownership of such accounts was transferred, and while the former was made the agent to collect them, the money collected was that of the owner in the hands of a collecting agent, and liable to be paid to such owner when demanded. While thus in the hands of such agent and sufficiently identified, the collected funds could not have been levied upon by a creditor of the Down-Draft Company as its money, for under the law of Pennsylvania this could only be done by an attachment execution, and under the decisions of that state (Phillips' Estate, 205 Pa. 530, 55 Atl. 216, 97 Am. St. Rep. 750, and cases there cited) such attaching creditor had no higher right to the proceeds of the collected accounts belonging to the Credit Company than had the Down-Draft Company.

[2] The relative rights of the Credit and Down-Draft Companies then being such that no execution creditor of the latter could take this fund from the Credit Company, it follows that the receiver in bankruptcy took no greater right than an execution creditor, for the bankrupt law provides:

"Such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights,

remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." Act July 1, 1898, c. 541, § 47, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631).

Thus measuring the receiver's rights by those of an execution creditor.

[3] Such being the case, it follows that this fund was the property of the Credit Company, unless absence of notice to the several debtors invalidated the sale of the accounts. What the effect of absence of notice might be, were the rights of debtors owing such accounts here involved, does not concern us in this case, and need not be discussed, but certain it is that such lack of notice does not invalidate the transfer of these accounts as between the Credit and the Down-Draft Companies. That point was covered in Greey v. Dockendorff, 231 U. S. 514, 34 Sup. Ct. 167, 58 L. Ed. 339, where it was said:

"It is objected that this lien was secret. But notice to the debtors was not necessary to the validity of the assignment as against creditors. Williams v. Ingersoll, 89 N. Y. 508, 522. And merely keeping silence to the latter whether known or unknown, created no estoppel. Wiser v. Lawler, 189 U. S. 260, 270 [23 Sup. Ct. 624, 47 L. Ed. 802]; Ackerman v. True, 175 N. Y. 363 [67 N. E. 629]. There was no active concealment, and no attempt to mislead any one interested to know the truth."

It follows, therefore, that the decree below must be reversed, and the case remanded, with instructions to approve the decree entered by the referee.

[4] We note in conclusion that this case turns on a question of law, and is therefore properly brought before us on petition to revise.

BRITTON v. THOMAS.

In re DANIELS' ESTATE.

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

No. 4736.

BANKRUPTCY ⊂=364—PROOF OF UNSECURED CLAIM—JUDGMENT ALLOWING AMENDMENT—EFFECT.

As regards a creditor of bankrupt having waived right to the money collected on drafts, by filing proof of an unsecured claim, including the full amount of the drafts, the amendment of such proof pursuant to a judgment allowing it unappealed from and still standing in full force, so as to reduce the claim on the drafts to the amount thereof not collected, leaves the claim as if originally filed as amended, so that no waiver can be claimed.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 485, 504; Dec. Dig. ⊂=364.]

Appeal from the District Court of the United States for the Western District of Missouri; Arba S. Van Valkenburgh, Judge.

Petition by John B. Thomas against A. J. Britton, trustee in bank-

ruptcy of the estate of Claud Daniels, bankrupt. From an order of the court affirming a decision of the referee in bankruptcy in favor of petitioner, the trustee appeals. Affirmed.

G. M. Sebree, of Springfield, Mo. (Robert Lamar, of Houston, Mo., on the brief), for appellant.

V. O. Coltrane, of Springfield, Mo., and J. C. Dyott, of Willow Springs, Mo., for appellee.

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

CARLAND, Circuit Judge. This is an appeal from an order of the district court which affirmed a decision of the referee in bankruptcy, holding that the appellee was entitled to a fund of $2,350, with interest, on deposit with the Southern Missouri Trust Company. The facts which condition the correctness of the order appealed from are as follows:

On October 23, 1912, the appellee was the active manager of the Bank of Willow Springs, at Willow Springs, Mo. On that date the Daniels Commission Company drew three sight drafts on Rash, Banker & Company of Los Angeles, California, payable to the order of the Bank. One draft was for $1,500 and two for $750 each. Attached to these drafts was a bill of lading, duly indorsed for a car of eggs consigned to the order of the Daniels Commission Company, Los Angeles, Cal. Upon the delivery of these drafts with the bill of lading attached to the Bank of Willow Springs, the Commission Company received credit on the books of the Bank for $3,000, which was subsequently drawn out and used by the Commission Company in its business.

December 16, 1912, Claud Daniels, doing business under the name of the Daniels Commission Company, was adjudged a bankrupt. Rash, Banker & Co. declined to pay the drafts. Appellee paid the Bank of Willow Springs cash for the drafts, and thus became the owner thereof and the proceeds of the car of eggs. On June 14, 1912, appellee entered into an agreement with appellant as follows:

"Whereas, in the month of October, 1912, the Daniels Commission Co., of Willow Springs, Missouri, shipped to Rash, Banker & Co., Brokers of Los Angeles, California, one carload of eggs, which have been disposed of by said brokers, and the net proceeds realized from the sale of the same amounts to $2,507.85; and, whereas, in the month of November, 1912, a petition in bankruptcy was filed against the said Daniels Commission Co., and said company was afterwards adjudged bankrupt by the United States District Court for the Southern Division of the Western District of Missouri, and A. J. Britton, of Cabool, Missouri, was duly elected, and is now the duly qualified and acting trustee in bankruptcy of said Daniels Commission Co.; and, whereas, J. B. Thomas, of Willow Springs, Missouri, claims the proceeds of said carload of eggs sold by Rash, Banker & Co., and the said J. A. Britton, trustee, also claims the said proceeds, and the said brokers, Rash, Banker & Co., have been notified by the Farmers & Merchants' National Bank of Los Angeles, California, representing the said J. B. Thomas, and also by John C. Dyott, who was the receiver of the Daniels Commission Co., of said claims; and, whereas, the said Rash, Banker & Co. are unwilling to pay out said funds until the said conflicting claims are settled: Now, for the purposes of having said funds transferred and brought within the jurisdiction of the United States District Court for the Southern Division of the Western District of Missouri, and

without waiving any claims or rights either the said A. J. Britton, trustee, or the said J. B. Thomas may have to the same, it is hereby agreed, that the said Britton, trustee, and the said Thomas will make a joint order on Rash, Banker & Co., to transmit said funds, $2,507.85, to the Southern Missouri Trust Company, of Springfield, Missouri; said amount to remain in said trust company as a special deposit in the names of A. J. Britton, trustee, and J. B. Thomas and draw interest at the rate of three per cent. per annum. It is further agreed that the said A. J. Britton, trustee will, within one year from this date institute legal proceedings to have the right and title to said fund determined, and that he will prosecute said action with due diligence to a final judgment, and that the Southern Missouri Trust Company shall be authorized to pay said fund and the accrued interest to whomsoever it shall be adjudged to belong.

"Dated this 4th day of June, A. D., 1913.

"J. A. Britton,
"Trustee Daniels Commission Co.
"J. B. Thomas."

Pursuant to this agreement the sum of $2,507.85 was collected from Rash, Banker & Co., and said sum, less expenses and attorneys' fees, was deposited with the Southern Missouri Trust Company; the exact amount deposited being $2,350.

By reason of the foregoing facts it must be conceded that the appellee is entitled to the fund on deposit, unless he has forfeited his right thereto by reason of the facts now to be stated.

November 28, 1913, appellee filed proof of an unsecured claim against the bankrupt estate of the Daniels Commission Company in the sum of $11,436. This claim included the amount due on the drafts. At the time appellee filed proof of the unsecured claim he knew the drafts had not been paid, but testified that he did not know that the allowance of the unsecured claim constituted a waiver of his right to the particular money arising from the drafts. January 21, 1915, the unsecured claim of appellee was allowed. June 1, 1915, appellee accepted a dividend thereon of $343.08. Appellee knew, in February, 1914, that the money arising from the drafts had been deposited with the trust company, but he testified that he did not know that the money would be paid when he filed his unsecured claim in November, 1913. July 15, 1915, appellee filed a petition with the referee for permission to amend his proof of claim made in November, 1913, by striking therefrom the amount due on the drafts except the difference between said amount and the amount actually collected and on deposit with the trust company. The petition set forth the facts as detailed herein, and also alleged that the failure of appellee to mention the drafts as security in the proof accompanying his claim was caused by inadvertence and unintentional omission. This petition was contested by appellant, and on August 3, 1915, the referee made the following order in reference thereto:

"Before John Schmook, a referee in bankruptcy of said court, at Springfield, Missouri, in said Division, August 30, 1915. The petition of J. B. Thomas, a creditor of said bankrupt, to amend claim by him heretofore filed, and thereafter on the 21st day of January, 1915, duly allowed in his favor against said bankrupt estate, in the sum of $11,436, and the objections of the trustee, to said petition for leave to amend, having come regularly on for hearing, on the said petition to amend and on said objections thereto, said John B. Thomas appearing in his own proper person and by V. O. Coltrane, Esq., and J.

C. Dyott, Esq., his attorneys, and said trustee, A. J. Britton, appearing in his own proper person and by G. M. Sebree, Esq., and Robert Lamar, Esq., his attorneys, and the same having been by agreement of parties submitted to the referee for hearing and decision, and said claimant and said trustee having offered evidence, and the referee having heard the evidence and argument of counsel and being fully advised in the premises, after due consideration it is by the referee ordered that the petition of said John B. Thomas, claimant herein, for leave to amend, be and the same hereby is granted, and said petitioner is accordingly given leave to amend his said claim so that the third item thereof shall read and be for the sum of $586.52 only, instead of $3,000, on the three drafts in said claim mentioned, all due October 23, 1912, and the objections of said trustee to said petition for leave to amend be and the same hereby are overruled and dismissed; provided, however, and upon condition that said John B. Thomas shall refund and repay to said A. J. Britton, trustee in bankruptcy of said estate, the sum of $343.08, being dividend declared and ordered paid on said claim allowed January 21, 1915, aforesaid and by the said John B. Thomas received as such creditor. It having been admitted by all parties, on said hearing, that said claimant, John B. Thomas, had made formal tender to said trustee of said dividend, aforesaid."

Appellant by proper proceedings carried said order before the District Court for review, and on October 11, 1915, said court, Hon. Wilbur J. Booth presiding, in all things approved and affirmed the above order. This judgment still stands, and is not subject to review in the present proceeding. June 3, 1915, appellee filed the petition in the present proceeding, wherein, after stating the facts, he prayed that the title to the fund on deposit with the trust company be determined, and that if it should be determined that it belonged to him, a proper order be made in the premises. Appellant answered the petition of the appellee, and such proceedings were thereafter had that on February 1, 1916, the referee made the following order:

"That said J. B. Thomas have and recover said sum of $2,350 and interest thereon from February 10, 1914, at the rate of three per cent. per annum, being the fund so deposited as aforesaid. It is further by said referee ordered and adjudged that said A. J. Britton, trustee as aforesaid, join with said Thomas, and said Britton as such trustee is hereby directed and empowered so to join, in an order upon said Southern Missouri Trust Company to pay said sum and interest to said Thomas. It is further by the referee ordered and adjudged that said Southern Missouri Trust Company and said trustee pay to said Thomas and that said Thomas have and recover of and from said trust company and from said trustee aforesaid, said sum of $2,350 so deposited as aforesaid, and interest thereon at 3 per cent. per annum, from February 10, 1914, and that execution issue."

This order was subsequently approved and affirmed by the District Court (Judge Van Valkenburgh presiding) on petition for review. The present appeal is from such last-named order: On the facts as stated appellant claims that appellee waived his right to the fund on deposit by filing proof of an unsecured claim wherein the drafts were included as a portion of the indebtedness due appellee. Numerous cases are cited in the briefs upon the doctrine of election of remedies, but we do not think that question is open on the present record for this reason. The judgment of the district court allowing appellee to amend the proof of his unsecured claim, so as to reduce the claim on the drafts from $3,000 to $586.52, still stands in full force. As a result thereof appellee cannot be held to have ever filed proof of a general claim for the amount on deposit with the trust company (23 Cyc. 973, and cases

cited). This being so, we do not see how it can be claimed that appellee has elected to take anything except the fund on deposit. In other words, as his proof of an unsecured claim stands amended so as not to make a general claim on the drafts except for the difference between the amount advanced on the drafts and the amount collected on the same, he has never made any general claim for the fund on deposit. After the judgment, allowing the unsecured claim to be amended, was rendered, then the claim stood as if it had been originally filed in the way it had been amended.

The judgment below is therefore affirmed.

SANBORN, Circuit Judge, concurs in the affirmance on the ground that the appellee was not estopped by his original claim, his receipt of a dividend upon it, and his other acts from refunding the portion of the dividend derived from the portion of the claim based on the amount due upon the drafts and recovering the proceeds thereof. Rankin v. Tygard, 198 Fed. 795, 797, 806, 119 C. C. A. 591, 593, 602, and authorities there cited; Thomas v. Taggart, 209 U. S. 385, 391, 392, 28 Sup. Ct. 519, 52 L. Ed. 845.

DU BOIS ELECTRIC CO. v. FIDELITY TITLE & TRUST CO.

(Circuit Court of Appeals, Third Circuit. December 26, 1916. Rehearing Denied February 9, 1917.)

No. 2168.

NEGLIGENCE ⊂=55—LIABILITY—DUTY.

A corporation which contracted with a political party to hang a banner across a street and which had no further duties with respect thereto, though it was, at a later time and under a separate contract, employed to string some lights along the banner, owed no continuing duty to maintain the banner in position, the banner not being in itself a nuisance, and therefore is not liable for injuries to a pedestrian resulting from the fall of the banner.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 68; Dec. Dig. ⊂=55.]

In Error to the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

Action by V. W. Pancoast against the Du Bois Electric Company. After the death of plaintiff, the Fidelity Title & Trust Company, as ancillary administrator, was substituted. Judgment for the plaintiff, and defendant brings error. Reversed, and new trial ordered.

A. L. Cole and H. B. Hartswick, both of Clearfield, Pa., for plaintiff in error.

Charles Alvin Jones and Sterrett & Acheson, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. On October 12, 1912, a banner stretched across a street in the borough of Du Bois fell and severely injured Vernon W. Pancoast, a citizen of New York. In the following March he sued the borough, and in August, 1914, obtained a judgment, which was removed to this court by a writ of error and afterward reversed. Borough of Du Bois v. Pancoast, 218 Fed. 60, 133 C. C. A. 662. On October 6, 1914, while the writ of error was pending, he brought a second suit, naming the Du Bois Electric Company, the Deposit National Bank, and Joseph Bensinger (who we understand was the tenant of the Commercial Hotel) as defendants. The suit against the borough was abandoned, and the second action was discontinued so far as the bank and Bensinger were concerned. Pancoast died in November, 1915, and the Fidelity Title & Trust Company carried on the action as ancillary administrator. A verdict and judgment for the plaintiff having been obtained in August, 1916, the present writ of error was taken out. The following facts, which are quoted from the former opinion, appeared also in substance on the last trial:

"In October, 1912, a banner of a political party was stretched across one of the principal streets in the borough of Du Bois. One end of the supporting cable was fastened to a chimney that extended above the roof of the Commercial Hotel, a four-story brick building abutting on the street. * * *

"The banner—which was of considerable size, was made of rope mesh, and carried a portrait on cloth of one of the candidates for president—had been stretched across the street only a few days before October 12th. It was suspended from a wire rope or cable, and one end of the cable was fastened to the chimney in question. The chimney was an extension of the hotel wall, and was about 21 inches square, and probably from 3 to 4 feet in height. The roof of the building was nearly flat, and a cornice extended beyond the chimney about 3 feet, overhanging the sidewalk to this extent. Two turns were taken about the base of the chimney, and a loop was formed by clamping the end to the body of the cable. Witnesses testified that on the day in question the weather was 'very stormy,' and described the wind as 'pretty strong' and as 'unusual.' Whatever may have been the cause of the accident, the chimney broke about 6 or 8 inches above the roof, and the loop probably slipped upward off the chimney, thus letting the banner down. The plaintiff was injured, not by the banner, but by one or more of the falling bricks."

On the trial now under review it appeared further that the Electric Company had put up the banner and had fastened the supports on October 7th. The company had been employed by M. O. Skinner, the local chairman of the party referred to, Skinner himself having, no doubt, obtained the necessary permission to use the buildings on each side of the street. The company had no connection with the matter except hanging the banner, and, having done that work, it withdrew from the premises, and on the same evening reported to Skinner. On October 12th, the day the banner fell, Skinner employed the company to string electric lights along the supporting wire, and this work was done in the morning, the accident taking place in the afternoon. The company was not the owner or occupier of either building, and, after finishing the work of erection, it did not control or supervise the banner or the supports. On the two occasions named, the company was engaged by Skinner to do a few hours' work, and thereupon left the premises, and was afterward paid for its services.

The evidence leaves some room for doubt whether the company should be regarded as an independent contractor, or as a master whose servants are permitted to accept temporary employment under another's control and direction. It was testified, without contradiction, that Skinner called at the company's office and asked to have the banner put up; that the company sent two men to do the work; that one of them met Skinner the same evening and told him how the cable had been fastened, to which Skinner replied that it was all right; that the company charged for the work by the hour, paying the men their regular wages, and was afterwards repaid by Skinner; and that the company had no access to the buildings and no control over the banner after it had been hung. For present purposes we shall treat the contract as an independent employment, but, clearly it had a very limited object. The company was to furnish laborers for a few hours' work and to be repaid the ordinary wages for their services. Nothing more was contemplated, and the slightness of the thing to be done, and the brevity of time required to do it, go far, in themselves, to forbid the inference that the company was intended to have, or actually did have, any further control after the men had finished the job and had left the premises.

Under all this evidence, was the company liable for the injury? The verdict necessarily implies that the work was negligent, and for the legal consequences thereof the company may have been liable on its contract with Skinner. But it had no contract with Pancoast, and if it is bound to make reparation for his injury, this must be for the reason that it owed him a duty as a person lawfully using the street. But, as we decided in 218 Fed. 60, 133 C. C. A. 662, the banner was not in itself a nuisance, and the only ground, therefore, for holding the defendant liable to Pancoast would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered. The plaintiff's difficulty is that no facts were proved to support the inference of such a duty. The company's only relation to the work grew out of its employment by Skinner, which was limited in scope and time, and had been fully performed. The company had no further control over the banner. It had nothing to do with the supporting buildings, and had no right to enter them without permission from the occupiers. Its connection with the transaction had ceased—the stringing of the lights was a second and separate employment, and does not strengthen the plaintiff's case—and we can find no evidence to support the theory on which the jury was allowed to find a verdict. A Pennsylvania decision in point is Curtin v. Somerset, 140 Pa. 70, 21 Atl. 244, 12 L. R. A. 322, 23 Am. St. Rep. 220. There, a contractor to erect a hotel disobeyed the specifications and built the porch negligently. After the hotel had been turned over to a tenant of the owner, a guest who suffered injury by reason of the contractor's conduct sued him for damages, but was not allowed to recover, the court saying:

"The question arises, What is the responsibility of the contractor under such circumstances? That he would be responsible to the company for any loss sustained by it in consequence of his failure to erect the building in conformity to the plans and specifications may be conceded. There was a con-

tractual relation between them, and for breach of a contract, not known to and approved by the company, he would be liable. Is he also liable for an injury to a third person not a party to the contract, sustained by reason of defective construction? It is very clear that he was not responsible by force of any contractual relation, for, as before observed, there was no contract between these parties, and hence there could have been no breach. If liable at all, it can only be for a violation of some duty. It may be stated, as a general proposition, that a man is not responsible for a breach of duty where he owes no duty. What duty did the defendant owe to the plaintiff? The latter was not upon the porch by the invitation of the defendant. The proprietor of the hotel, or whoever invited or procured the presence of the plaintiff there, may be said to have owed him a duty, the duty of ascertaining that the porch was of sufficient strength to safely hold the guests whom he had invited. The plaintiff contended, however, that as the hotel company was not responsible, the contractor must necessarily be so. This, however, is moving in a circle. It by no means follows that, because A. is not responsible for an accident, B. or some other person must be."

See, also, Fitzmaurice v. Fabian, 147 Pa. 199, 23 Atl. 444, Congregation, etc., v. Smith, 163 Pa. 561, 30 Atl. 279, and the collection of cases to be found in 26 L. R. A. 505, 43 Am. St. Rep. 808; Thornton v. Dow, 60 Wash. 622, 111 Pac. 899, 32 L. R. A. (N. S.) 968.

The jury should have been instructed to find a verdict for the defendant, and the judgment is therefore reversed and a new trial awarded.

In re GRANT et al.

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

Nos. 30, 31.

1. BANKRUPTCY ⊜444—PETITION TO REVIEW—TIME FOR FILING.

Under bankruptcy rule 15 of the Southern district of New York, requiring a petition to review an order of the referee to be filed within 10 days after the order is made, unless such time is extended before or after the expiration of the 10 days by the referee or court, an order may be reviewed on petition filed more than 10 days after rendition, where the time was actually extended by the referee, although not embodied in his return.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920-927; Dec. Dig. ⊜444.]

2. BANKRUPTCY ⊜446—ATTORNEYS' FEES—ALLOWANCE—APPEAL.

As the allowance of fees to the attorneys for the trustee in bankruptcy rests in the discretion of the trial court, whose discretion will not be reversed on appeal, unless abused, the denial of a petition to review the referee's allowance of such fees will not be reversed, where the court expressed satisfaction with the allowance, notwithstanding the denial was improperly based on the ground that the petition for review was not filed in time.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 929; Dec. Dig. ⊜446.]

Petitions to Revise and Appeals from the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Peter Geddes Grant and Rufus E. Leavitt, individually and as copartners doing business under the firm name of Leavitt & Grant, and the firm of Leavitt & Grant.

Petition by Henry A. La Chicotte to revise an order dismissing a petition to review the referee's order approving the trustees' account, and to revise an order denying reargument of the petition to review. Petitioner also appeals. Affirmed.

This cause comes here from the United States District Court for the Southern District of New York on two petitions to review. One petition is to revise an order dismissing a petition to review a referee's order approving the trustee's account. The other petition is to revise an order denying a reargument of the petition to review.

Prince & Nathan and Henry M. Stevenson, all of New York City (Alfred B. Nathan and Sidney J. Loeb, both of New York City, of counsel), for trustee.

Franklin Taylor, of New York City (Joseph J. Zeiger, of New York City, of counsel), for petitioner.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The petitioner is a creditor of the bankrupts to the extent of $45,947.20 and his claim has been filed and allowed. He is in this court objecting to the allowance made to the attorneys of the trustee on the settlement of the latter's accounts. It is alleged that the attorneys rendered services which were not alone necessary and difficult, but unusual; that there were several hundred creditors, with unusual credit liabilities in contrast to the smallness of the assets and estate; and that whatever assets were gotten in were only procured after litigation. Eight or nine separate actions were commenced against as many creditors. In most of them judgments were obtained, and in others compromises were made with the approval of creditors.

The trustee on July 1, 1915, filed his final accounts, and on July 29th the referee held a meeting of creditors to pass on the trustee's accounts and upon the petitions for allowance to the attorneys for the trustee. These petitions called attention to the fact that the sum of $1,500 had been already paid by the trustee to his attorneys "for and on account of services rendered and to be rendered." The payment of $1,500 had been made on June 26, 1913. At the meeting on July 29, 1915, the petitioner was represented by attorney and through him objected to any further allowances to the attorneys. Nevertheless the referee certified to the court that in his opinion the attorneys were entitled to more than twice the amount of the trustee's commissions as their allowance, but the District Judge refused the application for an additional allowance, and filed on September 27th a memorandum in which he declared that, "considering all parties, this estate has yielded as large fees as the result will permit." That order was never in terms vacated. An application was made by the trustee's attorneys before the District Judge to resettle the last-mentioned order, but that application was also denied.

A memorandum opinion was filed on November 18th, in which the judge said:

"The point now raised is whether, in computing the amount that the referee had power to award, there was to be taken into consideration a payment on account made to said attorneys before the present rule of court went into effect. I did not intend to prevent the attorneys from getting anything more than what had been paid to them years ago, and have always considered the rule now in force to apply to the present power of the referees. It is not necessary to resettle the order. It is held that a grant of double the trustee's commissions made by the referee was authorized, and all that was denied was anything more than that. A payment made before the present rule went into effect was presumptively earned at that time and is not to be counted. The referee is justified in countersigning a check for double the amount of the trustee's commissions in favor of the trustee's attorneys. There is no necessity for a new order."

The opinion above set forth contains erroneous statements of fact. The payment of $1,500 on account was made after, and not before, rule No. 8 went into effect. The payment was made in June, 1913, and the rule went into effect in February, 1913. This error, however, is not material in the view we take of the question presented to this court.

On January 21, 1916, the referee made orders in which he directed various allowances to the attorneys for their services and disbursements, which allowances aggregated $2,087.59. The petitioner filed his petition with the referee to review these last-mentioned orders in so far as they granted allowances to the attorneys to the extent of twice the amount of the trustee's commissions, without deducting therefrom the $1,500 previously paid. He alleged that the orders were in violation of rule 8 of Instructions to Referees in Bankruptcy of the Southern District of New York, adopted February 1, 1913. He also objected on the ground that it violated the unvacated order of the court of October 8, 1895, to which reference has heretofore been made. Thereafter, on February 11, 1916, the referee certified the questions for review under the petition to the District Court. After a hearing before the District Judge a memorandum opinion was handed down on February 26th. In that opinion the District Judge said:

"This opinion to review is plainly taken too late, as appears from the face of the return. It brings up nothing, and is therefore dismissed. I may add that Mr. Miller interpreted the decision of this court made by me on November 18, 1915, with entire correctness. It follows that, if the petition had been timely, the referee's decision would have been affirmed; but decision is put upon the ground that the attempted petition is invalid."

[1] The petition to review was not taken too late. Bankruptcy rule 15 of the Southern District of New York has to be filed with the referee within 10 days after the order is made, "unless such time is extended before or after expiration of said 10 days by the referee or the court." The time for filing the petition had actually been extended by the referee, but it was not embodied in the return from the referee. As the District Judge said in his opinion of March 1st, denying reopening, "the regularity of an appeal must be determined by the return made to the appeal." "Of course," he added, "I should not stand on a point so technical, if I were of opinion that there is anything in the petition to review. As stated in my late memorandum, Mr. Miller correctly interpreted my opinion. Therefore, even if the

appeal papers had been sufficient on their face, the result would be the same."

[2] It is evident that the District Judge is satisfied that the allowance made to the attorneys was a proper one, and that, if the papers upon which the petitioner relies had appeared in the record originally before him, they would not have altered his original determination of the matter. We are unable to see what good would be accomplished if this court should reverse the orders denying the petitioner the relief he asked. It is for the District Judge to determine the allowance to be made to the attorneys. This he has done, and he is satisfied with the amount fixed.

In a proceeding in bankruptcy there are many matters which are not governed by a fixed rule, but are confided to the sound judicial discretion of the judge. His decision in such cases may be brought before the Circuit Court of Appeals for review. But the Appellate Courts have established the rule that in such cases they will not reverse, unless the decision below was unmistakably wrong, or unless a plain abuse of discretion is shown. In re S. B. Judkins Company, 205 Fed. 892, 124 C. C. A. 205; Black on Bankruptcy, § 48.

We see no sufficient reason for revising or vacating the orders of the District Court, and for directing it to enter an order reversing the orders of the referee of January 21, 1916, as prayed.

The orders are affirmed.

PANTOMIMIC CORP. v. MALONE et al.

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

No. 141.

CUSTOMS DUTIES ⇐22—PROHIBITED IMPORTATION—PICTURE OF PRIZE FIGHT.

A picture is caused to be brought into the United States, in violation of Act July 31, 1912, c. 263, 37 Stat. 240 (Comp. St. 1913, §§ 10416–10418), declaring it unlawful to bring or cause to be brought into it any film or other pictorial representation of any prize fight, which is designed to be used or may be used for purposes of public exhibition, where on a reel in Canada, in front of an electric light, is run an original positive film taken from the original negative film of a foreign prize fight, and opposite it in the United States, through a moving picture camera, is run an unexposed film, from a reel; the two reels being connected by an endless chain, so that the two films move the same distance in the same time, resulting in an exact negative reproduction being taken on the American side of the positive film on the Canadian side, from which secondary negative, rephotographed by another camera, a positive film, capable of public exhibition, could be and was made.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⇐22.]

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

Suit by the Pantomimic Corporation against Dudley Field Malone, Collector, and another. From a decree dismissing the bill, complainant appeals. Affirmed.

Harold T. Edwards, of New York City, for appellant.
H. Snowden Marshall, U. S. Atty., of New York City, for appellees.
Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. August 9, 1916, the complainant filed its bill against the defendants, as collector and deputy collector of United States customs at the port of New York, alleging that they had threatened and attempted to seize, and were threatening and attempting to seize, a certain secondary negative and a certain secondary positive film belonging to it, now in the port and collection district of New York, for the purpose of bringing an action for their condemnation, as provided in sections 3072, 3082, and 3087 Rev. St. (Comp. St. 1913, §§ 5775, 5785, 5790), which would cause the complainant irreparable injury, for which there was no adequate remedy at law, and praying that a temporary injunction might issue, restraining the defendants from so doing, to be made perpetual on final hearing.

On the same day Judge Mayer granted an order upon the defendants, returnable August 17th, to show cause why they should not be enjoined as prayed for, issuing a restraining order in the meantime. The defendants answered, admitting all the allegations of fact in the bill, but denying that the complainant was entitled to the relief sought for, and praying that the bill be dismissed. August 17th the matters came on before Judge Augustus N. Hand for hearing, and on September 1st he vacated the order and dismissed the bill.

The defendants relied on chapter 263, Laws of 1912, 37 Stat. 240, which is as follows:

"Chapter 263.—An act to prohibit the importation and the interstate transportation of films or other pictorial representations of prize fights, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that it shall be unlawful for any person to deposit or cause to be deposited in the United States mails for mailing or delivery, or to deposit or cause to be deposited with any express company or other common carrier for carriage, or to send or carry from one state or territory of the United States or the District of Columbia to any other state or territory of the United States or the District of Columbia, or to bring or to cause to be brought into the United States from abroad, any film or other pictorial representation of any prize fight or encounter of pugilists, under whatever name, which is designed to be used or may be used for purposes of public exhibition.

"Sec. 2. That it shall be unlawful for any person to take or receive from the mails, or any express company or other common carrier, with intent to sell, distribute, circulate, or exhibit any matter or thing herein forbidden to be deposited for mailing, delivery, or carriage in interstate commerce.

"Sec. 3. That any person violating any of the provisions of this act shall for each offense, upon conviction thereof, be fined not more than one thousand dollars or sentenced to imprisonment at hard labor for not more than one year, or both, at the discretion of the court."

April 5, 1915, one Jess Willard and one Jack Johnson engaged in a prize fight at the city of Havana, Cuba. Moving pictures of the fight were taken on negative films, from which positive films could be and were developed for public exhibition. Early in April, 1916, a moving picture camera was set up eight inches on the American side

of the international boundary between the state of New York and the Dominion of Canada, with the lens directed towards Canada. About eight inches on the Canadian side of the boundary a box was set up facing the camera. An original positive film taken from the negative film made at Havana was run on a reel through the box in front of an electric light on the Canadian side. An unexposed film was run from a reel through the camera on the American side directly opposite it. The two reels were connected by an endless chain, so that the two films should move the same distance in the same time. The result was that an exact negative reproduction was taken on the American side of the positive film on the Canadian side. From this secondary negative, rephotographed by another camera, a positive film capable of public exhibition could be made and was made.

The complainant is engaged in the moving picture business, is the owner of the secondary negative film, and has the exclusive right to make positive films therefrom for public exhibition, which it proposes doing. To sustain the decree, the statute being penal, the things complained of must fall within its language. It is not enough that they are within the mischief of the act. Sarlls v. United States, 152 U. S. 570, 14 Sup. Ct. 720, 38 L. Ed. 556. It will be seen that neither the original negative nor the original positive taken at Havana were ever in the United States, and that the secondary negative and positive which are now in the United States were produced here by means of light rays crossing from a box in Canada to a camera in New York and there making a picture of the positive film in Canada on a sensitized negative film in New York.

As the United States has no right to exercise police power, pure and simple, within the states, the legislation must rest upon the power of Congress to regulate commerce. The Supreme Court has held the act constitutional in Weber v. Freed, 239 U. S. 325, 36 Sup. Ct. 131, 60 L. Ed. 308, Ann. Cas. 1916C, 317. It is quite apparent that the only prohibition in the language of the act that can apply in this case is that against bringing or causing to be brought in the film in question or a pictorial reproduction of the fight to be used or that may be used for purposes of public exhibition.

Judge Hand held that such pictorial reproduction was so brought in and we agree with him. The transaction is plainly within the mischief of the statute, but the appellant contends that the statute only prohibits the importation of something physical or corporeal, whereas nothing but rays of light were brought in on this occasion. Generally speaking, this may be so; but we think that, when parties on each side of the boundary co-operate, by means of two plants connected together, to transfer a prohibited picture from Canada to New York, they are carrying on foreign commerce and do cause the picture to be brought into the United States, within the meaning of the act, even though rays of light are necessary to the result. Certainly the operation resulted in producing a picture in New York of the picture in Canada.

In Kalisthenic Exhibition Co. v. Emmons (D. C.) 225 Fed. 902, the complainant sought to bring in a negative film of the same fight on the

ground that it could not be used for purposes of exhibition, because a positive film would have first to be taken from it, which positive film could be so used; but the court held that the negative film was a pictorial representation within the meaning of the act, and the Circuit Court of Appeals was of the same opinion. 229 Fed. 124, 143 C. C. A. 400.

The decree is affirmed.

WRIGHT et al. v. RUMPH.

(Circuit Court of Appeals, Fifth Circuit. December 2, 1916. Rehearing Denied January 9, 1917.)

No. 2915.

1. CONTRIBUTION ⟸4—JOINT MAKERS OF NOTE.

Where one of several joint makers of a note declined to pay his pro rata share, and the other joint makers discharged the note, paying equal shares, each of such makers acquired a separate action against that maker declining to pay his proportionate share, for, while each maker is liable to the holder for the full amount, they are, as between themselves, liable only for their proportionate share, and are bound to indemnify any other maker, who may pay more than his proportionate share.

[Ed. Note.—For other cases, see Contribution, Cent. Dig. §§ 3, 4; Dec. Dig. ⟸4.]

2. BANKRUPTCY ⟸76(1)—CLAIMS—"PROVABLE CLAIMS"—PETITION.

Bankr. Act July 1, 1898, c. 541, §§ 59, 63, 30 Stat. 561, 562 (Comp. St. 1913, §§ 9643, 9647), respectively declare that three or more creditors who have provable claims against any person, amounting in the aggregate in excess of $500, may file a petition to have such person adjudged a bankrupt, and that debts of the bankrupt may be proved and allowed against his estate which are founded upon a contract, express or implied. Defendant, one of six joint makers of a note for $10,000, declined to pay his pro rata share, and the other five makers discharged the note, paying it in equal shares. *Held* that, as there was an implied promise on the part of defendant to indemnify his comakers, the claim of each comaker for his proportionate share constituted a "provable debt" within the act, and entitled such makers to file against defendant a petition in involuntary bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 50, 56, 99, 100; Dec. Dig. ⟸76(1).

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

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

Petition in involuntary bankruptcy by J. H. Wright and others against W. V. Rumph. From a decree of dismissal, petitioners appeal. Reversed.

O. W. Gillespie, of Ft. Worth, Tex., for appellants.

D. M. Alexander, of Ft. Worth, Tex. (H. D. Payne and Alexander, Baldwin & Ridgway, all of Ft. Worth, Tex., on the brief), for appellee.

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

WALKER, Circuit Judge. The four appellants, J. H. Wright, J. H. Harrison, J. M. Back, and Martin Ballweg, filed an involuntary petition in bankruptcy against W. V. Rumph. The alleged bankrupt filed a motion to dismiss the petition, upon grounds suggesting the insufficiency of it upon its face. This motion was granted, the order to that effect stating that the petition and the proceedings thereon "are hereby dismissed for the reason that in the opinion of the court said petitioners fail to show that they are three creditors with provable claims within the true intent and meaning of the acts of Congress relating to bankruptcy." The averments of the petition showed the following facts:

On the 2d day of September, 1915, the four petitioners, together with W. V. Rumph and J. N. Thomas, for a valuable consideration executed and delivered as joint makers, and became and were equally bound to pay, two notes, one in the sum of $11,386.55, payable to the Ft. Worth National Bank, of Ft. Worth, Tex., and one in the sum of $10,000, payable to the Stockyards National Bank, of the same place; both of said notes falling due on the 1st day of December, 1915. Said Rumph failed and refused to pay his pro rata part of said notes. The petitioners, together with said Thomas, were compelled to pay, and did pay on the 1st day of December, 1915, all of said notes, principal and interest, to the said banks in the following manner: The petitioners and Thomas paid in full in cash the $10,000 note, each paying one-fifth thereof, $2,000, and they paid in cash on the principal and interest of the $11,386.55 note the sum of $7,695.20, each paying one-fifth thereof, $1,539.04, and then and there promised to execute their note for the balance due on the last-named note, which cash payment, and the execution and delivery of the note for said balance, were accepted by the Ft. Worth National Bank as full payment and discharge of the $11,386.55 note to it, and thereafter, on January 22, 1916, in pursuance of said promise, the petitioners and said Thomas executed their note, as joint makers, for the sum of $3,956.45, payable to the Ft. Worth National Bank. The petition alleged the insolvency of Rumph on December 1, 1915, and at the time the petition was filed in March, 1916, and the commission by him of acts of bankruptcy during the month of December, 1915.

[1, 2] To the extent of one-sixth of the $2,000 paid by each of the petitioners to discharge the $10,000 note, his payment was of an amount which his co-obligor, Rumph, should have paid. While the six makers of the note were jointly bound as principals to the payee of it, yet, as between themselves, each was a principal only for his share, and a surety for the remainder. The law implies a promise from each of such obligors to each of the others that each will indemnify the other in case he pays more than his proportionate part of the obligation. Each of the five joint obligors who together paid off the note, each paying one-fifth of the amount due, thereby acquired a separate right of action against the comaker who did not participate in the payment to recover of the latter one-fifth of the amount which he should have contributed as his proportionate part of the $10,000 payment. Faires v. Cockerell, 88 Tex. 428, 31 S. W. 190, 639, 28 L. R. A. 528;

Bragg v. Patterson, 85 Ala. 233, 4 South. 716; 2 Elliott on Contracts, § 1393; 6 Ruling Case Law, pp. 1044, 1046, 1061. Without regard to the averments of the petition with reference to the payment of the note for $11,386.55, we are of opinion that it showed that the payment of the $10,000 note was so made as to give to each of the four petitioners a provable claim against the alleged bankrupt within the meaning of Bankruptcy Act, §§ 59, 63. The petition was not subject to be dismissed on either of the grounds stated in the motion made to that end.

The decree dismissing the petition is reversed.

GIDEON v. HINDS et al.

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

No. 53.

1. APPEAL AND ERROR ⟸854(2)—REVIEW—REASONS.

An appeal brings up the ultimate question whether the decision was right or wrong; and, if the result is right, it will not be disturbed because a wrong reason was assigned.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig.. §§ 3408–3410; Dec. Dig. ⟸854(2).]

2. CORPORATIONS ⟸116—RIGHT TO PURCHASE STOCK—REASONABLE TIME—WHAT CONSTITUTES.

Where a contract gave plaintiff an option to purchase corporate stock at any time, plaintiff was bound to exercise the option within a reasonable time, and so a delay of more than 10 years will preclude an enforcement of the option, in analogy to the 10-year limitation statutes (Code Civ. Proc. N. Y. §§ 388, 410), regardless of when the statutes began to run.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 493, 494, 496; Dec. Dig. ⟸116.]

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

Bill by George D. Gideon against Arthur Hinds and Hinds, Noble & Eldredge, impleaded with G. Clifford Noble. From a decree dismissing the bill as to the answering defendants, complainant appeals. Affirmed.

On March 9, 1904, and as part of a scheme for uniting and incorporating two existing businesses, the capital stock of a then formed corporation was divided among Gideon (plaintiff below and appellant), Hinds (principal defendant below and appellee), Noble (a defendant who did not answer), and one Eldredge. By the same written instrument that apportioned the stock in question the following agreement was entered into between Gideon, Hinds, and Noble: "The said George D. Gideon shall have the right and option to purchase at any time, in equal amounts from Arthur Hinds and G. Clifford Noble, shares of their stock in the corporation (then formed) until the holdings of said Gideon shall be equal to those of said Hinds and Noble, respectively, or of the one of them holding the larger amount of stock." The contract also contains provisions regarding the price to be paid for stock so transferred, which are immaterial in the view taken of this case.

No attempt was made by Gideon to exercise this option until November 19, 1914, at which date he notified both Hinds and Noble of his desire and intent to acquire from each of them a number of shares of stock not exceeding the amount he was entitled to under the agreement hereinabove set forth. Noble

acquiesced in the demand, Hinds refused to comply, and this action was brought to compel specific performance; i. e., require Hinds to turn over to Gideon the demanded number of shares at a price to be ascertained by the court, if Hinds continued contumacious and refused to proceed in the manner set forth in the contract. Hinds answered, and in his answer set out (among other defenses) that the action was barred by the New York statute of limitations and that the demand was stale. The issues having thus been framed, Hinds moved under equity rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) to dismiss the bill, asserting that the action was barred by the statute. This motion was granted, and final decree entered, dismissing the bill, from which Hinds took this appeal.

Fred T. Kelsey, of New York City, for appellant.

Roger Hinds, of New York City, for appellees.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). After what in substance was a hearing on bill and answer, the court below entered a final decree of dismissal, apparently upon the ground that the cause of action was barred by the 10-year limitation, prescribed in Code Civ. Proc. § 388, read in conjunction with section 410.

[1] An appeal brings up the ultimate question whether the decision appealed from was right or wrong; and if the result was right it is a matter of no moment that the reasons assigned for judgment may have been erroneously stated.

[2] In 1904 Gideon had an option to purchase stock from Hinds "at any time," which means *within a reasonable time*. He never sought to exercise that right until 1914, more than 10 years after its creation. Such delays as this have been held fatal in some decisions, by applying the statute of limitations as a measure of reason (Stevens v. McChrystal, 150 Fed. 85, 80 C. C. A. 39; Waller v. Texas, etc., Co., 229 Fed. 87, 143 C. C. A. 363); in others, the words "at any time" have been examined in the light of all the circumstances shown, and a period far less than that of the statute deemed unreasonable (Park v. Whitney, 148 Mass. 278, 19 N. E. 161).

There are some facts stated in the bill, persuasive that it was the intent of all parties to limit this option to three years; but we rest decision on the finding that nothing is pleaded, nor indeed even suggested, justifying or excusing inaction for the time explicitly admitted. It makes no difference whether, under the true construction of the Code provisions cited, the statute begins to run from the date of option created, or the date of demand thereunder; the admitted fact that no attempt to exercise that option was made for upwards of 10 years is proof conclusive that it was not exercised within a reasonable time, and therefore not in accordance with the true meaning of the contract between the parties.

The decree below is affirmed, with costs.

In re PIERSON et al.

(Circuit Court of Appeals, Second Circuit. November 4, 1916.)

Nos. 4–7.

BANKRUPTCY ⇐140(3)—BROKERS—RIGHTS OF CUSTOMERS.

Where bankrupt brokers have not enough stock in their box and hypothecated to cover all their customers who were long of it on the day of failure, such customers may recover their pro rata shares; the shares of any who make no specific claim going to the general creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⇐140(3).]

Petitions to Revise Order of the District Court of the United States for the Southern District of New York.

On rehearing. Former opinion modified, and affirmed.

For former opinion, see 233 Fed. 519, 147 C. C. A. 405.

Bayard L. Peck, of New York City, for petitioner Quinn.

Goldman, Heide & Unger, of New York City, for petitioners Levy, Van Thyn, and Vrieslander.

James Gillin, of New York City, for petitioner Gott.

Stanchfield & Levy, of New York City, for alleged bankrupts.

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

PER CURIAM. The decision of the Supreme Court in Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, requires us to modify our opinion lately handed down, so as to direct that the court below permit the claimants Van Thyn, Vrieslander, Levy, and Quinn to recover their pro rata shares of the respective stocks on hand. But their shares must be ascertained by including in the calculation the shares of all long customers in the same position, whether they made claim for their shares in the stock on hand or not. That the shares of those who claim should be increased by the circumstance that other long customers made no claim would be inequitable. What would otherwise have gone to those customers should go to the general creditors.

Reconsideration does not cause us to change our opinion in other respects, viz. as to the claims of Quinn and Gott.

ERIE R. CO. v. KRYSIENSKI.

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

No. 58.

1. MASTER AND SERVANT ⇐86—INJURIES TO EMPLOYÉS—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT.

For the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]) to apply, it must appear that the defendant is a carrier engaged in interstate commerce, and that the injured employé was employed by defendant in its interstate business.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 137; Dec. Dig. ⇐86.]

2. TRIAL ⊂=295(5)—INSTRUCTIONS—CONSIDERATION.
Instructions must be considered as a whole, and so a charge in an action under the federal Employers' Liability Act that the jury must find plaintiff was engaged in the interstate commerce of defendant railroad company at the time of the accident, and that such act was applicable if plaintiff was engaged in taking from a vat a part of an engine that defendant, either through itself or its subsidiary companies, in which it had a stock control, used in interstate commerce, it being immaterial whether the engine was leased by defendant to its subsidiaries for interstate commerce, or used itself, was not open to objection that the jury were directed that defendant's dominant stock ownership in subsidiary companies established a business identity, if not corporate unity.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 708; Dec. Dig. ⊂=295(5).]

3. CORPORATIONS ⊂=585—IDENTITY—OWNERSHIP.
Even complete stock ownership of one corporation by another does not result in identity of corporate existence.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2332–2337; Dec. Dig. ⊂=585.]

4. MASTER AND SERVANT ⊂=284(1)—INJURIES TO SERVANT—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT—JURY QUESTION.
Where an employé of the defendant railroad company was injured in removing from a vat a portion of an engine leased by defendant to a subsidiary company, in which defendant had a stock control, and used by such company in interstate commerce, evidence of that fact, together with the fact that the several companies, which were all engaged in interstate commerce, were operated practically under the same management, is sufficient to take to the jury the question whether defendant, in respect to such engine, was engaged in interstate commerce, so that the action for injuries would fall within the federal Employers' Liability Act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1000; Dec. Dig. ⊂=284(1).]

5. MASTER AND SERVANT ⊂=265(1)—INJURIES TO SERVANT—INTERSTATE COMMERCE—FEDERAL EMPLOYERS' LIABILITY ACT.
In an action under the federal Employers' Liability Act, where the evidence shows that the case might well be within the act, the initial burden is satisfied, and defendant has the burden of showing that the case does not fall within the act.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 877, 894; Dec. Dig. ⊂=265(1).]

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

Action by Tomasz Krysienski against the Erie Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

Krysienski (plaintiff below) worked as a laborer for the Erie Railroad (defendant below) in its machine and repair shop. In said shop dirt and grease were removed from engine parts prior to repair work by immersing the same in a vat containing a hot fluid. The verdict has established that the laborer was injured by falling into this vat through the negligence of the railroad, and while engaged in inserting or removing, or otherwise handling, one or more of the engine parts then immersed, or about to be, in said hot fluid. By stock ownership the Erie Company controls two other railroads (New York Susquehanna & Western and New Jersey & New York), both of which are engaged in interstate commerce, as also is the Erie.

All the engines, on some part or parts of which plaintiff below was working

at about the time of the accident, belonged to the Erie Company; but some of them were employed in the business of the stock controlled corporations above named. The terms of employment do not appear, except that the controlled companies agreed to pay the Erie for such repairs as might be made upon engines engaged in their work. The evidence did not render it possible to declare whether or not that particular engine part which the plaintiff below was handling at time of injury had been, or was again to be, used in the business of the controlled railroads or either of them. It appeared without contradiction that the two controlled corporations "operated" their own trains, but that train arrangement and dispatching were attended to by the Erie, whose terminals and connecting tracks were all used in common.

The court charged the jury that, in order to give the plaintiff a verdict, they must find from the evidence that Krysienski was "engaged in the interstate commerce of the defendant (i. e., the Erie Railroad) at the time of the accident," and also instructed them that the federal Liability Act was applicable if they found "from the evidence that the part [which Krysienski] was engaged in taking from the vat was a part of an engine that the Erie Railroad Company either through itself or through its subsidiaries, or the companies in which it had a stock control, used in interstate commerce." It was further charged that "it would make no difference whether the engine was leased by the Erie Railroad for use by the New York, Susquehanna & Western or the New Jersey & New York Railroad Company, provided you believe it was used by those companies in connection with the Erie Railroad Company in interstate commerce."

Plaintiff below had a verdict; to the judgment thereon, this writ was taken.

William C. Cannon, of New York City, for plaintiff in error.

Vine H. Smith, of New York City, for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] It is not doubted that, under the act in question, not only must the defendant sought to be charged be a railway carrier engaged in interstate commerce, but the person who seeks to charge the defendant must have been employed by said defendant, and in that defendant's share of interstate commerce. Pedersen v. Railway, 229 U. S. 146, 33 Sup. Ct. 648, 57 L. Ed. 1125, Ann. Cas. 1914C, 153; North Carolina R. R. Co. v. Zachary, 232 U. S. at 256, 34 Sup. Ct. 305, 58 L. Ed. 591, Ann. Cas. 1914C, 159.

[2] Since the Erie Company and its controlled roads were, regarded severally and separately, all engaged in interstate transportation, the statute was admittedly applicable, if Krysienski's occupation at the moment of injury was a part of, or assisted in, or contributed to, the interstate commerce of defendant below.

It is insisted that the learned trial judge ruled, in effect, that the Erie Company's dominant stock ownership in the other railways named, was enough to prove business identity, if not corporate unity. No such declaration of law was made. The charge is to be considered, not in fragments, but as a connected whole, and, so viewed, the quotations hereinabove made fairly show how the matter was put to the jury.

[3, 4] Undoubtedly even complete stock ownership of one corporation by another does not result in identity of corporate existence. United States v. Delaware, etc., Co., 213 U. S. 366, 29 Sup. Ct. 527, 53 L. Ed. 836; Stone v. Cleveland, etc., R. R. Co., 202 N. Y. 352, 95 N. E. 816, 35 L. R. A. (N. S.) 770. Yet any kind of controlling interest

was a material circumstance in considering the ultimate question presented. That question is: Whose was the interstate commerce in which an Erie employé was concerned, while repairing in an Erie shop an Erie engine used by the Susquehanna?

The mere fact that the Erie Company owned most of the Susquehanna stock did not answer the question, but it assisted; and when to that fact was added the subordinate carrier's method of getting engines, arranging and dispatching trains, and using terminals, there was enough uncontradicted evidence to justify the jury (and in our opinion the court) in holding that the interstate commerce of the Erie System —i. e., of several co-ordinated and centrally controlled carriers—was in acquisition and performance one commerce belonging to the master company. It matters not that we assume the earnings of the controlled railways to have been kept separate and apart (an assumption most favorable to plaintiff in error), for such earnings were the result of work done for and under the dominant corporation, and as much a part of the latter's business as are the several departments of the modern store, a part of the store business, though each department is owned by its manager, who is not liable for the store's debts.

It follows that the instructions complained of were right, not because of stock control, but because of the manner of doing business, for which stock control probably laid a foundation, but to which it was not at all necessary. The same result might have been reached by a traffic arrangement. Kansas City, etc., Co. v. McAdow, 240 U. S. 51, 36 Sup. Ct. 252, 60 L. Ed. 520.

[5] There is another view of this case (not much pressed at bar), but worthy of mention because of the frequency of claims under this statute. When plaintiff below rested, there was evidence showing that some of the parts in the vat belonged to engines owned, used, and to be used by the defendant itself, as distinct from any of its controlled or subordinate companies. If Krysienski was hurt while laboring on any of these portions of machinery, it is admitted that the statute was applicable. In Pittsburgh, etc., Co. v. Glinn, 219 Fed. 148, 135 C. C. A. 46, the court said:

"Where the facts show the case may well have been within the statute, the initial burden is satisfied, and it is for the defendant to show the contrary."

We agree with this ruling. Applying it to the present cause, the plaintiff below showed circumstances produced by the orders or business customs of the Erie Company, to which the statute could apply; the burden of proof then lay on the defendant below to show inapplicability. Such burden admittedly has not been borne.

Judgment affirmed, with costs.

CUTLER HARDWARE CO. v. HACKER et al.

In re F. J. HACKER & CO.

(Circuit Court of Appeals, Eighth Circuit. November 23, 1916.)

No. 4585.

1. JUDGMENT ⊂=582—MERGER—EFFECT OF MERGER.
While merger of debts in a judgment is the general rule, yet, when justice and equity require, the judgment will be construed as a new form of the old debt.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1079, 1082; Dec. Dig. ⊂=582.]

2. BANKRUPTCY ⊂=354—RIGHTS OF PARTNERSHIP CREDITORS—RIGHTS OF INDIVIDUAL CREDITORS.
Partnership creditors reduced their debts to judgment in the state court according to the local law against both the firm and the individual members. All were adjudicated bankrupts within nine days after the rendition of the judgment. Bankr. Act July 1, 1898, c. 541, § 5f, 30 Stat. 548 (Comp. St. 1913, § 9589), declares that the net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts; but, should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets, and, should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners. *Held* that, as the judgment did not change the character of the partnership debts, the judgment creditors were not, despite the usual theory of merger, entitled to primary participation in the distribution of the individual assets of the partners.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 555–564; Dec. Dig. ⊂=354.]

Appeal from the District Court of the United States for the Northern District of Iowa; Henry T. Reed, Judge.

In the matter of F. J. Hacker & Co., a partnership, and F. J. Hacker and S. J. Hacker, individual members thereof, bankrupts. Petition by Josephine Hacker and another, as individual creditors of F. J. Hacker, a partner, for review of an order of the referee overruling their objections to the allowance of claims of creditors of the partnership against the estate of its individual members and their participation in the distribution of the assets of the individual estates equally with the individual creditors of the partners. From an order in part vacating and setting aside the order of the referee (225 Fed. 869), the Cutler Hardware Company appeals. Affirmed.

Edwards, Longley, Ransier & Smith, of Waterloo, Iowa, for appellant.

Mark J. Butterfield, of Waterloo, Iowa, for appellees.

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

HOOK, Circuit Judge. [1, 2] The question in this case is whether the reduction of partnership debts to judgment, in a state court ac-

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

cording to the local law, against both the firm and the individual members, all being thereafter adjudged bankrupt, entitles the judgment creditor to primary participation in the distribution in the bankruptcy court of the individual estates. The trial court allowed the judgments against all the estates, but ordered that participation in the individual assets be postponed until after the individual creditors were fully paid. In other words, the court held that the judgments upon the partnership debts against the individual members did not change their character within the meaning of section 5f of the Bankruptcy Act of 1898, which provides:

"The net proceeds of the partnership property shall be appropriated to the payment of the partnership debts, and the net proceeds of the individual estate of each partner to the payment of his individual debts. Should any surplus remain of the property of any partner after paying his individual debts, such surplus shall be added to the partnership assets and be applied to the payment of the partnership debts. Should any surplus of the partnership property remain after paying the partnership debts, such surplus shall be added to the assets of the individual partners in the proportion of their respective interests in the partnership."

This provision expresses the rule of distribution in equity in cases of insolvent partnerships generally recognized and applied from the beginning of our judicial history. In Murrill v. Neil, 8 How. 414, 12 L. Ed. 1135, the rule was stated to be:

"That partnership creditors shall in the first instance be satisfied from the partnership estate, and separate or private creditors of the individual partners from the separate and private estate of the partners with whom they have made private and individual contracts, and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid."

See, also, Amsinck v. Bean, 22 Wall. 395, 22 L. Ed. 801.

In United States v. Hack, 8 Pet. 271, 8 L. Ed. 941, the first phase of the rule was enforced against the statutory priority of the United States as a creditor of an individual partner. Lately in Farmers' Bank v. Ridge Ave. Bank, 240 U. S. 498, 36 Sup. Ct. 461, 60 L. Ed. 767, the court declined to recognize the exception which obtained in England in cases where the partnership as such and the individual members were all insolvent, and there was no partnership estate to distribute.

The rule is applicable here. The indebtedness to the appellant was primarily that of the partnership. The partners had not individually contracted to pay it, and the judgments against them were but the legal conclusion from their relation to the firm. The judgments against the partners, as well as the partnership, did not change the inherent character of the indebtedness. While merger in judgment is the general rule, yet according to recognized exceptions the judgment will be construed as a new form of the old debt when justice and equity require. The incident of the old debt will be carried forward to prevent the inequitable destruction of a right, privilege, or exemption.

In Boynton v. Ball, 121 U. S. 457, 7 Sup. Ct. 981, 30 L. Ed. 985, the action on the debt was begun before the commencement of the

bankruptcy proceedings, and the judgment was rendered after the debtor was adjudged bankrupt, but before his final discharge. The court said:

"The argument is that the judgment now existing against Boynton is not the debt that existed at the time bankruptcy proceedings were initiated; that by the change of the character of the debt from an ordinary claim or obligation to a judgment of a court of record it ceased to be the same debt, and became a new and different debt as of the date of the judgment. * * * But this court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a court of record, it still remains the same debt on which the action was brought in the state court, and the existence of which was provable in bankruptcy."

In Wisconsin v. Pelican Ins. Co., 127 U. S. 265, 292, 8 Sup. Ct. 1370, 1375 (32 L. Ed. 239) it was said:

"The essential nature and real foundation of a cause of action are not changed by recovering judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a court, to which a judgment is presented for affirmative action (while it cannot go behind the judgment for the purpose of examining into the validity of the claim), from ascertaining whether the claim is really one of such a nature that the court is authorized to enforce it."

The doctrine applies also to the method and extent of enforcement in bankruptcy. In Turner v. Turner (D. C.) 108 Fed. 785, the court held that, in determining whether a money judgment against a bankrupt was provable against his estate, it would consider the nature of the original cause of action. It said:

"Reducing a debt or duty into judgment works no change in its character. Notwithstanding the change in form from that of a simple debt or duty by merger into a judgment of a court of record, it still remains the same debt or duty on which the action was first brought."

In Re Baker (D. C.) 96 Fed. 954, 959, it was said:

"There is no merit in the contention that, because a judgment is, generally speaking, a debt, it is like any other debt in the administration of the bankrupt law. The character of the claim upon which the action is brought and the nature of the proceeding enter into and determine the character of the judgment when brought into a court of bankruptcy."

It is a very common thing to look into a judgment to see what it was about. The fact that the state law authorized the judgments against both the partnership and the members is not important. That is a general practice. It appears that the judgments of the appellant were rendered but nine days before the adjudication, and that the bankrupts were then insolvent. Whether sections 5g and 67f (Comp. St. 1913, § 9651) are material in that connection need not be considered.

The order is affirmed.

WATTS v. WESTON et al.

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

No. 11.

1. JUDGMENT ⟸593—JUDGMENT AS BAR—MATTERS CONCLUDED.
Where a continuing contract was terminated by the absolute refusal of the party whose action was necessary to further perform, a claim for damages on account of the breach constituted an indivisible demand, and when the same or any part of the same was pleaded, litigated, and final judgment rendered, such suit and judgment constitute a bar to subsequent demands which were or might have been litigated therein.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1108; Dec. Dig. ⟸593.]

2. JUDGMENT ⟸588—JUDGMENT AS BAR—MATTERS CONCLUDED.
The bar of a judgment for plaintiff for nominal damages in an action on a guaranty of performance of a contract by a third person, who had wholly repudiated the contract and refused to perform, *held* not avoided by pleading in a second action a modification of the contract, which might have entitled plaintiff to substantial damages.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1062, 1090; Dec. Dig. ⟸588.]

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

Action at law by Emily Watts, as executrix, against Walter Weston and Alfred J. Weston. Judgment for defendants, and plaintiff brings error. Affirmed.

See, also, 227 Fed. 1023, 141 C. C. A. 673.

Writ of error to a judgment of the District Court, entered upon a verdict directed for defendant.

Lowen E. Ginn, of New York City, for plaintiff in error.

Clarke M. Rosecrantz, of New York City, for defendants in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. A generation has passed since the controversy arose of which this case is the latest fruit. Transfers and devolutions of interest have occurred, but, as there is no question presented requiring reference thereto, the case will be considered as if the present plaintiff and defendant had themselves transacted all the business hereinafter referred to.

The present action began in 1898, was tried in 1900, and the judgment to which this writ was taken entered in 1914; under the mandate directed by this court in Re Watts, 214 Fed. 80, 130 C. C. A. 520. The verdict which plaintiff assigns as error was directed because the trial court held the judgment affirmed by us in Watts v. Weston, 62 Fed. 136, 10 C. C. A. 302, a bar to the present suit. That earlier action between these parties began in 1890, and will be referred to as the '90 suit; this litigation will be called the '98 suit.

In 1880 the firm in which defendant was then a partner, and to whose rights plaintiff has succeeded, made a contract with one Kne-

vals, whereby the latter agreed to consign to them "the entire production of coal" from a certain colliery, "at a price to be agreed upon from month to month on or about the 1st of each month." In 1885 Weston retired from the firm, transferred his interest therein and in the Knevals contract to Watts, and agreed to guarantee or indemnify the latter "against any and all loss or losses, damage or damages, that might arise from or by reason of any default or breach" on the part of Knevals, in respect to the coal agreement aforesaid. Shortly thereafter Knevals "ceased and refused to consign and deliver" coal under said contract, as is stated in the complaint; in point of fact he wrote a letter absolutely refusing to ship any more coal.

It is most favorable to plaintiff to hold, as we do, that the foregoing facts were either admitted or proven in the suits of both '90 and '98. When they had been shown in the earlier action, the trial court directed a verdict of 6 cents for the plaintiff. The reasons for the direction are set forth in the opinion rendered by us on writ of error. 62 Fed. 136. Our findings are authoritative, because the reasons given by a higher court for affirming the action of a lower court become (so to speak) the legal meaning of that lower court's judgment, whatever may have been the reasoning or opinion of the trial judge.

It follows that the judgment in the '90 suit held, and holds finally as between these parties, that the Knevals contract was valid, that Knevals had committed a breach thereof, that Watts was entitled to recover on Weston's guaranty against such breach, but that the recoverable damages were nominal only.

The single difference between the '90 suit and this of '98 is as follows: At the trial of the earlier action plaintiff sought to amend in order to show a modification (made in 1884) of the Knevals contract, which (we will assume) would have rendered legally possible the ascertainment of substantial damages. Leave so to amend was refused, and the refusal approved as reasonable by this court. In this action plaintiff has pleaded and (we assume) proved the same modification. On this difference alone is this belated writ of error founded.

[1] Obviously, Knevals' categorical refusal to ship any more coal completed Watts' cause of action and perfected his right to the fullest damages the case would ever permit, long before the '90 suit was ever begun. Allen v. Field, 130 Fed. at page 651, 65 C. C. A. 19; Anvil Mining Co. v. Humble, 153 U. S. 540, 14 Sup. Ct. 876, 38 L. Ed. 814.

It is enough to show the lack of merit in the present contention to point out as an inexorable rule of law that, when Knevals' contract was discharged by his total repudiation thereof, Watts' claims for breaches and damages therefor "constituted an indivisible demand, and when the same, or any part of the same, was pleaded, litigation had and final judgment rendered, such suit and judgment constitute a bar to subsequent demands which were or might have been litigated." Bucki, etc., Co. v. Atlantic, etc., Co., 109 Fed. at page 415, 48 C. C. A. 459. Cf. Landon v. Bulkley, 95 Fed. 344, 37 C. C. A. 96.

The rule is usually applied in cases of alleged or supposed successive breaches, and consequently severable demands for damages;

but if the contract has been discharged by breach, if suit for damages is all that is left, the rule is applicable, and every demand arising from that contract and possessed by any given plaintiff must be presented (at least as against any given defendant) in one action; what the plaintiff does not advance he foregoes by conclusive presumption.

[2] The legal proposition on which plaintiff here stands is that the causes of action in the two suits are not the same. In method of statement, as to media concludendi (United States v. California, etc., Co., 192 U. S. 355, 24 Sup. Ct. 266, 48 L. Ed. 476; United States v. Dalcour, 203 U. S. at page 423, 27 Sup. Ct. 58, 51 L. Ed. 248) or form of action, this may be admitted as true; and it was held on the writ to the judgment in the '90 suit that by amendment to turn the complaint in that action (practically) into the complaint in this, would change the cause of action.

It is not necessary to consider at length that familiar phrase, which is used in several senses, and whose meaning is often to be tested by surroundings or context. The '90 record shows that Watts did not ask for a dismissal, or voluntary nonsuit, nor to withdraw a juror. He stood on a breach of Weston's guaranty by reason of Knevals' default, asserting that the nebulous words as to price in the coal contract of 1880 meant market prices, and assigned as error that his specific request to go to the jury on that theory was denied. This he did with full knowledge of the demand, or rather method of stating the same, now so strenuously urged. Having thus chosen his line of attack, it makes no difference whether the decisions as to advancing all existing unliquidated demands in one suit, or the rule frowning on successive but different methods of reaching the same result, be appealed to; either is fatal to plaintiff's cause.

Suit was brought in 1890 on the same guaranty which is at the basis of this action; and in legal contemplation Watts proved damages of 6 cents. With the same knowledge as he then had, he now demands on the same guaranty more damages, reached, however, by a slightly different road. He had his day in court, and the judgment entered as of that day is a bar to his further proceeding.

Judgment affirmed, with costs.

CHAUTAUQUA SCHOOL OF NURSING v. NATIONAL SCHOOL OF NURSING.

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

No. 10.

COPYRIGHTS ⊂⊃53—SCOPE OF COPYRIGHT—INFRINGEMENT—WHAT CONSTITUTES.

Complainant's copyrighted publication, dealing with hypodermic medication, divided the operation into 12 successive steps, illustrating the steps by cuts taken from photographs of a person actually performing the operation and administering the hypodermic injection. Defendant disposed of a copyrighted lecture on medicines and their administration, prepared by an army surgeon. One division of the surgeon's lecture was

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

devoted to the hypodermic, and was accompanied by 12 cuts, showing the successive steps of the operation, which were actual protographs of the surgeon's hands performing the same. *Held* that, as the process of hypodermic medication is a matter of common knowledge, in which complainant could acquire no exclusive property, and as it is not essential that a production, to be original and new within the copyright laws, shall be different from an earlier production, but only that it shall disclose original work, the lecture prepared by the army surgeon, though similar to complainant's lecture, showed an original work, and was not an infringement.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 51; Dec. Dig. ⟸53.]

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

Suit by the Chautauqua School of Nursing against the National School of Nursing. From a decree for complainant (211 Fed. 1014), defendant appeals. Reversed.

Stanchfield, Lovell, Falck & Sayles, of Elmira, N. Y., for appellant.
Thrasher & Clapp, of Jamestown, N. Y., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. Appeal from a decree of the District Court holding the defendant guilty of infringing the complainant's copyright and ordering it to surrender all infringing publications in its possession or under its control to the complainant.

Each of the parties conducts a school for the education of nurses by correspondence and by printed lectures and books. In 1910 the complainant published and copyrighted its lecture No. 6, entitled "Remedies, the Methods by which they are Administered," some 12 out of 39 pages of which were devoted to hypodermic medication. The operation was divided into 12 successive steps, and the text describing and explaining it was numbered and divided in the same way. There were cuts of various forms of syringes obtained from the makers, directions how to use them, and as to the drugs and doses to be administered. Finally, there were 12 cuts taken from photographs of a person actually performing the operation of preparing and administering a hypodermic injection. In 1912, Maj. Charles R. Reynolds, a surgeon in the United States Army, published and copyrighted a lecture entitled "Medicines and Their Administration." The defendant obtained from him the right to print, sell, and distribute the lecture, and was doing so. Out of 39 pages, 17 are devoted to "The Hypodermic." The lecture divides the operation into 12 successive steps, described by separately numbered divisions of the text. It has cuts of syringes obtained from the manufacturers, directions as to their uses, the drugs and doses to be given, and 12 cuts showing the successive steps of the operation, being actual photographs of Maj. Reynolds' hands performing the same.

Infringement is charged, especially in connection with the subject of hypodermic injections. Of course, all previous medical knowledge was common property to any writer. There is in neither lecture any exercise of the imagination or any original investigation. But the complainant alleges that, though it originated nothing new, it was the

first to treat separately the successive steps in the operation as generally practiced and to illustrate each pictorially. The evidence sustains this allegation. We do not understand such a plan of instruction to be copyrightable. It is a startling proposition to say that the complainant has secured the monopoly for 28 years of stating in separate categories and illustrating pictorially the successive steps of this very well known operation. It is said in Drone on Copyright, p. 205:

"*Works Alike May be Original.*—It is not essential that any production, to be original or new within the meaning of the law of copyright, shall be different from another. Whether the composition for which copyright is claimed is the same as or different from, whether it is like or unlike, an existing one, are matters of which the law takes no cognizance, except to determine whether the production is the result of independent labor or of copying. There cannot be exclusive property in a general subject, or in the method of treating it; nor in the mere plan of a work; nor in common materials, or the manner or purpose for which they are used. The rights of any person are restricted to his own individual production. There is nothing in the letter or the spirit of the law of copyright to prevent or to discourage any number of persons from honestly laboring in the same field. Two or more authors may write on the same subject, treat it similarly, and use the same common materials in like manner and for one purpose. Their productions may contain the same thoughts, sentiments, ideas; they may be identical. Such resemblance or identity is material only as showing whether there has been unlawful copying. In many cases, the natural or necessary resemblance between two productions, which are the result of independent labor, will amount to substantial identity. Thus, the differences will be often slight, and sometimes immaterial, between two descriptions of a common object; two compilations of like materials; two maps, charts, or road books of a common region; two directories of one city; two photographs of the same scene; two engravings of the same painting. But, notwithstanding their likeness to one another, any number of productions of the same kind may be original within the meaning of the law; and no conditions as to originality are imposed on the makers, except that each shall be the producer of that for which he claims protection."

Considering the text first: The complainant had no monopoly of the things taught in its lecture, because they were the common teaching. Maj. Reynolds, in preparing his lecture, had a right to consult all previous publications on the subject, including the complainant's lecture No. 6, and to state in his own language what he thought to be the proper and the best practice. From the nature of things there were certain to be considerable resemblances, just as there must be between the work of two persons compiling a directory, or a dictionary, or a guide for railroad trains, or for automobile trips. In such cases the question is whether the writer has availed himself of the earlier writer's work without doing any independent work himself.

In respect to the pictures, if Maj. Reynolds had rephotographed the complainant's, he would have been clearly availing himself of the complainant's work, and so an infringer. The evidence, however, is clear that he had original photographs taken of his own hands manipulating the instruments from the beginning to the end of the operation. That the pictures in each lecture should resemble each other is quite natural, because these successive steps illustrate the practice in general use. With these considerations in mind, we are not at all satisfied, upon comparing the two lectures, that Maj. Reynolds has appropriated the complainant's work.

The decree is reversed.

BALDWIN CO. v. R. S. HOWARD CO.

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

No. 130.

1. TRADE-MARKS AND TRADE-NAMES ⟸73(1)—RIGHT TO TRADE-NAME.
Complainant first adopted the name "Howard" alone to designate pianos sold by it, and with full knowledge of R. S. Howard, a piano salesman, copyrighted the name. Thereafter the R. S. Howard Company was formed to manufacture pianos. *Held* that, as complainant built up a profitable business under the name "Howard," defendant corporation, while entitled to use the name "R. S. Howard Company" to designate its pianos, cannot appropriate the name "Howard," regardless of the validity of complainant's trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 84; Dec. Dig. ⟸73(1).]

2. APPEAL AND ERROR ⟸843(2)—REVIEW—MOOT QUESTIONS.
Where the trial court granted complainant relief in a suit for unfair use of complainant's trade-mark, regardless of its registration, the question of the validity of the registration, the decision being upheld, need not be determined on appeal.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3331; Dec. Dig. ⟸843(2).]

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

Bill by the Baldwin Company against the R. S. Howard Company. From a decree for complainant (233 Fed. 439), defendant appeals. Affirmed.

On appeal from a decree in an action brought by the Baldwin Company against the R. S. Howard Company for unfair competition by reason of the use by the defendant of the complainant's trade-mark "Howard" upon pianos not made or sold by the complainant. The opinion of the District Court is reported in 233 Fed. 439.

Samuel S. Watson, of New York City, for appellant.

Lawrence Maxwell, of Cincinnati, Ohio, Edmund Wetmore, of New York City, John E. Cross, of Baltimore, Md., and Oscar W. Jeffery, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge. [1] This is an action in equity upon the trade-mark "Howard" as applied to pianos. The custom of the trade is to stencil the name upon the front of the piano just above the keyboard and also upon the cases in which the pianos are shipped. The question here is whether the R. S. Howard Company, the defendant, has a right to use the word "Howard" as a trade-mark in connection with sales of pianos manufactured by it. That it may use its own name, R. S. Howard Company, is not disputed, but the contention is that the complainant has a right to the use of the name "Howard" alone as applied to the fall-board of the pianos manufactured by it because of its long use and also because of the defendant's acquiescence in that use. The Baldwin Company adopted the name "Howard" alone to designate

pianos sold by it in 1896 with the full knowledge of R. S. Howard and procured the trade-mark in that name with his acquiescence. It has built up a large and flourishing business in this manner, with the knowledge of R. S. Howard and it would now be most inequitable to permit him to destroy this business and reap the fruits thereof by transferring a large part thereof to himself. He has a perfect right to use his own name, R. S. Howard, in the piano business but he has not at this late day the right to appropriate the good will of the complainant's business by the use of the trade-mark "Howard," which has by long use come to mean the pianos sold by the complainant.

The name "Howard" without prefix or suffix, when used in connection with pianos, indicated that they were the product of the Baldwin Company, the complainant herein. There can be no doubt as to the wide publicity given by the complainant to the "Howard" piano and the large sales made by it under that name. In other words, it was the enterprise, energy, capital and brains of the complainant company that established and maintained the reputation of the Howard piano and that company is entitled to have its rights protected. The facts necessary to understand the situation are fully set out in the opinion of Judge Hough and need not be repeated here.

[2] The appellant disputes the validity of the trade-mark registrations but it is contended that the validity of these registrations is not in issue in this case, at least so far as this court is concerned. The appellee's brief contains the following:

"The appellant's brief attacks the plaintiff's right to its trade-mark registrations, but the validity of the registrations is not in issue in the case. At the final hearing below, plaintiff did not claim infringement of its registrations and confined its charge of infringement solely to its common law rights in the name 'Howard,' and Judge Hough at the close of his opinion said:

" 'I incline to ground that decree solely on principles of unfair competition, and leave the trade-mark situation to take care of itself; but upon this point I am willing to hear further argument if the matter is pressed, as it was not much alluded to in argument.'

"The matter was not pressed by either side and therefore there is no finding about it in the decree. It was evidently the opinion of the court below that all questions concerning the validity of the registrations should be left to the cancellation proceedings instituted by the R. S. Howard Company in the Patent Office and now about to come to final hearing there."

We are inclined to think that the court was not called upon to hear what were practically moot questions not essential to a decision and which, even if decided according to the appellant's contention, would not affect the controlling question in the least.

The decree of the District Court is affirmed.

WARD, Circuit Judge (concurring). I concur in the opinion of the court, but think we should go further. The complainant set up in its bill ownership of a trade-mark for the word "Howard" registered under the act of 1881 (Act March 3, 1881, c. 138, 21 Stat. 502) and of another such trade-mark registered under the act of 1905 (Act Feb. 20, 1905, c. 592, 33 Stat. 724), and prayed that it might be declared the exclusive owner of both. The defendant in its answer alleged that both these trade-marks were registered without authority of law and

in its counterclaim prayed for affirmative relief, viz., that such registrations be declared invalid. This is relief we have power to grant, and I think we should do so because as to the trade-mark registered under the act of 1881 there is no evidence that it was ever used in commerce with foreign countries or with the Indian tribes, and as for the trade-mark registered under Act Feb. 20, 1905, it was a surname and not used for 10 years before the passage of the act or displayed in such a particular or distinctive manner as to fall within the exception contained in section 5 (Comp. St. 1913, § 9490), and so was not entitled to registration. The defendant duly assigned error to the decree in this respect and argued the question in its brief and at the hearing.

THE VIRGINIAN (two cases).

(Circuit Court of Appeals, Ninth Circuit. October 23, 1916.)

No. 2728.

COLLISION ⊜98—STEAM VESSELS MEETING—CONSTRUCTION OF RULES.

Inland Navigation Rules, Act June 7, 1897, c. 4, § 1, art. 18, rule 9, 30 Stat. 100 (Comp. St. 1913, § 7892), which provides that "the whistle signals provided in the rules under this article, for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined, in the daytime by a sight of the vessel itself, or by night by seeing its signal lights," applies only to the meeting, passing, or overtaking signals specified, and does not relieve a vessel of the duty to give alarm signals as required by rule 3, where from any cause she cannot understand the course or intention of an approaching vessel, although it may be because neither the approaching vessel nor her lights can be seen.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 208–210; Dec. Dig. ⊜98.]

On petitions for rehearing. Denied.

For former opinion, see 235 Fed. 98, — C. C. A. —.

GILBERT, Circuit Judge. Petitions for a rehearing filed by the American-Hawaiian Steamship Company and by two amici curiæ question the correctness of the decision of this court on the ground, as alleged, that it disregards the statutory rules of navigation and holds the Virginian at fault for failure to pursue a course which, it is said, those rules expressly prohibited it to pursue. It is asserted that the decision ignores rule 9 of article 18 of the Act of June 7, 1897 (30 Stat. 101), which provides that:

"The whistle signals provided in the rules under this article, for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are in sight of each other, and the course and position of each can be determined in the day time by a sight of the vessel itself, or by night by seeing its signal lights."

It is contended that this rule is paramount and is without exception, and that it makes rule 3 of article 18 inapplicable to the situation in which the Virginian was placed, and that the Virginian not being able

to see the Strathalbyn was not at liberty to give alarm signals as provided in rule 3. We do not so construe the rules. Rule 9, in our opinion, refers only to signals for steam vessels meeting, passing, and overtaking. It provides that none of those signals shall be given, except while steamers are in sight of each other. The several short and rapid blasts provided for in rule 3 are not signals for steam vessels passing or overtaking. They are signals to be resorted to only under the circumstances prescribed in that rule. They are to be used whenever for any cause one of the two approaching steam vessels fails to understand either the course or intention of the other. And such was the situation which confronted the Virginian. The Flyer had overhauled and passed her. About five minutes later the Strathalbyn blew one whistle to the Flyer, signifying its intention to pass port to port, and the signal was answered by the Flyer. Those signals were heard on the Virginian. When abeam of the Flyer the Strathalbyn blew one whistle to the Virginian. The pilot, the third mate, and the lookout of that vessel assumed that the whistle was intended for the Virginian, but they were unable to make out the approaching vessel or see any light upon it. At that point of time we think the obligation was imposed upon the Virginian "immediately," or at the latest as soon as the Strathalbyn's second signal was heard, to signify that it failed to understand the course of the Strathalbyn, to give the alarm prescribed by rule 3, and to reverse. We are not convinced that the court below was in error in concluding that if the Virginian had so sounded the alarm signal and reversed the collision would have been averted. In the Albert Dumois, 177 U. S. 240, 253, 20 Sup. Ct. 595, 600, 44 L. Ed. 751, Mr. Justice Brown said:

"This court has repeatedly held the fault, and even the gross fault, of one vessel, does not absolve the other from the use of such precautions as good judgment and accomplished seamanship require."

Finding both vessels at fault, we think that the decree which divides the damages between the two vessels is substantially just, and the petitions for rehearing are denied.

TIDE WATER OIL CO. v. GLOBE INDEMNITY CO.

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

No. 38.

PRINCIPAL AND SURETY ⊂=100(3)—DISCHARGE OF SURETY—BOND OF BUILDING CONTRACTOR.

The surety on the bond of a building contractor *held* discharged from liability for the collapse of the building shortly after completion, where a change in the location of some 800 or 900 feet was made without its consent after the bond was given.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 163; Dec. Dig. ⊂=100(3).]

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

Action at law by the Tide Water Oil Company against the Globe Indemnity Company. Judgment for defendant, and plaintiff brings error. Affirmed.

The Tide Water Company (plaintiff both here and below) made a written contract with one Shelly, dated April 17, 1913, for the erection of a building. The contractor therein agreed "to furnish to (plaintiff) a bond in the sum of $20,000, with surety." This action is on the bond so furnished, and dated April 28, 1913. The Globe Company (defendant both here and below) is surety thereupon. The contract with Shelly contained (in the annexed specifications) the proviso that, should the plaintiff "desire any variation from the work as planned and specified, * * * the contractor shall execute such variations * * * only on the written order of" plaintiff's representative. The condition of the bond was that, if Shelly performed his contract "according to the terms, covenants and conditions thereof," the obligation should be void, etc. The building collapsed shortly after completion, probably because of insecure and improper foundations. On the day of the contract's date, work began on the building site previously agreed upon between plaintiff and Shelly. About two weeks later plaintiff concluded to build at a place 800 or 900 feet distant, and work recommenced on the new site May 5th or 6th. Of this change of plan defendant had no notice, and to it never gave formal assent. These facts appearing by uncontradicted evidence, the trial judge directed a verdict for defendant.

Walter B. Walker, of New York City, for plaintiff in error.
Daniel Combs, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). In United States v. Freel, 99 Fed. 237, 39 C. C. A. 491, affirmed 186 U. S. 309, 22 Sup. Ct. 875, 46 L. Ed. 1177, we considered the effect of a change of location far less radical than is here shown. That action was on a bond given to secure performance of a contract existing when bond given, and specifically providing for "changes, alterations, or modifications in the plans," etc. The case was heard on demurrer, and Wallace, J., pointed out that the only question presented was whether the principal contract authorized the change actually made. The change here shown is even more radical than that discussed in the case cited. It cannot fairly be called a "variation," and the Case of Freel is plainly applicable.

Later decisions have not affected the authority of that decision. It was specifically approved in Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 348. In United States v. McMullen, 222 U. S. 460, 32 Sup. Ct. 128, 56 L. Ed. 269, Holmes, J., pointed out that sureties on a bond have no right to insist upon a "sacrosanct prohibition of change. * * * The law has no objection to [change] if [sureties] assent. Whether they have done so or not is simply a question of construction and good sense, taking words and circumstances into account."

This language announces no new rule; questions of construction are not for the jury; and it remains the duty of the court to infer from the evidence, if uncontradicted, whether the surety consented or assented to a substantial change of contract. We cannot doubt that no assent

can be inferred or presumed in this case. Nor do we doubt that the change of location materially contributed to the fall of the building, because the new site was marshy; but decision is based only on the plain fact that a new and substantially different agreement was made between the contracting parties without the surety's consent or knowledge.

Judgment affirmed, with costs.

PRESIDENT SUSPENDER CO. v. MACWILLIAM.

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

No. 37.

1. TRADE-MARKS AND TRADE-NAMES ⟸1—NATURE OF TRADE-MARK.
   The sole function of a trade-mark being to indicate the origin of the goods, it cannot exist in gross or apart from the business in which it is used.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 1, 3; Dec. Dig. ⟸1.]

2. GOOD WILL ⟸5—CONVEYANCES—MODE OF CONVEYANCE.
   The good will of an established business is an incorporeal property, which may be sold in connection with the sale of the business on which it depends.
   [Ed. Note.—For other cases, see Good Will, Cent. Dig. § 2; Dec. Dig. ⟸5.]

3. TRADE-MARKS AND TRADE-NAMES ⟸35—CONVEYANCE OF TRADE-MARK—MODE OF CONVEYANCE.
   The sale of a business and its good will carries with it a sale of a trade-mark used in connection with the business, although not expressly mentioned in the instrument of sale.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

4. TRADE-MARKS AND TRADE-NAMES ⟸35—CONVEYANCES—EFFECT OF.
   The inventor of a new suspender, who granted plaintiff an exclusive license for the manufacture of the same during the life of the patent, conveyed his business, as well as the good will and trade-mark. Plaintiff greatly extended the business by advertising the suspenders, which were sold under the name of the "President," with a tri-colored band around the web, and the inventor received large royalties. *Held* that, the contract having been carried out and the royalty payments made, the right to the trade-mark passed to plaintiff on expiration of the patent, notwithstanding a provision in the contract that it might be terminated on nonpayment of the royalties.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. §§ 39, 40; Dec. Dig. ⟸35.]

5. TRADE-MARKS AND TRADE-NAMES ⟸11—EXPIRATION OF PATENT—NAME OF PATENTED ARTICLE.
   On expiration of a patent for suspenders sold under the name and trade-mark "President," such name and trade-mark does not pass to the general public, the name never having constituted a generic description; consequently rights in the trade-mark were not affected by the expiration of the patent.
   [Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. ⟸11.]

6. TRADE-MARKS AND TRADE-NAMES ⟸11—EXPIRATION OF PATENT—NAME OF PATENTED ARTICLE.

There is no presumption, on the expiration of the patent, that the name under which the patented article was sold passes to the public on the theory that it constituted a generic description of the article; but proof of that fact is essential for the expiration of the patent to effect rights in the trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 15; Dec. Dig. ⟸11.]

7. CONTRACTS ⟸147(2)—CONSTRUCTION—PURPOSE.

While the sole purpose of construction of a contract is to ascertain the intention of the parties, the intent must be drawn from the language they have used.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. § 730; Dec. Dig. ⟸147(2).]

8. EVIDENCE ⟸397(1)—PAROL EVIDENCE—RULE—ADMISSION.

In the absence of fraud or mistake, parol evidence is not admissible to vary the terms of a written contract.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756, 1763, 1764, 1765; Dec. Dig. ⟸397(1).]

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

Bill by the President Suspender Company against Hugh C. Macwilliam. From a decree for complainant (233 Fed. 433), defendant appeals. Affirmed.

The defendant, prior to October 1, 1898, was manufacturing and selling at St. Paul, Minn., a certain suspender which he had devised and to which he had affixed the word "President" as a trade-mark, together with a red, white, and blue banner emblem. On August 16, 1898, the defendant took out a patent on the suspender, being patent No. 609,286. The plaintiff at that time was known as the "C. A. Edgarton Manufacturing Company," and was also engaged in manufacturing and selling suspenders and the like. It maintained its factory at Shirley, Mass. The name "C. A. Edgarton Manufacturing Company" was changed in August, 1914, to "President Suspender Company." The business was an old and established one, and its product was known throughout the United States and in foreign countries.

On October 1, 1898, the defendant granted to the plaintiff, on a royalty basis, an exclusive license to manufacture and sell throughout the United States a suspender containing the improved feature covered by the patent. By the same instrument he transferred to the plaintiff the good will of the business. The clause reads as follows: "Said party of the first part agrees to and he does hereby turn over and transfer to the party of the second part the good will of his present business of manufacturing and selling said suspender within the United States, and all orders he now has or may hereafter take within the United States for the said suspender." The defendant also sold to plaintiff, as part of the same transaction, all the machinery, tools, and stock, finished and unfinished, and all other assets used by him in the business of manufacturing and selling suspenders under said mark and name "President" and under said banner device. The transfer carried the defendant's entire business and good will, and he at once went out of the suspender business; and the plaintiff at once began to manufacture and sell suspenders bearing the mark "President," and has continued the manufacture and sale to this day.

The plaintiff states that it has made and sold between 30,000,000 and 40,000,000 pairs of suspenders bearing the mark "President," and that the boxes accompanying the goods have always borne its name alone. It also claims to have expended about $750,000 in advertising the name "President,"

and it has paid the defendant royalties to the amount of about $500,000. In addition to the name "President," there has always been affixed with it a label or ticket having an emblem or banner comprising a blue escutcheon with red and white stripes, across which the mark "President" is printed.

The patent license expired on August 16, 1915, and thereupon defendant resumed the manufacture of "President" suspenders. He at the same time resumed the use of the trade-mark "President," and has affixed thereto a red, white, and blue banner practically identical in visual appearance with the banner used upon plaintiff's goods. Within two months thereafter the plaintiff brought this suit.

W. P. Preble, of New York City, for appellant.

Rogers, Kennedy & Campbell, of New York City, and Roberts, Roberts & Cushman, of Boston, Mass. (Robert Cushman and Charles D. Woodberry, both of Boston, Mass., of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). The plaintiff claims to be the owner of the trade-mark "President" in connection with the business of manufacturing and selling suspenders. It seeks an injunction restraining the defendant from an infringement of its trade-mark. The injunction was granted by the court below, and the defendant has brought the case here on appeal.

The defendant applied for the registration of the trade-mark "President" on January 10, 1899. This was issued to him in his own name on May 16, 1899. After the decision of this case in the court below, the Commissioner of Patents ordered the cancellation of its registration; and an appeal from that order is now pending in the Court of Appeals for the District of Columbia. With that we are not in any way concerned.

The contract of October, 1898, granted to the plaintiff an exclusive license to make and sell to the end of the term of the patent the patented suspender, subject, however, to certain conditions which it is not necessary now to consider. It also transferred the good will of the business, as well as all the machinery, stock, tools, and other assets used by the defendant in the suspender business, and the latter wholly withdrew from the business of manufacturing and selling suspenders. The only real question in the case is whether the trade-mark "President" and the red, white, and blue escutcheon used with it passed from defendant to the plaintiff by virtue of the contract. The defendant answers the question in the negative. He says the trade-mark is not mentioned in the contract and has not passed.

[1] A trade-mark right cannot exist independently of some business in which it is used. The sole function of a trade-mark being to indicate the origin or ownership of the goods, it cannot exist apart from the business to which its use is incident. There is no such right known to the law as an exclusive ownership in a trade-mark apart from the right to use it in a business. It cannot exist as a right in gross. Thomas G. Carroll, etc., Co. v. McIlvaine (C. C.) 171 Fed. 125; Weener v. Brayton, 152 Mass. 101, 25 N. E. 46, 8 L. R. A. 640; 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.

[2] The defendant agreed in the contract of October 1, 1898, to transfer the good will of the business to the plaintiff. The "party of the first part [the defendant] agrees to and he does hereby turn over and transfer to the party of the second part the good will of his present business of manufacturing and selling said suspender," etc. The good will of an established business is incorporeal property which the law permits to be sold in connection with a sale of the business on which it depends and of which it is an incident. Lewis v. Seabury, 74 N. Y. 409, 30 Am. Rep. 311; Cruess v. Fessler, 39 Cal. 336.

[3] A sale of a business and of its good will carries with it the sale of the trade-mark used in connection with the business, although not expressly mentioned in the instrument of sale. Kidd v. Johnson, 100 U. S. 617, 25 L. Ed. 769; Nelson v. Winchell, 203 Mass. 75, 89 N. E. 180, 23 L. R. A. (N. S.) 1150; Merry v. Hoopes, 111 N. Y. 415, 18 N. E. 714; Corbett Bros. Co. v. Reinhardt-Meding Co., 77 N. J. Eq. 7, 76 Atl. 243; Myers v. Kalamazoo Buggy Co., 54 Mich. 215, 19 N. W. 961, 20 N. W. 545, 52 Am. Rep. 811; Allegretti v. Allegretti Chocolate Cream Co., 177 Ill. 129, 52 N. E. 487. The principle is as well established as any in the whole law of trade-marks. The right to the use of a trade-mark passes to any one who takes the right to make or sell the particular article to which the trade-mark has been attached. Filkins v. Blackman, Fed. Cas. No. 4,786; Leather Cloth Co. v. American Leather Cloth Co., 11 H. L. Cas. 523.

[4] The defendant, however, says that the contract he made was not a sale. It was simply a license, and that how long it was to last depended on whether the plaintiff lived up to the contract. But it was an exclusive license for the entire life of the patent to manufacture and sell the patented article. The convenience of the parties was served by an agreement to pay and accept royalties on the suspenders sold during the life of the patent, with a right to terminate the contract in case of default. The agreement seems to have been observed to the letter. And now that the patent has expired the defendant asserts the right to use the trade-mark again. This court is unable to perceive any reason for holding that a patentee who gives an exclusive license to another to manufacture and sell a patented article for the life of the patent, and who at the same time transfers the good will of the business to the licensee, retains any right to the trade-mark which he can avail himself of during the life of the patent ordinarily or on its expiration. The cancellation clause did not impair the licensee's right to the trade-mark, any more than it impaired his right to sell the patented article. The right of the plaintiff to the trade-mark must be regarded as exclusive of the defendant, as was the plaintiff's right to manufacture and sell the patented article. The contract was never canceled, and the plaintiff has never lost the right to the exclusive use of the trade-mark which it has enjoyed for a period of 18 years during which time its value has been, presumably, constantly enhanced by the manner in which the plaintiff has carried on its business and by the expenditure of the sum of $750,000 in advertising over its own name the trade-mark "President." The public have identified and had the right to identify the "President" suspender

with the plaintiff's company. The obvious purpose of the use of a trade-mark in the sale of goods is to enable one to reap the benefit of the good will and reputation which he has built up for his goods by his skill and industry. The exclusive use of this trade-mark is still in the plaintiff, and the defendant cannot now be permitted to appropriate to itself the benefit of the good will of the business which it transferred to the plaintiff in 1898, and which the plaintiff's own conduct in the years which succeeded has so largely enhanced.

[5, 6] It is true that the trade-mark was used with a patented suspender, and that in Singer Manufacturing Co. v. June Manufacturing Co., 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118, it was decided that, if the owner of a patent had given to its product a name which constituted its generic description, the right to make the patented article and to use the generic name passed to the public upon the expiration of the patent, and that therefore the exclusive right to use the trade-mark ceased with the life of the patent. It is to be observed that the doctrine of the Singer Case rests upon the fact that the name had come to indicate the invention and thus constituted its generic description. The fact that the name "President" has come to indicate the invention and constitutes its generic description is one of fact, to be proved by evidence. There is no evidence in this record that the word "President" has ever come to indicate to the public the generic description of the suspender of the patent. The only evidence in the case indicates that it is a mark of origin, indicating the plaintiff, its business, and its goods. There is no presumption of law, without proof of the fact as above indicated, that a name used on a patented article passes to the public on the expiration of the patent. Hughes v. Alfred H. Smith Co., 209 Fed. 37, 126 C. C. A. 179.

But the doctrine of the Singer Case is inapplicable to the facts of this case for another reason. In the case at bar the name "President" antedated the patent. The defendant, in his application filed in the Patent Office on January 10, 1899, declared:

"The trade-mark [President] has been used continuously in business by me since January 1, 1897."

The declaration that it had been used by him continuously since January 1, 1897, is shown by the record to have been incorrect, in that he ceased to use it upon the making of the contract of October 1, 1898, and only resumed its use after the patent expired. There is, however, no evidence which contradicts the statement that he was using it in January, 1897. This was prior to the patent, which, as has been already stated, was granted on August 16, 1898. In Batcheller v. Thomson, 93 Fed. 660, 35 C. C. A. 532 (1899) the trade-mark antedated the patent by more than 2½ years, and the name rather than the patent gave value to the article, and this court held that the doctrine of the Singer Case was inapplicable. In the case at bar the name antedated the patent for 1 year and 7 months. We think the case is governed by the Batcheller Case, and not by the Singer Case.

The appellant's counsel did not on the argument contend that the appellant's right to use the trade-mark existed under the doctrine of the Singer Case, which was not referred to by him. We think it best,

however, to call attention to that case, and to state the reasons which seem to us to make it inapplicable to the facts herein involved. The appellant's counsel based his argument upon the theory that it was not intended by the contract he made on October, 1898, to transfer the trade-mark, and that the intention of the parties should prevail. No doubt the sole purpose of the interpretation of a contract is to ascertain the intention of the parties.

[7, 8] The first rule of construction, however, is that the intent of the parties, as expressed in the words they have used, must govern. And in the absence of fraud or mistake, and neither fraud or mistake is alleged, parol evidence cannot be received to add to or vary the contract as written. When the appellant, by his written contract transferred to the appellee the good will of his business, he transferred the trade-mark. Where the language of an instrument, as here, has a settled legal construction, parol evidence cannot contradict that construction. Godkin v. Monahan, 83 Fed. 116, 119, 27 C. C. A. 410; Hearne v. Insurance Co., 20 Wall. 488, 492, 22 L. Ed. 395.

The language the parties used in their contract of 1898 has, as we have pointed out elsewhere in this opinion, a settled legal construction, namely, that "good will" is inclusive of the trade-mark.

Decree affirmed.

ÆOLIAN CO. OF MISSOURI v. VICTOR TALKING MACH. CO.

(Circuit Court of Appeals, Third Circuit. December 19, 1916.)

No. 2117.

PATENTS ⊂=212(1)—LICENSES—CONSTRUCTION.

Defendant, the manufacturer of talking machines which were patented, entered into a contract with plaintiff for the distribution of its machines. The contract expressly declared defendant's desire to maintain control of its patented machines in the hands of the public, as well as in the hands of the distributors and dealers, and provided that machines and records should not be sold, but only licensed for use during the life of the patent; defendant having the right to retake the machines and records upon certain conditions. The contract further declared that distributors should not license dealers who had not first signed a license agreement furnished by defendant, and declared that defendant should have the right to terminate the license agreement at any time for cause or otherwise, notice to be forwarded by mail in writing to the last known address of the licensee; the termination and annulment taking effect at once. Plaintiff became interested in the distribution of competing talking machines. Defendant filed a written notice terminating the license, and thereunder refused to furnish machines, etc., ordered before the termination. The orders were acknowledged by statements reciting that, while defendant did not obligate itself to fill all orders within a specified time, though requested, it would make every reasonable effort to do so. *Held* that, as defendant, being the patentee, had an absolute monopoly, and might merely license the use of its machines, instead of disposing of them absolutely, and as the license was intended to preserve that right, defendant's refusal to furnish the machines after termination gave no right of action.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 312–313; Dec. Dig. ⊂=212(1).]

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

Action by the Æolian Company of Missouri against the Victor Talking Machine Company. There was a judgment for defendant, and plaintiff brings error. Affirmed.

George D. Beattys, of New York City (Frank S. Katzenbach, Jr., of Trenton, N. J., of counsel), for plaintiff in error.

Samuel H. Richards and Thomas E. French, both of Camden, N. J., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. For several years the Æolian Company of St. Louis was a "distributor" of the Victor Talking Machine Company's products, but on September 30, 1914, the relation ceased. At that time several orders of the Æolian Company had not been filled, and as the Victor Company afterward refused to supply the machines the present suit was brought to recover damages therefor. The District Court entered a judgment of nonsuit.

The controlling question is the character of the relation between the parties. In the plaintiff's view this was the ordinary relation of buyer and seller, and if that be true the nonsuit can hardly be sustained. The defendant denies this position, and relies on the terms of the contract hereinafter referred to. No material fact is in dispute. The Victor Company has a factory in Camden, N. J., and is a well-known maker of talking machines, records, and other articles used in reproducing sound. Most of its goods are patented, and instead of selling them outright it prefers to exercise its undoubted power to part with them only under a limited license. These licenses take their place in a system of distribution, part of the system being involved in the present suit. The Æolian Company was one of the "distributors"—the class nearest to the maker—and, although in some respects it resembles the wholesaler in an ordinary business, nevertheless it differs in important particulars.

The plaintiff's business connection with the defendant began in 1910, but a new contract was made on September 17, 1913, and we need not go behind that instrument. The contract is in writing, was prepared by the defendant, and embraces many provisions. Its scope would not appear satisfactorily from a brief summary, and for that reason we quote most of its articles in full:

"(1) Desiring to maintain control of its patented talking machines and records in the hands of the public, as well as in the hands of the distributor and dealer, in order, among other things, that the license conditions under which the goods are put out to the public may be enforced, the Victor Talking Machine Company (hereinafter referred to as the Victor Company), from August 1, 1913, licenses only the *use* of its patented goods under the conditions hereinafter noted, the title remaining in the Victor Company with the right to repossess and retake at any time the patented goods upon the payment to the user of the royalty paid by him for the use of the said patented goods, less 5 per cent. per annum of the list royalty as to machines and 10 per cent. per annum of the list royalty as to records, for each year, or fraction of a year, the user shall have had the use thereof; this right, however, to be ex-

ercised only at the will of the Victor Company. In view of the fact, among other things, that other disc records and disc machines have been, and are being, placed upon the market, some of inferior quality, as well as other talking machine supplies of inferior quality, the Victor Company insists on Victor machines being used only with Victor records and Victor supplies, and Victor records being used only on Victor machines and with Victor supplies, and the Victor Company now licenses its patented talking machines for use only with disc records manufactured by it, and licenses its patented records for use only upon talking machines manufactured by the Victor Company; the said Victor talking machines and records are further licensed only for use with needle supplies sold by the Victor Company, and, further, the machines and records of the Victor Company are licensed for use only with sound boxes manufactured by it under its patents. Victor records are licensed for use only for reproducing sound on Victor machines with Victor supplies, and for no other purpose. The Victor Company has spent large sums of money in perfecting its records, among other things, and has found that the use of inferior needles is disastrous and destructive to the records, both as to the reproducing quality and as to wear. It has also spent large sums of money in perfecting its needles, in order to produce the best results in use in combination with its records, machines, and sound boxes, and all these conditions of license must be strictly observed. All Victor talking machines, records, and sound boxes are covered by letters patent included in the list hereinafter noted, owned and controlled by the Victor Company, and they are not sold, but *licensed for use only* under the conditions noted on the labels accompanying the goods, and as herein provided, and any attempted sale, or any use of the said patented goods in violation of the conditions, and in excess of the license, will constitute an infringement of the said patents of the Company. The license is granted for the term of the patent protecting the goods having the longest term to run, noted upon the license label.

"(2) A limited license is granted to the distributor accepting the conditions hereof to use the Victor patented machines, records, and sound boxes procured by the distributor from the Victor Company under the said conditions of license, for demonstrating purposes, and in distributing the said goods to assign the same right to any regularly licensed dealer of the Victor Company, with the further right to such dealer to assign the right to the public to use the said goods for the purpose of reproducing sound therefrom in accordance with the patents, upon the payment of the full list royalty or license fee (as per the current schedule as issued by the Victor Company, a copy of which accompanies this agreement and as adopted and fixed by the Victor Company from time to time), under and subject to the conditions of the license herein noted, and noted upon the labels accompanying the goods. A similar right is also granted to the distributor to assign to the public the right to use the said goods under the same conditions. All dealings between distributors and dealers and the public and all other parties in the handling of the said Victor patented goods are, and are understood to be, assignments to the user of the license or right to use the said patented goods strictly under the conditions herein noted, and under the conditions noted on the license labels accompanying the said patented goods, and no license shall be assigned by any distributor to a dealer at less than the dealers' licensed discount royalty, or by any dealer to a user, or any other party at less than the full list royalty, and then only under and subject to the conditions of license. The license only relates to the particular goods manufactured by and received from the Victor Company, and is limited strictly to said goods.

"(3) Books of record, showing the license transactions in full with dealers and the public, must be kept by the distributor, and held accessible, if requested, to the Victor Company, or its representative, and such statistics shall be furnished to the Victor Company when requested. The discount quoted to distributors and dealers applies only to Victor patented goods, and the goods are for use only in the United States of America. The license to the public is and shall be only a limited license to use the said patented goods herein noted, for the purpose only of reproducing sound, under and subject to all the

conditions herein noted, and to the conditions noted upon the labels accompanying the goods, among which are the following:

"(a) The Victor Company retains title, and also the right to repossess the said patented machines, records, and sound boxes at will, as, among other things, in the case of breach of any of the conditions of license upon the payment to the user of the royalty paid by him for the use of the said patented goods, less 5 per cent. per annum of the list royalty as to machines and sound boxes, and 10 per cent. per annum of the list royalty as to records, for each year, or fraction of a year, the user shall have had the use thereof.

"(b) Victor machines are licensed for use only with Victor records.

"(c) Victor records are licensed for use only with Victor machines.

"(d) Victor machines and Victor records are licensed for use only in connection with Victor sound boxes; Victor sound boxes are licensed for use only in connection with Victor machines and Victor records.

"(e) Victor machines and records are licensed for use only with needles supplied by the Victor Company; needles will be supplied by the Victor Company, direct to any licensee of any of its patented machines at wholesale price, upon written request.

"(f) Victor machines and records are licensed for use by the public only when the full list royalty shall have been paid.

"(g) Victor machines and records are not licensed for use for public entertainment for profit; for a license for such public use an extra license fee of ten per cent. (10%) of the full list royalty shall be payable.

"(h) Only the license to use said Victor patented goods is granted, and all other patent rights are retained by the Victor Company; any use in excess of the rights granted, and any violation of the conditions, will constitute infringement of the Victor Company's patents and render the parties so using without right, or violating any of the conditions, liable to an action for infringement of the said Victor Company's patents. A breach of any of the conditions on the part of the distributor will render him also liable not only for infringement of the patents but for an action on contract, or other proper remedy.

"(i) The Victor machines, sound boxes, and records, at the expiration of the patent having the longest term to run, under which the goods are licensed, shall become the property of the licensee (the goods being then free of the patents, the subject-matter of the license): Provided that the licensee shall have faithfully observed the conditions of license, and the Victor Company shall not have previously taken possession of the goods as herein provided.

"(4) Distributors must secure the signature of the applicant for dealers' discounts upon our 'Dealers' Application Blank,' the distributor filling in the other necessary information required thereon, and forwarding the same to the Victor Company, accompanied by the dealers' license agreement signed in triplicate for acceptance, and a distributor must secure from the Victor Company before shipping the initial order of Victor patented goods its consent to establish the applicant.

"(5) Distributors shall not quote a discount from our list royalties to any one but a regularly licensed talking machine dealer in Victor patented goods, or to a person having a regularly established store or place of business, and who will take an initial order of not less than three Victor machines, of different styles, and one hundred Victor records, excepting and not including in the initial order any style of Victor Victrola listing above $125, or a Victor Auxetophone, and the order must be for the purpose of engaging in a legitimate talking machine business. Distributors must not, directly or indirectly, allow better discount royalties than those authorized by the Victor Company, nor shall they allow any discount whatever from the Victor Company's current list royalties to any suspended dealers, or to any dealers who have not signed the dealers' license agreement.

"(6) Distributors must not license, either directly or indirectly, Victor patented goods to any dealer who will not first sign a license agreement furnished by the Victor Company, containing conditions substantially as herein provided, relative to the use of said patented goods, and governing and control-

ling the same; and distributors must furnish the Victor Company with a properly and duly executed dealers' license agreement containing the said conditions, within ten days of the date of the execution of each of said license agreements. Distributors shall not furnish any dealer or dealers with said patented Victor goods who have violated their dealers' license agreement, and to whom the Victor Company refuses to extend further license privileges, a list of which names and addresses of such dealers will be furnished by the Victor Company to the distributor."

"(8) All Victor patented goods are licensed through licensed Victor distributors and licensed Victor dealers, and under the conditions noted. The distributors, as well as the dealers, are required to keep the records in the envelopes, containing the license label, in which they are put out by the Victor Company, at all times, and to deliver all records in the said envelopes. No license is granted if the record is not delivered in the envelope containing said conditions."

"(12) Licensed Victor distributors are permitted to exchange Victor products with each other, at either distributors' or dealers' royalty.

"(13) Victor patented goods are licensed for use only in the United States of America, and must not be shipped outside this territory, and any misuse of the said license to use by any distributor or dealer will be construed as a violation of the license agreement, and render the distributor or dealer, among other things, liable to annulment of the license agreement. Distributors must co-operate in absolute good faith with the Victor Company."

"(15) The Victor Company, also reserves the right for itself and its representatives of access at all reasonable hours to its said machines in the possession of any of its licensees, for the purpose of repairing the same or placing the same in proper operative condition should the said machine in the judgment of the Victor Company require inspection, repair or adjusting, though the Victor Company assumes no obligation so to do.

"(16) A consideration for the fixing of the license royalties by the Victor Company at the figures at which they are fixed is, among other things, that the title of the patented goods remains in the Victor Company, and only the right to use is granted as hereinbefore provided, and only with Victor supplies, and that all the covenants and conditions will be strictly observed."

Article 14 will be considered hereafter.

Under this contract the parties did business for a year. From time to time the plaintiff mailed orders for goods, and these were all acknowledged in the following form:

"We acknowledge with pleasure receipt of your favor of ———, which will be given our careful attention at the earliest possible date, but we cannot obligate ourselves to fill all orders completely or within a specified time even when so requested, although we will make every reasonable effort."

Of these orders the complaint has to do with nine; some of the goods included therein have been delivered, and on these the plaintiff has paid the agreed royalties. The undelivered goods are the subject of this suit, and as to these the parties have stipulated that, although delivery was reasonably possible after September 30, 1914, the defendant made no effort to deliver—the reason being that on September 9 the defendant notified the plaintiff that the agreement would be terminated on September 30, and followed this notice on September 30 by a letter stating that the agreement had been terminated and annulled, "to take effect at once." The defendant justifies this act under article 14, which provides inter alia:

"The Victor Company shall have the right, and reserves unto itself the right, to terminate this license agreement at any time for cause or otherwise;

notice of the termination of said license agreement to be forwarded by mail in writing by the Victor Company to the last known address of the party or parties accepting this agreement; the said termination and annulment of said license agreement to take effect at once."

(At this point it should be said that, although the District Court disposed of this case by a nonsuit, some facts were in evidence that ordinarily would have belonged to the defense. They are contained in a written stipulation that was offered as a whole by the plaintiff, and it thus happened that a part of the defense is in the record.) Probably one reason for the cancellation is the following facts, which appear in the stipulation: A Connecticut corporation owns the majority of the plaintiff's stock, and has the same principal officers; the St. Louis company being evidently one of its branches or subsidiaries. When the parties arranged for the agreement in question they understood that the Connecticut company and its branches at Cincinnati, Indianapolis, and Dayton, would handle the Victor goods as retail dealers; but afterward, and before September 30, 1914, the Connecticut Company agreed with the Columbia Company, a competitor of the Victor, that the branches in St. Louis, Cincinnati, Indianapolis, and Dayton should be supplied with Columbia goods whenever the Connecticut company should so desire. Further, before September 30 the Connecticut company had begun to make a sound-reproducing instrument of its own—the Æolian-Vocalion—and had taken preliminary steps toward having its own agents deal in this instrument, giving the agents to understand that they would be allowed to handle the Vocalion whenever the Connecticut company should so desire. Nearly all these agents were also either distributors or retail dealers for the Victor Company, and the consent of the latter was neither asked nor given, either to this arrangement or to the arrangement concerning the Columbia goods. It is true that the defendant's answer sets up other breaches of the plaintiff's agreement, but no evidence is before us except the facts just outlined, which are alleged to violate the plaintiff's covenant to co-operate in absolute good faith with the Victor Company.

We have now reached the point where the parties come most directly into collision. The plaintiff concedes the defendant's right under article 14 to annul the agreement "for cause or otherwise," but contends that the present suit is maintainable under the following part of the article, which has not yet been quoted:

"It is distinctly understood and agreed however that any such termination, or any termination of the same, shall not relieve the party operating under this license agreement from any liability to the Victor Company which may have occurred or accrued during the existence of the agreement. The distributor shall have the privilege to withdraw as licensee when he so desires."

The argument is that whatever rights of action the defendant may thus have expressly reserved to itself must be implied in favor of the plaintiff, on the ground that such rights are necessarily reciprocal. But we do not know, and we are not called upon to decide, what rights the defendant may in fact possess under the language just quoted.

The scope of these words is not now in issue, and cannot properly be determined. Several questions are readily supposable, for example, the contract having been canceled, would the Æolian Company be still bound for unpaid royalties in respect of goods already delivered? As to such machines, would its obligation be discharged by returning or offering to return them? Might the Victor Company prohibit the Æolian Company from further using machines on which royalty had already been paid? Might it prohibit the Æolian Company from licensing retail dealers in respect of such machines? Did the withdrawal of the license affect the future only? If it affected the past also, to what extent? We intimate no opinion concerning these questions, or any others that might be stated; they are not raised and cannot be decided in this suit.

Our only concern is with the rights of the plaintiff under a contract that is conceded to be no longer in force. The plaintiff has no express right, and must therefore rely on such implied right as may be granted by the general rules of law or equity. In our opinion these rules do not support the right now claimed, but rather tend to deny it. The plaintiff must recover, if at all, on the theory of a lawful right to have the undelivered machines themselves; for if this be not true no damage has been done by nondelivery. The theory seems to be untenable; the machines would have been useless without a license, and there was no license after the contract was canceled. To allow recovery of damages for nondelivery under such circumstances, would in effect prolong the agreement after its lawful termination, and would in effect compel the defendant to continue the plaintiff's license after the license had been revoked. We are considering rights under patents, and we must remember that while a patent lasts it is a monopoly, and that the patentee is a despot whose power has only been tempered here and there. He may license whom he will, and if he reserve the power to cancel the license he may do so and may thus resume his own complete control. Of course, he must fulfill whatever obligation he may have undertaken while the license was in force; but he is not bound to continue a license that may be revoked at his own pleasure. Unless we do violence to the fundamental conceptions of the patent law, we cannot regard the agreement in question as a contract of sale between the patentee and a distributor. Both in form and in substance it is a limited license, and we have no power to make a new contract for the parties. Taking its provisions as a whole, it resembles the appointment of a selling agent, with an interest in the thing to be sold, and such a relation would suggest almost inevitably that some precaution should be taken against a lack of harmony, which would obviously be fatal to the object of the contract. At all events, precaution was taken in the contract before us, although its value would be much impaired if the plaintiff's contention should succeed. We think it impossible to treat these parties substantially as vendor and vendee, and unless we so treat them the plaintiff has no case.

We have no opinion about the plaintiff's rights in respect of goods already received and settled for. All we decide is that after article 14

was enforced, and the agreement was canceled the plaintiff had no legal right to the delivery of any more machines, and to a license for their use, and therefore that such a right cannot be assumed as the basis for recovery in a suit for failure to deliver.

The judgment is affirmed.

BONNELL v. WARD.

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

No. 27.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—OUTLET BOX FOR ELECTRIC CONDUITS.

The Bonnell reissue patent, No. 13,432 (original No. 921,584), for an outlet box for electric conduits, claims 10 and 16, are void as setting up new matter not covered by the original patent. Claim 6, assuming its validity, must be narrowly construed, and, as so construed, *held* not infringed.

2. WORDS AND PHRASES—"CLAMP"—"WEDGE"—"DRAW"—"DRAWING."

The words "clamp," "wedge," and "draw" convey a progressive conception of the application of mechanical force. "Clamp" represents one extreme; "draw" the other. To "clamp" is merely to fasten or secure. "Drawing" signifies active propulsion in addition. "Wedge" is an intermediate term, and looks both ways; but, used in any accurate mechanical sense, it looks more toward drawing than it does toward merely clamping.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Clamp; Draw; Drawing; Wedge.]

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

Suit in equity by Hattie W. Bonnell against F. H. Ward. From the decree, both parties appeal. Affirmed on complainant's appeal, and reversed on defendant's appeal.

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

Of the three claims involved, 6, 10, and 16, I put aside claims 10 and 16. The invention originally described and illustrated, and shown by the appliance in evidence, does not disclose, in my opinion, any means to draw the conduits in the bushings, which constitutes an essential element of those two claims. In other words, claims 10 and 16 in the reissued patent, to that extent, set up new matter. To my mind the three words "clamp," "wedge," and "draw" convey a progressive conception of the application of mechanical force. "Clamp" represents one extreme; "draw" the other. To clamp is merely to fasten or secure. Drawing signifies active propulsion in addition. "Wedge" is an intermediate term, and looks both ways; but, used in any accurate mechanical sense, it looks more toward drawing than it does toward merely clamping. I am of opinion that claims 10 and 16 set up new matter within the prohibition of the statute, and are therefore void.

Claim 6, however, is not subject to that objection. It accurately describes and sets forth the essential elements of the invention claimed. The invention is certainly not anticipated by anything shown in the proofs, and in the light of the prior art it is clear that it is a valuable and useful invention.

While the defendant's box is not a Chinese copy of the complainant's, it does embody all the essential elements of this claim.

My conclusion is that claim 6 of the patent in suit is valid, not anticipated, and infringed by the defendant.

Kay, Totten & Powell, of Pittsburgh, Pa. (W. P. Long, of New York City, of counsel), for complainant.

W. P. Preble, of New York City, for defendant.

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

PER CURIAM. We concur in the opinion of the District Judge, except as to claim 6 of the patent to Bonnell, No. 921,584, for an outlet box for electric conduits. Assuming the patent to be valid, we think the claim should be narrowly construed, and that, so construed, the defendant's structure does not infringe.

CHEATHAM ELECTRIC SWITCHING DEVICE CO. v. BROOKLYN RAPID TRANSIT CO. et al.

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

No. 87.

1. PATENTS ⊜283(2)—SUIT FOR INFRINGEMENT—DEFENSES.
   The owner of a patent, who has recovered a judgment at law for its infringement, cannot thereafter maintain a suit in equity against users with respect to the same devices included in the judgment, and the use of which has ceased.
   [Ed. Note.—For other cases, see Patents, Dec. Dig. ⊜283(2).]

2. PATENTS ⊜277—SUIT FOR INFRINGEMENT—EFFECT OF PRIOR ADJUDICATION.
   That a jury in an action at law found that a patent was of a primary character, and that their verdict was affirmed by an appellate court, does not fix the status of the patent as a pioneer in subsequent litigation between different parties.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 435; Dec. Dig. ⊜277.]

3. PATENTS ⊜178—EQUIVALENTS.
   The most generous equivalents of the elements of a patented device can never go beyond the invention revealed by the drawings and specifications, and assured by the claims.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 436; Dec. Dig. ⊜178.]

4. PATENTS ⊜112(3)—SUIT FOR INFRINGEMENT—ESTOPPEL.
   A patentee, who subsequently applied for another patent, which in interference proceedings was awarded to another, is estopped to deny that there is a patentable difference between the device of such patent and that of his prior patent.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. § 164; Dec. Dig. ⊜112(3).]

5. PATENTS ⊜237—EVIDENCE OF INFRINGEMENT—SIMILARITY OF RESULTS ATTAINED.
   Similarity of results accomplished by two devices is not per se even evidence of equivalence or infringement.
   [Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 374, 375; Dec. Dig. ⊜237.]

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6. PATENTS ⊂328—INFRINGEMENT—ELECTRIC RAILWAY SWITCH.
The Cheatham patent, No. 612,702, for an electric railway switch, *held* not infringed.

7. WORDS AND PHRASES—"SPRING ARMATURE."
By the term "electro-magnet having a spring armature" is meant that, according to the strength of the current energizing the magnet, the switch-actuating current flows through a contact touching the armature by force of a spring, or through another contact by force of the magnet's attraction overcoming the spring.

8. WORDS AND PHRASES—"PARALLEL CONTACT STRIPS."
The term "parallel contact strips," as used in describing a track switch, electrically actuated and used with and for trolley cars, means that the switch-actuating current flows through a circuit always completed by the passage of the trolley wheel along the "contact strips," which together bridge the trolley wire and prevent the trolley wheel touching the same while passing the length of the strips.

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

Suit in equity by the Cheatham Electric Switching Device Company against the Brooklyn Rapid Transit Company and others. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 229 Fed. 165. See, also, 227 Fed. 613.

Appeal from final decree dismissing bill in equity on patents 612,702 (claim 3) and 917,541 (claims 1 and 2), entered in the District Court for the Eastern District of New York.

O. Ellery Edwards, Jr., of New York City, for appellant.

Thomas J. Johnston, of New York City, for appellees.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge. These patents were the subject of decisions in this court in Transit, etc., Co. v. Cheatham Electric, etc., Co., 194 Fed. 963, 114 C. C. A. 599, and Cheatham Electric, etc., Co. v. Transit, etc., Co., 209 Fed. 229, 126 C. C. A. 297. In the case first cited the claims there and here in suit are set forth. The earlier patent expired shortly after this action began.

The patented device is for a track switch, electrically actuated and used with and for "trolley cars." Plaintiff first sued at law, and recovered damages for the use of a specified number of infringing switches of a style or design known herein as Type 14; it then filed a bill to reach certain other devices, similarly infringing, acquired or used after verdict. These are the suits above referred to as having been before this court.

The defendants here are the same as in the prior cases, plus several other "surface car" companies operating on Long Island, and comprised within what is commonly known as the Brooklyn Rapid Transit system. It was stipulated that certain of the defendants had within six years before suit used the Type 14 switch, but had discontinued the same, and that all the defendants had within the period named used another switch, called herein Type 15. Patent 612,702 is the only one said to be infringed by this last type of switch.

Litigation over this patent, between the parties here, or some of them, has been long and acrimonious, with the result that discussion had gone much beyond what we regard as the legitimate limits of this cause. Our decision will be confined to two points: (1) Is the plaintiff entitled in this case to any recovery in respect of Type 14? (2) Does Type 15 infringe?

[1] In respect of the first inquiry, the court below found as a fact that the Type 14 devices ascertained or admitted herein as having been used by any defendant—

"had all been removed from the defendant's system prior to the time of the trial. They are the same as the switches for which the Transit Development Company has been held responsible in the preceding suit." 229 Fed. 167.

There is no reason to disagree with this conclusion, and plaintiff, having had judgment or decree in respect of the switches shown, must look to such judgment for satisfaction.

Type 15 switch is the embodiment of a recent patent to one Collins (No. 1,152,791); wherefore plaintiff contends: (1) That the date of invention of Cheatham (its patentee) is earlier than that of Collins; and (2) Cheatham's was a "pioneer" invention, entitled to a range of equivalents wide enough to cover Type 15, despite many dissimilarities in structure.

It is urged that both these facts (and they are facts as distinct from arguments) are shown by the record of the case before us in 194 Fed. 963, 114 C. C. A. 599, wherein Cheatham swore to his earlier inventive date, and this court is said to have found or held that patent 612,702 was a pioneer. The record in that case was offered in evidence "in bulk" at the trial herein, and rejected. Such rejection was entirely right as to Cheatham's alleged testimony respecting his date of invention, because the offer was not made on the ground of the witness' death or absence. Ecaubert v. Appleton (C. C.) 67 Fed. 924.

[2] Nor did that record prove, nor tend to show, that Cheatham's patent must be viewed as pioneer by the trial court, for to that extent does the contention go. In that action at law, it was quite properly left to the jury to decide whether the invention was of that primary character to which the convenient word "pioneer" had come to be applied. We may assume that the jury so found, and that their verdict became the law of the patent as between the parties to that suit. We so held in the subsequent equity action. 209 Fed. 229, 126 C. C. A. 297. But that such verdict, or the judgment entered thereupon, became an adjudication of status, decisive of the primary nature of the invention, and binding on all subsequent triers of facts in suits between different parties, is a proposition not to be sustained. We distinctly overruled it in Fountain, etc., Co. v. Steel City, etc., Co., 223 Fed. 544, 139 C. C. A. 134.

[3] Before it is necessary to consider whether, on the competent and material evidence in this record, it is shown that Cheatham's invention is primary, or whether, upon the widest range of equivalents, infringement can be discovered in the use of Type 15, the question arises whether Cheatham is not estopped to deny that Collins' is a

different device, resting on a different idea, and embodying an inventive thought wholly separate from that revealed by the patent in suit. It is obvious that the most generous equivalents can never go beyond the invention revealed by drawings and specifications and assured by claims. Groth v. International, etc., Co., 61 Fed. 284, 9 C. C. A. 507.

[4] It appears that Cheatham filed an application for a patent, substantially when Collins did, in 1911; an interference resulted, and Collins won, receiving his patent above referred to. Cheatham's verified application is in evidence. It is not doubted that Cheatham described substantially, if not exactly, what Collins did, and therefore in 1911 asserted in effect that there was a patentable difference between what was already covered by No. 612,702 and what he asked for, but found Collins entitled to. No range of equivalents can overcome a patentable difference; nor is the truth of this statement impaired by the fact that a patentable improvement may in use be applicable only to a major device covered by an earlier patent.

It is conclusively presumed that no one knows as thoroughly as does the inventor what are the limits of his own inventive thought; most of the doctrine of claims rests on this presumption. It follows that, when Cheatham applied for (in substance) a patent on Type 15 switch, he thereby affirmed that he did not think or believe that what he wished to patent was covered by his own or any other existing grant of monopoly. The conclusion is that what Cheatham declared to be patentable as against himself (inter alios) is to be taken as not embraced in No. 612,702, and by his own assertion, and therefore does not infringe. This is the doctrine of McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800, and singularly applicable to the facts at bar.

Since it may be contended that Type 15, and Collins' device generally, though sufficiently novel to warrant patenting, nevertheless embraces matters protected by the patent in suit, and must therefore pay tribute, we proceed to ascertain what this record shows in respect of the nature of the patent under consideration. In the decision below, and the several other opinions there referred to, the arrangements and operation of Cheatham's switch are fully set forth. In our judgment the invention is very far from meriting such descriptions as were given of pioneer devices in Wagner, etc., Co. v. Wyckoff et al., 151 Fed. 589, 81 C. C. A. 129, and Autopiano Co. v. Amphion, etc., Co., 186 Fed. 163, 108 C. C. A. 291.

[5-8] The only claim alleged as applicable to Type 15, is No. 3, of 612,702. See 194 Fed. 964, 114 C. C. A. 599. That claim is for a combination of old and well-known parts, producing an effect which, of course, could not be patented, and as to which similarity of result is not (per se) even evidence of equivalence or infringement. Burr v. Duryee, 1 Wall. (68 U. S.) 572, 17 L. Ed. 650; Westinghouse v. Boyden, etc., Co., 170 U. S. 537, 18 Sup. Ct. 707, 42 L. Ed. 1136. One of the enumerated elements of that combination is an "electro-magnet having a spring armature," which means that, according to the strength of the current energizing the magnet, the switch-actuating current flows through a contact touching the armature by force of a spring,

or through another contact by force of the magnet's attraction overcoming the spring. Another element is described as "parallel contact strips," a phrase meaning that the switch-actuating current flows through a circuit always completed by the passage of the trolley wheel along the "contact strips," which together bridge the trolley wire and prevent the trolley wheel touching the same while passing the length of the said strips. Whenever the trolley wheel is not present to complete the circuit, there is no complete path (in Cheatham's device) for the switch-actuating current.

These elements are vital to the claim in suit. Type 15 switch uses neither of them, and would not operate if they were present.

We need not go further, for we find it difficult to imagine a patent so primary as to entitle the inventor to an equivalency such as is here demanded; but as this patent is a narrow one, both by the very specific language of its own claim and by its nature (in view of the prior art), we are of opinion that Type 15 does not infringe, and uphold that finding of the court below in favor of those defendants against whom plaintiff heretofore recovered judgment at law because of their use of Type 14. No judgment or decree, based on the use of an infringing article, can ever prevent the same defendant from using a non-infringing one. Such judgment or decree may limit available defenses, but it can do no more.

Let the decree be affirmed, with costs.

IRVING-PITT MFG. CO. v. BLACKWELL-WIELANDY BOOK & STATIONERY CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1916.)

No. 4681.

1. PATENTS ⊂=297(2)—SUITS FOR INFRINGEMENT—EFFECT OF PRIOR DECISIONS.
In patent causes, prior decisions of other courts are not conclusive, but, if based on substantially the same evidence, should be followed unless the second court is clearly of a different opinion.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 482; Dec. Dig. ⊂=297(2).]

2. PATENTS ⊂=22—INFRINGEMENT—EQUIVALENTS.
The range of equivalents to which a patentee is entitled depends upon and varies with the extent and nature of the invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. ⊂=22.]

3. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—LOOSE-LEAF BINDER.
The Pitt patent, No. 778,070, for a loose-leaf binder, in view of the prior art is entitled to a comparatively limited range of equivalents, and as so construed *held* not infringed by the binder of the Watson patent, No. 1,049,785.

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

Suit in equity by the Irving-Pitt Manufacturing Company against the Blackwell-Wielandy Book & Stationery Company. Decree for defendant, and complainant appeals. Affirmed.

Dean S. Edmonds and John C. Pennie, both of New York City (Pennie, Davis & Marvin, of New York City, on the brief), for appellant.

Bruce S. Elliott, of St. Louis, Mo., for appellee.

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

SMITH, Circuit Judge. The complainant, the Irving-Pitt Manufacturing Company, a corporation, is the owner of letters patent No. 778,070 granted December 20, 1904, to the Irving-Pitt Manufacturing Company of Kansas City, Mo., a copartnership, assignee of William P. Pitt for an improvement in loose-leaf books. In Irving-Pitt Manufacturing Co. v. Twinlock Co. (McMillan Book Company, intervener) 220 Fed. 325, in the District Court for the Southern District of New York presided over by Judge Rose of Maryland, it was determined that this patent was valid. This case was affirmed on appeal on the opinion filed below in 140 C. C. A. 603, 225 Fed. 1022. The evidence as to the prior art was substantially the same in that case as in this one.

[1] In Mast, Foos & Co. v. Stover Mfg. Co., 177 U. S. 485, 20 Sup. Ct. 708, 44 L. Ed. 856, in speaking of the effect of such a decision under the rule of comity, it is said:

"Comity is not a rule of law, but one of practice, convenience, and expediency. It is something more than mere courtesy, which implies only deference to the opinion of others, since it has a substantial value in securing uni-

formity of decision, and discouraging repeated litigation of the same question. But its obligation is not imperative. If it were, the indiscreet action of one court might become a precedent, increasing in weight with each successive adjudication, until the whole country was tied down to an unsound principle. Comity persuades, but it does not command. It declares, not how a case shall be decided, but how it may with propriety be decided. It recognizes the fact that the primary duty of every court is to dispose of cases according to the law and the facts; in a word, to decide them right. In doing so, the judge is bound to determine them according to his own convictions. If he be clear in those convictions, he should follow them. It is only in cases where, in his own mind, there may be a doubt as to the soundness of his views, that comity comes in play and suggests a uniformity of ruling to avoid confusion, until a higher court has settled the law. It demands of no one that he shall abdicate his individual judgment, but only that deference shall be paid to the judgments of other co-ordinate tribunals. Clearly it applies only to questions which have been actually decided, and which arose under the same facts.

"The obligation to follow the decisions of other courts in patent cases, of course, increases in proportion to the number of courts which have passed upon the question, and the concordance of opinion may have been so general as to become a controlling authority. So, too, if a prior adjudication has followed a final hearing upon pleadings and proofs, especially after a protracted litigation, greater weight should be given to it than if it were made upon a motion for a preliminary injunction."

The opinion in that case by Mr. Justice Brown has been repeatedly followed in the various Circuit Courts of Appeals in the United States. It was first followed in this circuit by Judge Adams, District Judge for the Eastern District of Missouri but later a judge of this court and who recently departed this life to the great sorrow of all his associates, in New York Filter Mfg. Co. v. Jackson (C. C.) 112 Fed. 678.

It was cited by this court, though not in a patent case, in Plattner Implement Co. v. International Harvester Co., 66 C. C. A. 438, 133 Fed. 376. It was cited in a patent case in an opinion by Judge Adams speaking for this court in Torrey v. Hancock, 107 C. C. A. 79, 184 Fed. 61, 69. In Doelger v. German-American Filter Co., in the Circuit Court of Appeals for the Second Circuit, 122 C. C. A. 472, 204 Fed. 274, the court said:

"The doctrine of stare decisis applies. Though the decisions of other courts are not conclusive upon us, an orderly administration of the law requires us to follow them when based upon substantially the same facts, unless we are clearly of a different opinion."

In National Electric Signaling Co. v. Telefunken W. T. Co., in the Circuit Court of Appeals for the Second Circuit, 137 C. C. A. 353, 355, 221 Fed. 629, 631, it is said:

"Comity, though it does not compel us to follow the decision in the First circuit, certainly does require us to do so unless we are strongly persuaded that the decision is erroneous. In view of the fact that the apparatus of the claims in question has never, so far as we can find, gone into commercial use and has been limited, by a court having co-ordinate jurisdiction with this court, to apparatus described and shown, we should be very sure of our position before interpreting the claims so that they will practically dominate the art."

The Circuit Court of Appeals of the Second Circuit, in Baldwin v. Abercrombie & Fitch Co., 228 Fed. 895, 898, 143 C. C. A. 293, quoted the opinion of Mr. Justice Brown in Mast, Foos & Co. v. Stover Mfg. Co., supra, substantially as we have quoted it. It will thus be seen

that, while the decisions in the Second circuit in Irving-Pitt Mfg. Co. v. Twinlock Co. are exceedingly persuasive and would in the absence of a clear conviction upon our part be conclusive, the complainant necessarily takes those decisions subject to all the weakness shown thereby in its case. In that case the defense was invalidity of plaintiff's patent and noninfringement. Briefly stated, the plaintiff's device consists of a curved metal which assumes the ordinary shape of the back of a book and constitutes a spring. The edges of this metal are turned up and in so as to constitute a bearing or barrier. Between these bearings or barriers are inserted two plates with half hooks attached. These plates meeting each other along the entire length, the one having a V-shaped projection and the other a V-shaped depression also along its entire length forming a toggle joint. These plates extend to the bearings or barriers mentioned on the sides of the spring-back. When the toggle joint is depressed, the spring-back throws the ends of the hooks or half rings in contact thus making of them complete rings which bind the inclosed manuscripts. When the hooks are thrown apart, the toggle joint is thrown upward until it passes the center, and, to prevent it from passing up so high as to unjoint it, a cover is put down over the hooks or half rings the edges of this top plate inclosing the back or spring plate. This may or may not be close against the back or spring plate. The shape of the back or spring plate and its material is such as to bring a pressure upon the hook plates and cause the hooks to open or shut with a snap.

On the other hand, the defendant is manufacturing under the patent No. 1,049,785, issued to Richard M. Watson January 7, 1913, upon an improvement in loose-leaf binders. This is best illustrated by Figure 2 of the drawings accompanying his application which was as follows:

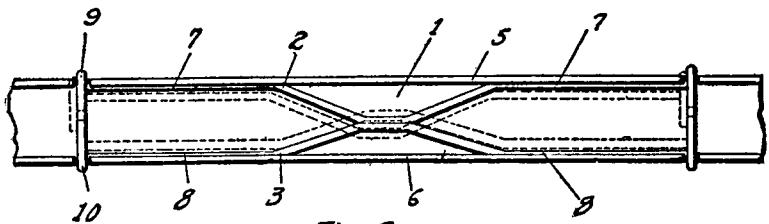

Fig. 2.

There are no plates of the character used in complainant's patent. In a curved back such as used by complainant but in the actual manufacture of less resilient metal, and there was no provision that the back should be of resilient metal, the wires indicated in the drawings forming a toggle joint at "1" but by reason of the form of the wires when the hooks which were an integral part of the same were pulled apart the wires expand in length simply using the back plate not as a spring but as bearings or barriers by which the wires are lengthened and so narrowed. In other words, the complainant's patent is wholly dependent upon the curved shape of the back or spring plate, and its

resiliency, while the defendant's patent does not at all depend upon either, but upon the spring character of the wires as indicated. We do not mean that with even the least resilient of metals and a curved back there would be no tendency of the back to give and return to its position after the toggle joint has passed the center, but that the Watson patent would operate in a firm case in which there was no spring to the back at all. In other words, in defendant's structure any spring that may have come from the back as previously indicated is purely incidental and not at all functional.

This brings us to the question of the rank of the complainant's patent as primary or otherwise and to how far the complainant was entitled to equivalents.

In Irving-Pitt Mfg. Co. v. Twinlock Co. (D. C.) 220 Fed. 325, Judge Rose said:

"The inventor was far from the first comer into this general field. Many patents for various forms of such books, or of devices to form a part of them, had preceded his. As under such circumstances is to be expected, the McMillan finds most or all of the separate elements of complainant's combination in the prior art. That, however, is unimportant, if in fact complainant has made a new and useful combination of some of these elements and in doing so has exercised what is (for want of a better term) called inventive genius."

Again, speaking of the tenth claim of the complainant's patent, he says:

"It is very old to fasten one thing to another by a strip of cloth. Complainant has no right to monopolize any other way of doing this than that claimed in his patent."

[2] In Paper Bag Patent Case, 210 U. S. 405, 28 Sup. Ct. 748, 52 L. Ed. 1122, the court said:

"The right view is expressed in Miller v. Eagle Mfg. Co., 151 U. S. 186, 207 [14 Sup. Ct. 310, 318 (38 L. Ed. 121)], as follows: 'The range of equivalents depends upon the extent and nature of the invention. If the invention is broad and primary in its character, the range of equivalents will be correspondingly broad, under the liberal construction which the courts give to such inventions.' And this was what was decided in Kokomo Fence Machine Case [189 U. S. 8, 23 Sup. Ct. 521, 47 L. Ed. 689] supra, Cimiotti Unhairing Co. v. American Fur Refining Co., [198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100] supra, and Computing Scale Co. v. Automatic Scale Co., 204 U. S. 609 [27 Sup. Ct. 307, 51 L. Ed. 645]. It is from the second of those cases, as we have seen, that the citation is made which petitioner contends the point of law upon which infringement depends is formulated; but it was said in that case: 'It is well settled that a greater degree of liberality and a wider range of equivalents are permitted where the patent is of a pioneer character than when the invention is simply an improvement, may be the last and successful step, in the art theretofore partially developed by other inventors in the same field.'

"It is manifest therefore that it was not meant to decide that only pioneer patents are entitled to invoke the doctrine of equivalents, but that it was decided that the range of equivalents depends upon and varies with the degree of invention. See Ives et al. v. Hamilton, Ex'r, 92 U. S. 426 [23 L. Ed. 494]; Hoyt v. Horne, 145 U. S. 302 [12 Sup. Ct. 922, 36 L. Ed. 713]; Deering v. Winona Harvester Works, 155 U. S. 286 [15 Sup. Ct. 118, 39 L. Ed. 153]; Walker on Patents, § 362; Robinson on Patents, § 258."

In the recent case of Moon-Hopkins Billing Machine Co. et al. v. Dalton Adding Machine Co. et al., — C. C. A. —, 236 Fed. 936, this court said:

"The right of a patentee to the mechanical equivalents of his structure or device is proportioned to the position of his invention in the art to which it relates. If the invention is a pioneer or primary one, his right is broad and comprehensive; if but for a slight improvement it is correspondingly narrow. Between the two extremes the measure of equivalents varies accordingly."

[3] We have examined the many patents introduced and are of the opinion that, owing to the state of the art at the time of complainant's patent, it was entitled to a comparatively limited scope of equivalents, and the defendant's book does not in this view infringe the patent of complainant, and the decree of the District Court, having been to the same effect, is affirmed.

COLUMBIA MACHINE & STOPPER CORP. v. ADRIANCE MACH. WORKS, Inc., et al.

SAME v. FERD. NEUMER, Inc.

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

No. 13.

PATENTS ⇐328—INFRINGEMENT—BOTTLE CAPPING MACHINE.

The Lawson patent, No. 1,095,406, for a bottle capping machine, *held* infringed by a modified structure built by defendants.

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

Suits in equity by the Columbia Machine & Stopper Corporation against the Adriance Machine Works, Incorporated, and Benjamin Adriance and against Ferd. Neumer, Incorporated. From orders granting supplemental injunction, defendants appeal. Affirmed.

For former opinions, see (D. C.) 226 Fed. 203; 226 Fed. 455, 141 C. C. A. 198.

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

I have no doubt of the validity and propriety of the complainant's procedure under the circumstances. After all, the issue must be determined by a comparison of the two mechanical structures.

In their altered machine the defendants employ, instead of a vertical shaft extending through the base for the purpose of rotating the bottle support, a shaft which is cut off above the base, but which is positively connected to an auxiliary shaft extending into the base for the purpose of rotating the bottle support, thereby performing the identical function which the lower part of the main shaft performed in the machine adjudged to be an infringement. There has been no change in the manner in which the cam and concentric bottle support are rotated in the defendants' new machine. The cam is secured to the main shaft, and the bottle support, which is concentric with the main shaft, is rotated through a gear near its periphery by the auxiliary shaft, which is geared to the main shaft and partakes of its motion. The complain-

ant's combination has been held to be novel and meritorious, and as such entitled to a fair range of equivalents.

I am of opinion that this machine infringes claim 6 of the patent in suit, and the complainant's motion is granted.

Alfred C. Coxe, Jr., of New York City, and John W. Steward, of Paterson, N. J., for appellant Adriance Co.

Tomlinson, Coxe & Tomlinson, of New York City, for appellant Ferd. Neumer, Inc.

Henry D. Williams, of New York City, for appellee.

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

PER CURIAM. Decrees affirmed.

OHMER FARE REGISTER CO. v. OHMER et al.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1916.)

No. 2857.

1. PATENTS ⟸328—INVENTION—OPERATING MEANS FOR FARE REGISTERS.
The Ohmer and Tyler reissue patent, No. 11,911 (original No. 635,343), for mechanism for operating fare registers, claims 12 and 13, construed broadly, are void for lack of invention, in view of the prior art.

2. PATENTS ⟸17—INVENTION—SCOPE OF PATENT.
In considering the scope of an invention, to determine whether the advance made amounts to invention or only mechanical skill, the question is one of fact, taking into account the entire prior art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 16, 17; Dec. Dig. ⟸17.]

3. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—FARE RECORDER.
The Ohmer patent, No. 646,757, for a fare recorder, in view of the meritorious result obtained by the combination, marking a substantial advance in the art, discloses invention and is valid; also *held* infringed as to claims 4, 6, and 13, and not infringed as to claims 7 and 14.

4. PATENTS ⟸26(2)—COMBINATIONS—COMBINATION OR AGGREGATION.
To constitute a combination, and not merely an aggregation, it is not necessary that all the constituents so enter into the combination as to coact all the time with all the others, or change the mode of connection with every other; but it is sufficient that the elements so coact that as a consequence of their union a new and useful result, and not a mere aggregation of several results, follows.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 29; Dec. Dig. ⟸26(2).]

5. PATENTS ⟸328—INFRINGEMENT—FARE REGISTER.
The Ohmer, Tyler, and Breidenbach patent, No. 694,322, for a fare register, narrowly construed, as required by the prior time recorder art, *held* not infringed.

6. PATENTS ⟸56—PRIOR ART—ANALOGOUS ARTS.
The time recorder art is analogous to the fare recorder art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 89; Dec. Dig. ⟸56.]

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7. PATENTS ⊂⊃22—INFRINGEMENT—MECHANICAL EQUIVALENTS.
The doctrine of mechanical equivalency requires that the result be accomplished in substantially the same way, and the range of equivalents depends upon the advance made by the inventor in the art.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 24; Dec. Dig. ⊂⊃22.]

8. PATENTS ⊂⊃165—CONSTRUCTION—VOLUNTARY LIMITATION.
An intentional limitation by a patentee is none the less effective, because unnecessary or self-imposed.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊂⊃165.]

Appeal from the District Court of the United States for the Southern District of Ohio; John E. Sater, Judge.

Suit in equity by the Ohmer Fare Register Company against Wilfred I. Ohmer and others. Decree for defendants, and complainant appeals. Reversed.

R. J. McCarty, of Dayton, Ohio, for appellant.

H. A. Toulmin, of Dayton, Ohio, for appellees.

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

KNAPPEN, Circuit Judge. Suit for infringement of three patents relating, respectively, to street car fare registers or fare recorders. The appeal is from a decree dismissing the bill for noninfringement.

[1] The first patent (reissue No. 11,911, May 28, 1901, to John F. Ohmer and another), relates to means for operating fare registers. The original patent issued October 24, 1899, and was followed by an intermediate reissue October 13, 1900. The patent expired pending this appeal. When the original patent was applied for (January 19, 1899), registers counting and indicating a single class of fares were old; and multiple fare registers—that is to say, registering two or more classes of fares—were not new. Such multiple registers were not only of the portable class, such as illustrated by Hornum's 1875 patent, and that to Ohmer himself issued in 1896, but included several types designed for permanent attachment to the car, as illustrated by the patent to Boyd (1896), which registered three separate classes of fares, the Wright patent (1896), also registering three classes of fares, and the patent to Ohmer himself (1897), adapted to a plurality of fares (the drawings showing five different classifications); and Kelch had, in 1898, applied for a patent (granted in 1902) disclosing mechanism for not only indicating and counting, but also for recording, two or more classes of fares. At least one three-fare register was in commercial use when the patent in suit was applied for.

The reissue in suit has no relation to the mechanism for indicating, registering, or recording fares. It relates merely to mechanism for operating or actuating the registering mechanism. The patent does not even mention fare recorders, although the means in question are obviously adapted to actuating the mechanism therefor, as well as that for counting and registering. The means illustrated and described in the

patent include a series of vertically movable slides, each having a laterally projecting foot, and adapted each to engage and actuate a given series of registering wheels and a fare display tablet. The invention, as stated in the patent, comprises means for actuating these slides "separately and at different times." The actuating means consist of a depending arm carried by a horizontally slidable carriage, and adapted to be slid under the foot of the vertical slide associated with the desired bank of fare register wheels. The turning, by the conductor, of a rod conveniently disposed in the car (until the pointer on a dial indicates the fare collected), actuates a chain gear which moves the carriage to the desired position. This sets the actuator. A pull, by the conductor, on a rope connected with the transverse bar lifts it and in turn the depending arm, and thereby raises the vertical slide which actuates the register wheel.

The patent has 13 claims, Nos. 12 and 13 being the only ones in issue. Each of the first 5 claims contains as elements both the horizontal and vertical sliding members referred to. Claims 6 to 11 are somewhat broader. Claim 12 is printed in the margin.[1] Claim 13 differs from claim 12 only in calling for the second movement of the actuating device "in planes at an angle to the plane of said initial movements," and for parallel relation between the two operating members, which in plaintiff's mechanism, as disclosed and as manufactured, are the setting rod and the actuating rope.

Defendants' operating means may be thus compared and contrasted with plaintiff's: (a) Defendants' actuating device, instead of being a depending arm of a transversely moving carriage, is a sleeve (splined upon a shaft) itself made to slide transversely of the machine, and carrying two oppositely disposed projections; (b) defendants' actuating device, instead of being brought into initial position by the turning of the rod which actuates the carriage from which the actuating arm depends, is brought into such initial position by means of a carriage or block between whose lugs the actuating member lies loosely, the carriage being mounted upon a screw shaft adjacent to the shaft carrying the actuating member; the revolving of the screw shaft by means of a rod causing the carriage to move upon its shaft, and thus the actuating member to move upon its own separate shaft; (c) defendants' actuating device, instead of being actuated by the lifting (through the rope) of the transversely moving member carrying the depending arm, is so actuated by the reciprocating movement, transversely of the machine (through the operation of a separate rod controlled by the conductor), of a shaft which, through suitable gears, turns the shaft on which the actuating device is splined, so bringing one

[1] "12. In operating means for fare registers, the combination of an actuating device adapted to be initially moved to various positions to engage mechanism of a fare register, and adapted to be subsequently moved to actuate said fare register mechanism, operating members connected with said actuating device and attached to a car, one of said operating members being adapted to shift said actuating device in its first or initial movement, and the other of said operating members being adapted to operate said actuating device in its second or subsequent movements."

of the projections thereon into engagement with the registering mechanism. Defendants' operating members are thus two separate rods, as compared with plaintiff's rod and cord; the two rods being disposed in the car parallel to each other. Defendants' operating mechanism differs materially from that of plaintiff, especially in the second actuating movement; but the claims in suit, if broadly construed, read upon defendants' device. An important question is whether, in view of the prior art, the claims are valid, if construed broadly enough to cover defendants' mechanism.

No invention was involved in the first element of the combination of the claims in suit, viz., an actuating device adapted to be moved, first, to the appropriate setting position, and, second, to actuate the registering mechanism; nor in making the planes of the two movements in angular relation to each other. Such devices were common, not only in the related arts, but in the fare register art itself; several of the devices disclosing actuators in the form of slides. For example: In the Roney and Mead voting machine patents (the voting register art is analogous to that of fare registers[2]) the actuator moves sidewise to engage the recorder slide and vertically to actuate it. In the Howe voting machine patent a crank handle operated by the voter moves a sliding block in position to actuate the desired slide, and the movement of the turnstile as the voter leaves the booth operates gearing which actuates the slide and records the vote. The plane of the second movement is angular to that of the first. It is enough, however, to refer to Ohmer's 1897 fare register patent, which discloses a plurality of slides radially mounted, an actuator in the form of a finger on a rod, movable to position to engage and actuate any one of the slides, as directed on the dial by the position of the pointer on the operating rod; the actuator being set by the rotation of the rod and actuated by a sliding movement outwardly. If it be thought that invention can be found in raising the actuating mechanism by means of a vertical slide, it is enough that the defendants have not that device.

It is evident that any invention which may be found to exist in the broad claims in suit must reside in the inclusion in the combination of two operating members, both connected with the actuator; the one adapted to shift it into setting position, the other to actuate it. (We pass for the present the parallel position of the two operating members called for by claim 13.) In the fare-registering devices of Kelch and Boyd a separate operating device (in those cases a cord) is employed for each class of fare to be registered. In the Ohmer 1897 patent a single rod is employed for both the setting and actuating movements—the rotary movement of the rod setting the actuator, and the longitudinal movement giving it an outward sliding motion. The inventors in the patent in suit which we are now considering distinguish their operating device as an improvement over such methods of operation. The ultimate question would seem to be whether, in view of the prior art, the broad employment of separate setting and actuating members, including their arrangement in the car, involves invention?

[2] In Ohmer's 1897 fare register patent the mechanism was treated as applicable to operating a cash register from distant points.

According to Wright's fare indicator and recorder patent (1896), the desired counting and indicator wheel and the recorder wheel are operated by a cord in the car operated by the conductor; another cord, also in the car, is used for actuating the recording mechanism. In the Kennelly fare register patent (1895) the turning of a shaft by the conductor puts an actuator into operative connection with one of the two registers; a pull upon a separate rod moves the actuator and thus the register. True, in Wright's device the separate classifications are dollars, dimes, and cents, and his cords did not effect the same movements as plaintiff's rod and cord; and in Kennelly the selection is between "up" and "down" fares, and is made only at the beginning of the respective trips. But manifestly Wright's mechanism is equally adapted to three classifications of fares, and illustrates an arrangement of operating members within the car. Kennelly's mechanism is likewise adapted to the performing of both operations in the case of each fare. Kennelly's mechanism, however, was operable only at the register.[3] And it is said that the one-rod setting and actuating mechanism of Ohmer's 1897 patent was not suitable to long cars by reason especially of the tendency of the rod to sag and thus interfere with its effective longitudinal movement. It is urged that a valuable and novel feature is thus found in the parallel arrangement within the car of two operating members (setting and actuating respectively) accessible to the conductor at a variety of positions within the car. In fact, the claims in suit call only for an attachment of the two operating members to the car. But, disregarding this, it is obvious that, so far as the setting mechanism is concerned, the device of Ohmer's 1897 patent had the useful feature of accessibility generally in the car claimed for the mechanism of the patent in suit. In view of this earlier Ohmer device, and the devices of Wright and Kennelly, it is difficult to find invention in the employment of two separate members (in place of a common member) for the setting and actuating operations, respectively; and it would seem that, in view of the common use of cords for mere purposes of pull, not only in the arts generally, but in the fare counter and register arts in particular, the employment of a cord would naturally suggest itself to a skilled mechanic as avoiding the difficulty said to have been experienced with Ohmer's single rod setting machine. See Vulcan Soot Cleaner Co. v. Diamond Co., 237 Fed. 818, —— C. C. A. ——, decided by this court November 8, 1916.

We cannot think that, in view of the prior art, the mere disposing of the setting and actuating members in parallel relation to each other, or so as to be operable in a part of the car remote from the machine, involves any degree of invention. Aron v. Manhattan Ry. Co., 132 U. S. 84, 10 Sup. Ct. 24, 33 L. Ed. 272; Akers Co. v. Great Lakes Works, 237 Fed. 359, —— C. C. A. ——, decided by this court November 8, 1916.

[2] We are cited to no reference in the prior art fully anticipating the patent in suit. But we are considering the scope of invention, not

[3] Having in mind what has been said about Kennelly's disclosure, claim 12 in suit can be made to read literally upon it, although this fact is by no means conclusive of the question of invention.

anticipation; and in such inquiry the question is one of fact, taking into account the entire prior art, whether the advance made in the given case amounts to invention or only mechanical skill. Herman v. Youngstown Co. (C. C. A. 6) 191 Fed. 579, 112 C. C. A. 185; Ferro Concrete Co. v. Concrete Steel Co. (C. C. A. 6) 206 Fed. 666, 668, 124 C. C. A. 466; Ft. Pitt Co. v. I. & M. Mfg. Co. (C. C. A. 6) 232 Fed. 871, 875, 147 C. C. A. 65. All elements of the prior art have a bearing upon the question of invention; it being unnecessary to a finding of lack of invention that every element be found in one embodiment. Zimmerman v. Machinery Co. (C. C. A. 6) 232 Fed. 866, 868, 147 C. C. A. 60; Keene v. New Idea Spreader Co. (C. C. A. 6) 231 Fed. 701, 708, 145 C. C. A. 587; Ft. Pitt Co. v. I. & M. Mfg. Co. (C. C. A. 6) supra, 232 Fed. at page 874, 147 C. C. A. 65.[4]

Defendants contend that plaintiff's patent is confined to means for operating the sliding mechanism disclosed.[5] But, passing this contention, and assuming that the narrow claims may involve invention, we are disposed to think, upon a consideration of the entire prior art adduced, that the claims in suit, if construed broadly enough to cover defendants' mechanism, would be void for lack of invention. In reaching this conclusion we have not overlooked the consideration of commercial success. But, while public favor is to be considered where invention is in doubt, yet not only is it not otherwise important (Cincinnati Traction Co. v. Pope [C. C. A. 6] 210 Fed. 443, 449, 127 C. C. A. 175), but in the instant case the record does not show that the commercial success of plaintiff's device is appreciably contributed to by the mechanism of the claims in suit. For all that appears in the record, the success may be due largely, if not entirely, to other features of invention or construction, including the devices of the other patents in suit.

[3] The second patent in suit is No. 646,757, April 3, 1900, to John F. Ohmer. It relates to improvements in multiple fare recorders. As stated in the specification, the improvements in a broad sense "comprise mechanism by means of which printed statements, impressions, or records of the different classifications of fares, of the month and day of the different trips, and of the number of the register may be taken on a single sheet and by a single operation." The invention does not cover the registering mechanism, nor has the patent any relation to the means for operating either the registering or recording

[4] It is noticeable that defendants' setting mechanism, viz., the screw shaft carrying a traveling block, embracing an actuator on another shaft, is an old device, found in substance, for example, in the Chamberlain adding machine mechanism patent (No. 582,980).

[5] The specification states that "the present invention comprises means for actuating the slides *B* separately and at different times to operate the mechanisms of the register"; and, again, "We do not wish to be restricted to the present means shown for moving the carriage or slide, as it is possible to do this by other and different means from those shown and described; but we desire to claim, broadly, a carriage or slide adapted to be moved to positions to engage with the slides of a street car register and means for operating said slide or carriage and for actuating it to move the register slides and also the first and second operating devices for selecting and registering, respectively."

devices. The patent is for a recorder only. The accompanying reproduced Figure 3 of the patent drawings sufficiently shows the recording mechanism:

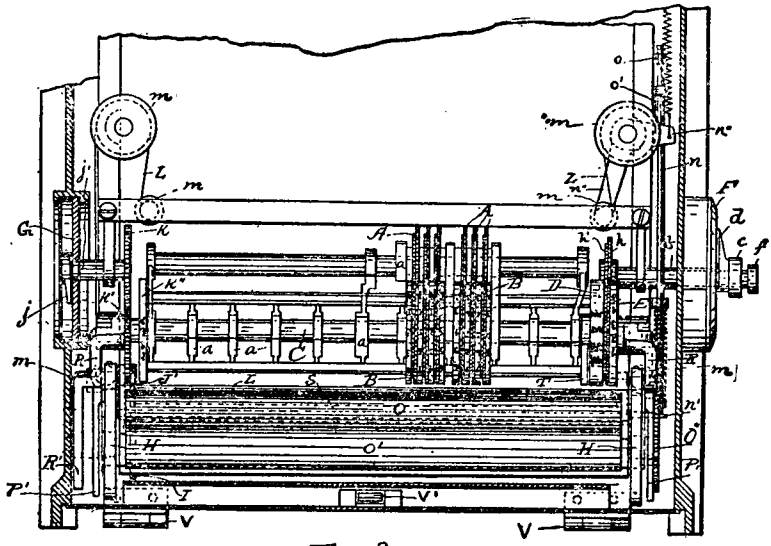

Fig. 3.

Two series of fare-recording wheels *B*, *B*, are shown mounted on a transverse shaft *C*—the other banks of wheels having been omitted for convenience. These recording wheels are operated by the gears *A*, *A*, carried by a shaft above the shaft *C*. Two type wheels, *D* and *E*, representing respectively the month and day of the month are also carried at the extreme right end of the shaft *C*, and are placed in proper printing position by the manual turning of the shafts *c* and *f* through gearing, *h*, *h*—a pointer on the dial *F* serving to indicate the proper position. At the left of the date wheels is a fixed type in the bar *T*. At the left end of and carried by the shaft *C* is a trip-number printing wheel *k''*, manually set in printing position by the turning of the shaft operating the gear *k* thereon meshing with the gear *k'*, joined to the trip-numbering wheel, this operating shaft carrying a pointer *j* indicating the proper position on the dial. There is also provision for an automatic advancement of the numbering wheel at the end of the trip; but that mechanism is not here important. The classified fare-recording wheels, the two dating wheels (month and day), the fixed type bar indicating the number of the register as well as the trip-numbering wheel, are by one operation brought into printing position with the platen in the lower part of the recorder, and the entire record, embracing all the features stated, is by a single impression permanently taken upon a single sheet in the machine.

The claims in suit are Nos. 4, 6, 7, 13 and 14. Claim 4 is printed

in the margin.[6] Claim 6 adds to the elements contained in claim 4, the fixed bar indicating the number of the register; claim 7 adds to the elements contained in the two previously mentioned claims, the "type wheel denoting the trips." Claim 13 covers the combination in a fare register of the fare-denoting type wheels, the type wheels denoting the trips, the fixed type bar indicating the specific register and impression devices for taking statements from these type wheels and bar. Claim 14 covers the combination in a register of type wheels denoting the total registrations made, the type-numbering wheels, and the impression devices for taking such statement. The defenses prominently urged are lack of invention and noninfringement.

Some of the elements of the combinations of the various claims in suit were old at the time the patent in question was applied for. For example: A similar arrangement of dating wheels to that shown in plaintiff's device had been disclosed by the patent to Murphy (1895) on cash registers; the patent to Carney (1897), also on cash registers; that to Jackson (1897) on time-recording and transfer stamp; and the patent to Grobet (1896) on transfer ticket registers. Each of these patents had day and month wheels, and substantially the setting mechanism therefor employed by plaintiff. It was also old to print the number of the register or car by means of a permanent type bar, in connection with the total of fares taken; as illustrated, for instance, by the patents to Brooks (1876), Sargent and Hirt (1894), and Honiss (1896). Each of the devices mentioned employed a permanent type bar for indicating either the car or register number. But none of them anticipated the combination of either of the claims in suit. Murphy's device, for example, had no groups of type wheels for different classifications of fares; it simply printed upon a cash register ticket its date, its consecutive number, and presumably the amount of the transaction. Carney merely printed the number, dates, and amounts of the various transactions. Jackson printed the day, the month, and the hour. The closest reference so far mentioned is Brooks, whose machine recorded (not on a permanent sheet of paper in the machine, but on a separate ticket) the unclassified trip fares and the register or car number. The Hepton British patent, No. 20,758 (1891), is a closer reference than Brooks, but it falls short of disclosing the invention of the claims in suit. Hepton's register, designed for tram cars and omnibuses, counts the classified fares as taken. On a permanent record, taken at the end of the trip, the totals of the classified fares, together with the trip number, are printed. The device had dating type, inserted by hand in a type frame, and mechanism by which the date and trip number were printed on each ticket given to the

[6] 4. In a fare recorder, the combination with type wheels assembled in groups each group denoting a definite kind of fare, of type wheels denoting the months and the dates thereof, a dial indicating the months and the dates thereof, mechanism interposed between said date type wheels and dial whereby movement may be imparted simultaneously to said type wheels and dial hand to indicate the same date on both the wheels and dial, and means for taking an impression of the type wheels showing the number of fares collected up to the time of taking such impression, and the date upon which such statement was taken.

passenger; but this mechanism and operation were distinct and separate from those for recording the fares. The patents to Ohmer and Kelch (1899) and to Ohmer, Kelly, and Kelch (1900) contain nothing more significant than the references before mentioned.

We think the patent in suit clearly involves invention. Even if every element of the claims were found in the prior art, invention would still exist if by their combination a new and useful result is obtained, or an old result in a new and materially better way; and that we think has been accomplished by the invention covered by the claims in issue. Ohmer was the first to accomplish the result effected by the device of the patent, by means of which "printed records of the different classifications of fares, of the month and day of the different trips, and of the number of the register may be taken on a single sheet and by a single operation." This result we think a meritorious one, marking a substantial advance in the art, and disclosing invention rather than mere mechanical skill.

[4] We are not impressed with the suggestion that the claims involve mere aggregation. In order to escape aggregation, it is not necessary that all the constituents so enter into the combination as to coact all the time with all the others or change the mode of connection with every other. It is sufficient that the elements so coact that as a consequence of their union a new and useful result, and not a mere aggregation of several results, follows. International Mausoleum Co. v. Sievert, 213 Fed. 225, 229, 129 C. C. A. 569, and cases cited; Houser v. Starr (C. C. A. 6) 206 Fed. 264, 273, 121 C. C. A. 462. We think the recording of the various items of information by a single operation upon one and the same sheet is a unitary result, and not a mere aggregation of results.

We think defendants are shown to infringe claims 4, 6, and 13. Their machine performs the functions of these claims in substantially the same way. The more prominent respects in which defendants' mechanism is said to lack the elements contained in these claims are these: Claims 4 and 6 call for mechanism interposed between the dating type wheels and dial for imparting movement simultaneously to the type wheels and the dial hand. Defendants contend that by this "mechanism" is meant the gear wheels *h* and *h'*, which defendants do not have, as they employ for operating the different dating wheels a nest of sleeves, so making the gearing of the patent unnecessary; but we think defendants' device is clearly "mechanism" within the terms of the claims. It is not important that this mechanism is old, nor that the dating wheels are not on the same shaft as the other printing wheels. Claims 6 and 13 call for a fixed type bar indicating the specific register. Defendants employ an electroplate for printing the register number. But we think defendants' electroplate and bar the equivalent of the fixed type bar of the patent. They serve the same function and in substantially the same way. Claim 7, however, calls for including in the record "the trip upon which such statement was taken." Counsel seem to agree that the ambiguous language of claim 14 means substantially the same thing. Plaintiff's device prints the trip number each time an impression is taken, viz. at the end of each

trip. Defendants' machine takes two impressions, one at the end of the trip, the other a totalized statement at the end of several trips. Both are permanent records. As we understand the record on appeal, one of defendants' types of machine prints the trip number in the conductor's trip statement; in another type, the trip number does not appear. In neither form of trip statement is the date shown. The specific language of claim 7 is:

"And impression devices for taking a print or impression setting forth a statement of the different fares collected up to the time of taking such statement, the date and the trip upon which such statement was taken."

The question seems to be whether the "impression" called for is limited to the single trip statement. While the question is not free from difficulty, we are disposed to think that the language, "the trip upon which such statement was taken" (differing from the expressions used in claims 4, 6, and 13) means the single trip. If this is so, claim 7 is not infringed by either device, as it calls for an impression of "the date" as well as the "trip," and claim 14 is not infringed by one of defendants' devices because the claim calls for the "trip" number.

[5] The third patent in suit is No. 694,322, February 25, 1902, to John F. Ohmer and others, and relates solely to means for identifying the person taking the statement from the register—the identifying means being a key bearing a distinctive mark, as, for instance, the conductor's number. According to the device of the patent, when the key is out of the machine, the operating parts are held by notches, so that they cannot be operated. The insertion of the key releases the notches, unlocks the printing mechanism, and places the identifying number on the key in alignment with the figures or characters of the fare or other recording wheels, so that the impression of the figures or device upon the identifying key is recorded therewith.

The claims in suit are Nos. 2, 6, and 11. We print claims 2 and 11 in the margin.[7] The only noticeable differences between claims 6 and 2 are that the former provides for taking "printing or impression devices," instead of merely "impression devices" as in the second claim, and in including "mechanism for locking said register * * * under the control of the identification key." It will be noted that claims 2 and 6 expressly call for the placing of the identification mark upon the key *in alignment with the type-wheel,* and that each of the three claims in suit expressly calls for a taking of the impression *of the identification mark upon the key.* Omitting other differences, defend-

[7] "2. In a fare register, the combination of type wheels upon which is registered the work of said register, a key bearing an identification mark adapted to be placed in alignment with said type wheels, and impression devices adapted to press one or more sheets against said type wheels and said identification mark on said key, and whereby an impression or print is obtained showing the work of the register and the identification of the person taking such statement."

"11. In a register, the combination of groups of register wheels, means for moving the wheels of each group at each registration, a key bearing a number or other mark of identification, and means for taking impressed or printed statements from said wheels and said key, whereby the work of the register is ascertained, and the person taking each statement is identified therewith."

ants' identifying mechanism differs from that of the patent in this prominent respect: Its key has no identification mark, except as it bears an identifying number or other *device not directly used for printing* purposes. The identification is effected by the use of a numbered key, having on its end notches characteristic of the individual key, which notches engage steps upon a segment wheel, whereby figures (corresponding to the number of the identifying key) upon the peripheries of type wheels are placed in alignment with the other type-recording mechanism of the register. The key is thus not placed in alignment with the type wheels, and no impression is or can be taken of the key or of any identifying mark thereon.

When the patent in suit was applied for (1901), the use of identifying mechanism similar to plaintiff's was old in the workmen's time recorder art. Bundy had ten years before (patent No. 452,894) disclosed a time recorder having a key bearing an identification number, the insertion of which brought the identifying number in alignment with the clock-work operated time mechanism. A turning of the key actuated the printing mechanism, which recorded by the one operation the time (hour and minute) and the employé's identifying number. Bundy's key did not unlock the machine. Heene in 1894 (patent No. 530,340) showed a time-recording device like that of Bundy, so far as any features here involved are concerned. Thurston had in 1899 (patent No. 632,907) shown an identification key of the same nature as Bundy's from which the employé's identification number or mark was printed, in connection with the day and hour of leaving or arriving. In the Thurston device the recorder could not be operated until the key was inserted, and when once inserted and operation of the mechanism begun, the key could not be withdrawn until the operation of the machine was completed. Dallimore in 1900 (patent No. 640,276) had disclosed a device for registering the quantity of liquids passing from a reservoir, or the number of articles withdrawn from it. His machine was locked from operation when the key was not in place. The key bore an identification mark upon its end, from which an impression was taken upon the same line with the meter record. There was thus disclosed the specific combination of the claims of the patent under consideration, as applied to the time recorder art at least. No application of such mechanism or combination had ever been made to the fare register or recorder art; and it is suggested in the specification of the patent in question that the means employed in the time recorders subserved entirely different purposes from the invention of the patent we are considering, and so does not conflict therewith; and plaintiff so contends in this court. We think this proposition erroneous.

[6] The time recorder art is at least strongly analogous to the fare recorder art; the only substantial difference being that in the one case it is time which is registered and recorded, and in the other fares. The relation of the fare register art to the cash register art is suggested, not only in the first Ohmer patent in suit, but also in the patent now under consideration. And in International Time Recording Co. v. Bundy Recording Co. (C. C. A. 2) 177 Fed. 933, 101 C. C. A. 213,

the time recorder art was held to be analogous to the art of car-mileage indicators. We think the disclosures of the time recording art, as related to the fare register art, involves more than mere suggestion. If the application of the time recorder mechanism to the fare recorder art involves more than double use (Houser v. Starr, supra; Weir Frog Co. v. Porter [C. C. A. 6] 206 Fed. 670, 124 C. C. A. 470), it, at the best, involves only slight invention, entitling plaintiff at the most to a narrow range of equivalents. But in the time recorder art identification keys had been used prior to the application for the patent here in question, of substantially the same type and used in substantially the same way as defendants' identifying mechanism, as shown by the patents to English (No. 450,617—1891) and to Emley (No. 788,760), which was applied for previous to plaintiff's patent; and plaintiff insists that the two uses of identification keys are thus mechanical equivalents.

[7] The doctrine of mechanical equivalency requires that the result be accomplished in substantially the same way, and the range of equivalents depends upon the advance made by the inventor in the art. Grand Rapids Show Case Co. v. Baker (C. C. A. 6) 216 Fed. 341, 354, 355, 132 C. C. A. 485. Defendants' mechanism does not accomplish the desired result in substantially the same way as plaintiff's. No impression is or can be taken from its key. It effects identification only as it sets in operation another and distinct train of mechanism from which the record is taken. Whether or not the two devices would be regarded mechanical equivalents under the broad range permissible in case of a primary patent, the present is not such a case. It is not the case of the substitution of one simple element (as a weight) for another simple element (as a spring). The instant case is broadly distinguished from Bundy Mfg. Co. v. Detroit Time Register Co. (C. C. A. 6) 94 Fed. 524, 537, 36 C. C. A. 375, for two reasons —first, Bundy was the first to accomplish the result of his invention; and, second, the difference in the two mechanisms was merely that in the one the insertion of the key first unlocked the mechanism and a further push in the same direction operated the recorder, while in the other the first operation was the same and with the same result, the second operation being effected by a mere turn of the key instead of a push.

[8] We are, moreover, disposed to think the inventors intentionally limited themselves to a key from which the impression should be actually taken; and an intentional limitation is none the less effective because unnecessary or self-imposed. McClain v. Ortmayer, 141 U. S. 419, 425, 12 Sup. Ct. 76, 35 L. Ed. 800; Cimiotti Co. v. American Co., 198 U. S. 399, 415, 25 Sup. Ct. 697, 49 L. Ed. 1100; Mich. Engine Valve Co. v. Monarch Mfg. Co. (C. C. A. 6) 233 Fed. 107, 110, 147 C. C. A. 177. The inventor is presumed to have been familiar with the prior time recorder art; he mentions the art generally in his specifications. The fact that the latter speaks only of keys "to indicate or print the number or mark of each workman" suggests the confining of his combination to the use of such a key. It is also significant that, while the three claims in suit expressly call for the

taking of the impression directly from the key (two of them in terms call for an alignment of the key itself with the type wheels), others of the claims (as Nos. 7 and 10) make no such limitation; the seventh calling merely for "means for identifying," etc., and the other for "an identification key by means of which the person taking such statement is identified therewith." Claims 7 and 10 are thus broad enough in the respect mentioned to embrace both kinds of keys. The inventor may well have thought defendants' identifying means not highly suitable to the purposes of his invention, and thus deliberately confined himself by the claims in suit. We think the district court rightly held these claims not infringed.

An order will be entered reversing the decree of the district court and remanding the record with directions to enter a new decree, finding the claims of the first patent in suit invalid, if construed as they are by plaintiff and as necessary to be construed if infringement is found; finding the claims of the third patent in suit, as well as claims 7 and 14 of the second patent, not infringed; finding claims 4, 6, and 13 of the second patent valid and infringed; and for the usual decree for injunction as to the last-named claims of the second patent, as well as for accounting with respect to damages and profits from such infringement. Plaintiff will recover one-half its costs in this court.

As it is not shown that the individual defendants have infringed in their individual capacities, either before or after the organization of defendant corporations, or that their action as corporate officers has been of such character as to make them personally liable for infringement by the corporate defendants, the decree for costs will run against the corporate defendants only. Proudfit Co. v. Kalamazoo Co. (C. C. A. 6) 230 Fed. 120, 140, 144 C. C. A. 418.

TURNER v. UNITED STATES.

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

No. 4581.

PATENTS ⊜326(4)—INJUNCTION—VIOLATION—PROCEEDINGS FOR PUNISHMENT.

A proceeding for civil contempt for violation of an injunction, begun and prosecuted by the complainant in an infringement suit to preserve an individual property right, and so heard, should not, in disregard of his interest, be turned at the end into a criminal prosecution, merely to speed a hearing in an appellate court.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 615–619; Dec. Dig. ⊜326(4).]

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

Proceeding in error by C. A. P. Turner against the United States to review an order adjudging him guilty of criminal contempt. On motion to dismiss. Motion granted.

Frank A. Whiteley, of Minneapolis, Minn. (Charles J. Williamson, of Washington, D. C., on the brief), for plaintiff in error.

James A. Carr, of St. Louis, Mo., as amicus curiæ.

A. C. Paul, of Minneapolis, Minn., specially appearing for Drum and others, in support of the motion to dismiss.

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

HOOK, Circuit Judge. There is a motion to dismiss this writ of error. It is claimed that in a proceeding against Turner, the plaintiff in error, for a civil contempt by violating an injunction in a patent case, the fine assessed against him was changed from its proper remedial character to a punitive one in favor of the United States, and that it was done solely for his convenience to facilitate a review by this court, and against the objections of the plaintiff in the case and the United States attorney.

On June 7, 1915, a decree of perpetual injunction and for an accounting was rendered against Turner in the court below in a suit brought by John L. Drum for infringement of a patent. Turner adopted a "new construction," which he claimed did not infringe the patent in suit, but which the plaintiff Drum claimed was but a formal and immaterial change; so on July 23, 1915, Drum filed a "petition for attachment for contempt." A hearing was had on this petition on August 3, 1915, upon proofs consisting of affidavits and exhibits. The affidavits were largely by experts and of a technical character. The experts testified as to the scope of the patent in suit, and of the opinion of this court upon which the decree of injunction was rendered, and as to the character of Turner's new construction. On August 7th the trial court entered an order in the suit in equity holding Turner in contempt, fining him $200, and specifying that "said sum, at the request of defendant's [Turner's] counsel, * * * to be paid to the clerk of this court for the use and benefit of the United States." Both parties, plaintiff Drum and defendant Turner, excepted to the order. The former claimed that the proceeding was a remedial part of the main equity cause, and the fine should be for his benefit. Turner objected on the ground, among others, that in view of the new and changed character of his construction the issue could not be tried in contempt proceedings. On August 30th the court entered a second order of the same general purport as the first, except that, instead of being in the equity cause, it was entitled "The United States of America v. Claude A. P. Turner." The fine remained at $200, and execution was provided for its collection. This order was entered without notice to either of the parties, as they claim. On September 14th the plaintiff in the equity suit moved to strike this order from the files. Turner also moved to strike from the files the first order of August 7th, in which it was recited that the fine was made payable to the United States at the request of his counsel. This recital might have endangered a writ of error. On September 16th both motions were granted, and the court entered a third order as of August 3, 1915, nunc pro tunc; that being the day of the hearing of plaintiff's peti-

tion for attachment. This order was made in the equity case, recited the appearance of counsel therein, that plaintiff's petition in the contempt proceeding came on for hearing, and that the affidavits and exhibits referred to were considered. After a statement as to the arguments the order contains this recital:

"The court asked how a judgment against the defendant could be immediately brought before the Circuit Court of Appeals for review. Counsel for the plaintiff Drum then stated to the court that such an adverse judgment might be reviewed by the Circuit Court of Appeals upon appeal from the final decree after the termination of the accounting. Counsel for the defendant then stated that such an adverse judgment would be reviewable immediately upon writ of error, if the fine imposed were made payable to the United States. Whereupon the court adjudged the defendant to be guilty of contempt in violating the injunction order, and directed that the defendant should be fined in the penal sum of two hundred dollars ($200), said fine to be made payable to the United States so that the order and judgment shall be reviewed immediately by the Circuit Court of Appeals of the Eighth Circuit."

This was followed by the formal language of an order imposing a fine payable to the United States to be collected by execution, and a stay thereof for a limited time for a bill of exceptions and writ of error. The plaintiff excepted to the order, because the contempt proceeding was a remedial part of the original equity cause, and the fine should be for his benefit, and also because the fine was made payable to the United States solely to aid defendant in taking the matter to this court. The defendant Turner excepted on several grounds involving the merits of his new construction as compared with plaintiff's patent, and that the controversy should not be tried in a contempt proceeding. The United States attorney for the district appeared and objected to the order, because the contempt adjudged was civil and the government was not concerned.

The order just described is the one which Turner seeks to have reviewed. The United States is the sole defendant in error, yet by his assignments of error Turner invokes the judgment of this court upon his new construction and the original patent in suit. The distinctions between a civil proceeding for contempt in aid of the rights of a litigant and a proceeding of a criminal or punitive character to vindicate the jurisdiction or authority of a court of justice are well settled, and so are the distinctive features of the trials and the methods of securing review in appellate courts. Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 31 Sup. Ct. 492, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; Doyle v. London Guarantee Co., 204 U. S. 599, 27 Sup. Ct. 313, 51 L. Ed. 641; Bessette v. W. B. Conkey Co., 194 U. S. 324, 24 Sup. Ct. 665, 48 L. Ed. 997; In re Nevitt, 117 Fed. 448, 54 C. C. A. 622. A proceeding of the former character, begun and prosecuted by a litigant to preserve an individual property right, should not, in disregard of his interest, be turned by the court at the end into a criminal prosecution, merely to speed a hearing in an appellate court. It is quite plain that is what occurred below. While the prayer of plaintiff's petition for the process in contempt did not definitely indicate its character, yet taken in its entirety there is no doubt but that the proceeding in form, substance and intent was of a

civil or remedial character. After setting forth the facts in detail, the petition concluded with the averment that, if not granted, "the long and expensive litigation carried on herein will be fruitless, and petitioner's interests will be irretrievably and irreparably damaged." The nature of the controversy and the method of trial point to the same conclusion. The attitude of the United States attorney is mentioned merely as one of the incidents of the proceeding below. We do not consider or decide whether the consent or participation of such an officer is essential to the protection or vindication of the authority of a court of the United States by a prosecution for criminal contempt.

Defendant's very objection that the controversy was of a character that should not be tried in a contempt proceeding would be much stronger, if the proceeding were a criminal prosecution in which he might, if found guilty, be imprisoned as for a definite, completed offense. There is nothing in the record indicating that the court thought its decree of injunction had been willfully or contemptuously violated. On the contrary, the order shows that the fine was made payable to the United States "so that" the controversy could be immediately brought here on writ of error, instead of awaiting a slower appeal in the equity case. And the result is that it is proposed by Turner to have a more or less difficult question of patent infringement heard here in a proceeding in error to which his adversary is not a party, and in which the party substituted, the government, refuses to appear. The power of a court of the United States to protect and vindicate its dignity and authority by imposing fines and sentences of imprisonment is a most important one. It should be exercised very carefully and sparingly, and should not be placed at the service of a private litigant for his procedural purposes.

The writ of error is dismissed.

CITY OF MINNEAPOLIS v. JEWELL.*

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

No. 4578.

1. PATENTS ⟸328—INVENTION—SYSTEM FOR CONTROLLING OPERATION OF FILTERS.

The Jewell patent, No. 649,410, for a system for controlling the operation of filters, claim 1, which covers broadly the idea of the control of the valves of a filter from a central station is void for lack of invention, in view of the prior art.

2. PATENTS ⟸328—INVENTION—FILTER.

The Jewell patent, No. 649,411, for a filter, claim 14, is void for lack of novelty and invention.

Appeal from the District Court of the United States for the District of Minnesota; Wilbur F. Booth, Judge.

Suit in equity by Ira H. Jewell against the City of Minneapolis. Decree for complainant, and defendant appeals. Reversed.

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

*Rehearing denied December 20, 1916.

Amasa C. Paul, of Minneapolis, Minn. (Chas. D. Gould and Richard Paul, both of Minneapolis, Minn., on the brief), for appellant.

John E. Stryker, of St. Paul, Minn., for appellee.

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

HOOK, Circuit Judge. This is an appeal by the city of Minneapolis from a decree of injunction and for an accounting for infringement of claim 1 of patent No. 649,410 and claim 14 of patent No. 649,411, both issued to the plaintiff Ira H. Jewell, and dated May 8, 1900.

[1] The first of these patents relates to a system for controlling the operation of filters. Claim 1, held to have been infringed, is as follows:

"A filter provided with a system of controlling valves which are provided with actuating devices located so as to be accessible for control from a single position of an operator."

This claim is not for any particular novel method of accomplishing the result indicated, but embraces broadly the idea of control of the valves of a filter from a central station or position. It is quite immaterial whether it was intended to apply it to a single filtering unit or to a series of units of a more comprehensive plant, or whether the actuating means is by hand, or by hydraulic, pneumatic, or electric power. The claim is for an all-embracing central control. There is too much in the prior art, and in common, familiar practice in other branches of industry, to admit of the validity of a claim so broadly made. It is sufficient, without more, to refer to the patent to Cowles, No. 564,474, July 21, 1896, relating to improvements in apparatus "for opening and closing doors, hatches, ports, valves, cocks, gates," etc. One of Cowles' specified objects was a combination of apparatus "whereby two or more independent mechanical devices, which may be widely separated and of varying types, may be independently and systematically operated, controlled, continuously registered, and locked, all from the same point, 'central station,' or operating board, and by one operator." Cowles' idea of operating from a central position the mechanical devices which actuate separated valves stands out very clearly, and it is not important that he intended it principally, though not exclusively, as he says, to be applied to an hydraulic system on shipboard.

[2] Claim 14 of the second patent held to have been infringed is:

"A filter comprising a tank having a tapered lower end, and an opening at the bottom of the same, a screen at the lower end of the tank in line with said opening, a granular filter bed within said tank, the part of said bed contained within the tapered portion of the tank being made of relatively large granules whereby water passing upwardly therethrough in washing the filter is laterally deflected, so as to be distributed throughout all parts of the bed and a screen interposed between said larger granules and the part of the bed above the same."

It was old in the filtering art to employ a filtering medium composed of a bed of fine material like sand overlying one of coarser ma-

terial like gravel, and to cleanse it of the impurities deposited during filtration by a reverse or upward current of water flowing either normally or under pressure. It was desirable for efficient cleansing that the water in reverse movement be deflected and distributed so that it would reach every part of the filter bed, particularly the overlying sand, and leave no unwashed portions. We think it is too clear for much discussion that all of the elements of plaintiff's claim 14 are found in the prior patents to Hyatt, No. 322,103, No. 409,970, and No. 619,-755, and the patent to Peterson, No. 222,731. Those pertaining to the object above indicated, and which it is contended the defendant is using in its municipal water plant, are shown in the last patent to Hyatt, No. 619,755, dated February 21, 1899, excepting the screen interposed between the sand and gravel. The plaintiff says this screen is important as an aid in distributing the reverse flow of water to the superimposed bed of sand. This idea is evidently an afterthought born of the litigation. The function of the screen is described in the specifications of the patent in suit as being "to prevent the pebbles from rising upwardly out of place when the filter is being washed by reversing the water therethrough," and it is added:

"In case the reverse current be under a low pressure said screen may be omitted."

No such function for the screen as is now asserted is mentioned in the specifications or stated in the claim, though it should be said that if the screen were novel and the function were actually performed the omission would not deprive the plaintiff of the benefit. But it was old to have a screen between the coarse and fine layers of the filter bed. See patents to Peterson, No. 222,731; Hyatt, No. 322,103; Weiderman, No. 347,403; and Hefel, No. 603,483. If the screen performed the function mentioned for the plaintiff, it would perform it in the older structures, though perhaps in Hyatt's case not as effectively, because the screen did not rest in actual contact with the gravel or larger particles below. It is also said that in high velocity washing the interposed screen was necessary to prevent the disturbance of the relative positions of the sand and gravel. This was doubtless the principal reason for its use in the older structures and also in the plaintiff's; but if in practice the gravel showed a tendency to be forced up and out of place, we do not think the insertion of a screen to prevent it doing so rises to the dignity of invention. It would have naturally occurred to an ordinary person familiar with such work.

The decree is reversed, and the cause is remanded, with direction to dismiss the bill.

UNITED STATES COLUMN CO. v. BENHAM COLUMN CO.

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

No. 17.

PATENTS ⇐328—VALIDITY—PATENTABILITY.

Patents Nos. 835,717, 844,973, and 844,974, for building columns, the improvement in which consisted of the filling of a cap telescoped into a hollow steel column with cement, in addition to filling the column itself with cement, and the insertion of a reinforcing rod extending from the cement-filled casing of one column through the cement-filled cap into a socket in the base of the superimposed column, *held* invalid for lack of invention.

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

Suit by the United States Column Company against the Benham Column Company. From a decree for complainant (225 Fed. 55), defendant appeals. Reversed.

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

R. B. Killgore, of New York City, for appellee.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. The District Judge sustained various claims of three United States patents to George F. Thorn for building columns, Nos. 835,717, 844,973, and 844,974. His opinion sets forth fully and clearly the state of the prior art and his conclusion is rested principally on the presumption of invention arising from the granting of the patents, together with public appreciation of the subject patented. The object of the patents was to produce firm and stable columns which could be set one above the other for supporting the floors in buildings of several stories. All the elements of the combinations were old and the combination was useful. The improvement consisted in the filling of a cap telescoped into a hollow steel column with cement, in addition to filling the column itself with cement, which was old, and the insertion of a reinforcing rod extending from the cement-filled casing of one column through the cement-filled cap into a socket in the base of the superimposed column. The evidence of public use as showing invention is very meager, and we are not able to discover invention in extending the cement filling of hollow columns, which was old, into the hollow caps inserted into the casing of the column or in connecting two columns by a rod projecting from the lower into the upper column.

The decree is reversed.

LAMSON CO. v. STANDARD STORE SERVICE, Inc.

(District Court, D. Massachusetts. February 21, 1916.)

No. 483.

1. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—CABLE CARRIER APPARATUS.
The Amsden patent, No. 960,617, for cable carrier apparatus, discloses invention and covers a meritorious improvement, but not a pioneer invention; also *held* valid as against the claim of public use more than two years prior to the application, but, as limited by the prior art, not infringed.

2. PATENTS ⇐328—VALIDITY AND INFRINGEMENT—LOCKING DEVICE FOR CARRIERS.
The Amsden patent, No. 1,071,018, for a locking device for cable carriers, *held* valid, but limited to the particular construction of the device shown and described; also *held* infringed.

In Equity. Suit by the Lamson Company against the Standard Store Service, Incorporated. On final hearing. Decree for complainant in part, and for defendant in part.

Charles P. Hidden and Benjamin Phillips, both of Boston, Mass., for plaintiff.

Emery, Booth, Janney & Varney, of Boston, Mass. (Frederick L. Emery and Louis A. Jones, both of Boston, Mass., of counsel), for defendant.

DODGE, Circuit Judge. The plaintiff owns United States patent 960,617, issued to it June 7, 1910, as assignee of George A. Amsden, for cable carrier apparatus, and United States patent 1,071,018, issued August 26, 1913, also to it as Amsden's assignee, for locking device for carriers. The first patent has 18 claims, the second 15. The defendant has made and sold apparatus described in United States patent 1,055,258, issued March 4, 1913, to Louis W. Chism, assignor to Walsh Store Service, Incorporated, for cable carrier apparatus. The plaintiff says that such apparatus infringes claims 3, 7, 8, and 11 of the first Amsden patent (960,617), and that certain carriers made and sold by the defendant infringe all the claims of the second Amsden patent (1,071,018).

[1] 1. As to the first Amsden patent, the defendant contends that it is invalid by reason of an alleged public use more than two years before Amsden filed his application on August 25, 1905. If this defense cannot prevail, the defendant insists that the four claims sued on cannot be so construed as to cover the apparatus which it makes and sells under the Chism patent, No. 1,055,258. From the patent itself and the four claims sued on are obtained the following indications of the nature of the questions thus raised:

This patent states that "its principal object is to provide means whereby a carrier or box may be utilized running upon its side"; also that another object is "to provide drop line receiving and dispatching way stations for high line apparatus, and also improved switching devices for diverting the carrier from the main line to

said stations." For "other important features" of the invention reference is made to the description and claims.

The first three claims sued on cover specified features "in a cable carrier apparatus." Claim 3 specified:

(1) A track or way.
(2) A carrier adapted to travel upon its side on said track or way.
(3) An endless motor cable adapted to propel said carrier along said track or way.
(4) A drop loop or depression in said track or way forming a drop or way station.
(5) Means in said drop station for placing said carrier in co-operation with said track or way.
(6) Automatic means for engaging said carrier with said cable.

Claim 7 specifies:

(1) A track or way.
(2) Carriers adapted to travel upon their sides along said track or way.
(3) A motor cable adapted to propel said carriers along said track or way.
(4) A plurality of drop stations located along said track or way.
(5) Means for sending or receiving said carriers to or from any of said drop stations.

It is to be noticed that the above two claims, 3 and 7, are the only ones sued on which specify the carrier running upon its side, to utilize which was stated to be the principal object of the invention. The other two claims sued on, as will be seen, purport to cover, with the other elements specified, all carriers, whether running on their sides or not.

Claim 8 specifies:

(1) A track or way.
(2) A carrier adapted to travel on said track or way.
(3) An endless motor cable adapted to propel said carrier along said track or way.
(4) A drop loop or depression in said track or way forming a drop or way station.
(5) Means in said drop station for placing said carrier in co-operation with said track or way.
(6) Automatic means for engaging said carrier with said cable.

Claim 11, the last of the four sued on, covers, "in a cable carrier apparatus," the following described combination:

"The combination with (1) a central station, of
"(2) A sending and receiving track or way;
"(3) Carriers adapted to travel on said track or way;
"(4) An endless motor cable adapted to propel said carriers along said track or way;
"(5) An independent drop receiving track or way station;
"(6) Means for diverting said carriers from said sending track or way into said receiving track or way station;
"(7) A drop loop on said receiving track;
"(8) Means in said drop loop for returning said carriers to said central station."

It will be noticed that the "drop loop or depression" on the track or way, "forming a drop or way station" (claims 3 and 8), the "plurality of drop stations located along" the track or way (claim 7), or the "independent drop receiving track or way station," with the

"drop loop on said receiving track" (claim 11), refer to a feature common to all the four claims sued on, which, with its co-operating switching devices, constitutes the means for securing the second and less important of the two objects which the patentee sought to secure in his apparatus, according to his own statement above quoted. It is this drop station feature only which is important for the purposes of the case. As to the limitation in claims 3 and 7 that the carriers are to travel on their sides, notwithstanding the importance claimed for it in the patent, as above, the plaintiff's brief has treated it (pages 12, 16) as unnecessary in view of the prior art, and immaterial in the present controversy.

For the purposes of this suit, the plaintiff insists upon the drop station of the Amsden apparatus as its distinguishing and important feature. The claim is made that:

"Amsden was the first to produce a high-line cable system having completed drop stations; that is, stations located at a low level and connected by track sections with the high line at the high level, and provided with means not only for receiving carriers at the low level from the cashier's desk, but also for dispatching carriers from the low level to the cashier's desk."

And it is contended that this was a "pioneer invention," and Amsden's patent a "pioneer patent."

There is no dispute that in establishments using cash-carrier apparatus, what is known as the "high-line" type of apparatus has proved its superiority over and has generally superseded what is known as the "low-line" type, which preceded it, and was the type at first adopted for installations of such apparatus. The advantages of keeping as much as possible of the track and cable upon which the carrier boxes are to travel near the ceiling, where it will be out of the way of people on the floor, are obvious and undisputed. But means for getting the carrier boxes up and down, from and to the points nearer the floor from which they are to be sent, and at which they are to be received, are essential, and the plaintiff contends that Amsden's were the first commercially successful means.

Before Amsden's application there had been high-line installations wherein the carriers had been lifted in elevators or hoisting devices operated by the sender to the overhead level of conveying tracks and cable, and there held until so engaged with such tracks and cable as to be carried along by them at that level to the central station or cashier's desk. From that point they were returned to the sending point by there re-engaging them with the tracks and cable, which would then take them along the circuit until disengaged and switched from the conveying track to a descending section of track ending at the sending point, down which section their own weight would carry them.

In Amsden's first patent, elevators or hoisting devices, distinct from the main tracks and cable, are dispensed with by carrying both tracks and cable, at each station for sending and receiving, downward from their normal level, around a short curve at the station level and upward again to the normal level, thereby forming with them what the patent calls "drop loops." Suitably arranged pulley wheels,

around which the moving endless cable passes, enable it to follow the tracks in their downward and upward course around the drop loop, without losing that relation with them which enables it to continue the movements along them of carriers engaged with it. Outward going carriers from the central station, destined to a given sending and receiving low-level station, are, by the operation of selecting and switching devices, not now requiring description in detail, there transferred from the main track to an independent section of downwardly extending receiving track, down which they slide, released from the main cable, to its terminus adjacent to the bottom of the loop for that station in the inward-bound track, at which terminus there are arrangements permitting their removal. Re-engaged with the main track and cable at a convenient point near the bottom of said loop, the inward-bound movement of said cable takes them along said track to the top of said loop and back to the central station. On their way thither they pass downward and up again around all the intervening loops in said track.

Installations of Amsden apparatus, comprising about 8,500 drop loop stations of this kind in all, have been made by the plaintiff since 1904 or 1905. The degree of commercial success thus indicated tends to establish the plaintiff's claim that the above method of arranging high-line apparatus was distinctly superior to the types of high-line apparatus which had preceded it; nor is this tendency materially lessened by the fact that the plaintiff has recently modified the patented structure above described, in apparatus installed by it comprising in all about 700 drop loop stations, so as to permit carriers moving toward the central station to cross over the top of each intervening drop loop upon continuous high-level track, instead of having to travel around all drop loops between the central station and the particular drop loop station from which they have been dispatched. As will appear, this modification approaches the defendant's structure more nearly in some respects then does the construction which the patent describes.

The defendant's claim that the sale or public use of apparatus including drop loop stations, such as Amsden describes and claims, for more than two years before his application, has been proved by the evidence heard, may here be considered.

There is no question that in 1903 Amsden himself, then employed by the plaintiff's predecessor in the same business, superintended an installation of cash carrier apparatus in a large department store in Minneapolis, belonging to Donaldson & Co. It is undisputed that a considerable, but not the larger, portion of the apparatus installed was of a high-line type, including five special drop stations, and when completed embodied the above-considered invention of Amsden's subsequent patent, save for a possible difference in cross-section of the tracks used, which I consider immaterial. If this portion of said apparatus had been sold or was in "public use" before August 25, 1903, the invention in question was not patentable after that date, and the Amsden patent for it is without validity.

Although that portion of the installation which embodied Amsden's

invention, as above, was a considerable and an important portion, it was not the larger portion, and the apparatus was, for the most part, of the low-line type. Three contracts, dated April 28, May 5, and June 15, 1903, respectively, covered the entire installation as at first planned, and according to them it was all to be of the low-line type. But a still later contract, dated June 29, 1903, provided for the substitution of the five special drop stations, instead of five low-line stations called for by the earlier contracts. All these contracts were between the Donaldson Company and the plaintiff's predecessor, the Martin Cash Carrier Company. Amsden acted for the Martin Company in making the contracts, besides superintending the installation made in pursuance of them. The five drop stations referred to constituted the first apparatus anywhere erected embodying the invention of his first patent, and until this part of the apparatus was not only set up complete, but in actual use for its intended purposes, there was no saying positively that the invention was capable of practical commercial use.

A bill dated September 12, 1903, was rendered for the greater part of the work, including that done in erecting the five drop stations, and this bill was subsequently paid. The Donaldson store was reopened to the public, the installation as a whole being then practically complete, on Monday, August 31, 1903. Unless public use of that part of its cash carrier system which included the five drop stations began at an earlier date, no anticipation is shown. Three of the drop stations were in what was known as the "book department," and there is testimony that the "book department" was in working order and open to the public on Monday, August 17, 1903. If this is proved to be true, and if the drop stations in that department were also in regular use and operation from and after August 17th, public use of them for eight days preceding August 25, 1903, is shown.

The witnesses who undertake to fix the date of the opening of the "book department" as August 17th are the Donaldson Company's secretary and treasurer, its former chief engineer, and an electrical contractor employed by the Martin Company in the work referred to. Their depositions were taken in Minneapolis in January, 1915, more than 11 years after the dates they undertake to fix. Only one of them could assist his memory by any memoranda made in 1903, and such as he used for that purpose were insufficient of themselves to establish the dates in question, though serving as the basis for deductions which the witness sought to draw from them and from his memory as to the order of events.

Amsden himself, on the other hand, testifying 6 months later, at the hearing before me, and basing his recollection on memoranda he says he made at the time, states that the portion of the system installed which included the five drop stations remained still incomplete on September 3, 1903, and that none of those stations were in operation before that date.

The burden is on the defendant to show public use before August 25, 1903, the result of the evidence is that it could have begun only a few days at most before that date, and I find the evidence as a whole, con-

sidering the extent to which it depends upon mere memory after a long term of years, insufficient to produce that clear conviction necessary to justify a finding that it actually did begin before the date named. That the apparatus belonging to the five drop stations was not sold to the Donaldson Company before the bill covering it was paid would seem, in any event, the only conclusion possible on the evidence. I find nothing to show a complete sale at any earlier time. For the purposes of this case, Amsden's first patent is therefore regarded as valid.

The remaining question is whether it is infringed by the defendant's apparatus, made under the Chism patent. In one respect this apparatus is better entitled than Amsden's to be called a "high-line" cable system, viz.: Its main track, or way, and its endless cable, adapted to propel the carriers moving on said track or way, are kept at a continuously high level throughout their entire length; no part either of the main track or way, or of the main cable, being carried downward and up again through any "drop loop" like Amsden's. If there are at the low level sending and receiving stations, which can be said to answer to Amsden's "drop station," it has no construction formed in and by the main track, like Amsden's, but is composed of two independent auxiliary sections of track, one for receiving at, the other for sending from, the particular station. Removal of either section from the apparatus would leave unaffected the operation of the main track or main cable. The defendant's receiving sections are, for all purposes here material, like those of Amsden in arrangement and operation. Considered by themselves, neither the defendant's nor Amsden's receiving means differ in any respect here material from what was known and used before Amsden. Closely adjacent to the terminus of the defendant's receiving section is the lower end of its independent sending section of track, in engagement wherewith carriers may be there placed for return to the central station. So engaged, they are lifted thereon vertically to the level of the main track and cable, at that level automatically switched from the sending to the main track, and connected with the main cable, which then takes them along the main track to their destination. They are so lifted upon and along the sending track, until so connected with the main track and cable, by a separate auxiliary endless cable employed at each low-level station for that purpose only; each of such auxiliary cables being independent of the main cable, except that friction pulleys in engagement with the main cable, and thus kept in rotation by its movement, keep in motion the friction pulleys around which each auxiliary cable passes at its station and which keep it there in motion.

The significant feature of difference between the defendant's apparatus and Amsden's thus consists in the different means employed at each low-level station for returning carriers to the central station. Instead of employing the main track and cable to lift the carriers from the way station level to the high level, as does Amsden, bringing them for that purpose down to the station level and immediately back again, the defendant uses for the same purpose an independent local track and a local cable, independent of the main cable, except that the motion of both is produced by the same source of power, by which arrangement

the defendant avoids making with its main track and cable the curves and circuit involved in Amsden's drop loops.

In view of this difference there is difficulty in making the terms of any of the claims in suit fit the defendant's mechanism. In claim 3, the feature or element (4) in the above analysis is "a drop loop or depression in said track or way forming a drop or way station"; and the same is true of claim 8. No other than the main track or way can be the track or way meant in either claim, nor can the "drop station" in either be regarded as formed otherwise than by the "drop loop or depression" in that track or way, which both specify. In claim 7, unless the "drop stations located along said track or way" referred to in the feature or element (4) thereof are drop stations formed as specified in claims 3 and 8, the claim is too broad, because it would include the stations of the prior art from which carriers were lifted to track and cable at an overhead level by means of elevators or hoisting devices operated by the sender. In claim 11, element (7) specifies "a drop loop on said receiving track." If this means the "receiving track" of (5) and (6) in the same claim, the defendant's independent receiving section of track at each way station has no drop loop in it; and if it refers to the track whereon carriers are returned to the central station, the defendant's return track, as has been stated, is without any loops.

A construction of these claims, such as is necessary for the purpose of holding them infringed by the defendant's apparatus, does not seem to me justified, unless the above contention by the plaintiff is established, that Amsden's invention provided the first complete drop stations in high-line apparatus, and is therefore to be treated as a pioneer invention.

One statement of the grounds upon which the plaintiff relies in support of this contention, and of the extent to which it claims a pioneer character for Amsden's invention, has been quoted above. What is meant by a "complete drop station" appears from that statement to be a low-level station "connected by track sections" with the high-level line, and provided at its low level both with receiving and with dispatching means.

That there was high-line apparatus before Amsden, having low-level stations provided at that level both with receiving and with dispatching means, cannot be denied. In such stations so provided, the receiving means employed a track section connecting the high line with the station. Dispatching means provided at such stations, however, instead of employing track sections connecting the station with the high line over which carriers could run as on the main track, had elevating mechanism for lifting the carriers to the main track, and although their ascent was direct and controlled by guideways, these can hardly be called track sections in the sense here intended. Apparatus of the above kind is described in the patents to Cowley, No. 474,040 (1892), and to Martin, No. 539,127 (1895), relied on by the defendant.

Amsden's loops in his return track provided his low-level stations with track connection from the station to the high line, over which carriers can be sent upward by the same power which moves them

horizontally on the high line itself, instead of the previously used mechanism otherwise operated for hoisting them to the connection with the high line. But in doing this, he cannot be said to have availed himself of an idea wholly new with him. The older low-line apparatus is shown to have afforded not infrequent instances of adaptation to particular circumstances involving carrying the main track and cable upward from a station to an overhead level, though followed by a return to the lower level. And in the later high-line apparatus before Amsden there are shown to have been instances wherein the return track and cable were brought downward from the high level to reach a given station, and from it were carried back again to the high level.

Amsden's patent, therefore, cannot fairly be said to cover either a function never performed before, or a wholly new device, or a device of such novelty and importance as will distinguish it from a mere improvement upon what preceded it. Drop loops were not wholly new with him; it is only in his adaptation of them to provide better dispatching means at each low-level station than were afforded by the station equipment of prior apparatus, that his novelty consists. It was no doubt a meritorious improvement, but I cannot, on the evidence, regard it as so new or so important as to justify making his claims cover the provision of dispatching means at low-level stations not employing drop loops at all and operating upon principles differing so widely from his as do those provided in the defendant's apparatus.

It is to be noticed that there is no claim in Amsden's patent of any such importance for his "drop-line receiving and dispatching way stations," as has been claimed for them in the present controversy. They appear in his patent as subordinate in importance to the use of carriers running on their sides, and as of no greater importance than the improved switching devices therein described, with neither of which improvements are we here concerned. Nor has the plaintiff's evidence shown the commercial success of Amsden's apparatus as a whole to have been due in any greater proportion to the dispatching means provided for his drop stations than to its other new and improved features.

It is further to be noticed that the specification of the patent contains no indication whatever that the drop stations mentioned in the claims may be different in any respect from the "drop-line stations," to provide which is one declared object of the patent, or that they may be formed otherwise than by looping down the main track and cable—i. e., the "line"—as the patent specifies. The proceedings in the Patent Office upon Amsden's application, as it seems to me, further enforce the conclusion that drop stations of any other kind were not within the applicant's contemplation.

It was said on the plaintiff's behalf, in argument, that the differences between the defendant's apparatus and the apparatus of the patent are, in the respects here important, merely colorable differences, not material as regards use and operation. With this view I find myself unable to agree. The defendant's independent section of dispatching track and separate local cable differ in their method of operation too widely from the dispatching portion of Amsden's loops. By dispensing with the latter, the defendant foregoes advantages which they possess and

avoids disadvantages which they involve. That on the whole the defendant's dispatching means are improvements over Amsden's seems hardly disputed. My conclusion must be that no infringement of any of the claims in suit is proved.

[2] 2. As to Amsden's second patent, No. 1,071,018, it relates only to a locking device said to be especially adapted for use in carriers such as are used in cable carrier apparatus. The object of the invention is declared to be:

"To supply a simple and effective locking device which will positively lock the cover of the carrier closed and prevent the accidental opening of the same when rounding the turn or in transit."

That the alleged infringing carrier, Plaintiff's Exhibit H, infringes the claims of this patent, if the patent is valid, the defendant does not dispute; but it contends that the device of the patent differs from prior devices only in details, not new with Amsden, in the selection and use whereof nothing beyond mechanical skill and judgment were involved.

The defendant had no actual notice of this patent until the present suit was brought, September 27, 1913, one month after the patent had been issued. The plaintiff had omitted to mark the carriers it made under it according to Rev. St. § 4900 (Comp. St. 1913, § 9446). Immediately upon the bringing of the suit, the defendant, under advice of counsel, stopped making and selling carriers like Exhibit H, and substituted carriers of a different construction, which are not before the court in this case. Although the carriers like Exhibit H, for which the defendant could be required to account, would seem to be, of necessity, very few in number, the plaintiff's right to a decree in respect of them is established unless the defendant has shown that, as it contends, the patent covering them does not describe an invention having patentable novelty.

The locking device, as therein described, is for use on carriers having lids or covers thrown and held open by a spring. In a circular depression in the face of the cover is pivoted a lock lever having one end upturned for use as a handle, while the other end forms a latch adapted to engage under a lip or projection made by indenting a portion of the side wall; the cover being cut away so as to let it pass said lip or projection in closing and opening. Pressure on the upturned end or handle in one direction, the cover being closed, swings the lever so as to bring the latch at its other end underneath the lip or projection and thereby hold the cover closed. Pressure in the opposite direction swings the lever so as to withdraw the latch from beneath the projection and let the cover fly open.

A stud on the underside of the lever, between its pivot and the upturned handle end, passing through a suitably curved slot in the cover, limits the movement of the lever in each direction. A flat spring secured to the inside of the cover has a rib or projection so located as to engage one side or the other of the stud, which, while permitting the stud to ride over it during the movement of the lever from one end to the other of the slot, holds the lever, when in position at either end, against accidental displacement.

Among a number of prior patents to which it refers, the defendant

relies mainly on those to Martin, Nos. 331,418 and 368,219 (1885), to Wotruba, No. 394,320 (1888), and to Upp et al., No. 860,947 (1907). These references show, if it is not sufficiently obvious without them, that none except old and familiar features are found in the patented device. The defendant's contention that, combined as in the patent, they have no new function or mode of operation, and that Amsden has added nothing to former devices in which they may be found, save in the way of mechanical detail, seems to me of considerable force. But in view of all the evidence, including that as to the commercial success of the patented carriers, I am not clear that patentable invention is wholly wanting in Amsden's adaptation of the component features to the special requirements of a cash carrier for use with apparatus of the kinds here involved. It seems to me certain, however, that the invention is necessarily so limited in its scope as to require its restriction to the particular construction shown and described. Exhibit H is held to infringe because it exactly corresponds to that construction. Of the 15 claims of the patent, it may be said generally that they are drawn with the obvious purpose of covering as much as possible beyond the particular construction referred to. I hold the claims valid to the extent only that they cover that construction, and infringed by Exhibit H only because it embodies that construction. The terms of the decree to be entered will restrict its application to carriers embodying the same construction.

A decree may be entered, dismissing the bill as to the first of the two patents sued on. As to the second patent, it will provide for an injunction and for an account within the limits indicated.

MANTON-GAULIN MFG. CO. v. DAIRY MACHINERY & CONSTRUCTION CO., Inc.

(District Court, D. Connecticut. December 14, 1916.)

No. 1384.

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—MACHINE FOR HOMOGENIZING MILK.

The Gaulin patent, No. 756,953, for an apparatus for intimately mixing milk or other liquids, was not anticipated, and is of a pioneer character, and entitled to a liberal construction, the machine being the first to successfully homogenize milk; also *held* infringed.

2. PATENTS ⟸238—INFRINGEMENT—CHANGE OF FORM.

The impairment of the function of a part of a patented structure by omitting a portion will not avoid infringement; nor will a mere change in form, where the principle of operation is preserved and appropriated.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 376; Dec. Dig. ⟸238.]

3. PATENTS ⟸312(3)—DEFENSE OF INVENTION BY ANOTHER—SUFFICIENCY OF EVIDENCE.

The defense that another than the patentee was the original inventor of a patented structure must be established beyond any reasonable doubt, and not merely by a fair preponderance of the evidence.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 548, 549; Dec. Dig. ⟸312(3).]

In Equity. Suit by the Manton-Gaulin Manufacturing Company against the Dairy Machinery & Construction Company, Incorporated. On final hearing. Decree for complainant.

Frederick P. Fish, and J. L. Stackpole, both of Boston, Mass., for plaintiff.

Henry D. Williams and Livingston Gifford, both of New York City, for defendant.

THOMAS, District Judge. This is the usual bill in equity, charging the defendant with infringement of letters patent No. 756,953, issued April 12, 1904, to Auguste Gaulin, of Paris, France, for certain alleged new and useful improvements in system for intimately mixing milk, although in fact the invention of the patent has for its object, as is stated in the specification:

"An improved apparatus for intimately mixing milk and other liquids more or less resembling it by means of the action produced by the passage of liquids more or less heterogeneous under considerable pressure through very small orifices."

The plaintiff is a Maine corporation engaged in the manufacture of machines under the protection of the patent in suit, and it holds the title to it by licenses and assignments which have been put in evidence, subject to certain rights of payment and contingent reversion to the patentee.

The defendant is a Connecticut corporation, which manufactures machines at Derby, in this district, and which, as the plaintiff charges, contains and embodies the invention recited in the second claim of the patent in suit, which is as follows:

"In a machine of the class described, co-operating elements having squeezing surfaces, means to yieldingly hold the elements in contact and means to force the milk between the surfaces, substantially as described."

[1] Prior to the filing of the bill of complaint herein, the defendant had succeeded to the business of a New Jersey corporation, the Dairy Machinery & Construction Company, doing business in Connecticut, and which had been the defendant in a suit by the plaintiff upon the same patent in this district, in which it was held by Judge Martin that this second claim was valid and infringed by the defendant's apparatus involved in that case. Manton-Gaulin Mfg. Co. v. Dairy Machinery & Construction Co. (D. C.) 203 Fed. 516. The Dairy Machinery & Construction Company had, however, been dissolved before the entry of a decree, and no technical judgment was entered against it.

Although Judge Martin's decision is not res adjudicata, nevertheless a due regard for the orderly administration of justice requires that I should follow that decision, unless the instant case presents essentially different evidence. The defendant's machine in that suit was, in some respects, different from the one now charged to be an infringement, and a principal question herein involved is whether the apparatus which the defendant now uses, and which is referred to in the evidence as "defendant's device No. 1," is so different in form and operation from that used by the defendant in the former suit, as to escape

the charge of infringement. This defense of infringement is now mainly supported by certain patents to Mathieu Julien, which were in evidence in the former cause, the gist of the defendant's contention being now, as in the former case, that the Julien patents deprived Gaulin of the quality of a pioneer inventor, and therefore the patent in suit is to be strictly construed, and, as the defendant's device No. 1 does not have "means for yieldingly holding the elements in contact," there is no infringement. The patents relied upon are as follows:

(1) French patent No. 220,446, of March 26, 1892, for a machine for intimately mixing liquid substances.

(2) British patent No. 22,115, of December 2, 1892, entitled a process for enriching milk and producing cream and butter, presenting generally a plurality of pumps arranged to pump into a single pipe.

(3) British patent No. 23,637, of November 9, 1898, for a process for treating butter and restoring it to fresh condition. While apparatus is also mentioned in the title of the patent, the apparatus is excluded from the claims, which are wholly for the process.

(4) British patent No. 14,840, of August 2, 1893, entitled "Apparatus for Effecting the Intimate Mixture of Liquids, Semi-Liquids, or Liquified Matters," in which the drawings are identical with those of the process patent No. 22,115, and the description of the apparatus very much the same.

There has also been introduced in evidence quite an amount of fact testimony, which was not in the former suit, showing that in 1899 and 1900 homogenized milk was produced as a commercial product in Paris and elsewhere in France by passing the milk through a piston valve and homogenizing devices made and constructed as shown in the Julien patents in evidence. The purpose of this additional defense was to show that Gaulin, the patentee, was not the original inventor of the machine patented by him, but that it was actually invented by Julien, and that Julien disclosed the invention to Gaulin.

Judge Martin sustained the patent in suit as a pioneer patent for homogenizing milk, or, in other words, for the breaking up of the butter globules in milk, and he supported himself in this result by the assertion, which with the evidence before him was, in my opinion, clearly justified, that, while different machines had been invented prior to the Gaulin patent for pulverizing and mixing liquids of different consistency, some by beating, some by mixing, and others by being forced under pressure through orifices, there was no other patent or known process adapted to the complete breaking of all the globules of butter fat in milk, and that the special object of the Gaulin patent was to break up all the globules, so that there would be no separation in the milk thereafter, putting the milk in such condition that practically every part of it is exactly alike, and that when in that condition the flavor of the milk is improved, and, if sterilized and sealed, it will be kept in good condition for long periods of time, and that a process that does not break up all the globules of butter fat will not accomplish the result desired.

The specification of the patent does not use the word "homogenizing," and so far as appears from the record that word was practically unknown in the art before the invention of Gaulin, and came into use only as a result of his invention; in other words, Gaulin, by this in-

vention, created the art of homogenizing. Gaulin in his specification, after stating that:

"The present invention has for its object an improved apparatus for intimately mixing milk and other liquids more or less resembling it by means of the action produced by the passage of liquids more or less heterogeneous under considerable pressure through very small orifices"

—then goes on to say that:

"Apparatuses have been constructed for intimately mixing fatty liquids, and these have been used for the treatment of milk. I have myself constructed such apparatuses."

This was undoubtedly a reference to Gaulin's earlier French patent, No. 295,596, dated December 23, 1899, the machine of which mixed the liquids by passing them under pressure through small holes, but which failed to "homogenize," because the holes, being substantially round, were necessarily so large that most of the fat globules passed through the holes without coming in contact with the walls of the holes and were not broken.

Gaulin further states in his specification that:

"Experience has shown that none of these apparatuses has produced the required result in the treatment of milk"

—a statement which would seem to be borne out by the evidence. The reason why the prior attempts at "homogenizing" were unsuccessful is pointed out in the specification of the patent, page 1, lines 27 to 40, as follows:

"With some of them all the butter globules are not invariably pulverized, as is necessary, which causes the milk not to keep and, moreover, acquire a disagreeable taste. In other machines in passing through the pulverizing orifice the butter globules are not all attacked, because it is only at the surface of the jet of milk which is forced into these orifices that there is really contact with the walls of the orifices, and the center particles of the jet flowing through the length of the said orifices resume their original shape on escape from the apparatus. If it is the butter portion, it again becomes globular."

And the purpose of the invention as conceived by Gaulin is stated in the subsequent lines of the specification as follows:

"My invention comprises an apparatus whereby the object in view is attained. One of the important points of my invention, for which I seek letters patent, consists in causing the liquid to flow not only through invariable orifices, but also between adjustable surfaces so arranged as to be adaptable exactly one against the other and maintained pressed elastically and strongly one against the other. It results from the action of these surfaces upon the globules and other separate parts of the liquid that there is a complete breaking up and an intimate intermixture of these parts, whereas the passage of the liquid alone through invariable orifices, however fine they may be, only gives an incomplete incorporation. In the case of milk, for example, this much more energetic action of the surfaces pressed one against the other is explained by the fact that the solid or pasty globules (fat, casein, etc.) are obliged to force their passage between the said surfaces and cannot pass except by opening them. They are therefore necessarily flattened, crushed, and torn by these surfaces, which tend constantly to close upon them. By means of this novel system in the case of which we are speaking I am able to obtain treated milk exempt from any bad taste without recourse to any special precaution—such as the silvering of the tubes, etc.—whereas up to now milk

treated always possesses a disagreeable flavor, which according to my experiments results from the incomplete mixing of the various elements."

In the machines of the prior art, the orifices which are referred to in the part of the specification just quoted, were invariably round and therefore comparatively enormous in cross-section, so that the fat globules passed through the middle of them unbroken; and the essential characteristics of the invention as conceived by the patentee are pointed out later on in the specification as:

"The employment of surfaces for mixing pressed elastically one against the other, whatsoever be their forms or dimensions and whatsoever their actuation with regard to the other parts."

Taking into account the testimony of Davies and Gaulin, and the other evidence in the case, I am clear, as was Judge Martin, that the prior patents relied upon by this defendant cannot be given the force contended for without a reconstruction of them in the light of the invention in suit, that the patent in suit must be regarded as a pioneer patent, that Gaulin in fact constructed the first machine for successfully homogenizing milk, that his invention is to be regarded as one of a pioneer character, and that the mechanical functions performed by his machines are, as a whole, entirely new. If this be the case, the plaintiff is entitled to a very liberal construction of the claims of the patent, and all subsequent machines which employ substantially the same means to accomplish the same result must be regarded as infringements, although the subsequent machines may contain improvements in the separate mechanisms which go to make up the machine. Morley Sewing Machine Co. v. Lancaster, 129 U. S. 263, 9 Sup. Ct. 299, 32 L. Ed. 715.

Judge Martin found that the defendant's machine in the prior suit accomplished the same result as does the machine of the patent in suit, and by substantially the same means, to wit, squeezing surfaces held closely in contact by pressure devices, and by substantially the same mode of operation, and I am convinced that the defendant's machine No. 1 is merely a modification of the defendant's machine which was before Judge Martin. In both machines the liquid is homogenized by being forced between the surfaces of discs held closely, but elastically, together exactly in accordance with the principle of the invention of the patent in suit. Although the defendant in its machine No. 1 has, as compared with the old machine, reduced the number of discs from 12 to 5 for a 400-gallon per hour machine, or to three for a 200-gallon per hour machine, it has nevertheless increased the size of each disc, and has modified the holding device to get the increased pressure on these devices due to the increased area of the discs and other parts which are exposed to the pressure of the liquid; in other words, the changes made by the defendant in its present machine have simply diminished the differences which are found between the infringing machine in the former suit and the machine of the patent in suit. The defendant, by employing a number of discs, provided more squeezing surfaces between which the milk is forced than there are in the machine of the patent in suit; but that I do not regard as a matter of

very great importance, for the reason that each of the squeezing surfaces of the defendant's machine, viz. the faces of the discs between which the liquid is forced, acts upon the film of milk, passing between it and an adjacent surface, in exactly the same way and with exactly the same result as does each of the surfaces, viz. that of the valve base and its seat in the machine of the patent in suit.

[2] Clearly, the mere interposition of squeezing surfaces in the defendant's machine is not a substantial difference, but one purely formal; and, if it is, it is none the less an infringement. The law is well settled that infringement is not avoided by dividing an integral element of a patented machine into distinct parts so long as the function and operation remain substantially the same; and the same rule applies as to the joinder of two elements into one integral part accomplishing the purpose of both, and no more, so long as the same results are accomplished. The impairment of the function of a part of a patented structure by omitting a portion will not avoid infringement, nor will a mere change in form, where the principle of operation is preserved and appropriated. Winans v. Denmead, 15 How. 330, 342, 14 L. Ed. 717; Nathan v. Howard, 75 C: C. A. 97, 143 Fed. 889, and numerous cases there cited.

Moreover, the defendant's spindle acts automatically in exactly the same way as does the spring of the patent in suit. As the pressure in the defendant's machine increases, the spindle has an increasing yield, thus permitting the squeezing discs to separate further apart; and as the pressure of the liquid in defendant's machine decreases, the spindle has a decreasing yield, thus forcing together more closely the squeezing discs; and there is no difference in function or mode of operation between the defendant's steel spindle and the spring of the patent in suit. Mathematically and mechanically they must be considered as equivalents.

[3] Furthermore, I am satisfied that the fact testimony introduced at great length for the purpose of showing that it was Julien, and not Gaulin, who was the original inventor of the machine, does not come within the rule that is required for this kind of testimony. The courts have uniformly and consistently held that such testimony must establish beyond any reasonable doubt, and not by a fair preponderance of the evidence, the defense that the invention of the patent in suit was suggested to the patentee by some other person, and that unless it is so established it should be unhesitatingly rejected. Such a defense cannot be supported, as are ordinary issues in civil cases, by a mere preponderance of the evidence, but must go to the extent of being absolutely clear, unequivocal and convincing. The law on this subject is very fully stated by Judge Putnam in Eastern Paper Bag Co. v. Continental Paper Bag Co. (C. C.) 142 Fed. 479, 500. But, beyond that, I am not convinced that the defendant has sustained this defense by even a preponderance of the evidence. Gaulin clearly and without any instruction from Julien or any one else understood the invention of squeezing surfaces held strongly, but elastically, together, between which the milk passed in such a thin film that the fat globules were

broken, and this is the substance and essential feature of the patent in suit.

Let there be a decree for an injunction, an accounting, and a reference to a master.

ERIE PUMP & EQUIPMENT CO. v. WISCONSIN STEEL CO.

(District Court, N. D. Illinois, E. D. December 21, 1916.)

No. 496.

PATENTS ⇐328—VALIDITY AND INFRINGEMENT—BOILER FEED REGULATOR.

The Copes patent, No. 662,687, for a boiler feed regulator, claim 6, is valid, if narrowly construed, but, as so construed, *held* not infringed.

In Equity. Suit by the Erie Pump & Equipment Company against Wisconsin Steel Company. On final hearing. Decree for defendant.

Suit in equity brought June 25, 1915, for infringement to patent No. 662,687, issued to James W. Copes November 27, 1900, applied for September 9, 1899.

Ernest J. Andrews and Lincoln B. Smith, both of Chicago, Ill., for plaintiff.

Wallace R. Lane, of Chicago, Ill., and William J. Belknap, of Detroit, Mich., for defendant.

SANBORN, District Judge. The patent relates to expansion tubes for the regulation of steam boilers. The tubes are placed outside the boiler on a level with the normal water line, and are inclined from the horizontal; the upper end being connected with the steam dome, and the lower end with the water of the boiler. By this system the inflow of water into the boiler is controlled through the action of expansible tubes, which directly operate a valve for admitting water when required. When the valve is closed, pressure is built up in the feed pipe by the continuous operation of the boiler feed pump. As soon as the pressure in the feed pipe becomes greater than that in the boiler, a governor is operated to shut off the pump. The expansible tubes are directly connected to the water valve system, which controls the inlet of water from feed pipe to boiler. Lowering the water raises the temperature of the tubes, expands them, and opens the steam valve to increase the pump action, and raising the water lowers the temperature of the tubes, contracts them, and slows the pump. In his application the patentee says he knows it is not new to use expansible tubes for the purpose described by him, but believes it to be new to so arrange such a tube as to permit of the micrometer adjustment of the connected parts, and thus obtain control of the steam supply.

Defendant claims that the Copes claim sued on (being No. 6) is invalid, in view of the Thomas patents, No. 454,088, June 16, 1891, and No. 488,619, December 27, 1892, or, if the Copes claim is to be narrowly sustained, then that defendant does not infringe, because its construction is nearer to Thomas than Copes. It is also claimed that the

Thomas construction has been used for a long time in Cleveland and other cities, and has worked satisfactorily. The Thomas patents were not cited as references to the Copes application.

Claim 6, the one in suit, reads thus:

"In a boiler feed regulator, the combination with an expansible tube, connected with the boiler above and below the normal water level therein, of a feed water pump, a feed water pipe from said pump to said boiler, a valve in said water pipe, a steam pipe from said boiler to said pump, a valve in said steam pipe, and hydraulic means connecting the valve in said water pipe with the valve in said steam pipe, in such relation with said expansible tube as to predetermine the co-operative actuation of said two valves by said expansible tube, substantially as set forth."

This claim says nothing about multiplying levers in or connected with the expansion tube, and the claim substantially reads on the Thomas construction, as shown in the patents referred to, and in the actual devices built on the Thomas patents in a number of buildings in Cleveland. I am satisfied that the testimony of Clark and Ingleson on the trial, with the photographs and all the surrounding circumstances, show that the Thomas inventions were in use there before the Copes patent was applied for. A little doubt was raised on the trial by the fact that in the earlier stages of the case the witnesses did not understand that the expansion tubes shown in the Cleveland buildings were other than horizontal. But I think this doubt is not sufficient to discredit the proof of prior use, in view of the positive testimony at the trial, the fact that these constructions were under the Thomas patents requiring the tubes to be inclined, and the photographs.

The Copes patent is valid narrowly, but not infringed. There should be a decree dismissing the bill of complaint, with costs.

ATLANTIC FRUIT CO. v. SOLARI et al.

(District Court, S. D. New York. September 11, 1916.)

1. SHIPPING ⇐39—BREACH OF CHARTER—"LAWFUL MERCHANDISE."
Contraband goods, carried by a neutral vessel from a neutral country to a port of a belligerent in time of war, are "lawful merchandise," within a clause of the charter party limiting her use to the carriage of such merchandise, where the export of such goods was not prohibited by the laws of the country from which the shipment was made.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 141–148; Dec. Dig. ⇐39.

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

2. SHIPPING ⇐38—BREACH OF CHARTER—"RESTRAINT OF PRINCES."
Where a Dutch vessel, under a time charter to libelant, an American company, and subchartered, also by time charter, to respondents on arrival at an Italian port with a contraband cargo, was prohibited by the Dutch government from leaving port under the charter for any voyage while the vessel was under charter to the charterers or subcharterers, the order being modified after some months by permitting her to proceed, but on condition that she should not trade to any port of a belligerent country, such action constituted a "restraint of princes," within a mutual ex-

ception of such risk in the charter, and was such a frustration as justified the subcharterers in abandoning it.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 136–140; Dec. Dig. ⊂⊃38.

For other definitions, see Words and Phrases, First and Second Series, Restraint of Princes.]

In Admiralty. Suit by the Atlantic Fruit Company against Luigi Solari and R. Lawrence Smith. On exceptions to libel. Sustained in part.

Hunt, Hill & Betts, of New York City (George Whitefield Betts, Jr., and Francis H. Kinnicutt, both of New York City, of counsel), for libelant.

Gilbert, Lauterstein & Gilbert, of New York City (Abraham S. Gilbert, of New York City, of counsel), for respondent Solari.

Austin, McLanahan & Merritt, of New York City (Scott McLanahan, of New York City, of counsel), for respondent Smith.

AUGUSTUS N. HAND, District Judge. [1] The Atlantic Fruit Company held a time charter for a term of years of the registered Dutch steamers Van der Duyn and Van Hogendorp, and entered into subcharters of these vessels with the respondents. The subcharter of the Van der Duyn was from May 24, 1915, for 10 months, and of the Van Hogendorp from August 4, 1915, to April 5, 1916. Each charter party was on a printed form of the Atlantic Fruit Company, which was the customary government form, and provided that the vessel was to be delivered at New York, and—

"to be employed in carrying lawful merchandise, including petroleum or its products in cases, between safe ports in the United States and the Mediterranean, not east of the west coast of Italy, charterers' option trading to safe French Atlantic ports not north of Brest and safe South American ports not south of the river Plate."

The charter party contained, among others, the following provisions (I quote here, to illustrate, from the charter party of the Van der Duyn):

"[Owners]:

"1. Shall provide and pay for all provisions, wages and consular shipping and discharging fees of captain, officers, engineers, firemen and crew; shall pay for the insurance of the vessel, except as noted in addenda; also for all engine room and deck stores, and maintain her in a thoroughly efficient state in hull and machinery for and during the services, guaranteeing to maintain the boilers in a condition to bear a working pressure of at least within 20 pounds of what is allowed by Lloyds or Veritas (and the pressure to be carried continuously at sea) during the whole term of this charter.

"2. In default of payment of hire, the owner[s] shall have the faculty of withdrawing the said steamer from the service of the charterers without prejudice to any claim they, the owner[s] may have on the charterers in pursuance of this charter."

"26. The act of God, perils of the sea, fire, barratry, of master or crew, enemies, pirates, thieves, arrests and restraints of rulers, princes and people, collisions, stranding or other accidents of navigation excepted, even when occasioned by negligence, default or errors of judgment of pilots, masters, mariners, or other servants of the shipowner[s]. Ship not answerable for losses through explosion, bursting of boilers, breakage of shafts or any latent defect

in the machinery or hull not resulting from want of due diligence by owner[s] of ship, or any of them, or by ship's husband or manager."

"[Charterers]:

"28. Shall pay and provide for all the coals, port charges, pilotages, agencies and commissions, and stevedoring charges.

"29. Shall pay for the use of said vessel $25,000, twenty-five thousand and $^{00}/_{100}$ dollars, U. S. currency, per calendar month, commencing from the time of delivery and at and after the same rates for any part of a month, hire to continue from the time specified for terminating the charter until her delivery to owner[s] (unless lost) at a port in the United States. Payment of said hire to be made in cash in New York monthly in advance for the first month half monthly thereafter."

"General Conditions.

"40. The act of God, the enemies, fire, restraints of princes, rulers and people and all other dangers and accidents of the seas, rivers, machinery, boilers and steam navigation throughout this charter party always excepted."

Each steamer was delivered to the respondents at New York pursuant to her subcharter. The first voyage of the Van der Duyn was with a cargo of frozen meat from New York to Genoa, which was delivered to the Italian military authorities. The libelant was informed by the respondents that this meat was not shipped or intended for military purposes, but was for consumption by the civilian population. Objections made to carrying this cargo both by the Dutch consul and the master and crew were only obviated by these untruthful statements. The second voyage to Genoa was from Montevideo with a similar cargo of meat, which was delivered to the Italian army in a similar way. On this occasion respondents assured the libelant that the beef was intended for the Italian civilian population. Before leaving Montevideo on this voyage, threats were made to the master and crew by the German ambassador and the Austrian consul at Montevideo that the vessel would be destroyed by submarines because she carried contraband, and the master and crew were only persuaded to sail by representations by the respondents that the cargo was intended for use by civilians. The vessel and the lives of those on her were actually in jeopardy by reason of carrying the contraband goods. The vessel was discharged on September 23, 1915, at Genoa, and the master was then ordered by respondents to clear her and sail to Montevideo. He refused to sail, however, on the ground that the previous carriage of contraband goods had subjected the vessel to risk of destruction by war ships, torpedoes, and mines, and that a subsequent voyage from Montevideo to Italy with meat would involve the same risk.

Between this time and October 19th the government of Holland ordered the Dutch consul at Genoa not to permit the crew to sign "for any voyage while the vessel was under charter to the respondents or libelant," and she was thus prevented from sailing. After negotiations with the Dutch government through the State Department of the United States, during which the libelant endeavored to have the order of the Dutch consul rescinded, the Dutch government decreed that the vessel should not during the present war trade to any port of any country involved or thereafter becoming involved as a belligerent in the war, and that she should not leave Genoa until

the owners and the libelant had signed an agreement to that effect. The owners required of the libelant a payment of $1,000 per month additional charter hire for two years and a lump sum of $1,750 as a condition of entering into the agreement with the Dutch government, and these payments the libelant made. The vessel was then released; the libelant notified the respondents thereof and requested sailing orders. The latter refused to give such orders, and stated that they had no further use for the vessel. On December 18th the vessel sailed for New York, and on January 12, 1916, entered upon a new subcharter under which she is now employed. Libelant was obliged to incur expenses in sending representatives to Holland and Genoa to procure the release of the vessel, and in the employment of agents and attorneys in various places and in other matters, in excess of $17,500.

The steamship Van Hogendorp was only engaged in one voyage from New York to Montevideo, and thence with frozen meat to Genoa, which was delivered to the Italian army, after representations by the respondents that the cargo was only for the civilian population of Italy. Otherwise, similar things occurred as in case of the Van der Duyn; that is to say, the master refused to return to Montevideo and the Dutch consul took the same steps as in case of the Van der Duyn, after which this vessel was similarly freed with permission to engage in a limited trade and repudiated by the respondents.

Hire was paid to October 26, 1915, in the case of the Van der Duyn and to October 19th in the case of the Van Hogendorp. On December 14th the Dutch government allowed each vessel to sail from Genoa. The libel seeks to recover full hire between the date up to which the last payments were made and the time when the new subcharters became effective, difference in hire between the old and the new subcharters to the end of the original terms, cost of coal supplied for last voyages from Genoa to New York, port charges while at Genoa, cash required by owners as condition of assurance to Dutch government, additional charter hire required by owners for period of two years, as well as legal and other expenses incurred in freeing the vessels from the embargo by the Dutch government. The claims as set forth in the libel aggregate $275,797.29.

The respondents have excepted to the libel on the ground that it states no cause of action. This, like a demurrer, admits all the foregoing allegations of fact in the libel. The respondents contend that they had a perfect right under the law to carry contraband, and that the refusal of the vessels to sail because of the exercise by the respondents of their lawful right to carry the contraband was a breach of the charter party by the libelant, which bars recovery upon it.

The libelant insists that the vessels could only carry "lawful merchandise," that this term did not include, but excluded, contraband goods, and that for that reason, not only hire unpaid prior to the new subcharters, but all losses and damages, are recoverable. Libelant also insists that, even if contraband goods could be carried under the charter, the situation confronting the masters of these vessels constituted such a peril as justified them in protecting their ships and

refusing to sail. Libelant further says that restraint of princes occurred by reason of the existing circumstances, that the actual embargo and subsequent limited permission to trade granted by the Dutch government also constituted a further restraint of princes, excepted by the charter parties, and that during such restraint charter hire was payable under the law. The libelant, therefore, insists that loss of charter hire and coal and port charges are in any event due, even though the other expenses occasioned by the carriage of contraband may not be recoverable.

There are but few cases where the term "lawful merchandise," or similar language, has been construed by the courts. In the old case of Seton, Maitland & Co. v. Low, 1 Johns. Cas. 1, the New York Supreme Court held that "lawful merchandise" in a marine insurance policy included contraband goods. Chancellor Kent there said:

"Two questions were raised, on the argument in this case: (1) Whether the contraband goods were lawful, within the meaning of the policy. (2) If lawful, whether the assured were bound to disclose to the defendant the fact that part of the cargo was contraband of war.

"On the first point, I am of opinion that the contraband goods were lawful goods, and that whatever is not prohibited to be exported, by the positive law of the country, is lawful. It may be said that the law of nations is part of the municipal law of the land, and that by that law (and which, so far as it concerns the present question, is expressly incorporated into our treaty of commerce with Great Britain) contraband trade is prohibited to neutrals, and, consequently, unlawful. This reasoning is not destitute of force, but the fact is that the law of nations does not declare the trade to be unlawful. It only authorizes the seizure of the contraband articles by the belligerent powers; and this it does from necessity. A neutral nation has nothing to do with the war, and is under no moral obligation to abandon or abridge its trade; and yet, at the same time, from the law of necessity, as Vattel observes, the powers at war have a right to seize and confiscate the contraband goods, and this they may do from the principle of self-defense. The right of the hostile power to seize, this same very moral and correct writer continues to observe, does not destroy the right of the neutral to transport. They are rights which may, at times, reciprocally clash and injure each other. But this collision is the effect of inevitable necessity, and the neutral has no just cause to complain. A trade by a neutral, in articles contraband of war, is therefore an unlawful trade, though a trade, from necessity, subject to inconvenience and loss."

This decision was followed by the same court in Skidmore v. Desdoity, 2 Johns. Cas. 77, and Juhel v. Rhinelander, 2 Johns. Cas. 120, and the last case was affirmed on appeal by the Court for the Correction of Errors in 2 Johns. Cas. 487. A somewhat similar doctrine was enunciated by Lord Ellenborough in the old case of Barker v. Blakes, 9 East, 283, where it was held that a policy of insurance was not violated by the carriage of contraband cargo. He said:

"The voyage and commerce, therefore, in the course of which the vessel carrying the goods insured was in this case engaged, not being either of a hostile description, nor in any other way expressly or impliedly forbidden by the law or policy of this country, the general objection to the plaintiff's recovering at all under this policy of assurance falls to the ground."

See, also, North. Pac. Ry. v. American Trading Co., 195 U. S. 465, 25 Sup. Ct. 84, 49 L. Ed. 269.

Apparently the opinions of the courts on the subject not only treat contraband as lawful cargo, but also as coming within the description of the term "lawful merchandise." It is to be borne in mind, also, that much of the carrying trade with Europe during the present war has been in contraband goods, and if what is in fact lawful merchandise under our laws was to be forbidden by the contracts under consideration it would have been an easy matter to exclude contraband in express terms, as was done by the language of the charter party in the recent case of F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co. [1915] L. R. 3 K. B. 668, instead of leaving the matter to a doubtful expression, which had been held to include contraband in the only decisions where the question was squarely up for adjudication. I do not think the fact that petroleum was mentioned in the charters is significant, though that was doubtless contraband, nor do I regard the payment of insurance for war risks by the respondents important. The provision as to petroleum was apparently inserted because it might not be regarded as "lawful merchandise" on account of the possible danger to other cargo occasioned by its presence, and not because of its contraband character. Nor is the argument as to the insurance of war risks more persuasive, for such insurance was most important, as well as common, when hazards to cargoes of all descriptions from floating mines and zealous submarine commanders were so great. The arguments as to these provisions of the charter party have been sufficiently answered by the libelant, but the latter has not answered what appears to me the conclusive argument, that contraband goods were lawful goods and could be properly carried, subject to risk of capture, if there had been no provision as to "lawful merchandise." How merchandise which was under our laws already lawful could be rendered unlawful by providing in the charter party for the carriage of "lawful merchandise," I am unable to perceive.

There is a dictum in the old case of Weston v. Minot, 3 Woodb. & M. 437, Fed. Cas. No. 17,453, and in Boyd v. Moses, 7 Wall. 316, 19 L. Ed. 192, to the effect that contraband goods are not lawful merchandise, but in the first case the remark of the court had no bearing on the issues involved, and the reasons for the opinion expressed were not given. The second case merely quoted the dictum of the Circuit Justice who delivered the opinion in the first. In each case the question involved was whether cargo which was injurious from its intrinsic nature to other cargo violated the charter party, and had nothing to do with contraband.

The Styria, 101 Fed. 728, 41 C. C. A. 639, and affirmed on appeal, as to the general principle involved, in 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027, is the only case really relied on by libelant as tending to decide that contraband is not lawful merchandise. In that case the bills of lading covered "goods of all kinds dangerous or otherwise." A cargo of sulphur was loaded at Palermo for New York. The court held that the captain was justified in unloading it on the outbreak of the Spanish War, because it was contraband, and subjected the ship to capture by war vessels off the Spanish coast. The ground upon which

the decision was placed was the "restraint of princes" clause, though the court incidentally remarked that:

"The ship made no contract to carry contraband of war to the port of a belligerent, and should not be held to the obligations of a contract into which she has never entered."

This language merely means that the "restraint of princes" clause furnished an excuse for refusing to carry contraband, because there was no specific provision to carry such cargo, and the danger of seizure and destruction was an effective restraint. In other words, the "restraint of princes," and not the contraband goods which occasioned the restraint, was a sufficient excuse for refusing to carry the cargo. The court there said:

"There is no logical difference between a restraint of princes and rulers exercised by a cruiser with power to visit, search, and seize, lying two leagues off Cape Empedocle, and that exercised by a half dozen cruisers patrolling a narrow strait through which, if the voyage be made, the vessel must pass. Under such circumstances, the owner of contraband cargo (loaded, as this was, before war broke out) could with reason insist that it would be gross negligence on the part of the ship to bring his cargo forward. * * * That a blockade is within the term 'restraints of rulers and princes' has been settled for the federal courts by the decision in Olivera v. Insurance Co., 3 Wheat. 183 [4 L. Ed. 365]. That a well-founded apprehension of capture by the cruisers of a belligerent is the equivalent of an actual restraint is the doctrine of the later authorities."

See, also, The Kronprinzessin Cecilie, 228 Fed. 948; Rodoconachi v. Elliott, L. R. 9 C. P. 518; Nobel's Explosives Co. v. Jenkins, [1896] L. R. 2 Q. B. 326.

[2] The effect of the foregoing decisions is that a danger of seizure, such as is alleged by the libel, and admitted by the exceptions to it, constituted a "restraint of princes," which excused the libelant under that clause, if not at common law, from proceeding on her voyage on September 23, 1915. This was followed by an actual restraint by the Dutch government until December 18, 1915, and a partial restraint thereafter. It seems to be settled that the regular break-down clause furnishes almost the only excuse for not paying hire, except an actual frustration of the enterprise.

Judge Hough held in The Santona (C. C.) 152 Fed. 516, that a detention in quarantine for 36 hours caused no cessation of hire. The Circuit Court of Appeals of this circuit decided, in Clyde Commercial S. S. Co., Ltd., v. West India S. S. Co., 169 Fed. 275, 94 C. C. A. 551, Ward, J., writing the opinion, that a detention of about 11 days by the Texas authorities did not relieve the charterer from the payment of hire. In Admiral Shipping Co. v. Weidener Hopkins & Co. [1916] L. R. 1 K. B. 429, there was a detention by the Russian government of a month, but Bailhache, J., held that this did not cause a cessation of hire. The same result was reached in the case of Scottish Navigation Co. v. W. A. Souter & Co., [1916] L. R. 1 K. B. 675. In F. A. Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] L. R. 1 K. B. 485, the Court of Divisional Appeal held that a British vessel on time charter, which was requisitioned by the government, must still pay hire, though the charterer had no use of

her; and such was the decision in Modern Transportation Co. v. Duneric S. S. Co., [1916] L. R. 1 K. B. 726, though in that case the government only paid about half the charter hire agreed upon by the original parties.

The reasoning of these last two cases was that a requisition by the government created an assignment by operation of law of the rights of the charterer, that he would receive hire from the government, and that there was, therefore, not such a frustration of the enterprise as relieved the charterer from the payment of hire. The payment of hire is enforced in such cases because the vessel is chartered subject to the restraint of princes, but in the case at bar the libel alleges that the Dutch government issued a decree or order to the Dutch consul at Genoa not to permit the crew of said vessel "to be signed on or before him for any voyage while the said vessel was under charter to the respondents or libelant." Amended Libel, fol. 70. Thus the Dutch government refused to allow the contract between the owners and libelant to continue in operation, and only after lengthy negotiations between the libelant and the Dutch government, covering a period of about two months, did that government release the steamship and permit the consul to sign the crew, and then only upon condition that the vessel should not trade to any port of any country at war, or any European country that might thereafter become involved as a belligerent in said war.

It is urged that this action by the government, which deprived the subcharterers of the use of the ships for a substantial portion of the charter period, constituted a "frustration," and relieved the respondents from the payment of charter hire, and I agree with this contention. I am well aware of the English decisions which express doubt as to whether any "restraint of princes" can amount to a "frustration" in a time charter. Here, however, was a case where the Dutch government did not, according to the allegations of the libel, simply at one time restrain the sailing of the vessel, but decreed that it would not permit the crew to be signed *"for any voyage while the said vessel was under charter to the respondents or libelant."* This, I think, was a decision to annul completely the rights of the charterers. If the restraint had been a temporary matter pending negotiation, it might very likely be regarded as not sufficient to amount to a "frustration"; but when, under the allegations of the libel, it was coupled with a declaration that the charterers could never use the ship, and continued for about two months, I think the respondents had a right to treat the decree as amounting to a "frustration," which ended relations between them and the libelant. As was said in the case of Embiricos v. Sydney Reid & Co., [1914] L. R. 3 K. B. 45, quoting the remarks of Lord Gorell in The Savona, [1900] L. R. 3 K. B. 252: "I do not think this case can be decided by what happened afterwards."

The law in regard to this matter was laid down by Bailhache, J., in the Admiral Shipping Case, supra, at page 438, as follows:

"Before I part with this case, and to prevent any misconception in the unlikely event of this judgment being referred to on any subsequent occasion, I desire to point out that nothing that I have said has any application to or

bearing upon a case in which the chartered vessel is either lost actually or taken out of the possession and control of the owners by one of the excepted perils, so that the owners are unable to give the charterers the use of their vessel for any purpose whatever."

It is to be remembered that charter hire has apparently been paid up to the time that the Dutch government intervened. Up to that time, I think there had been no "frustration." I cannot tell definitely from the pleading what periods the claims for the various port charges actually covered. So far as these sums were paid for charges prior to the decree of the Dutch government, they are recoverable.

Northern S. S. Co. v. Earn Line, 175 Fed. 529, 99 C. C. A. 151. So far as these expenses were incurred afterwards, they are the burden of the owner. An amended libel must specify how far these items covered the period prior to the Dutch decree.

For the foregoing reasons, I hold that the exceptions to the libel must be sustained, and the libel dismissed, with the usual leave to file an amended libel within 10 days.

SHERMAN NAT. BANK OF NEW YORK v. SHUBERT THEATRICAL CO. et al.

(District Court, S. D. New York. December 5, 1916.)

No. 13,286.

1. COURTS ⟸264(2)—JURISDICTION OF FEDERAL COURTS—ANCILLARY SUIT.

A trustee in bankruptcy obtained an order enjoining a bank from paying out a deposit in which the bankrupt claimed an interest. Afterward another claimant, which was a nonresident, brought an action at law against the bank, which was a citizen of the district, to recover the deposit. Thereupon the bank filed a bill in the nature of a bill of interpleader in the same court, alleging that it claimed an interest in the fund through an assignment from the bankrupt and that there were also other claimants, who were made defendants. It asked an injunction against the prosecution of actions at law, and that the rights of the respective parties in the fund be determined. *Held*, that the effect of the bill was to draw in for a single decision the whole controversy, a part only of which was involved in the action at law, and that the bill was ancillary, and within the jurisdiction of the court, regardless of the citizenship of the other defendants.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 801; Dec. Dig. ⟸264(2).]

2. COURTS ⟸508(1)—JURISDICTION OF FEDERAL COURTS—INJUNCTION AGAINST PROCEEDINGS IN STATE COURT.

Where the jurisdiction of a federal court first attaches to the subject-matter of a suit, as in a possessory suit, Judicial Code (Act March 3, 1911, c. 231) § 265, 36 Stat. 1162 (Comp. St. 1913, § 1242) does not apply, and the court may enjoin prosecution of suits in a state court, which would interfere with the exercise of such jurisdiction.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1418; Dec. Dig. ⟸508(1).]

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3. INTERPLEADER ⟸8(2)—PERSONS ENTITLED TO INTERPLEAD—COMPLAINANT'S INTEREST IN FUND.

A bill in the nature of a bill of interpleader may be sustained, although filed by one claiming a partial interest in the fund, and although his claim is of legal cognizance, where an accounting may be required to determine complainant's interest, and there are other and conflicting claims.

[Ed. Note.—For other cases, see Interpleader, Cent. Dig. §§ 9, 11; Dec. Dig. ⟸8(2).]

In Equity. Suit by the Sherman National Bank of New York against the Shubert Theatrical Company (a New Jersey corporation), Lee Shubert, Jacob J. Shubert, the Shubert Theatrical Company (a New York corporation), Irving M. Dittenhoefer, trustee in bankruptcy of Theodore A. Liebler and George C. Tyler, copartners as Liebler & Co., and the Welden National Bank of St. Albans. On motion by complainant for injunction and to strike out the defenses pleaded by the Shubert Theatrical Company of New Jersey. Motions granted.

The bill is in the nature of a bill of interpleader, for which the plaintiff claims no original jurisdiction, but only jurisdiction ancillary to an action at law, now pending in this court, in which the defendant herein, Shubert Theatrical Company of New Jersey is plaintiff, and itself is defendant. The allegations regarding the citizenship of the various parties are most inadequate, and, in view of the presumptions against jurisdiction obtaining in this court, they must be taken as though they were as follows: The plaintiff is a citizen of New York; the Shubert Theatrical Company of New Jersey is a citizen of New Jersey; Lee Shubert and Jacob J. Shubert are citizens of New York; the Shubert Theatrical Company of New York is a citizen of New York; Irving M. Dittenhoefer, as trustee in bankruptcy of Liebler & Co., is a citizen of New York; the Welden National Bank of St. Albans, Vt., is a citizen of Vermont. In fact, no allegations of the citizenship of any of the individual defendants are alleged in the bill, but the facts probably correspond with the presumption of law.

The bill asserts that in the month of March, 1912, Liebler & Co., a firm composed of Theodore A. Liebler and George C. Tyler, were indebted to the plaintiff in the sum of $25,000, composed of three notes theretofore executed, and were indebted to the Welden National Bank of St. Albans in the sum of $15,000, composed of three notes for $5,000 each. On the 15th day of March, 1912, Liebler & Co. executed to the plaintiff and to the Welden National Bank of St. Albans, as security for the payment of these notes, a joint assignment of one-half of the interest of such firm in all its share, under a contract hereafter mentioned, in the profits of Shubert Theatrical Company of New York from the production of a play called "The Blue Bird," during the seasons of 1912–1913 and 1913–1914. Such notes were renewed from time to time, and on the 4th day of December, 1914, there were due substantial sums of money to both the plaintiff and the Welden National Bank of St. Albans. Irving M. Dittenhoefer in 1915 was chosen trustee in bankruptcy of Liebler & Co., who became bankrupt on December 4, 1914. The profits of Liebler & Co. arose from an agreement on October 17, 1910, with Shubert Theatrical Company of New York, by which it agreed to pay to Liebler & Co. one-half its own profits from its presentation of "The Blue Bird." During the month of November, 1911, the defendants Lee Shubert and Jacob J. Shubert opened an account with the plaintiff, which contained profits arising from the production of "The Blue Bird" under the agreement between them and Liebler & Co. On December 7, 1914, Dittenhoefer, the bankruptcy receiver of Liebler & Co., served on the plaintiff a certified copy of an order of this court restraining all persons from paying over any funds in which Liebler & Co. claimed interest, and demanded that plaintiff hold all such sums in its possession. The plaintiff refuses to pay to Lee Shubert, Jacob J. Shubert, or

any one else, the sums remaining in said account, and on August 2, 1915, the defendant Shubert Theatrical Company of New Jersey, whose connection with the other defendants is now shown, began the action at law in this court upon the deposit, which is mentioned at the outset, and which is still pending. The bill concludes with the allegations that Dittenhoefer, as trustee, has a claim upon the funds; that Lee Shubert and Jacob J. Shubert have the right to draw checks upon the deposit, and the plaintiff has received no release or authorization from either of them to pay the balance; that the Shubert Theatrical Company of New York claims some right to the deposit, as does the Welden National Bank of St. Albans, Vt.; that the plaintiff claims an interest in it by virtue of such assignment; that it is impossible in the action at law to obtain a judgment or decree settling the rights of all the parties hereto.

The answer of the Shubert Theatrical Company of New Jersey, after certain traverses, alleges for a first defense that on February 23, 1909, Liebler & Co. and the Shubert Theatrical Company of New York entered into an agreement, by which Liebler & Co. agreed for five years to present all their plays in theaters controlled by the Shubert Theatrical Company of New York, with certain exceptions, commencing September 1, 1909, in consideration of which Shubert Theatrical Company of New York would assume one-half the expenses of a certain operatic tour, to be undertaken by one Pietro Mascagni, under an agreement with Liebler & Co., and to share in a contract between one Bessie Abbott and Liebler & Co., under which she was to appear in an opera called "Ysobel." The statements of Liebler & Co. to Shubert Theatrical Company of New York at the time of the contract were that Bessie Abbott would appear in such opera for $1,000 a week, and that Mascagni would give his services in connection with the opera for $10,000. In the year 1910 Lee Shubert learned that these statements were intentionally false, and demanded back all the money he had advanced to Liebler & Co. for losses they claimed to have sustained on such tour, and rescinded the contract of the Shubert Theatrical Company of New York with them. Such moneys amounted to the sum of $34,665.20, and they were liable for $25,000 in addition. Yet in October, 1910, the Shubert Theatrical Company of New York promised Liebler & Co. to give them a one-half interest in the profits and losses of "The Blue Bird," on condition that Liebler & Co. should continue booking their plays at the Shubert Theater for five years. On the 10th day of May, 1911, Liebler & Co. asked the Shubert Theatrical Company to pay $25,000, the balance still due under the contract of February, 1909, but told the Shubert Theatrical Company of New York that they intended to book their plays with Klaw & Erlanger. Thereupon the Shubert Theatrical Company of New York procured the discount of the note of Liebler & Co. for $25,000 with the Hudson Trust Company, and charged the same against the interest in "The Blue Bird," but agreed that, if Liebler & Co. should carry out the agreement to book their plays, he would divide the profits of "The Blue Bird" for the season ending June. 1912, and would deduct the $25,000 borrowed from the Shubert Theatrical Company's share. In March, 1912, apparently for the second time, Liebler & Co. refused to book their plays with the Shubert Theatrical Company of New York. For a second defense, the answer alleges that an action was brought by Liebler & Co. against Lee Shubert for an account of the profits of "The Blue Bird," which action was dismissed. For a third defense, that this court is without jurisdiction.

The cause comes up on a motion by the plaintiff to enjoin the defendants from instituting any actions at law against it, and to strike out all the defenses of the answer of the Shubert Theatrical Company of New Jersey.

Rutgers Bleecker Miller and John Kirkland Clark, both of New York City, for complainant.

William Klein, of New York City, and Simon Fleischmann, of Buffalo, N. Y., for defendant Shubert Theatrical Co., of New Jersey.

James N. Rosenberg, of New York City, for defendant Dittenhoefer.

LEARNED HAND, District Judge (after stating the facts as above). [1] Dittenhoefer, who has procured an injunction against the payment of the deposit, is a citizen of New York, and so is the plaintiff. Disregarding for the time being any questions of the equity of the bill, this situation, therefore, raises the question of the constitutional jurisdiction of this court. That the bill is, from the standpoint of equity, an original bill, must of course be admitted, but that does not determine its jurisdictional status, which may none the less be ancillary. Minnesota Co. v. St. Paul Co., 2 Wall. 609, 633, 17 L. Ed. 886. It is true that most cases of ancillary jurisdiction arise when some property has come into the custody of this court, or at least when some suit is pending in which it may assume possession at any time. Wabash R. R. Co. v. Adelbert College, 208 U. S. 54, 28 Sup. Ct. 182, 52 L. Ed. 379. Such, indeed, is the explanation of cases like Freeman v. Howe, 24 How. 450, 16 L. Ed. 749, Krippendorf v. Hyde, 110 U. S. 276, 4 Sup. Ct. 27, 28 L. Ed. 145, and Pacific R. R. v. Mo. Pac. Ry., 111 U. S. 505, 4 Sup. Ct. 583, 28 L. Ed. 498. It is in my judgment the explanation even of Dewey v. West Fairmont Gas Coal Co., 123 U. S. 329, 8 Sup. Ct. 148, 31 L. Ed. 179, where the bill lay in aid of execution out of this court, the power to exercise possession through its marshal being the equivalent of possession itself. None of these cases helps the plaintiff, unless personal jurisdiction over the obligor alone brings "property" into court, even though the true obligee may not be also before it, a possibility upon which the very equity of the bill depends. It is true that in bankruptcy it has been decided that personal jurisdiction over the obligor puts the bankrupt's "property" into court. In re San Antonio Land & Irrigation Co. (D. C.) 228 Fed. 990; In re Berthoud (D. C.) 231 Fed. 529. And if that rule be of general application, then there is "property" in court here. If so, it would seem to follow that, under section 57 of the Judicial Code, this bill would lie against nonresident obligees, which seems to me a strong position.

I do not mean to rest quite upon that theory, for the question here really turns upon the word "controversies," as used in section 2 of article 3 of the Constitution, as defined by section 24, subd. 1, of the Judicial Code (Comp. St. 1913, § 991 [1]). The "controversy" at least involves, not only the liability of the obligor, but whether the plaintiff is the obligee. The plaintiff, by asserting that he is the obligee, has necessarily invited a decision which must determine the identity of the obligee, at least negatively, and the complete determination of that question is all that the bill of interpleader seeks to secure, because the court will in the action decide something positive about the identity of the obligee, even were it to decide that among all possible obligees the plaintiff is not one, though it may fail to decide which is the actual, among all putative obligees. In a question of constitutional jurisdiction it should accept the complete determination of that question, as the whole of the "controversy" at stake in the action; it should not cut too fine. Suppose section 274b of the Code, as added by act March 3, 1915, c. 90, 38 Stat. 956, included the addition of codefendants in actions at law, as perhaps it does; the defendant could bring in all other putative obligees as codefendants. Yet that would be only

because the procedure had become more elastic. Now, it cannot be that the constitutional jurisdiction of this court over the "controversy" depends upon the mere form of the remedy. Such bills as these are the equivalent, originated for that very purpose, of the greater procedural freedom of equity. They merely draw in the whole controversy for a single decision which the rigidity of legal procedure does not allow. Yet the power of the court to deal with the subject-matter in both cases is necessarily conferred by the Constitution and is not formally determined.

The analogous question of personal jurisdiction has been dealt with in a harmonious way. Thus, if personal jurisdiction exist over the obligor, it will support such judgment determining the identity of the obligee as the local forms may provide. This is true of taxation. Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277, 47 L. Ed. 439; Liverpool, etc., Co. v. Orleans Assessors, 221 U. S. 346, 31 Sup. Ct. 550, 55 L. Ed. 762, L. R. A. 1915C, 903. It is true, also, to discharge the obligor by payment under garnishment proceedings. Chicago, etc., Ry. v. Sturm, 174 U. S. 710, 19 Sup. Ct. 797, 43 L. Ed. 1144; Harris v. Balk, 198 U. S. 215, 25 Sup. Ct. 625, 49 L. Ed. 1023, 3 Ann. Cas. 1084. Notice is not even necessary if the local law so provides (B. & O. R. R. v. Hostetter, 240 U. S. 620, 36 Sup. Ct. 475, 60 L. Ed. 829), because the extent of the estoppel is strictly a matter of that law (N. Y. Life Ins. Co. v. Dunlevy, 241 U. S. 518, 36 Sup. Ct. 613, 60 L. Ed. 1140). The last case turns, I think, wholly upon the condition of the Pennsylvania law, though it must be confessed that this is not certain, if all the language be considered.

These cases rest upon the principle that the power to compel the obligor to pay must include the power to protect him in his payment and the successful obligee in his proceeds. It is exactly analogous to the incidental powers of a court which has custody of a res. Having awarded possession, the court must have power to protect both him who has delivered and him who has received. In each case the effective exercise of the power itself involves as an incident its validity against others. In the case of constitutional jurisdiction over choses in action, the same principle applies as to the territorial jurisdiction over the person in cases of choses in action, and to the constitutional jurisdiction in possessory suits. The court cannot completely protect the results of its judgment at law in a case such as this, without recourse to that procedural entirety that courts have devised to that end. True, jurisdiction is given only to the District Court, but that court is the same, whether it sits in equity or at law; each side of its jurisdiction contributes to a complete judicial competency in accordance with the customary limitations of the law. It may be urged that consistently section 57 of the Judicial Code should be held to apply, but that raises a quite separate question; i. e., whether the conferred procedural machinery comprises all the instances to which the constitutional jurisdiction might extend. This case does not raise that question.

There has been only one case of such ancillary jurisdiction divorced from any possessory element, so far as I have found, and that is a decision of Mr. Justice Clifford in Stone v. Bishop, 4 Cliff. 593, Fed. Cas.

No. 13,482 (1878), a case of a true interpleader. Unfortunately the point of jurisdiction seems not to have been argued, and the authority relied on (Freeman v. Howe, supra), with deference, scarcely supported the ruling. However, it must be taken as a decision, and from a high authority in such matters, that the jurisdiction exists, because the facts required the ruling. The attempted distinction of the defendant between a true interpleader and a bill like this is irrelevant, touching the question of constitutional jurisdiction. I therefore decide that the bill will lie in point of jurisdiction.

[2] As to enjoining any suits in the state courts, the question is not free from doubt, yet I think that, if the federal jurisdiction first attach, as here, section 265 of the Judicial Code (Comp. St. 1913, § 1242) does not apply. The case is quite different if the jurisdiction of this court first arise from the bill of interpleader itself. If, however, as I have said, the jurisdiction in the interpleader be ancillary, and depend upon a more liberal interpretation of "the matter in controversy," obviously it would be absurd to hold that the very purpose of the bill might be defeated through section 265. It may be urged that the bill would lie in the state court as well, and perhaps it might; but, to say the least, the efficacy of such a bill to restrain the action at law already pending in this court is doubtful. I do not rely so much on dicta like Peck v. Jenness, 7 How. 612, 625, 12 L. Ed. 841, and Riggs v. Johnson County, 6 Wall. 166, 196, 18 L. Ed. 768, as upon the well-settled rule in possessory suits and its applicability here, if once it be assumed that the "controversy" may include the determination of the actual obligee.

[3] In point of equity I think the bill will support the usual injunction against further prosecution of the action at law. True, the plaintiff has an interest in the fund, an interest which cannot be computed, perhaps, without an account; but that is the very distinction of a bill in the nature of a bill of interpleader. Pacific, etc., Bank v. Mixter, 124 U. S. 721, 729, 8 Sup. Ct. 718, 31 L. Ed. 567; Groves v. Sentell, 153 U. S. 465, 485, 14 Sup. Ct. 898, 38 L. Ed. 785; Hayward v. McDonald, 192 Fed. 890, 113 C. C. A. 368; McNamara v. N. Y. Life Ins. Co., 114 Fed. 910, 52 C. C. A. 530. The defendant urges that such a bill will lie only when the plaintiff's claim upon the fund is itself equitable, but the meaning of this rule has been misunderstood. There is no reason why the plantiff should not have a bill in the nature of interpleader, though his partial claim be of legal cognizance, provided the plaintiff's (at law) right to a jury trial of that claim be preserved. In Aleck v. Jackson, 49 N. J. Eq. 507, 23 Atl. 760, Vice Chancellor Green entertained the bill in such case, but allowed the original action at law to proceed. In Provident Savings Life Assur. Soc. v. Loeb (C. C.) 115 Fed. 357, the plaintiff's legal interest seems to have been left for general adjudication in the suit.

In the strict case of a bill of interpleader the decree discharges the plaintiff upon his paying the fund into court; the only issue is of the right to interplead, the decree directs the defendants to interplead, and, when they had done so, takes up the issues between them. This cannot be done in a bill like this. The plaintiff has attempted to set up its interest in the deposit, and until that has been decided the amount pay-

able into court cannot be decided. If this controversy were allowed to be settled in the action, it would be settled only as between the parties thereto, and it must be settled again between the other parties. Therefore, for the present at least, the action must be enjoined. If the issues under the plaintiff's claim are legal issues, they may be sent to a jury to determine at the proper time under rule 23 (198 Fed. xxiv, 115 C. C. A. xxiv) if any party wishes. Meanwhile the parties must prepare and serve their counterclaims against each other under rule 31 (198 Fed. xxvii, 115 C. C. A. xxvii). Thus, if Dittenhoefer has any claim against either of the Shubert Theatrical Companies, he may file and serve it; and so, also, the Welden National Bank of St. Albans. If either of the Shubert Theatrical Companies has any claim against the plaintiff, Dittenhoefer, or the Welden National Bank of St. Albans, it may do the same. Similarly, if there is a contest between them as to the title to the deposit. The same rule applies to the Shuberts personally. The defendants and the plaintiff will reply under rule 31 to these counterclaims. At the end of this period, the cause may go on the calendar for trial.

The motion of the plaintiff to strike out the defenses is granted. The second defense has no conceivable relevancy to the suit; the third is a mere point of law, which I have overruled. The first defense is so confused that, after considerable effort, I have been unable to learn what the purpose of the pleader really is. Apparently he means to allege, first, that the Shubert Theatrical Company of New York has a claim in deceit against Liebler & Co., which it can set off against Liebler & Co.'s claim for damages; second, that Liebler & Co. broke the contract under which it was to receive one-half the profits of "The Blue Bird." Evidence bearing upon these two defensive pleadings is so jumbled together that no one can know what the "ultimate facts" really are. Each would be a good defense to so much of the bill as sets up the plaintiff's claim to the fund, but as they stand they violate rule 30 (198 Fed. xxvi, 115 C. C. A. xxvi).

Under rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) I may require a "further and better statement," and it is under that rule that I strike out the defense, and require the defenses to be so stated, and not the evidence upon them.

UNITED STATES v. GUGGENHEIM EXPLORATION CO.

(District Court, S. D. New York. January 4, 1917.)

No. 22.

1. INTERNAL REVENUE ⊂⊃9—EXCISE TAX—STATUTE—CONSTRUCTION.
Excise Tax Law Aug. 5, 1909, c. 6, 36 Stat. 11, must be construed in favor of taxation.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.]

2. INTERNAL REVENUE ⊂⊃9—CORPORATE EXCISE TAX—"INCOME"—"OUTGO."
Within Excise Law Aug. 5, 1909, § 38 (Comp. St. 1913, §§ 6300–6307), imposing a tax on the net income of corporations, the tax being measured

by the net income received from all sources, "Income" means the flow of capital service, and is not synonymous with receipts; a disservice is a negative service, and a flow of disservice or negative income is called "outgo."

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.

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

3. INTERNAL REVENUE ⟸28—CORPORATE EXCISE TAX—ACTION TO COLLECT—BURDEN OF PROOF.

In an action to collect a corporate excise tax on the amount received by a corporation for the sale of stock owned by it, which had been carried on its books at the value of one dollar, the burden is on the government to show that the stock was worth only one dollar.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 76–81; Dec. Dig. ⟸28.]

4. INTERNAL REVENUE ⟸9—EXCISE TAX—INCOME—SALE OF PROPERTY.

Where defendant corporation had five years before transferred to another corporation mining property which the directors of the latter appraised at $49,000,000 in return for $17,000,000 of the preferred stock and $24,000,000 of the common stock in the other corporation, and the common stock the year before had received dividends of 7 per cent. and was reported by the president to be worth par, the amount received from the sale of such stock at less than par by defendant was not taxable as part of its income for the year, though the stock had been carried on the books of the corporation at a valuation of one dollar, since the actual value, and not the book value, must be considered in determining the income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⟸9.]

Action by the United States against the Guggenheim Exploration Company to recover the excise tax. Final judgment for defendant.

H. Snowden Marshal, U. S. Dist. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for the United States.

Louis Marshall, of New York City, for defendant.

MANTON, District Judge. The defendant, a New Jersey corporation, for the purpose of acquiring, developing, and operating mines in various parts of the world and acquiring the shares of stock and other securities of corporations engaged in a similar business, owned, in 1905, a large number of mining properties and interests in such properties.

The American Smelting & Refining Company, a New Jersey corporation, was likewise interested in mining properties. Both corporations were owned by practically the same stockholders. By arrangement between the two corporations, the American Smelters' Exploration Company was organized and acquired some of the properties of the defendant and of the American Smelting Company. The object of this last corporation was for the purpose of conducting a business similar to that carried on by the defendant. As originally organized, it was to have a total authorized capital stock of $54,500,-

000, of which $22,500,000 was to be known as "Preferred Stock Series A," $7,500,000 as "Preferred Stock Series B," and $24,500,000 was to be common stock. On March 30, 1905, the defendant offered to sell to the American Smelters' Exploration Company various properties and property interests which were specified in the offer and contained in a resolution found in the minute books of the company, and also agreed to acquire and turn over to the American Smelters' Exploration Company 40 per cent. of the capital stock of the Velardena Mining & Smelting Company, which was not then the property of the defendant, the latter paying therefor $1,600,000 of the preferred stock series A, and $1,000,000 of the common stock of the American Smelters' Exploration Company which was to be received by it, and that it would turn over as much of the outstanding stock of the Velardena Mining & Smelting Company as should be practicable. It was further provided that, if it should be unable to acquire any part thereof, it would pay into the treasury of the American Smelters' Exploration Company, in lieu thereof, such portion of the $1,600,000 of preferred stock series A, and of the $1,000,000 common stock of the American Smelters' Exploration Company, as such unacquired part should bear to the whole of the 40 per cent. of such outstanding stock. The defendant also agreed to turn over to the American Smelters' Exploration Company ores, ore supplies, and other property to the extent of $800,000 and cash to the amount of $4,810,000.

The offer was made upon the condition that, immediately upon its acceptance and the conveyance, transfer, and assignment of the property and payment or provision for the payment of the money which was to be acquired by the American Smelters' Exploration Company, the latter was to issue and deliver to the defendant, its nominees or assigns, $17,000,000 of the preferred stock series A, and $24,497,000 of the common stock of the American Smelters' Exploration Company, and $3,000 in cash. The $5,500,000 of preferred stock series A, other than that which the Guggenheim Exploration Company was to receive, was to be issued only at par for cash or its equivalent, for the future uses and purposes of the American Smelters' Exploration Company. It was further provided that the American Smelting & Refining Company was to guarantee the preferred stock series A.

The American Smelters' Exploration Company, by a resolution passed by its directors, accepted this proposition providing for the issuance of the shares of stock above referred to in consideration of the conveyance and transfer and payment to be made by the defendant and upon the conditions above specified. The resolution recited that, after a very careful examination of the properties and property rights to be transferred, "it is believed that the purchase by this company of the aforesaid mines, real and personal property, and stock, is necessary for the business of this company, and the said property and property interests so deemed to be necessary are in the judgment of this board of directors of the just, fair, and reasonable value of $49,000,000."

The consideration which the American Smelters' Exploration Company was to receive was stated to be $49,000,000. In accordance with these terms of the offer and resolution referred to, the transaction was carried out in 1905; the American Smelters' Exploration Company receiving the properties to be conveyed to it, and the defendant receiving the shares of stock to which it was entitled under the terms of the contract entered into. In accordance with the terms of its offer, the defendant transferred to the owners of the 40 per cent. of the capital stock of the Velardena Mining & Smelting Company $1,600,000 of the preferred stock series A, and $1,000,000 of the common stock. This left in the hands of the defendant $15,400,000 of the preferred stock series A. The $7,500,000 of the preferred stock series B were sold by the defendant, and subsequently it repurchased from the American Smelting & Refining Company, in 1905, $2,000,000 of the preferred stock series A.

In connection with these transactions which the defendant had with the American Smelting & Refining Company, it transferred to the latter $12,251,000 of the common stock of the American Smelters' Exploration Company, retaining 112,490 shares of the common stock of the American Smelters' Exploration Company. This company subsequently changed its name to the American Smelters' Securities Company, which increased the amount of its preferred stock series B to $30,000,000 and its common stock to $30,000,000. The defendant, however, continued to hold the 112,490 shares of common stock of the American Smelters' Securities Company until January 25, 1911, when it was sold for $6,749,400 to the American Smelting & Refining Company. The common stock of the American Smelters' Securities Company was not sold on the market prior to this sale by the defendant. This common stock owned by the defendant was carried on its books at the valuation of $1.

The government now claim that the amount realized on the sale of these 112,490 shares of common stock of the American Smelters' Securities Company represents a profit upon which an excise tax of $67,471.49 should be collected. For the reason that this item of profit was not returned by the defendant in calculating its tax for the year 1911, recovery is sought under the Excise Law of August 5, 1909. Section 38 of that act provides:

"That every corporation * * * organized for profit and having a capital stock represented by shares * * * now or hereafter organized under the laws of the United States or of any state or territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business by such corporation * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources during such year. * * *" Comp. St. 1913, § 6300.

Another provision of the act provides:

"Such net income shall be ascertained by deducting from the gross amount of the income of such corporations * * * received within the year from all sources," various items, etc. Comp. St. 1913, § 6301.

[1, 2] The trend of judicial opinion has been to examine closely the phraseology of the act itself, and it must be construed in favor of taxa-

tion. Many authorities cited by counsel have been influenced by the phraseology of the particular law upon which the action in each case is founded. From these quotations of the act in question here, it is evident that the tax is to be measured by the net income from all sources received within the year. The fundamental question, an all-important one, is: Was this sale a profit income from any sources received within the year?

[3] What is "income"? The flow of capital's service is its income. A disservice is a negative service. A flow of disservice or negative income is called "outgo." The income of our capital is that which it does for us. Therefore, another essential inquiry and, indeed, the basic one here, is the determination of a question of fact, as to what was the value of the common stock at the time it was acquired by this defendant. The burden of establishing its case is upon the government. Its obligation is to show by a fair preponderance of evidence that the common stock was worth but $1. In endeavoring to sustain this burden, the plaintiff relies solely upon the alleged admission against interest on the books of the defendant of a valuation of $1 for this stock.

[4] The sacrifice which the defendant made to become a stockholder of the American Smelters' Securities Company was its payment and transfer to said company of certain properties. The benefits received are represented by the amount realized on the sale of the common stock plus the amount of the preferred stock remaining on hand. The benefits less the sacrifices would constitute the income. Therefore the ascertainment of the values of the properties conveyed by the defendant is all-important, for, at the time when the excise law went into effect, these shares of stock, whatever they were worth, constituted the capital of the corporation. The amount that was realized on them could not have been income for the year 1911 for the reason that it represented the amount realized on the conversion of capital from one form into another.

The preceding facts, as narrated here, taken largely from the minutes and books of the corporations, indicate that the common stock was worth more than $1, and that the statement of value as $1 on the books of the defendant was a mere convenience of bookkeeping. The records of the defendant and of the American Smelters' Securities Company show that the property transferred in consideration of the stock issued to the defendant was valued at $49,000,000, which represented the face value of the shares of stock issued to the defendant. The resolutions adopted by the American Smelters' Securities Company, which purchased the shares of stock, show that as a result of an expert examination of the property and property interests offered to be sold, and the advantages to be derived by the American Smelters' Securities Company by the acquisition of the property transferred, the property was worth $49,000,000. The board of directors declared in this belief by adopting the resolutions and said that "in the judgment of this board of directors it was fairly and reasonably worth $49,000,000."

The New Jersey Corporation Law (section 49) provides:

"Any corporation formed under this act may purchase mines, manufactories or other property necessary for its business, or the stock of any company or companies owning, mining, manufacturing or producing materials, or other

property necessary for its business, and issue stock to the * * * value thereof in payment therefor, and the stock so issued shall be full-paid stock and not liable to any further call, neither shall the holder thereof be liable for any further payment under any of the provisions of this act; and in the absence of actual fraud in the transaction, the judgment of the directors as to the value of the property purchased shall be conclusive." 2 Comp. St. N. J. 1910, p. 1630.

No attack is made on the good faith of the directors who so solemnly declared in the resolution referred to the value of the property in question. These facts overcome in weight the alleged admission against interest of the defendant in its books when it places the valuation of the common stock in question at $1.

In Mitchell Bros. v. Doyle (D. C.) 225 Fed. 437, the court said:

"The fact that plaintiff carried its properties upon its books at their original cost prices is neither material nor important. Mere bookkeeping entries cannot preclude the government from collecting its revenues, nor are such entries conclusive upon the taxpayer, when it is shown, as here, that they represent and indicate ancient, instead of present, actual values. The bookkeeper creates nothing; his methods, figures, and records must yield to proven and established facts."

In U. S. v. Nipissing Mines Co. (D. C.) 202 Fed. 803, Judge Lacombe said:

"The suggestion that there can be no allowance for depreciation unless such depreciation is entered in the books of the company, recorded from time to time, seems to me without force. The books may be very badly kept, kept in such a way as will in the end bring them into trouble and difficulty; but this act does not provide any penalty for bad bookkeeping."

The net income of a corporation subject to the excise tax is not to be determined by bookkeeping facts, but by real facts. An increase in the book value of the assets of a corporation by a revaluation of property does not constitute any part of the gross amount of its income received within the year, and that, on the other hand, a book charge, because of the sale of an issue of bonds at less than par, is not a part of the expenses actually paid within the year out of the income to be deducted from gross income. Baldwin Locomotive Works v. McCoach (D. C.) 215 Fed. 967.

Some further evidence of valuation is found in the annual reports of the board of directors of the defendant to its stockholders for the years ending December 31, 1908, and December 31, 1909. In the first year, it is stated that, although these shares of stock were carried on the books at $1, there was every reason to believe that they were worth at least $40 a share, which meant $4,500,000.

In the 1909 report, a statement is contained that the company was earning 7 per cent. on its common stock and it was worth par. This report was rendered within a few months after the Corporation Excise Law went into effect. After Mr. Hills of the American Smelters' Securities Company testified that the company not only earned the dividends on its preferred stock, both series, but about 11 per cent. on its common stock. This was a showing for the year 1909.

In a recent case in the Eighth Circuit (Lynch v. Turrish, 236 Fed. 653, — C. C. A. —) decided September 4, 1916, Judge Sanborn said:

"The words 'income, gains, and profits' are used in common parlance and as legal terms in contradistinction to capital, property, and capital assets. The enhanced value of the land or property of a corporation, or of the stock of a corporation, which slowly accrues through a series of years from the natural and gradual increase of the value of the timber land or other property which the corporation holds without trading, is more analogous to property, capital, or capital assets than to income, gains, or profits. It is rather a growth, an increase of the property or capital assets, than income, gains, or profits produced by the property. * * * It is so unequitable, so unjust, so discriminatory to treat such an enhanced value, accruing through many years before the enactment of an income tax law, as the income, gains, or profits of the year in which it happens subsequently to be distributed, that the following rule, which is supported by the more forcible reasons and by the great preponderance of authority, has become the established law in the federal courts. The enhanced value of property which accrues from the gradual increase in its value during a series of years prior to the effective date of an income tax law, although divided or distributed by dividend or otherwise subsequent to that date, does not become income, gains, or profits taxable under such an act. Such enhanced value, like the property of which it is an outgrowth and in which it adheres, becomes the absolute property of its legal and equitable owners before the effective date of the law, and as against such a law thereafter remains their capital assets. Gray v. Darlington, 15 Wall. 63 [21 L. Ed. 45]; Sargent Land Co. v. Von Baumbach [D. C.] 207 Fed. 423; Von Baumbach v. Sargent Land Co., 219 Fed. 31 [134 C. C. A. 649]; Gauley Mt. Coal Co. v. Hays, 230 Fed. 110 [144 C. C. A. 408]; Industrial Trust Co. v. Walsh [D. C.] 222 Fed. 437."

The word "income" is not synonymous with the word "receipts." Von Baumbach v. Sargent Land Co., 219 Fed. 31, 134 C. C. A. 649. Income, as used in the statute, must be considered in contradistinction to property and invested capital. It is manifestly the purpose of the statute to tax the net income for the year in which the assessment is made.

Applying these rules to the necessary conclusion of fact found in this case, it follows that there is no income, gain, or profit accruing to the defendant during the taxable year in question, and the government has failed to support the burden assumed in prosecuting this claim.

For the reasons assigned, there must be a judgment directed in favor of the defendant.

OLSEN v. LUCKENBACH et al. FICKETT v. SAME. TORKILSEN v. SAME.

(District Court, S. D. New York. January 14, 1916.)

1. TOWAGE ⊜15(2)—LOSS OF TOW—LIABILITY OF TUG.

A tug with two coal-laden barges in tow December 24th passed the Delaware Breakwater bound for Providence, R. I. Weather conditions were not favorable. After proceeding up the coast for about 100 miles, the wind having freshened into a gale from the northeast, with a heavy sea the master, believing that he could not weather it, turned back for the breakwater. It was then dark, and he could not afterward see the barges. The wind having shifted more to the eastward, and finding that they were drifting toward the coast, he signaled the barges to cast loose and anchor, but received no answer, and from the direction and force of the wind and the length of the lines it is probable that his signals were not heard. Later, finding the tug being driven into the breakers, to save her he cut the hawser. The barges were wrecked on

the coast, and the crews lost. *Held*, that the evidence was not sufficient to convict the master of negligence in acting as he did in the crisis which confronted him, or to render the tug liable for the loss of the seamen.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⊂⊃15(2).]

2. TOWAGE ⊂⊃11(1)—LOSS OF TOW—LIABILITY OF TUG.

A standard of prudent conduct for the handling of a tow in a storm at sea, set up after the event by one who was not present, although a navigator of experience, must be regarded with the greatest caution as a criterion of legal obligation.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 11, 14, 16, 21; Dec. Dig. ⊂⊃11(1).]

In Admiralty. Suits by Christine M. Olsen, administratrix of the estate of Olaf Olsen, deceased, by Susie M. Fickett, administrator of the estate of William B. Fickett, deceased, and by Sarah H. Torkilsen, administratrix of Hans Torkilsen, deceased, against Edgar F. Luckenbach and John W. Weber. Decree for respondents.

Charles A. Ludlow, of New York City, for libelants.

William A. Jones, Jr., of New York City (Nelson Zabriskie and Peter Carter, both of New York City, of counsel), for respondents.

AUGUSTUS N. HAND, District Judge. The Edgar F. Luckenbach had in tow the schooner coal barges A. G. Ropes and the Undaunted. These barges carried over 5,000 tons of coal. The tug drew about 17 feet of water, and the barges about 27 feet of water. The tow passed the Delaware Breakwater about 4 o'clock December 24th, bound for Providence, R. I. There is no proof that weather conditions were not satisfactory, and, indeed, it is now practically admitted by all concerned that the captain was justified in putting out with his tow at the time he did. As he proceeded up the New Jersey coast the wind freshened, and by 4 o'clock on December 25th a gale from the northeast was blowing and a large sea running. About 9 o'clock the captain decided that he could not weather the storm, and made up his mind to turn back and return to the Delaware Breakwater, which was about 100 miles to the south. He has testified that the wind was blowing so hard from the northeast that he could not turn his tug and the tow to the starboard, so he tuurned to port. The place where he turned about was off Sea Girt, N. J. The captain in his deposition said:

"I put the wheel hardaport and tried to work her around to the eastward, but couldn't work her to it. The sea was running on her starboard side; she wouldn't work head to it. I put the wheel hardastarboard, and came around on the starboard wheel, turned her in shore to the westward. After I got turned around south-southeast, sounded and had 14½ fathoms of water strong. The wind was northeast. After I got turned around I headed her out. Continued on that course on down, trying to get to the Breakwater, or run far enough to the southward out of that, or until we got better weather. After I got down probably 10 miles more, the wind backed around again east on me, and kept on breezing up all the time. Around 11 o'clock I found out I couldn't do anything with the two barges. I say it was a little after 11, around 11; and I blew signals 'Prepare to anchor,' and I went probably 15 or 20 minutes, and I blew 'Head barge let go stern barge,' and then blew

'Let go anchor.' I never received no response, and I couldn't see them, and I couldn't tell what they had done, or whether they had let go. I never saw the barges from 6 o'clock at Sea Girt. I saw the barges then, and they were all right. They had no distress signals up then whatever, and after I turned around I only saw Sea Girt possibly 15 minutes to the longest. Just a little lull came and I could see the Light; it cleared it up, and it showed pretty bright then. After I turned around and got down as far as I did, it kept breezing on and breezing on, and I found out I was going sideways faster than I was going ahead. At 12 o'clock I blew them again 'Prepare to anchor,' but got no response from them at all. It was blowing hard and the sea was running high all the time, and we got in further all the time; but we hadn't got in further than 13½ fathoms. We got that up to 1 o'clock. * * * After 1 o'clock, shortly after 1 o'clock I had the mate sound again, and he sung out 12 fathoms of water, and at 1:20 or 1:30, I believe it was, he shouted out 9 fathoms of water, and just as he shouted out 9 fathoms of water, why I saw a light ahead of me, and by the bearing of that light I knew where I was at, and I shouted out, 'Cut the hawser,' and he cut the hawser, because I knew we were in the breakers, because one breaker had gone over us already. * * * Just as he cut the hawser we ran into another breaker, and I knew we were just as near in as I dare get without risking the lives of the 17 men and the tugboat. * * * If it was blowing a mile, it was blowing 70 miles an hour, and the sea was running very high. * * *"

After the hawser was cut, the barges, with the men on them, were dashed to pieces on the New Jersey coast, and these libels are filed by the widows of three of the crew of the barges to recover damages from the owner of the tug for negligent navigation.

[1] The libelants have been unable to obtain any testimony, except from the respondents' witnesses and the entries in the log of the tug. There consequently can be and is little, if any, dispute about the facts, and the libelants have been obliged to rest their case upon criticism of the navigation of the master of the tug (as disclosed in the log) made by an expert, Capt. McGoldrick, who has had very large experience in coastwise navigation of a similiar sort, and made a most favorable impression upon me as a fair and reliable witness. The gist of the criticism of the captain of the tug is that he should have anchored the tug and the coal barges when he found he could not proceed further to the northeast; that it was exceedingly dangerous to turn in such a storm, where there was not lee room of more than 10 or 12 miles, whereas standing to in the storm was comparatively safe, in view of the extra heavy anchors carried by the coal barges. A further criticism is made of the captain of the tug because he did not anchor after he had turned, when he found that he was continually drifting eastward, and the soundings during four hours after he turned at 9 o'clock in the evening showed that he was nearing the New Jersey shore.

Perhaps I should take up the second criticism first. The captain of the tug says that he blew signals to the barges to anchor at about 11 o'clock. It is obvious from the testimony that this was a hopeless expedient, because the nearest barge was about 1,200 feet astern of the tug, and the second barge was 1,200 feet behind the first one. It is most unlikely that the sound of a steam whistle could be heard against a roaring gale that was blowing, according to the testimony, not toward, but from the direction of, the barges, at the rate of upwards of 60 miles an hour. Undoubtedly, if the tugs had heard, they would have anchored, or at least answered, and their whistles, coming from the

windward side of the tug, should have been heard by its captain. Whether or not the idea of the captain was correct that he could not hold both of them, even when anchored, and that the last barge must let go, need not be considered, for apparently, under the existing conditions, the whistle of the tug could not be heard, and he insists that the tug could not safely go back, when such a gale was blowing, to a position nearer the barges, where he could rescue the bargemen, or make his whistle heard. I cannot say that this was not so, and therefore pass over this second criticism of the captain's navigation upon the ground that, after turning, the only thing he could attempt was to keep off the shore, and, if he found that failed, endeavor to blow the barges to anchor. These things he did. If he is incorrect in saying that he was in the breakers when he cut the hawser, yet he was drifting so rapidly that the soundings had changed from 12 to 9 fathoms in half an hour. With the high wind blowing, and the barges far nearer the shore, the whole tow would soon be in the breakers, and the danger was terrible and imminent.

In regard to the first criticism of the captain's navigation, I do not feel certain that it may not be well founded. It has been pressed with earnestness and ability by the libelants' counsel, and indeed, considering how little evidence was available on his side of the case, owing to the disappearance of the entire crew of the barges, I have felt that he has made a wonderfully strong argument under all the circumstances. It is to be remembered, however, that at the time the tug turned the tow the wind was not blowing eastwardly, but northeastwardly. I do not think, under these conditions, that the libelants have established that the captain was negligent in attempting to turn his tow and go before the wind, or that the wind was at the time so directly shoreward as to make his attempt ill-advised. If he had succeeded, all would have thought him a wise navigator. He had a difficult decision to make in a crisis, and, while I may doubt the correctness of his judgment, I cannot say that, under all the circumstances, he made it negligently or improvidently. He was undoubtedly bound to be loyal to the bargemen, to bear in mind that the hawser which bound the barges to the tug was almost their only hope in that storm, which was carrying tug and tow constantly nearer to the New Jersey coast, and in general to act the part of a prudent navigator and a brave man. After reading his explanation of his conduct, I cannot feel justified in pronouncing his decision improvident and reckless, because of the opinion of an expert.

[2] In the first place, even if the facts assumed by the witness, and no others, fully represented the real events, the opinion does not carry clear conviction to my mind; and, in the second place, it is based upon hypotheses as to conditions of wind and waves, and not upon the tremendous realties of that particular storm, with which the master of the tug had to deal. It is easy for any man of experience, or indeed without experience, to criticize the conduct of another in a great crisis; but a standard of prudent conduct, set up after the event by one who was not present, must be regarded with the greatest caution as a criterion of legal obligation. No substantial relief can, I think, ever be found for the men who now risk their lives in the coasting trade upon vessels

which have no motive power aboard until Congress shall see fit to require steam or sail power on all vessels in the coasting trade, and to forbid men to be sent or to go upon the ocean in barges which have no motive power of their own, and have too great bulk and weight to be controlled in a storm by a tug and a hawser.

After careful consideration, I have reached the conclusion that the libelants have not sustained the burden of proof in establishing that the captain of the tug was negligent, and I therefore direct that the libels be dismissed.

In re SOLTMANN.

(District Court, S. D. New York. December 14, 1916.)

1. BANKRUPTCY ⟸334—CLAIMS—PROOF—SECURED CLAIM—DEFICIENCY.
Under Bankr. Act July 1, 1898, c. 541, § 57h; 30 Stat. 560 (Comp. St. 1913, § 9641), providing that the value of securities held by secured creditors shall be determined by converting them into money according to the agreement under which they were delivered to the creditors, or by the creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and that the amount of such value shall be credited upon such claims, and a dividend paid only on the unpaid balance, a creditor, whose claim was secured by mortgage which he had foreclosed in an action begun after the bankruptcy proceedings were instituted, in which the receiver was made a party with the consent of the bankruptcy court, but not the trustee, cannot prove against the bankrupt's estate the amount of deficiency judgment as such, but only the difference between the mortgage debt and the reasonable value of the property, since the judgment could not bind the trustee, who was not a party to the action.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501–507; Dec. Dig. ⟸334.]

2. BANKRUPTCY ⟸334—PROOF OF CLAIMS—SECURED CLAIM—"LITIGATION."
In Bankr. Act, § 57h, providing that the value of the security held by a creditor of a bankrupt may be ascertained by litigation, as the court may direct, the word "litigation" is a comprehensive term, meaning any appropriate action or proceeding in the courts wherein the secured creditor and the trustee may each be heard, including foreclosure and sale.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501–507; Dec. Dig. ⟸334.

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

3. BANKRUPTCY ⟸334—PROOF OF CLAIMS—SECURED CLAIM—AGREEMENT.
Knowledge and acquiescence by the trustee in bankruptcy of proceedings for the foreclosure of a mortgage given by the bankrupt, if construed as an agreement by the trustee as to the method of liquidation of the security under Bankr. Act, § 57h, is invalid, because not under the direction of the bankruptcy court, as required by that section.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 501–507; Dec. Dig. ⟸334.]

4. BANKRUPTCY ⟸336—PROOF OF CLAIMS—AMENDMENT—STATUTE.
Under Bankr. Act, § 57k, providing that claims which have been allowed in part may be reconsidered for cause, and reallowed or rejected, before the estate has been closed, and section 57n, limiting the time for proving claims, a claim by a mortgagee for the amount of a deficiency judgment rendered in the state court, which was erroneously allowed by the referee

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on the judgment alone, may be amended, so as to show the excess of the debt over the reasonable value of the property, and allowed as to such excess.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 523, 524; Dec. Dig. ⊂=336.]

In Bankruptcy. In the matter of Edward G. Soltmann, bankrupt. On review of an order of the referee allowing the claim of R. Bleecker Rathbone. Order reversed, with leave to the creditor to apply to amend his claim.

Walter B. Raymond, of New York City, for trustee.
Eugene L. Bushe, of New York City, for creditor.

MAYER, District Judge. This is the review of an order made by the referee in bankruptcy allowing the claim of one R. Bleecker Rathbone at $14,872.23. On June 30, 1915, a petition in involuntary bankruptcy was filed against Soltmann, and a receiver in bankruptcy (Charles M. Bleecker) was appointed by the District Court. On July 13, 1915, the adjudication was had. Prior to the bankruptcy, Soltmann and his wife had executed and delivered to one Seibt a mortgage on certain real property as security for Soltmann's bond, and this mortgage was later assigned to Rathbone. On August 5, 1915, Rathbone began an action in the state Supreme Court to foreclose the mortgage and contemporaneously filed the usual lis pendens. On August 11, 1915, Rathbone applied for leave to sue and to join the receiver in bankruptcy as a party defendant, and on the same day the District Court made the following order:

"Ordered, that said R. Bleecker Rathbone be and he is hereby permitted to institute and maintain an action in the Supreme Court of the state of New York, New York county, against the said Edward G. Soltmann and said Charles M. Bleecker, as such receiver in bankruptcy of the said Edward G. Soltmann, for the foreclosure of a mortgage dated July 28, 1910, made by Edward G. Soltmann and Millie L. Soltmann, his wife, to Emil Seibt, and recorded in the office of the register of the county of New York on the 29th day of July, 1910, in Section 3, Liber 203 of Mortgages, page 461, and assigned to the said R. Bleecker Rathbone by assignment dated September 21, 1910, recorded in said register's office on September 28, 1910, in Section 3, Liber 218 of Mortgages, page 18, and that R. Bleecker Rathbone have leave to serve the necessary and proper papers in said action upon said Charles M. Bleecker as such receiver," etc.

On August 16, 1915, a trustee in bankruptcy was elected. On October 28, 1915, the usual decree of foreclosure and sale was made by the state court, and on November 23, 1915, the foreclosure sale was had, resulting in a deficiency, and a deficiency judgment was entered by Rathbone against Soltmann on December 31, 1915, for $16,334.50, with interest from December 30, 1915. The trustee was never made a party to the foreclosure suit.

The claim filed by Rathbone on January 5, 1916, was for $16,334.50, with interest from December 30, 1915; Rathbone alleging:

That "the said debt exists upon a judgment for deficiency docketed in the office of the clerk of the county of New York on December 31, 1915, in an action brought in the Supreme Court, New York county, against the said Edward G. Soltmann and others, to foreclose the mortgage on real property here-

inafter mentioned. * * * That the consideration of said debt is as follows: Moneys loaned and advanced to said Edward G. Soltmann by Emil Seibt, and secured by a bond and mortgage made by the bankrupt to said Emil Seibt, * * * which mortgage was duly assigned * * * to R. Bleecker Rathbone. * * * That said mortgage was duly foreclosed by action in said court, and said judgment thereafter rendered. * * * That deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever."

[1] It will be noted that the foreclosure suit was begun after the adjudication in bankruptcy. At the time of the adjudication Rathbone was a secured creditor. If he did not wish to surrender his security, his claim could be liquidated only in the manner provided by the bankruptcy statute. Section 57h provides:

"h. The value of securities held by secured creditors shall be determined by converting the same into money according to the terms of the agreement pursuant to which such securities were delivered to such creditors or by such creditors and the trustee, by agreement, arbitration, compromise, or litigation, as the court may direct, and the amount of such value shall be credited upon such claims, and a dividend shall be paid only on the unpaid balance."

This section was construed in Hiscock v. Varick Bank of New York, 206 U. S. at page 40, 27 Sup. Ct. at page 685, 51 L. Ed. 945, where the court said:

"The court was by this subdivision empowered to direct a disposition of the pledge, or the ascertainment of its value, where the parties had failed to do so by their own agreement. It is only when the securities have not been disposed of by the creditor in accordance with his contract that the court may direct what shall be done in the premises."

Rathbone had the alternative of foreclosing the mortgage according to its terms and filing a claim for the unpaid balance, or of applying to the bankruptcy court for its direction as to the method of liquidation. Subject to the approval of the court, Rathbone and the trustee could have agreed on the value of the security or arbitrated or compromised as to such value.

[2] Failing such a disposition, the court could have ordered that the value of the mortgage should be ascertained by litigation—in this case, by foreclosure and sale—or by proof before the referee of the value of the security. The word "litigation," as used in section 57h, is a comprehensive term, meaning any appropriate action or proceeding in the courts to ascertain the value of the security, wherein the secured creditor and the trustee may each be heard. If the court was of opinion that the best and most expeditious method was to sell under foreclosure, it could order the claim liquidated in that manner. If, on the other hand, because of delay or some other reason, the court thought the preferable method would be to ascertain value by testimony before the referee in bankruptcy, it could so order.

By the failure to join the trustee, the deficiency judgment was not binding on him, and is, therefore, not proof of the amount of the unsecured claim. Of course, the parties may agree that security be sold without notice, as in Hiscock v. Varick Bank, supra; but no such agreement is shown here.

[3] It was stated on the argument that the trustee, through his attorney, knew of and acquiesced in the foreclosure suit; but such knowledge could not vary the original agreement between mortgagor and mortgagee, and, if construed as an agreement as to method of liquidation, it was without validity for lack of the court's direction, as provided in section 57h.

By the failure to obtain the court's order as to the method of liquidation, proof of the amount of the unsecured claim, by receiving in evidence only the deficiency judgment, was futile. The real question, primarily, was what was the value of the mortgage, and not what was the amount of the deficiency judgment in a suit to which the trustee was not a party.

There is some difference of opinion as to whether the value is to be ascertained as of the date of filing the petition or as of the date of adjudication. In the case of active stock market securities, the exact date is often very important; but, in a case like this, the market was probably the same in June as in July, 1915.

While the real estate law in Pennsylvania differs from that of New York, in some respects, the fact that the true inquiry is as to the real value of the property is illustrated by In re Davis, 174 Fed. 556, 98 C. C. A. 338, and In re Dix (D. C.) 176 Fed. 582. So here, for instance, the creditor can prove, among other things, what price the property sold for on November 23, 1915, if market conditions were the same as in the summer of 1915; but the trustee can also show what all the circumstances were—i. e., whether, for instance, there was competitive bidding, or the defect in title was known, and the like.

The point is that the deficiency judgment in this case proves nothing, and is no evidence of the amount of the unsecured claim.

[4] Although the claim was presented on the wrong theory, the creditor should have an opportunity of proving whatever may be the correct amount of his unsecured claim, and he may move to amend or take such other course as he may be advised. In re Salvator Brewing Co. (D. C.) 188 Fed. 522, affirmed 193 Fed. 989, 113 C. C. A. 626; Bankruptcy Act, §§ 57k, 57n.

The determination of the referee is reversed, with leave to the creditor, Rathbone, to apply to amend his claim and take such other proceedings in respect thereof as he may be advised.

Settle order on three days' notice.

NOTE.—I have read as part of the record the order made by Judge AUGUSTUS N. HAND on August 11, 1915, and the motion papers upon which it was granted. As a condition of amending the claim, the creditor should pay the actual disbursements of the proceeding thus far had before the referee. Other details, if any, can be submitted on the settlement of the order.

FEDERAL CEMENT CO. v. SHAFFER.

(District Court, E. D. Pennsylvania. December 21, 1916.)

No. 1467.

CORPORATIONS ⊂=474—BONDS—ASSIGNMENT—RIGHT TO INTEREST.

An assignment, by way of pledge of corporate bonds, which stipulated for the payment of interest in half yearly installments, but which were not accompanied by interest coupons, does not transfer to the assignee the right to interest due, but not paid, before the assignment, but only the interest then accrued, but not yet due, and the interest thereafter to accrue, notwithstanding provisions in the assignment authorizing the assignee to sell or become the absolute owner of the bonds and to collect the interest.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1854; Dec. Dig. ⊂=474.]

Interpleader by the Federal Cement Company against William B. Shaffer. Sur trial hearing on bill, answer, and proofs. Decree directed in accordance with opinion.

See, also, 235 Fed. 912, and 229 Fed. 1021, 143 C. C. A. 662.

W. A. MacEldowney, of Philadelphia, Pa., and Paul C. Hamlin, of Philadelphia, Pa., for complainant.

Smith, Paff & Laub, of Easton, Pa., for defendant.

George J. Edwards, Jr., of Philadelphia, Pa., for intervener Beck.

Henry C. Thompson, Jr., of Philadelphia, Pa., for intervener Bridgewater Estate.

DICKINSON, District Judge. The present condition of this litigation is an illustration of the confusion which always results from not squarely facing a difficulty, but seeking, as one is naturally and properly enough tempted to do, to find some way of evading it. The only real question between the parties to the transactions now under investigation may be expressed in a few words, and its discussion compressed into as small a compass. Abstractly stated, it is this: Does the transfer of a bond, which admittedly carries with it interest accruing and to accrue, also carry with it installments of interest which were past due and payable before the transfer?

The case might have been presented as involving only this question, or at least have been reduced to this. As it has been presented, however, and the record being in the condition in which it is, an analysis of the pleadings and the proofs is necessary in order that we may be sure of what the proper decree to be entered is. Starting with the beginnings of the present dispute, we find the Federal Cement Company issued a series of bonds, which were apparently secured by the stock of another company, pledged for the payment of the bonds in much the same way in which a mortgage of real estate is usually given to secure a corporate bond issue. There was the like usual promise to pay the interest in half yearly installments and the principal at maturity. The common interest coupon device was not adopted. There was a provision for registering the ownership of the bonds, and the agreement was

to pay the interest and principal when due to the registered owner. Of these bonds, 81 were registered in the name of William B. Shaffer. The consideration for the bonds had been in fact paid by Sarah A. Shaffer, the wife of William B. Shaffer, and the registration in his name was a mistake made by the officers of the cement company. The bonds should have been registered in the name of Shaffer as attorney in fact for his wife, instead of in his own name as the owner. On December 12, 1911, Shaffer filed a voluntary petition in bankruptcy, and an adjudication followed. The bonds were not returned in his schedule of assets, but were claimed by Mrs. Shaffer as her property. Proof was made of her ownership and of the mistake made in the registration, and as a result the trustee in bankruptcy was directed to and did disclaim all claim of title to the bonds, and the assets of the bankrupt estate were administered with these bonds excluded. Application was then made to the cement company to permit a transfer of the bonds to Mrs. Shaffer, the real owner. The bonds, or some of them, had before this time been pledged as collateral. The application to register the transfer was joined in by and accompanied with written waivers from the trustee in bankruptcy and the collateral holders. Why the company should have refused is not clear. The facts are attested by the responsive answer filed in this proceeding, and are uncontradicted. The owner might, of course, have tested her right to registration by appropriate proceedings, but took instead what may have seemed at the time the easier course of seeking to remove objections by assigning the bonds and having the assignee apply and having the collateral holders apply. None of these efforts were successful. Moreover, the company withheld the interest which was due on the bonds. This resulted in the bringing of an action by the registered holder against the company for the interest, and this was followed by the filing of the original bill in this case. The bill called upon the registered holder to make discovery of all claims of ownership in the bonds, to establish his own title thereto, and to refrain from pressing his suit for the interest.

The defense interposed to the action and the bill as filed seemed to be based upon the theory that the registered owner was engaged in an effort to defraud his creditors, which effort it was the right and duty of the company to frustrate. Its rights and its defense to the demand for the payment of the interest was, however, limited to the legal defense that the action against it had not been brought by a proper legal plaintiff, or the equitable defense that it was entitled to protection against a double payment. The first was ruled against it, and it made a very tardy resort to the latter by paying into court the amount of the interest in pursuance of leave granted, and by filing a supplemental bill in the nature of an interpleader with itself in the rôle of a stakeholder.

It is charged by the defendant with having in these bills made a very uncandid use of the applications for registration by presenting these several applications as if made as claims of ownership by different persons in conflict and antagonism with the ownership as registered. On the face of this showing (without the explanation given by the defendant) a strong need for protection is certainly presented. With the explanation of the defendant the charge that the company had

taken an arbitrary, dog in the manger attitude would seem to be well founded.

By the pleadings and the proofs three classes of claimants upon the fund appear: One, that of William B. Shaffer, who claims as registered owner; the second, those who claim as collateral holders of some of the bonds; the third, an attachment creditor in proceedings against Shaffer as defendant and the cement company as garnishee.

A fully responsive answer was filed to the bill and supplemental bill. By it the facts, as outlined above, are presented, and a frank avowal of all the facts bearing upon the ownership of the bonds and full discovery of all claimants thereto is made. The answer sets forth that the real ownership of the bonds was and is in Sarah A. Shaffer; that William B. Shaffer owns the interest overdue and payable; that Wilson E. Beck has an attachment claim upon the fund through proceedings against the cement company as garnishee, and that certain of the bonds had been pledged as collateral, but the pledgees had no other interest therein, and no claim to the back interest.

It is further averred in the answer, by way of cross-bill, as a basis for affirmative relief, that the cement company had not paid into court the full amount they were ordered to pay. The answer prays, by way of affirmative relief, that the cement company be required to pay the balance of what is due by them into court, and the overdue interest part of the fund be awarded to the defendant Shaffer after payment of the judgment in attachment. William Graham, surviving executor of Francis M. Bridgewater, deceased, intervened as a party claimant, as did also Wilson E. Beck, the attaching creditor.

By way of anticipation of the proofs it may be stated that the cement company notified by registered letter a number of parties of the pendency of the proceedings, and warned them to appear and defend their interests. Among those so notified was the Easton National Bank. The bank did not ask to intervene, but filed a paper, which it terms an answer, in which it asserts itself to be a collateral holder of 32 of the bonds, designating them by serial numbers, and stating them to be of the face value of $16,000.

The only claimants upon the fund at the trial were William B. Shaffer, Wilson E. Beck, and the Bridgewater Estate. Beck claimed both as an attaching creditor and as collateral holder of some of the bonds. We understand, however, that his attachment claim embraces the other, and as the answer concedes his right to the payment of his attachment claim, there is no occasion to further discuss it.

It may be necessary to give the whole basis for the Bridgewater claim, and this we will do, but premise it with this statement: Some of the interest payments which make up this fund were due and payable before the pledge of the bonds. Some, although partly accrued, fell due after, and some wholly accrued after. The right of the pledgee to the interest accruing and to accrue after the giving of the pledge is admitted. In this aspect of the case, the only question in the abstract is that first suggested, subject to whatever modification any special features of the pledge itself or special facts appearing at the

trial would bring about. This latter possibility makes it desirable to go over the proofs in detail.

To bring the question proposed back to mind, we repeat the fact that these bonds contained only the covenant of the obligor to pay the interest. This covenant was in the body of the bond. The bonds were not coupon bonds, and there was no separate covenant to pay interest, in the sense of detachable coupons, bearing a complete and separate promise to pay. There was a stipulation also, in the nature of an amendment of the pleadings, correcting an error made in the serial numbers of the bonds pledged. The correction was to give the numbers 22 to 27 and 46 to 64 and 204 to 210 and 220 to 223 (all numbers inclusive) in place of those shown by the pleadings. The assignment was made March 4, 1913. This admittedly carried the interest for four out of the seven interest installments in court, and therefore to four-sevenths of this part of the fund.

The evidence on behalf of the claimant consists of an agreement pledging the 36 bonds as collateral security for a loan, which was in legal effect an assignment. There is in it and the subsequent agreement a distinct acknowledgment of the indebtedness and the pledge and an undertaking to execute any further transfers necessary to effectuate the agreement. It was stipulated that the usual form of transfer was executed and tendered to the cement company accompanying a demand for registration on April 11, 1913.

This overlong prelude is doubtless unnecessary but it is made to disclose all possible questions which may arise. For the reason already stated, we confine ourselves to the one argued. The others, if raised, may be disposed of when the formal decree comes to be entered. We will, however, advert to one of them. The papers of record show at least a possible claim of the Easton National Bank. The bank was notified of the pendency of this proceeding and warned to present its claim. It has not formally intervened as a party, and no proofs of its claim were submitted. Some understanding should be reached as to this claim. We have no space to follow the argument on behalf of the Bridgewater Estate. We do not see that basing its claim on the authority given the pledgee to sell or to become the absolute owner of the bonds, or on the provision permitting the pledgee to collect the interest, advances the argument. The pledgee did not in fact sell, and, if he had, he would have assigned only what he had by the assignment to him. The clause relating to the collection of the interest was certainly not meant to add to the rights of the pledgee. The use of the words "accrued or to accrue" has no significance, because this agreement was not made until October, 1915, and at that time all the interest now in court was due and there was accrued interest, to which the words related, which admittedly belonged to the pledgee.

The record of the action to recover the debt and the evidence of the value of the bonds is of no help to us, and the motion to strike it out is allowed. The question, therefore, recurs of whether a flat assignment of a bond passes the past-due interest. The bonds, in addition to the written assignment, were physically delivered. If there had been detachable interest coupons still attached, it might be well

argued that title to the coupons (although past due) passed by delivery. Had the overdue coupons been detached and not delivered there would be no basis for this argument. Does the mere assignment and delivery of the bonds carry the past-due interest? The efforts of counsel have not brought to light any direct ruling of the question. We have the aid for what they may be worth of the distinction between interest, the obligation to pay which arises out of a specific contract, and interest, which is an incident of the debt, and damages by way of or as measured by a computation of interest. We have also the doctrine established of the distinction in this respect between dividends which have been declared and passed to the credit of the stockholder and dividends which have been earned but not yet declared. We have also the doctrine that an assignment carries accruing interest not yet payable. Being without the aid of any authoritative ruling or discussion, it must be determined on general principles.

The facts are here that the obligation to pay interest and to pay principal are severable and distinct, and as the payments are to be made at different times, they are thus separated. This gives a right of action for each, and such right has been upheld in this case. We have also the fact of a separation of interest from the principal by the bringing of such an action and what followed it. We have the circumstance that the text-writers who have dealt with the rights of pledgees and assignees state (although not expressly so confining them) the right to be a right to the interest thereafter payable. We have also the line of cases in which dividends on preferred stock (in the nature of interest allowances) due and passed to the credit of the stockholder, but which have not in fact been paid, would not pass by an agreement of later date. In every case of conveyance what passes is what was in legal intendment conveyed, into which actual intent sometimes enters. When the actual intent does enter, as in this instance, if it is clear it is controlling. If it is not expressed, then the legal import of the words used is to be found. Here the actual intent of the parties might have been to pass or not to pass all the interest. If this intent had been expressed in apt words, effect would have been given to what was expressed. The fact may be and doubtless was that the pledge was given without thought of the distinction now made. We are therefore driven to the legal import of the words used, and to assume this was the intent. The governing principle would appear to be that in case of the assignment of a continuing contract moneys overdue under a prior breach do not pass. Cyc. 4, p. 69, § 4. Here there had been a breach of the covenant to pay this prior interest, and the moneys thus overdue and payable did not pass by the assignment which was made after the breach.

The finding, therefore, is that no more than the interest accruing and to accrue passed with the pledge of the bonds. If the parties are agreed that the question thus discussed is the only one upon which the court is asked to pass, a decree embodying this finding will be entered, and the question of costs and other matters may be disposed of in settling the form of decree.

A form of decree in accordance herewith may be submitted.

THE NORTH AMERICA.

(District Court, E. D. New York. December 21, 1916.)

COLLISION ⊂=95(1)—TOWS CROSSING—FAILURE TO OBSERVE CROSSING RULE.

A collision in New York Bay at night between two tows on hawsers, one passing up on the left side of the channel and the other crossing from the anchorage grounds to the west, *held* due solely to the fault of the crossing tug in crossing ahead of the approaching tow without signal, or observing the starboard hand rule, and without keeping a proper lookout. The other tug, although on the wrong side of the channel, *held* not in fault, since she was seen when at a distance by the crossing tug, and her position had nothing to do with the collision, which would not have occurred if the crossing tug had navigated properly and observed the rule.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⊂=95(1).]

In Admiralty. Suit for collision by the Central Railroad of New Jersey, owner of the lighter Mechanic, against the tug North America and the scow R. R. No. 8, with the tug Interstate impleaded. Decree for libelant against the tug North America.

Foley & Martin, of New York City, for libelant.

Harrington, Bigham & Englar, of New York City, for claimant of the North America.

Park & Mattison, of New York City, for claimant of the Interstate.

CHATFIELD, District Judge. This case arose from a collision between the derrick lighter Mechanic, loaded with a cargo of structural iron, and R. R. Scow No. 8, which was in tow of the tug North America, bound for the dumping grounds outside of Sandy Hook. The tug Interstate, with the Mechanic in tow on two hawsers 45 fathoms in length, left Arlington, N. J., at about 9:20 p. m. on the 4th of March, 1915. Passing out from the Kills, they proceeded with a flood tide around the Robbins Reef light and then up New York Bay toward the Hudson river. The pilot of the Interstate took a straight course toward the lights of Cortlandt Street ferry. Consideration of the chart will show that this would carry the boats along the westerly side of the main channel in the upper bay until a point was reached opposite Governors Island. This course would also pass near the easterly side of the anchorage grounds, which lie between the channel to the Pennsylvania terminal at Greenville and the channel to the Lehigh Valley terminal at Black Tom.

The North America had proceeded to an anchorage buoy located well within the anchorage just referred to, and apparently near the black buoy east of the Oyster Islands, in order to take to sea such scows as had been loaded and moored at this stake buoy. But one barge was ready, so the North America, which had left Pier 6, East River, at 10:30 p. m., took this single scow in tow and started out over the anchorage ground to turn down into the main channel and toward the Narrows.

Some of the witnesses located the stake buoy at a point some 1,200

or 1,500 feet further to the south. This does not affect the movements of the boats before collision, but makes it difficult to determine how far the Mechanic floated after the collision. It appears that when she finally overturned and sank, the iron comprising her cargo not only penetrated into the mud of the bottom, but held the Mechanic close by. This cargo was raised, and was found on a line between Bedloes Island and the lower part of Governors Island, or over half a mile to the north of where the collision would seem to have occurred.

There is no reason to suppose that the North America, with the No. 8 in tow, drifted (while getting under way) much to the north from the stake buoy, and it must be in any event concluded that the strong tide carried the Mechanic a considerable distance before she overturned. It will therefore be of no benefit to devote thought to fixing the precise place of collision, so far as distance up or down the bay is concerned.

The important question involving the place of the accident has to do with the side lines of the channel and of the anchorage grounds upon each side. The libelant's testimony is to the effect that the Mechanic and the Interstate were about in the middle of the deep water channel. Examination of the chart, taken into account with the set of the tide, when considered from the standpoint of the courses of the Interstate and the North America, make it substantially certain that the Interstate was not to the easterly of mid-channel, if mid-channel be held to mean the deep water space between the lines of the anchorage on each side.

This libel was filed against the North America by the owners of the Mechanic, for the damage to the Mechanic and the cargo, which was subsequently lifted from the bed of the bay at considerable expense, but thereby saving a total loss. The libelant charges fault against the North America in failing to keep a lookout, using too long a hawser, in turning under a port helm, so as to pursue a course down toward the Narrows, without regard to the rights of the Interstate and her tow, and in giving no signal whistles to indicate its course. The North America has brought in by petition the Interstate, alleging that the Interstate was at fault in proceeding up the left side of the deep water channel, in failing to observe proper lookout, so as to see that the North America was proceeding with a scow upon a hawser, instead of alongside, and in attempting to go too close under the stern of the North America before looking out for the management of its own tow.

The captain of the Interstate admits that, when he first saw the North America going across his bow with masthead lights indicating a tow, he proceeded as if that tow were alongside, intending to go astern of the North America. He admits that he then (observing the scow No. 8) sheered sharply to port, and then, steadying his helm, passed the No. 8 starboard to starboard, endeavoring in the meanwhile to drag the Mechanic around to the west, so as to prevent her drifting with the flood tide into the No. 8. He testifies that it was impossible to stop because of the tide. This would indicate that the tow was close to that of the North America at the time. The captain of the Interstate went ahead upon the assumption that the North America had him upon her starboard hand when they were upon crossing courses, that the North

America was the burdened vessel, and was bound to indicate a desire to cross the Interstate's bow, if her course was such as to cause interference with the course and speed of the Interstate. He held his course and speed until he saw that the North America was not observing his rights and that collision was imminent. But he goes further, and charges that the North America actually lengthened out its hawser before making the turn from the anchorage grounds into the channel, and that in making this turn it drew the scow No. 8 upon a curve to starboard, thus pocketing the Interstate and her tow, which were being carried by the flood tide and by the momentum from the Interstate's engines into the curve thus formed.

The captain of the North America, when the Interstate first approached, was out on the upper deck aft of his pilothouse attending to the lengthening out of the hawser. He went into the pilothouse just about the time that the Interstate made the sheer to port. Both he and the man at the wheel testified that the North America turned under a port helm. The helmsman testifies that this was done to avoid collision, but under the circumstances such a turn, against the flood tide, with a towing hawser, would be a detriment rather than a help in avoiding collision with a scow which was headed across the hawser.

Two propositions stand out plainly from the testimony: First, the Interstate was proceeding up the left side of what has been held to be a narrow channel (The Geo. F. Randolph [D. C.] 200 Fed. 96; The Bee, 138 Fed. 303, 70 C. C. A. 593); but she was observed by the North America, and her presence on the wrong side of the channel had nothing to do with the collision, if the North America was keeping a proper lookout, and if the North America proceeded so as to respect the rights of a boat upon her starboard hand while upon a crossing course. The cases cited hold that the presence of a boat navigating up the wrong side of the narrow channel is sufficient ground for fixing responsibility upon that boat, if the presence of the boat was the proximate cause of the collision, and if the boat misled thereby was interfered with, so as to make dangerous or impossible the showing of proper regard for the rights of those whom it should take into account. This is the rule even if at some time the boat on the right side of the channel has the other on her starboard hand near a bend. The Victory and The Plymothian, 168 U. S. 410, 18 Sup. Ct. 149, 42 L. Ed. 519. It has been held in such cases as The Aller, 73 Fed. 875, 20 C. C. A. 79, and The Merrill C. Hart (D. C.) 162 Fed. 371, that boats have a right to proceed without embarrassment in and out from an anchorage. But this does not mean without care, lookout, and observance of rules.

It is evident that at some point the Interstate would have to pass from the left side of the channel across to the right side, and while in that position other boats would have to navigate with respect to its movements. It is no excuse for the North America to point out that the Interstate had come from Robbins Reef upon the wrong side of the channel, if that had nothing to do with the collision, and if the North America, either through failure to maintain a proper lookout or to give signals as to its movements, paid no attention to a boat upon its starboard hand and on a crossing course. The North America might

as well have decided at the time in question that it would punish the Interstate for being in the wrong place by running it down as to now excuse its own carelessness by saying that the Interstate should be blamed for violation of some rule that did not enter into the situation.

The other point which evidently stands out from the testimony is that the North America lengthened out its hawser to at least 50 fathoms before getting straightened out down the channel, and that it navigated without regard to any of the boats moving to the east or outside of the boats anchored, while proceeding to get its hawser out and while swinging around into the channel. The captain of the North America testifies that, when he ported his helm, he did not think of a collision, as the Interstate was 300 feet away.

It must be remembered that, although the Interstate assumed that the North America had a tow alongside, and hence did not turn out of its course when the North America was first sighted, nevertheless the Interstate was the privileged vessel, and had the right to maintain its course and speed, unless the North America intimated by whistle signals that it was crossing the bow of the Interstate and was intending to proceed to the starboard, so as to pass the Interstate starboard to starboard. If the North America had so indicated, and if the Interstate had accepted the signal, then the Interstate would have been at fault if it failed to keep out of the way of the North America's tow. But upon the facts at bar the North America was at fault, and the charge that the Interstate failed to maintain a proper lookout is not substantiated.

As the position of the Interstate upon the wrong side of the channel does not seem to have been the proximate cause of the collision, it follows that the libelant should have a decree against the North America, with costs, and that the petition of the North America against the Interstate should be dismissed, with costs.

SWANSON et al. v. LINGA et al.

(District Court, N. D. California, First Division. December 11, 1916.)

No. 16111.

SEAMEN ⊂⊃16—SHIPPING ⊂⊃69—WAGES—CAPTURE OF VESSEL AS PRIZE.

The master and engineer of a neutral vessel, seized as prize by a belligerent, are not entitled to wages during the time they were held in custody as witnesses by the foreign government; it not appearing that they rendered any voluntary service to the vessel during such time.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 56–65; Dec. Dig. ⊂⊃16; Shipping, Cent. Dig. §§ 201, 293–307, 312, 313, 315, 317, 318; Dec. Dig. ⊂⊃69.]

In Admiralty. Suit by Martin Swanson and L. N. Bechtel against Carlos Linga and the Crowley Launch & Tugboat Company. On exceptions to libel. Exceptions sustained.

F. R. Wall, of San Francisco, Cal., for libelants.
Denman & Arnold, of San Francisco, Cal., for libelees.

DOOLING, District Judge. The libel avers: That the libelees are the owners of the power schooner Oregon, a merchant vessel under the flag of the United States; Linga being the owner of the greater part of said vessel, and operating it up to the time of her seizure on April 23, 1916. That on June 10, 1915, at San Francisco, libelant Martin Swanson was employed by the then master as second mate to serve upon the Oregon for the period of a year, and on June 23, 1915, at Mazatlan, the libelee Linga hired said Swanson to go as master of said vessel for the unexpired portion of said time, that is to say, until June 10, 1916. That on November 22, 1915, the master, presumably Swanson, hired libelant Bechtel as chief engineer, to serve as such until June 10, 1916. That on April 23, 1916, while the vessel was on a voyage from Mazatlan to Guaymas, laden with general cargo, and on the high seas, the vessel and her cargo were seized by the British cruiser Rainbow, and taken to Victoria, British Columbia, where she arrived on May 29, 1916, and where on May 30, 1916, the vessel and her cargo were turned over to the possession of the prize court by the captain of the Rainbow, and that "on said 30th of May each of said libelants was by said captain of said Rainbow placed in the custody of the marshal of said court, and each was kept by said marshal in said custody from said 30th day of May until the 3d day of September, 1916, in order to compel each thereof to give testimony before said court. That each of said libelants gave testimony before said court, and that it was a duty owed by each of them to the owners of said vessel and cargo, and to all persons interested in said vessel, to give such testimony." That no wages have been paid libelants from said May 29th, and that there is due to each of them the sum of $391.66; this being the amount that would be due, at the monthly rate for which they had been hired, for the period intervening between May 30th, when they were put into the custody of the marshal, until September 3d, when presumably they testified before the prize court.

It does not appear from the libel whether or not the vessel was condemned. The action is therefore apparently for payment, at the rate at which they had been employed, for the time that they were held as witnesses in the custody of the marshal of the prize court. It has been frequently held that upon the capture of a neutral vessel by a belligerent it is the duty of the master to remain by the ship until a condemnation, or until all hope of recovery is gone, and that he is intrusted with authority and obligation to interpose a claim for the property before the proper tribunal, and to endeavor by all means in his power to make a just and proper defense, and that, as these are his duties, he is entitled to receive compensation for his services in performing them, such compensation to be paid by the owner of the ship in the first instance, and ultimately as a general average charge by all the parties in interest. In the instant case it does not appear that libelants remained by the ship until condemnation, or until hope

of recovery was gone. Indeed, so far as one can gather from the libel, they did not remain by the ship voluntarily at all. Their suit is for the exact period during which they were in custody of the marshal of the prize court; the averment of the libel being:

"And each was kept by said marshal in said custody from said 30th day of May until the 3d day of September, 1916, in order to compel each thereof to give testimony before said court. That each of said libelants gave testimony before said court, and that it was a duty owed by each of them to the owners of said vessel and cargo, and to all persons interested in said vessel, to give such testimony."

As it is not averred that any service was performed after September 3d, when they were discharged from the custody of the marshal, it must be assumed that their services, whatever they were, ceased on that day. So that the real cause of action is, not for any voluntary services performed for the ship or its owners, but for compensation for a period during which they were involuntarily held as witnesses by a foreign government, whose subjects were equally interested with the owners of the vessel in the result of the proceedings in the prize court. Had the libelants, in an honest endeavor to save the ship and its cargo for their owners, remained voluntarily by the ship until condemnation, or until all hope of recovery was gone, their case would fall within principles fairly well settled. But they did not do so, and apparently after their release from custody, so far, at least, as the libel discloses, they had no further interest in the proceedings. For such involuntary services performed on the constraint of the captors, and it may be for their benefit, they have no claim upon the owners. The exceptions to the libel in this respect will therefore be sustained.

It is averred, however, that libelant Swanson, while master and before the capture, had expended $96.10 of his own money as necessary disbursements for the vessel. This amount, if his averment be true, he is entitled to recover.

It is therefore ordered that the exceptions which challenge the sufficiency of the libel to state a cause of action for the period during which libelants were detained as witnesses in the custody of the prize court be sustained.

BURROUGHS BROS. MFG. CO. v. DULANEY et al.

(District Court, D. Maryland. December 26, 1916.)

UNITED STATES MARSHALS ⇐7 — STATUTE — SERVICE OF PROCESS — FEES — "WRIT."

Under Rev. St. § 829, Comp. St. 1913, § 1386, allowing the marshal for service of any warrant, attachment, summons, capias or other writ, $2 for each person on whom service is made, a marshal who served a writ of summons with a copy of the declaration on each of the defendants is not entitled to the fee of $2 for each copy of the declaration, as well as for each copy of the writ, served, since the copy of the declaration is not a writ, and the reasonable construction of the statute limits the com-

pensation to one fee for any number of papers served on the same person at the same time.

[Ed. Note.—For other cases, see United States Marshals, Cent. Dig. §§ 8, 9; Dec. Dig. ⊂⊃7.

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

At Law. Action by the Burroughs Bros. Manufacturing Company against Henry S. Dulaney and others. On objection by the plaintiff to fees charged by the marshal for service of process. Objections sustained.

Haman, Cook, Chesnut & Markell, S. Ralph Warnken, and German H. H. Emory, all of Baltimore, Md., for plaintiff.

Samuel K. Dennis, U. S. Atty., and James A. Latane, Asst. U. S. Atty., both of Baltimore, Md., for United States marshal.

ROSE, District Judge. The first paragraph of section 829 of the Revised Statutes, section 1386, Comp. St. 1913, provides that the marshal shall receive "for service of any warrant, attachment, summons, capias, or other writ, except execution, venire, or a summons or subpœna for a witness, two dollars for each person on whom service is made." In the case at bar the marshal served on each of the four defendants a writ of summons with a copy of the declaration attached. He has charged in accordance with what appears to have been the practice of the office for many years $4 for the service on each person, on the theory that the two papers, to wit, the writ of summons and the copy of the declaration, constituted each a service of a separate writ. The plaintiff objects to such a constructive separation of what it naturally considers one service. It is right, and for two reasons: First, a copy of the declaration is not a writ of any kind, and the particular provision upon which the marshal relies applies only to writs; and, second, it would in any event be a strained construction to hold that Congress intended that the marshal should charge for the number of papers, at one time in the same case delivered to one person, rather than for service upon such person at one time.

I have been referred to no authority on the question, and have been able to find none, but it seems to me to be perfectly clear that a reasonable construction of the statute limits the marshal to one fee of $2 for one service at one time in one cause on one person, no matter how many papers, copies, orders to show cause, etc., may be served by him on that one individual at the one time, and in the one cause.

BAILEY v. LISLE MFG. CO.

(Circuit Court of Appeals, Eighth Circuit. November 6, 1916.)

No. 4609.

1. REFORMATION OF INSTRUMENTS ⊜45(2)—MUTUAL MISTAKE—SUFFICIENCY OF PROOF.

Evidence considered, and *held* insufficient to entitle a corporation to reformation, on the ground of mutual mistake, of a written contract, which was executed after having been read and fully considered at a directors' meeting, and where the other party denied any mistake, and was supported by the circumstances and probabilities of the case.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 158, 184–188, 190; Dec. Dig. ⊜45(2).]

2. REFORMATION OF INSTRUMENTS ⊜43, 45(2)—ACTIONS—BURDEN AND MEASURE OF PROOF.

In a suit to reform a written contract for mutual mistake, or for mistake on one side and fraud, deceit, or inequitable conduct on the other, the burden of proof rests on complainant, and nothing less than evidence that is plain and convincing beyond reasonable controversy is sufficient.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 154, 158, 184–188, 190; Dec. Dig. ⊜43, 45(2).]

3. REFORMATION OF INSTRUMENTS ⊜19(1)—RIGHT TO RELIEF—NEGLIGENCE AS DEFENSE.

It is negligence and clear failure to exercise ordinary care for intelligent business men, holding in their hands and reading a proposed written contract, which clearly states their agreement, to rely on any statement or assent made by the opposite party regarding its terms or obligations, rather than upon the written terms themselves, and they are not entitled to invoke the aid of a court of equity to alter the contract after its execution.

[Ed. Note.—For other cases, see Reformation of Instruments, Cent. Dig. §§ 74–78; Dec. Dig. ⊜19(1).]

4. ESTOPPEL ⊜90(2)—EQUITABLE ESTOPPEL—STATEMENTS AS TO TERMS OF UNEXECUTED CONTRACT.

A party to a proposed written contract, which has not been executed, by assenting to or acquiescence in misstatements by the other party as to its terms, is not estopped to rely upon and enforce the actual terms of the agreement as subsequently executed.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. § 244; Dec. Dig. ⊜90(2).]

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

Suit in equity by the Lisle Manufacturing Company against E. R. Bailey. Decree for complainant, and defendant appeals. Reversed.

John G. Park, of Kansas City, Mo. (McVey & Freet, of Kansas City, Mo., on the brief), for appellant.

Howard J. Clark, of Des Moines, Iowa (Orr & Turner, of Clarinda, Iowa, and Clark, Byers & Hutchinson, of Des Moines, Iowa, on the brief), for appellee.

Before SANBORN, Circuit Judge, and TRIEBER and VAN VALKENBURGH, District Judges.

SANBORN, Circuit Judge. E. R. Bailey, the defendant below, appeals from a decree which reforms and modifies the written contract of June 4, 1907, between the Lisle Manufacturing Company, a corporation, and himself, so as to deprive him of thousands of dollars, commissions which, according to the terms of the agreement, he had earned as the general sales agent of that company. As such agent he had made a sale of 15,000 cream separators to the William Galloway Company for $30.80 each, upon which he was to receive settlement and payment under the third paragraph of the contract, which provided that as commission or compensation as general sales agent he should "receive that part of the amount the company received from the sale of separators as is in excess of fifty (50) per cent. of retail list price on all separators he may sell or cause to be sold to the trade or others who may desire to purchase." The Lisle Company appealed to the court to modify this clause of the contract on the ground of mutual mistake, and the court by its decree so modified it that it now reads that Bailey shall "receive that part of the amount the company receives from the sale of separators as is in excess of fifty per cent. (50%) of retail list price on all separators he may sell or cause to be sold to the retail trade," thereby depriving Mr. Bailey of this commission which the Lisle Company by its written agreement contracted to pay him on the 15,000 separators he sold to the Galloway Company and on all other separators sold to the wholesale trade, or to any others than those engaged in the retail trade. Bailey insists that the evidence was insufficient to sustain the finding of a mutual mistake, and this claim has rendered it necessary to make a patient and thorough examination of the record.

[1] This record conclusively establishes these facts: In 1904 and 1905 Bailey was inventing improvements in cream separators, and had completed a model of a separator in the fall of 1905, which he exhibited to and tested in the presence of C. A. Lisle, the president, and William Orr, one of the directors, of the Powers Manufacturing Company, a corporation, and on November 7, 1905, that company made a written contract with Bailey whereby it agreed to pay him "that part of the amount they receive which is in excess of fifty per cent. of the list price as a commission on all machines (cream separators) that he may sell, or cause to be sold, to the trade or to others who may desire to purchase." At that time the Powers Company was without machinery suitable to make separators, and it proceeded to procure and operate such machinery, and changed its name to Lisle Manufacturing Company. The first separator it made was delivered to a purchaser on June 16, 1906. The separator first made was called the Monarch; that made pursuant to the Galloway contracts was called the Galloway separator. On June 5, 1906, Bailey had completed his improvements in cream separators, and had obtained a patent, No. 795,424, therefor. Thereupon the Lisle Company made a contract with him exclusively to make and sell his patented separator, and to pay him "a royalty of five (5) per cent. on actual amount received on each sale of all cream separators manufactured and sold under this contract." In the fall of 1906 Bailey sold about 6,000 separators for the Lisle Company to the

William Galloway Company for $36 each, and on November 17, 1906, the Lisle Company made a written contract with the Galloway Company to make and deliver these separators pursuant to that sale. On May 20, 1907, Bailey sold to the Galloway Company 15,000 cream separators for the Lisle Company at the price of $30.80 each, made a written agreement with the Galloway Company as sales agent of the Lisle Company for the sale and delivery of these separators, and obtained the promissory notes of that company for $12,000 in part payment of the purchase price, and delivered them to the Lisle Company. On June 4, 1907, the Lisle Company made the contract with Bailey which is the subject of this controversy, and which was modified by the court. The first article of that agreement provided that the commission contract of November 7, 1905, and the royalty contract of June 5, 1906, were abrogated and that the agreement of June 4, 1907, should take the place thereof as to all separators manufactured during its life, including those to be made under the Galloway contract for the 15,000 separators. The second paragraph provided that, in consideration of services rendered to the Lisle Company as general sales agent and for the privilege of manufacturing separators under his patents, the Lisle Company would pay him $1 for each separator made and sold by it and that part of 10 per cent. of the annual profit realized by it in excess of $1 upon each separator sold. The third paragraph, which the court modified, provided that:

"The said Bailey is to act on a commission as the general sales agent for the company for the sale of separators, * * * and as commission or compensation he is to receive that part of the amount the company received from the sale of separators as is in excess of fifty per cent. (50%) of retail list price on all separators he may sell or cause to be sold to the trade or to others who may desire to purchase."

The provisions of this contract of June 4, 1907, regarding the royalty or amount agreed to be paid "for the privilege of manufacturing cream separators under patents," it will be seen, differs from the provision of the royalty contract of June 5, 1906, whose place it took, in this: That under the contract of June 5, 1906, he was to receive 5 per cent. of the amount of the sales, while under the contract of June 4, 1907, he was to receive $1 on each separator sold, and the excess of 10 per cent. of the net profits over that amount. But the provision of the contract of June 4, 1907, regarding Bailey's service as general sales agent and the commission the company was to pay him therefor, is in effect the same as that in the commission contract of November 7, 1905, whose place the contract of June 4, 1907, took. During a few days preceding June 4, 1907, C. A. Lisle, the president of the Lisle Company, Edwin Lisle, his son, the secretary of the company, and William Orr, one of the directors of the company, an attorney at law, who sometimes acted as the company's attorney, had been objecting to the payment of the royalty of 5 per cent. on the sales of the 15,000 separators, and negotiating with Bailey to make the contract of June 4, 1907, in the place of the two preceding contracts, and they had finally agreed with him that, instead of the 5 per cent. on the sales owing him under the royalty contract, he should receive $1 for each of the 15,000 sepa-

rators sold and the excess of 10 per cent. of the profits over that amount. After this agreement had been reached, a meeting of the directors of the Lisle Company was called for June 4, 1907. There were present in the forenoon of that day at the meeting of the directors C. A. Lisle, Edwin Lisle, Orr, Standage, Ferris, Ganiard, and Bailey, and Vice President Woolson. The contract of June 4th had been prepared and was in the hands of the company. C. A. Lisle read it aloud to the gentlemen present, paragraph by paragraph, commented upon it, all had an opportunity to read it, there was a discussion of some of its terms for an hour or two, and then an adjournment until the afternoon, to enable Mr. Woolson, the vice president, who said he did not understand it, to read and study it. At the meeting in the afternoon a resolution was passed by the board, without further discussion or objection, which authorized and directed the proper officers of the company to execute the contract which had been read in the morning, and they did so. After this agreement and the second Galloway contract were made, the Lisle Company made and sold few more Monarch separators, and devoted itself chiefly to the manufacture and delivery under the Galloway contract of a separator approved by that company and called the Galloway separator.

The Lisle Company paid Bailey $1 on each of these separators, but it never paid him any of the excess of the amount of the sales over 50 per cent. of the retail list price which it received for them, or any of the excess of 10 per cent. of its net profits over the amount of $1 per separator, and in 1912 he brought an action to recover these amounts. As by the terms of the contract the company was clearly liable to pay them, and it could not defend the action at law on the ground that it was not bound to do so by that contract, it brought this suit to so modify the contract on the ground of mutual mistake as to relieve it from liability on account of the sales of its separators to the Galloway Company, and to other wholesale dealers, which constituted the great bulk of its sales. The action at law awaits the result of this suit. The facts thus far stated are either undisputed or conclusively established.

The company claimed that before the contract of June 4, 1907, was made Bailey agreed with C. A. Lisle, Edwin Lisle, and Orr that by that contract he would waive his commission of the amount of the sales in excess of 50 per cent. of the retail list price of the 15,000 separators sold to the Galloway Company, and to other wholesale dealers; that C. A. Lisle stated to the directors at their meeting on the morning of June 4, 1907, in the presence of Bailey, that such was the effect of the contract of that date; that Bailey then assented to that statement; and that by mutual mistake no provision was written into the contract of June 4, 1907, to that effect. Bailey denied all this, and the testimony regarding it is conflicting. The contract of November 7, 1905, for the excess of the amount of the sales over 50 per cent. of the retail list price was a contract for a commission, and this excess will be called henceforth the commission. The contract of June 5, 1906, for the 5 per cent. of the amount of the sales was a contract for a royalty, and that 5 per cent., and its subsequent modification to $1 per separator and the excess over that amount of 10 per cent. of the profits, will be

called the royalty. The question was: Did Bailey and the company mutually agree that the contract of June 4, 1907, should provide that he should not have this commission on the 15,000 separators he sold to the Galloway Company, and was this provision omitted from the contract by a mutual mistake of the parties? Orr, the treasurer of the company, testified that when the first Galloway contract for the 6,000 separators was presented to the board of directors in November, 1906, he said in the presence of Bailey that the company could not afford to pay any commission on that sale, and "the matter was discussed there, and it was stated that there would be no commission on that sale." On cross-examination he testified:

"I think nothing was said at the meeting in November, 1906, concerning the Bailey contract. It was a directors' meeting, related to accepting the Galloway contract. It was mentioned there that Mr. Bailey was only to get the 5 per cent. on the 6,000 contract, but his contract was not discussed. There was no contract discussed at all with Mr. Bailey at this time, and nothing presented in writing aside from the Galloway proposition for 6,000 machines."

Mr. Bailey testified on this subject:

"When the first Galloway contract was brought back in November, 1906, I do not know that my compensation was taken up in a special way; nothing was said outside the contract that was then in force."

The foregoing is the only evidence on this specific issue. At that time, November, 1906, there was a written contract of November 7, 1905, between the company and Bailey that he should act as general sales agent of the company, and that he should receive his commission, and he had made the sale of the 6,000 separators under that contract. There is nothing in this testimony to establish the fact that Bailey made any agreement to modify that contract, or that the company gave, or promised to give, him any consideration for such an agreement of modification. The evidence is clearly insufficient to abrogate or modify the written contract of November 7, 1905, and when, in June, 1907, the parties came to the negotiations for the contract of June 4th in that year, the Lisle Company stood bound under the contract of November 7, 1905, to pay him his commission, and under its contract of June 5, 1906, to pay him his royalty, on the 15,000 separators which in May, 1907, he had contracted to sell for it to the Galloway Company, if the Lisle Company accepted that contract.

In the negotiations for the contract of June 4, 1907, all the witnesses agree that there were propositions and suggestions of different amounts of royalty, and repeated and prolonged discussions as to the amount of royalty, that the company should agree to pay, but no such suggestions of amounts, and no discussion of the amount of the commission, that the company should agree to pay. C. A. Lisle testified that, when Bailey brought the second Galloway contract, it provided for a reduction of the existing selling price of the separators from $36 to $30.80, and that the company objected "to paying 5 per cent., and the matter was discussed pro and con for several days"; that in the discussion he offered 10 per cent. of the profits, and Bailey rejected the offer, and demanded that he have $1 on each separator; that, of course, Mr. Lisle wanted less than $1; that he told Bailey that he would give no more

than $1, and they finally agreed on $1 on each separator and the excess of 10 per cent. of the profits over that amount. He testified that this agreement related to the 15,000 separators sold to Galloway only, and that the royalty and the commission on the Monarch separators were to remain as they had been in the past. Edwin Lisle testified that he was present at the final agreement between C. A. Lisle and Bailey; that they were talking; that he came up to them, and as he came his father, C. A. Lisle, said, "I was just telling Mr. Bailey that we cannot accept that Galloway contract on the five per cent. basis;" that Bailey replied he was sure they would make lots of money by taking it on; that his father then said, "Mr. Bailey, the very best we will do is $1 apiece on the Galloway machines, and we will give you 10 per cent. of the profits gladly, and will continue to pay on the Monarch just the same as we always have;" that Bailey answered, "I will accept the dollar royalty now," or commission (I don't know what he said), "and I will expect to get the 10 per cent., provided it amounts to more than the dollar;" and C. A. Lisle said, "Well, suppose you draw up a contract along that line and submit it to the people"—the board of directors. Orr testified that one day C. A. Lisle called him into the bank, where he met Bailey and Brown; that this was some time after May 22, 1907, when they had talked of accepting the second Galloway contract; that Bailey said he ought to have the 5 per cent., and Lisle said he would never pay it; Brown said a good way to settle it was to pay him a per cent. of the net profits; Lisle said he would be willing to pay 10 per cent. of the net profits; Bailey said he could not accept that, and would think the matter over; that he could not wait until the end of the year to get some pay; that thereupon he (Orr) said a payment could be made on the 10 per cent.; that Mr. Lisle said that he would never approve of the Galloway contract with a 5 per cent. royalty clause in Mr. Bailey's contract. He did not say anything about paying Mr. Bailey anything about list price on the Galloway machines. Bailey testified to these conversations, and that the only subject of them was the reduction of his 5 per cent. royalty; that they all agreed, at the close of these conversations, to the modification of the royalty from 5 per cent. of the sales to $1 on each separator and the excess over that amount of 10 per cent. of the profits; that the terms of the contract of June 4, 1907, were agreed upon in that way before the meeting of the board on June 4, 1907, and that "the matter of releasing or cutting down his commission of all over 50 per cent. of the list price was never discussed with him, and he never made any such agreement; that the discussion did not extend outside the question of royalty."

The foregoing is all the testimony as to the agreement upon the terms of the contract in litigation before that contract was drawn and presented to the board, except that there was evidence that before these conversations and the oral agreement in which they resulted a proposed contract had been drawn, which had been changed by interlineation, which contained very different terms from those in the contract of June 4, 1907, and which had been repeatedly examined, and which was not satisfactory. Under this evidence, there is no escape from the conclusion, not only that the company failed to prove that there was any

agreement between Bailey and the company prior to the draft of the contract of June 4, 1907, and its presentation to the board on that day, that he should waive or renounce or reduce his commission on the sale of the separators under the second Galloway contract, but also that the weight of the evidence is that no such agreement was either discussed, negotiated, or made, and that the only subject upon which they had agreed was upon the reduction of the royalty. So it was that the parties came to the meeting of the board on June 4, 1907, bound by the commission contract of November 7, 1905, and the royalty contract of June 4, 1906, under an oral agreement to make a written contract and change the royalty from 5 per cent. of the amount of the sales of the 15,000 separators to $1 per separator and the excess of 10 per cent. of the net profits over that amount, and to embody the commission contract and the royalty contract thus modified in the new written agreement. The new agreement was drawn. It conformed to this oral agreement and embodied its terms. There was no mutual or other mistake in its draft.

But the company insists that the evidence of the acts of the parties on June 4, 1907, entitles it to a reformation of the contract: (1) Because they establish a mutual mistake in the execution of it; and (2) because Bailey is estopped by his acts on that day from resisting such a reformation. In the forenoon of June 4, 1907, the contract was presented to the officers and members of the board of directors of the company for examination and execution. There was more than one copy of it. C. A. Lisle, the president, had one copy from which he read aloud to the gentlemen present, and some of the other directors had the other copy, and at one time during the meeting it was in the hands of Orr, the treasurer of the company and the attorney at law. Directors C. A. Lisle, Edwin Lisle, Orr, Standage, Ferris, Ganiard, and Bailey, and Vice President Woolson were present. C. A. Lisle testified, in answer to the question, "What was said, if anything, with regard to what the compensation was of the Galloway contract for machines manufactured under those circumstances?" that he explained that it "was 10 per cent., on a 10 per cent. basis, with a $1 guaranty, on all sales made and delivered and paid for"; that Mr. Orr said that was correct, that was the way the contract was made, and that the matter of the Monarch separators was to be on the same basis as before. He testified that Mr. Bailey explained that the matter of the Monarch separators was to be on the basis of 50 per cent. of all above half of the list price. He did not testify that he told the directors that the reduced royalty was all that Bailey was to receive on the Galloway separators, or that Bailey had agreed to renounce or waive his commission contract. Edwin Lisle testified that C. A. Lisle said to the meeting that he and Bailey had agreed to combine the two contracts into one, to carry on the Monarch business as theretofore, and that Bailey had decided to accept 10 per cent. of the net profits as his compensation, his commission or royalty, on the Galloway contract, but that he must have $1 down and the balance of the 10 per cent. at the close of the year; that he then turned to Bailey, and asked him if that was correct, and he answered, "Yes." He further testified that Mr. Orr said

that, as he understood it, Bailey waived everything but his $1 and the 10 per cent., providing there was a 10 per cent., and that Bailey nodded his head, "Yes." Mr. Orr testified that Lisle proceeded to read the contract; "that he read down to the clause where it provided for the 10 per cent. royalty or profit, whatever you call that 10 per cent.;" that he explained that, and said that it applied only to the Galloway contract, or contracts of a similar nature. He then testified that he asked Mr. Lisle if that was all the compensation Mr. Bailey was to receive on the Galloway contract, and he said that it was; that he looked over towards Bailey, but Bailey did not say anything, or do anything; that he did not object to the statement. Mr. Orr also testified thus:

"When Mr. Lisle read down to the clause in the contract which states the 50 per cent. of the list price agreement, again he said that that applied to the Monarch machines, and other machines that were sold in the same way as the Monarch was sold. I don't remember that Bailey said anything in regard to that. He was there and took part. The main talk was about the 10 per cent. agreement."

He also testified:

"When I asked Mr. Lisle if that was all that Mr. Bailey was to get under the Galloway contract, that there was to be no commission for selling, he said that Mr. Bailey waived any commission on account of the large number of machines and the royalty would amount to so much."

This was all the testimony in support of the contention that at this meeting Bailey by act or silence assented or agreed to the proposition that by the contract to be made or otherwise he waived or surrendered, or would waive or surrender, his commission of that part of the amount realized from the sales of the 15,000 separators in excess of the retail list price. When this testimony is examined in view of the issue whether the alleged admission of Bailey extended over a waiver of the 50 per cent. commission on sales of the 15,000 separators, or was limited to the modification of the royalty, it is far from convincing. Bearing in mind the fact that the royalty on the Monarch and on all other machines under the contract of June 5, 1906, was 5 per cent. of the sales and the fact that the reduction of this royalty was the only reduction discussed in the negotiations for the contract, or at this meeting of the board of directors, the statement that the matter of the Monarch separators was to be on the same basis as before is perfectly consistent with the fact that the commission on the Galloway separators was to be the same as before, and that the only reduction was on the royalty upon them.

Another striking fact about this testimony is that, so far as it sustained the contention that Bailey by word or act consented or agreed that he waived or surrendered, or that the contract under discussion provided that he should surrender or waive, his commission, it rests on hearsay and the testimony of Mr. Orr, who, according to the testimony of Edwin Lisle, stated at the meeting that, as he understood the contract, Bailey waived everything but his dollar and the 10 per cent. Mr. Orr was certainly incorrect in his understanding of the contract which was then before him and under consideration, for it not only fails to evidence any waiver or sur-

render of anything except the difference between the 5 per cent. on the sales and the $1 and the 10 per cent. on the profits, but provides for the payment by the company of the very same commission, to wit, the excess of the sales above 50 per cent. of the retail price on all Bailey's sales, and in the first paragraph of it expressly provides that the settlement on the 15,000 separators shall be made under this agreement. As Mr. Orr was mistaken in his understanding of the contract, he may be in his understanding of what was said and done at the meeting. The testimony of Edwin Lisle as to the admission of Bailey is founded on what he heard said by Orr, and the testimony of Mr. Orr that, when Lisle was reading the 10 per cent. clause, he asked him if that was all that Mr. Bailey was to get under the Galloway contract, and Lisle answered that Mr. Bailey waived any commission on account of the large number of the machines and the royalty would amount to so much, is testimony of what he heard Lisle say. Lisle himself was on the stand, and he did not testify to any such statement or fact. The testimony of these witnesses to the sayings of each other about facts is not as persuasive as would be the testimony of the sayers to the facts.

But their testimony on the crucial issue in the case is shaken and contradicted by the evidence of others present. Bailey testified that there was more discussion at the meeting of the 10 per cent. clause than of any other; that the commission of 50 per cent. of the list price was not mentioned to his knowledge; that the paragraph in the contract regarding it was read to the board and remarks were called for; that he made no remarks about the contract, and as he was interested he did not vote upon it; and that the matter of relinquishing or reducing his commission of the excess of the sales over 50 per cent. of the list price on the 15,000 separators was never discussed with him, and he never agreed to do so. He testified that Mr. Woolson, the vice president, was not satisfied with the 10 per cent. clause, and the meeting adjourned to the afternoon, and Woolson took a copy of the contract. Woolson was called as a witness and examined by the company, but it asked him no questions about the acts and sayings at the meeting, and when Bailey's attorney undertook to do so the company objected, on the ground that such testimony was not cross-examination, and he did not testify upon the subject. Director Ferris was in the city during the trial, and he was not called to testify. Director Standage testified that he heard the discussion at the meeting; that Bailey wanted a profit above the 5 per cent.; that Lisle said they could not pay five per cent., but he would pay $1 for each separator; that, if it amounted to more, Bailey was to have it; that he "was to have half of the price of the machines, the purchase price, the selling price, half of the purchase price; that is my meaning of it. He wanted a 10 per cent. profit I think. Mr. Lisle said he could not pay it, and Mr. Orr said the same. Mr. Bailey argued for that amount, for $1 and 10 per cent. They said they would pay him $1; that is my memory. I understood Mr. Bailey agreed to it." Director Ganiard testified that he was present when the contract was read aloud to the members of the board by C. A.

Lisle in the forenoon of June 4, 1907; that he also read it to himself; that Mr. Orr was reading it; that he did not hear any claim advanced by any of the company's officers that Bailey was not to have commission on the Galloway business; that they wanted him to reduce the royalty, but that no claim was ever advanced to him that Bailey should not get the excess over 50 per cent. of the list price on the Galloway business; that "they considered the royalty too high. I do not think there was anything else objected to. I know there was not."

After the contract was signed, the Galloway contract was accepted, and all parties entered upon the performance of it. The Lisle Company rendered accounts monthly to Bailey, and paid him $1 on each separator sold under the Galloway contract; but it never paid him the excess of 10 per cent. of the profits, if any, nor the commission of the excess of these sales over 50 per cent. of the retail list price of the machines, and its officers testify that he never demanded nor claimed these amounts until February 19, 1912. Bailey testified that, shortly after receiving the first account of settlement under the second Galloway contract, he noticed that the company had credited him with only the $1 per machine, and he went to Edwin Lisle and asked him where the commission was for the machines; that he said there was no commission, that all they were going to pay him was the $1 per machine, and that he told Lisle that that was not according to his understanding at all; that he told Director Ganiard about it, but that after thinking it over he concluded that, as they were just starting the business, he would let the matter rest in the hope of an amicable settlement later, and he concluded to stand upon his contract. Edwin Lisle testified that no such conversation took place between him and Bailey. There was other evidence in the case, but none that can change the result which that which has been recited compels.

[2] The jurisdiction of a court of equity to reform a written contract for mutual mistake, or for mistake on one side and fraud, deceit, or inequitable conduct on the other, is indisputable. But the purpose of a written contract is to furnish a record of the terms of the agreement of the parties not easily impeached, and thereby to avoid subsequent disputes and conflicting testimony and claims regarding its terms and their meaning. To accomplish this purpose, and to prevent such disputes from annulling written agreements, two rules have been firmly established in equity: First, that the burden is on the complainant to prove the mutual mistake, or the mistake of one party and the deceit, fraud, or inequitable conduct of the other, upon which he relies for a modification or avoidance of the contract; and, second, that in view of the written record of the terms of the agreement made at the time a preponderance of the evidence is insufficient, and nothing less than evidence that is plain and convincing beyond reasonable controversy will constitute such proof as will warrant a modification or reformation of a written agreement. Simmons Creek Coal Co. v. Doran, 142 U. S. 417, 435, 12 Sup. Ct. 239, 35 L. Ed. 1063; Thallmann v. Thomas, 111 Fed. 277, 283, 49 C. C. A. 317, 323; Hearne

v. Marine Ins. Co., 87 U. S. 488, 490, 22 L. Ed. 395; Maxwell Land Grant Case, 121 U. S. 325, 381, 7 Sup. Ct. 1015, 30 L. Ed. 949; Biser v. Bauer, 205 Fed. 229, 232, 123 C. C. A. 417, 420.

The circumstances surrounding these parties when they entered upon the contract of June 4, 1907, the fact that they were then bound by contracts under which Mr. Bailey was entitled to receive upon the sales of the 15,000 separators as commission as sales agent the excess of the sales above 50 per cent., of the retail list price of the machines and a royalty of 5 per cent. of the sales, the fact that the evidence does not establish any assent or agreement on his part to make a contract to reduce his commission, although it does show that he agreed to make a contract reducing his royalty prior to the time that the contract of June 4, 1907, was drawn, the fact that there was never any discussion or debate about the reduction of the commission or the amount of it, but the provision of the contract of June 4, 1907, regarding it was in effect, the same as the provision in the contract of November 7, 1906, the improbability that there would have been a change of this commission or a relinquishment of it without debate or discussion, the fact that the testimony as to the conversation and statements in the presence of the board on June 4, 1907, when the draft of the contract was in the hands of the officers of the company and was being considered, is conflicting, and it is not probable that Mr. Bailey would have consented to a relinquishment of his commission on that day without debate or discussion or objection, have forced our minds to the conclusion that in this case the complainant fell far short of establishing by even a preponderance of the testimony, much less by evidence that is plain and convincing beyond controversy, either that there was a mutual mistake in the drafting or signing of the contract, or that the defendant Bailey by silence, act, or speech at the meeting of the board of directors of the company ever indicated his admission or assent to any statement that the royalty was all the compensation he was to receive for the sale of the 15,000 separators, that the commission clause of the contract was inapplicable to the sale of these separators, or that he relinquished his commission upon them.

[3] Even if the fact were established that Bailey assented to Lisle's or Orr's misstatement of the terms or meaning of the contract after it had been written and when it was in the hands of the company ready to be signed, where any officer of the company could, and some of them did, read it, that fact would present no sufficient ground for its reformation or modification. Conscience, good faith, and reasonable diligence condition the right to relief in equity. The contract was being read by and to the officers of the company, not to see what the company and Bailey had agreed upon, but to see whether or not it expressed their agreement. It is the duty of one, when he becomes a party to a written contract, to examine its provisions and determine for himself what obligations and what liabilities it imposes, and, if need be, to seek legal advice upon that subject. It is negligence, and clear failure to exercise ordinary care or diligence, for intelligent business men, one of whom is a lawyer, holding

in their hands and reading a written contract which clearly states their agreement, to rely on any statement or assent made by the opposite party regarding the terms or obligation of the agreement, rather than upon the written terms themselves, and "courts of equity will not relieve parties from the consequences of their own folly, or assist them when their condition is attributable to a failure to exercise ordinary care for their own protection." Great Western Mfg. Co. v. Adams, 176 Fed. 325, 327, 99 C. C. A. 615, 617; Travelers' Ins. Co. v. Henderson, 69 Fed. 762, 767, 768, 16 C. C. A. 390, 395, 396; Burk v. Johnson, 146 Fed. 209, 215, 216, 76 C. C. A. 567, 573, 574; Upton v. Tribilcock, 91 U. S. 45, 50, 23 L. Ed. 203.

[4] Nor can the complainant escape from the effect of this principle of equity on the ground that, if Bailey assented to or admitted the truth of the misstatements of the terms of the proposed contract which Lisle and Orr made, he would be estopped to rely upon and enforce the actual terms of the agreement, or would be guilty of deceit or inequitable conduct, (1) because that cause of relief was not pleaded, and (2) because such an admission or assent would not constitute actionable deceit, estoppel, or inequitable conduct. In Insurance Co. v. Mowry, 96 U. S. 544, 547 (24 L. Ed. 674), Mr. Justice Field, delivering the opinion of the Supreme Court, said:

"An estoppel cannot arise from a promise as to future action with respect to a right to be acquired upon an agreement not yet made. * * * The doctrine has no place for application when the statement relates to rights depending upon contracts yet to be made, to which the person complaining is to be a party. He has it in his power in such cases to guard in advance against any consequences of a subsequent change of intention and conduct by the person with whom he is dealing. For compliance with arrangements respecting future transactions parties must provide by stipulations in their agreements when reduced to writing."

The theory of estoppel, deceit, or inequitable conduct utterly fails here, because the complainant had the same knowledge and means of knowledge of what the agreement to be signed was that Bailey had, to wit, the written contract itself in the hands of its officers, and knowledge of the fact by the deceiver, and absence of knowledge and of the ready means of knowledge by the deceived, are indispensable to an estoppel, or to such deceit or inequity as will warrant the avoidance of a written contract. Chicago, St. P., M. & O. Ry. Co. v. Belliwith, 28 C. C. A. 358, 362, 83 Fed. 437, 441.

The decree below must be reversed, and the case must be remanded to the court below, with directions to dismiss the suit on its merits and to proceed with the trial of the action at law. And it is so ordered.

WUERPEL et al. v. COMMERCIAL GERMANIA TRUST & SAVINGS BANK.

In re SMITH BROS. CO., Limited.

(Circuit Court of Appeals, Fifth Circuit. December 15, 1916. Rehearing Denied January 10, 1917.)

No. 2903.

1. BANKRUPTCY ⟸440—APPELLATE PROCEEDINGS—MODE OF REVIEW—"CONTROVERSY ARISING IN THE BANKRUPTCY PROCEEDINGS."

Where a creditor, whose claim has been filed and allowed as a general claim, and who has received a dividend thereon, afterward files a petition to have the remainder of his claim allowed as a preferential debt and paid in full, the controversy thereon is one "arising in the bankruptcy proceeding," and the decree is reviewable by appeal under Bankr. Act July 1, 1898, c. 541, § 24a, 30 Stat. 553 (Comp. St. 1913, § 9608).

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

For other definitions, see Words and Phrases, Second Series, Controversy Arising in the Bankruptcy Proceedings.]

2. BANKRUPTCY ⟸293(1)—JURISDICTION OF COURT—ADVERSE CLAIM TO PROPERTY.

A court of bankruptcy has jurisdiction to adjudicate upon a petition claiming a fund which is alleged to have come into the hands of a trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(1).]

3. BANKRUPTCY ⟸345—CLAIM TO PRIORITY—ESTOPPEL.

A creditor, by filing a general claim, which is allowed, and on which he receives a dividend, is not estopped thereby from afterward asserting his right to preferential payment, in the absence of any showing that the trustee has been prejudiced by the delay.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

4. BANKRUPTCY ⟸140(2)—PROPERTY VESTING IN TRUSTEE—EQUITIES OF THIRD PERSONS.

To entitle a claimant to recover from a trustee money alleged to have been received under such circumstances as to render a bankrupt a trustee ex maleficio, it must be shown that the money augmented the estate held for distribution among general creditors; but proof of the receipt of the money by the bankrupt under such circumstances casts the burden on the trustee to show that the estate did not benefit thereby.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 219; Dec. Dig. ⟸140(2).]

5. BANKRUPTCY ⟸345—CLAIMS—PRIORITIES.

A commercial corporation assigned an account against a customer to claimant bank as collateral security for a note. By mistake the customer remitted direct to the corporation, which deposited the draft to its credit, and on the same day used the proceeds, together with all other money it had on deposit, in payment of existing obligations, and it did not appear that it ever replaced such deposits. It was at that time insolvent, and was afterward adjudged bankrupt. Claimant filed its claim as a general creditor, and the same was allowed. *Held* that, under the facts, it was not entitled to priority of payment of its claim in full over other creditors.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of the Smith Bros. Company, Limited, bankrupt. A. C. Wuerpel and another, trustees, appeal from an order directing payment in full of the claim of Commercial Germania Trust & Savings Bank. Reversed.

See, also, 231 Fed. 934, 146 C. C. A. 130.

This was an appeal from an order confirming the report of a special master, and adjudging that the appellee be paid out of the funds in the hands of the trustee the amount of its alleged prior claim in the sum of $4,153, with interest, less a credit of $706.01, being the dividend paid appellee on its claim, which it had also filed and had allowed as an unsecured claim. After having done so, it filed a petition in the bankrupt cause for the allowance of its claim as a prior claim. The petition was by the District Judge referred to a special master, and upon his report the decree appealed from was entered.

The facts are substantially agreed upon. The bankrupts were dealers in coffee. On May 26, 1913, the bankrupts sold to J. S. Brown & Bro., of Denver, 263 bags of coffee for $4,153. They transferred to the appellee the invoice against the purchaser by a written assignment indorsed on the face of the invoice. The transfer was absolute in terms, but was intended to secure a note executed by the bankrupts to the appellee in like amount and of the same date. The purchasers were notified by the appellee, the bank, of the transfer, and of its interest in the account, and the purchasers were asked to remit direct to the appellee the amount of the invoice. On June 10, 1913, the purchasers, through error, sent a draft for the amount of the invoice to the bankrupts. The manager of the bankrupts was out of their office on the receipt of the draft, and the bankrupts' cashier deposited the draft to the credit of the bankrupts at the German-American National Bank, which collected the draft. By stipulation of the parties it was agreed that, "so far as the trustees of the bankrupt estate know, all the money in the German-American National Bank on June 10, 1913, to the credit of Smith Bros. Company, Limited, and all the money deposited in said bank after that date to the credit of Smith Bros. Company, Limited, in so far as it was checked out, was used to meet the obligations of Smith Bros. Company, Limited, and that all money in the Commercial Germania Trust & Savings Bank to the credit of Smith Bros. Company, Limited, on May 28, 1913, and all the money therein deposited after that date to the credit of said company, in so far as the same was checked, was used to meet the obligations of said company, and that Smith Bros. Company, Limited, were insolvent on June 14, 1913, when the remittance of $4,153 was received from J. S. Brown Mercantile Company." It was also shown that on June 14, 1913, the bankrupts were overdrawn at the close of business with the German-American National Bank, with the Hibernia National Bank, and that there was a general debit balance against them, taking into account the balances and overdrafts, at all the banks at which they did business, of about $4,000. There were other facts in evidence, not necessary to be set out.

Charlton R. Beattie, of New Orleans, La., for appellants.

Edwin T. Merrick and Ralph J. Schwarz, both of New Orleans, La., for appellee.

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

GRUBB, District Judge (after stating the facts as above). The record presents three questions of practice and procedure, and one of substantive right.

[1] 1. The case is brought to this court by appeal, and the appellee contends that the appeal was taken more than 10 days from the date of the judgment appealed from, and should be dismissed because taken too late. The appellee contends that the appeal must be taken under section 25a, contending that the judgment appealed from was one "allowing or rejecting a debt or claim of $500 or over." The appellant contends that the appeal was allowed under section 24a, which invests Circuit Courts of Appeal "with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases," and that time for taking the appeal was 6 months.

In view of the fact that, prior to the time of the filing of the petition on which the order appealed from was made, the appellee's claim had been allowed in full as an unsecured claim, and that the trustee makes no complaint of its allowance in full as an unsecured claim, but has paid a dividend of 17 per cent. on it as such, we think it clear that the appeal by the trustee is not taken from a judgment allowing a claim under section 25a. The petition was filed with the District Judge, and by him referred to a special master. Its prayer was to be allowed full payment of its already allowed unsecured claim, as a prior claim, and this was the relief granted.

In the case of Hewit v. Berlin Machine Works, 194 U. S. 296–299, 24 Sup. Ct. 690, 691 (48 L. Ed. 986), the Supreme Court said:

"If the trustee had carried the case to the Circuit Court of Appeals on petition for supervision and revision under section 24b of the Bankruptcy Law, the case would have fallen within Holden v. Stratton, 191 U. S. 115 [24 Sup. Ct. 45, 48 L. Ed. 116], and the appeal to this court would have failed. But he took it there by appeal, though accompanied by some apparent effort to avail himself also of the other method. And as the Berlin Machine Works asserted title to the property in the possession of the trustee by an intervention raising a distinct and separable issue, the controversy may be treated as one of those 'controversies arising in bankruptcy proceedings,' over which the Circuit Court of Appeals could, under section 24a, exercise appellate jurisdiction as in other cases. Section 25a relates to appeals from judgments in certain enumerated steps in bankruptcy proceedings, in respect of which special provision therefor was required (Holden v. Stratton, supra) while section 24a relates to controversies arising in bankruptcy proceedings in the exercise by the bankruptcy courts of the jurisdiction, vested in them at law and in equity by section 2, to settle the estates of bankrupts and to determine controversies in relation thereto."

Hewit v. Berlin Machine Works was a controversy relating to the ownership of certain machines claimed by both the trustee and vendor. In this case, the controversy is as to the ownership of a fund claimed by both the trustee and the appellee. It is entirely separate from the matter of the allowance of the claim, and so is not governed by Coder v. Arts, 213 U. S. 223, 29 Sup. Ct. 436, 53 L. Ed. 772, 16 Ann. Cas. 1008, and Matter of Loving, 224 U. S. 183, 32 Sup. Ct. 446, 56 L. Ed. 725. Nor was it partially connected with the allowance of a claim, presenting in addition the question of a right to a lien, dependent upon a pure question of law, as in Huttig Sash & Door Co. v. Stitt, 218 Fed. 1, 133 C. C. A. 641. On the contrary, it is a proceeding entirely independent of any question as to the allowance or rejection of a claim, but is a controversy arising in the bankruptcy

proceeding. The appeal was properly taken under section 24a, and the time for perfecting it was 6 months from the date of judgment.

[2] 2. The trustee asserts that the bankrupt court was without jurisdiction to hear the petition because he contends the fund being litigated about never reached the trustee, and could not be said to be in his possession, when the appellee's petition was filed. However, if the appellee is entitled to any relief, it is on the theory that the amount claimed in the petition did reach the trustee in some form. If the fund was in the possession of the trustee when the petition was filed, then the bankruptcy court had jurisdiction to determine all claims asserted against it. The face of the petition filed by appellee showed the controversy to have been one within the jurisdiction of the bankrupt court. It is not, therefore, a case where the claimant would be required to sue the trustee in a plenary suit in the state court under section 23a. A determination that the fund in controversy never reached the estate in bankruptcy in any form would necessitate a decision for the appellant on the merits, as well as upon the jurisdictional question.

[3] 3. The trustee also contends that the fact that appellee filed an unsecured claim for the amount here in controversy, which was allowed and on which it received a dividend, without asserting any right of priority, operates as an estoppel against its now asserting any such priority. The record does not show that the trustee was in any way induced to change his position by the act of appellee. It does not show that he has paid out funds for costs or dividends that he would have retained for the satisfaction of the appellee's prior claim, had he been advised it was to be asserted. Nor does it appear that the trustee was injured by delay in asserting the alleged priority of appellee's claim in the way of making his proof or otherwise. In the absence of such a showing, we do not think the estoppel can be sustained. Wallace v. Stone, 107 Mich. 190, 65 N. W. 113.

[4] 4. The last question is whether the record shows the appellee to be entitled to a priority in payment of its claim over unsecured creditors. The claimed right is predicated upon the theory that the bankrupts in receiving and using the draft, which it had in equity assigned for value to the appellee, became a trustee ex maleficio for the appellee, entitling it to follow the fund, as far as it was traceable, and recover it for the satisfaction of its claim. Two things are necessary to entitle appellee to the relief it asks. The draft must have been received and cashed by the bankrupts under circumstances which would make them trustees in invitum, and of this proposition there can be no doubt from the admitted facts contained in the record. The second requisite is that the estate in bankruptcy was augmented or benefited by the fund arising out of the collection of the draft by the bankrupts. The law is well settled that such augmentation of or advantage to the bankrupt estate must arise from the transaction; otherwise, the injured person fails to trace the fund into the assets of the insolvent or bankrupt estate, and, failing to do so, ranks only as an unsecured creditor, along with all others. If it be shown that the injured person contributed nothing to the assets for distribution among common creditors, by the fund or property he lost to the insolvent or bankrupt, then there is no

equity in allowing him to withdraw from the fund for such distribution an amount he never added thereto. The equity depends upon the effect which the property or money of the injured person had in swelling or increasing that fund. It is not right that what was wrongfully obtained by the bankrupt from the injured person should be divided among his creditors, who were not victims of the wrong done. The equity depends upon the fact of such division of the property of the injured person. If it be shown that there was in fact no property of the injured person that went to the insolvent estate for division among creditors, then it would be inequitable to take from creditors that which belonged to them, and not to the injured person, and give it to the injured person.

A wrong done the injured person by the insolvent is not sufficient in itself to establish the right to priority. Profit resulting from the wrong to creditors must also exist. The amount of such profit is the amount the injured person is entitled to reclaim from the fund for distribution. If it be shown that no increase has resulted to the fund for distribution, then no profit results to the creditors, and there is no equitable reason for a reclamation by the person wronged. It is also true that the advantage or increase must be to the fund for distribution among creditors, and not to the insolvent or bankrupt himself. It is quite clear that if the insolvent or bankrupt is shown to have dissipated the fund obtained by his wrong to his personal use, and in a manner that adds nothing to the amount of his assets that come to his assignee or trustee, then his creditors profit nothing by the transaction. If the identical property or money obtained from the wrong person by the bankrupt was immediately lost by him, in specie, in gambling or by any other means, which added nothing to his property or estate, and so did not augment the assets that came into the hands of his assignee or trustee, when he was declared insolvent or adjudged bankrupt, it is clear that the wronged person could not trace his property or money into a fund, into which they had concededly never entered in any shape. It would then not be a question of identifying the property in that fund, for the property never would have been a part of the fund. It is also true that, though the property or money, obtained by the wrong of the bankrupt, entered the estate of the bankrupt before bankruptcy, but can be indubitably shown to have departed from it, before bankruptcy, in the sense that the creditors of the bankrupt could not benefit from it, on distribution, there can exist no reason for depriving the creditors of what they would otherwise have received on distribution, because of a wrong of the bankrupt through which they profited nothing.

[5] Coming to apply this principle to the instant case: There is no doubt that the Smith Bros. Company, Limited, received the $4,153, the proceeds of the draft which should have gone to appellee. Having received them, they are presumed to have augmented the estate that came to the trustee in bankruptcy, unless the contrary is affirmatively shown by the record. The trustee must satisfy the court that he received no part of the proceeds of the draft, and that the unsecured creditors, represented by him, got no benefit therefrom. If the evi-

dence had shown that the officer of the bankrupt, who handled the draft, had appropriated its proceeds to his individual use, the absence of benefit to both the bankrupt and its creditors would be apparent. In that event no part of its proceeds could have swelled the assets of the estate in bankruptcy. In this case the evidence and the stipulation show that the proceeds of the draft did go to the credit of the bankrupt corporation; it also shows, as we understand the stipulation and the concession in the printed brief for the appellee, that it was paid out by the bankrupt in satisfaction of its existing obligations, and that this happened on June 14, 1913, the day the bankrupt received the draft. It was deposited to the credit of the bankrupt with the German-American National Bank on that day. All funds at that bank were withdrawn by it before the close of business on that day. Some of the checks withdrawing funds from the German-American National Bank were drawn in favor of the Hibernia National Bank. However, that this was not a mere transfer of funds from one bank to the other is made apparent by the fact, shown by the record, that the bankrupt was overdrawn, at the close of business of the same day, at the Hibernia National Bank as well. It must, therefore, have employed all the funds there deposited from the German-American National Bank for the payment of its existing obligations. It is also shown that, at the close of business on the same day, the bankrupt had no credit balance in the aggregate at all the banks with which it dealt.

It is not claimed that the proceeds of the draft went into the purchase of new goods, but, on the contrary, that they went entirely to reduce existing obligations. That this was a benefit to the bankrupt is obvious. The test, however, is whether it was of interest to the general creditors, by swelling the fund or assets that came to the trustee for distribution among them. If new goods had been bought by the bankrupt with the proceeds of the draft, which went into its general stock, and presumably remained there till surrendered to the trustee, or if there had remained, at all times till bankruptcy intervened, a balance to the credit of the bankrupt, at any or all of the banks with which it did business, an amount in which the proceeds of the draft might be represented, an augmenting of the assets that came to the trustee would be shown. The stipulation and record affirmatively show that no such use was made of the proceeds of the draft, but that, on the contrary, they were used exclusively to pay existing obligations, and added nothing to the property or money that went to the trustee in bankruptcy. Unless it can be said that paying some debts benefits the creditors not paid, no benefit results in this case. If the draft had been indorsed by the bankrupt to a single creditor, to whom it owed a like amount, it is clear that the other creditors of the bankrupt could not have been benefited by such payment, in the full amount of the draft, since the creditor paid would only have depleted the assets on distribution in bankruptcy, to the extent of the dividend paid by the estate, which in case of insolvency would be less than the full debt. The benefit, resulting to the estate in bankruptcy, would lie solely in the amount of the dividend that

payment of the creditor paid in full before bankruptcy, avoided the necessity of paying out of the assets. This, then, is all that should be, in that event, taken from the creditors, since it represents the full benefit received by them from the payment to the bankrupt.

In the instant case, the concession is that the proceeds of the draft were paid out to existing creditors. The differences between the suggested case and this case would lie only in the increased difficulty of showing that the fund was dissipated before reaching the trustee; but this becomes unimportant in view of the concession. In this case there is also this difference from the illustration. The appellee has filed a claim as an unsecured creditor in the full amount of the proceeds of the draft it was entitled to, which has been allowed, and has received and will receive upon it the full dividend paid to other creditors. This would have been the extent of the liability of the estate to the creditors, whose obligations were paid in full, had they not been paid, but had filed claims. In that event, no claim would have been filed by the appellee. So that, in this case, the record shows that the unsecured creditors received no benefit from the receipt of the proceeds of the draft by the bankrupt, either in increased assets or reduced liabilities. The only difference is in the personnel of the claimants who filed the claim, which is immaterial to the creditors participating in the distribution.

Nor can it be said that the obligations paid with the proceeds of the draft would have been paid out of other funds of the bankrupt on deposit on June 14, 1913, and must be referred to those other sums, upon the principle that the bankrupt would have first used the funds it had the right to use for that purpose. The record shows an exhaustion of all its funds, subject to check, in all banks with which it had an account, upon the closing of business on that day. It cannot be presumed that an overdraft would have been permitted in so large an amount. The presumption is, therefore, overcome by the proof that claims in the amount of the proceeds of the draft were paid on June 14, 1913, and that the bankrupt had no funds with which to have paid them, other than the proceeds of the draft. So it affirmatively appears that the proceeds of the draft went into and out of the estate of the Smith Bros. Company, Limited, the bankrupt, on June 14, 1913. Unless replaced between that date and June 26, 1913, when there was, in effect, a general assignment made by the Smith Bros. Company, Limited, the fund for distribution among creditors did not profit by them. The record contains no evidence of such replacement. The misappropriation of the proceeds of the draft does not appear to have been discovered until June 26, 1913, and there could have been no intentional replacement. The bankrupt was insolvent June 14, 1913. The record does not satisfactorily show how much money, if any, the bankrupt had to its credit on June 26, 1913. It does show large collections by the liquidators between that date and the filing of the petition in bankruptcy, which were turned over to the bankrupt court. The proceeds of the draft, of course, did not enter into such sum. While the burden is on the trustee to show that the proceeds of the draft went out of the estate

of Smith Bros. Company, Limited, before the assets of that company were taken possession of by creditors, we do not think that the trustee, having shown their departure, would also have the burden of showing that they did not again re-enter the fund that went to creditors upon insolvency.

The view of the law we have expressed is sustained by the decisions. In the case of City Bank v. Blackmore, 75 Fed. 771, 773, 21 C. C. A. 514, 515, Circuit Judge Taft, for the Court of Appeals for the Sixth Circuit said, after holding that the record showed a case for the allowing of a priority of payment, if the fund for disposition among creditors was shown to have been enhanced:

"The sole question is, therefore, whether the credit thus secured to the Commercial Bank and its receiver by the draft entitled the City Bank to take $5,000 out of the assets held by the receiver. The question must certainly be answered in the negative, in any view which can be taken, unless it appears that the assets were increased $5,000 by the credit, or that the claims against them were so decreased that there was $5,000 more for distribution among those who remained creditors after the credit than there would have been, had no credit been given to the Commercial Bank for the draft. This does not appear. If no such credit had been allowed by the National Bank of the Republic, it would merely have been a claimant for $5,000 more, and would have been entitled, not to $5,000 in full, but only to pro rata dividends on that amount. The benefit to the general fund from the draft, therefore, is limited to the amount of the dividends payable on $5,000, and that amount the receiver has already allowed to the City Bank. It has no ground for complaint, therefore. No authority has been cited to show that a claim founded on fraud is entitled to a priority over other claims. It is only where, by the rescission of the contract out of which the claim arises, on the ground of fraud, the specific thing parted with or its proceeds can be sufficiently identified to be returned, that fraud seems to give a priority of distribution. It may not be necessary to show earmarks upon the proceeds of the thing parted with to justify such a remedy, but it must at least appear that the funds in the hands of the receiver were increased or benefited by the proceeds, and the recovery is limited to the extent of this increase or benefit. In every case relied upon by counsel for appellant, recovery, if decreed, was based on the fact that the property in the hands of the assignee or receiver of the person or bank against whom the claim of fraud, right to rescind, and priority of distribution was made, included in its mass either the very thing parted with or its proceeds. Railroad Co. v. Johnston, 133 U. S. 573, 10 Sup. Ct. 390 [33 L. Ed. 683]; Armstrong v. Bank, 148 U. S. 50, 13 Sup. Ct. 533 [37 L. Ed. 363]; Cragie v. Hadley, 99 N. Y. 131, 1 N. E. 537 [52 Am. Rep. 9]."

In the case of Frelinghuysen v. Nugent, 36 Fed. 229–239, Justice Bradley, for the Circuit Court for the District of New Jersey, said:

"Another difficulty in the complainant's case is the want of identity of the property claimed with the proceeds of the money abstracted from the bank. Formerly the equitable right of following misapplied money or other property into the hands of the parties receiving it depended upon the ability of identifying it; the equity attaching only to the very property misapplied. This right was first extended to the proceeds of the property, namely, to that which was procured in place of it by exchange, purchase, or sale. But if it became confused with other property of the same kind, so as not to be distinguishable, without any fault on the part of the possessor, the equity was lost. Finally, however, it has been held as the better doctrine that confusion does not destroy the equity entirely, but converts it into a charge upon the entire mass, giving to the party injured by the unlawful diversion a priority of right over the other creditors of the possessor. This is as far as the rule has been carried. The difficulty of sustaining the claim in the present case is

that it does not appear that the goods claimed—that is to say, the stock on hand, finished and unfinished—were either in whole or in part the proceeds of any money unlawfully abstracted from the bank. On the contrary, the goods and stock on hand were purchased of the other creditors of Nugent & Co. almost entirely, if not wholly, on credit, and really stand in the place of, and represent the debts of, the firm due and owing to said creditors. This is true with regard to all the raw stock on hand, and with regard to all the stock and materials from which the manufactured or partially manufactured goods were produced. If any moneys derived from the bank entered into the latter, they were those moneys which were regularly drawn by checks of the firm weekly for the payment of their hands. It seems impossible therefore, to sustain any such general charge or trust upon the goods and property of Nugent & Co. as that which has been set up and claimed by the complainant.".

In the case of Boone County Bank v. Latimer (C. C.) 67 Fed. 27, the court said on page 27:

"The difficulty in sustaining the complainant's claim is that the agreed statement of facts does not show that the sum of $1,500, collected by the Sedalia bank for the complainant bank, stood mingled with other moneys of the insolvent bank on hand at the time the bank passed into possession of the receiver. On the contrary, the statement is that between the time of the collection of the money by the bank and the succession of the receiver the bank had collected various other sums of money, and distributed the whole sums collected by it, with the exception of $495.29. So that neither the whole sum collected by it for the complainant was on hand in kind, nor other moneys of the bank to that amount with which it had been mingled. That was precisely the reason given by the courts in the two cases above cited for refusing the relief asked. It did not appear 'that the goods claimed were either in whole or in part the proceeds of any money unlawfully abstracted from the bank,' and because the property against which it was sought to enforce the lien was bought from other creditors. While the agreed statement of facts recites that since the receiver took possession he has realized large sums of money from the assets of the bank, no inference is permissible that such assets were the product, in whole or in part, of the money collected for the Boone County Bank. It is true that the general assets of the bank were augmented to the extent of the absorption of the $1,500 diverted from the rightful owner; but in the absence of proof that the trust fund constituted a part of the remaining assets, so converted into money by the receiver after his succession, I feel constrained by the limit to the equity rule established by the federal Supreme Court not to extend the lien to the general estate."

The general doctrine that the estate in insolvency must have been augmented by the fund sought to be recovered is well settled, and seems not to be disputed. Its application to the facts of this case is the disputed question. The authorities cited are most in point upon the proper application of the rule to the facts shown by the record. Following them, we think that the record affirmatively shows that the insolvent estate, which was to be administered in bankruptcy for the benefit of the creditors of the bankrupt, did not profit from the proceeds of the converted draft in any respect, and that when this affirmatively appears the injured or defrauded party is no more than an unsecured creditor, entitled to no priority, since it is not the character of the wrong done him alone, but also the fact of advantage received by other creditors thereby, that entitles him to such priority.

The decree of the District Court, adjudging that the appellee was entitled to be paid in full out of the assets of the bankrupt estate, is reversed, and the cause remanded to the District Court, with directions that the petition of the appellee be dismissed.

FIRST NAT. BANK OF PARIS, KY., et al. v. YERKES et al.

In re HUTCHCRAFT.

(Circuit Court of Appeals, Sixth Circuit. December 5, 1916.)

No. 2845

1. BANKRUPTCY ⟸461—APPEAL—TIME—RENDITION OF JUDGMENT.
As regards time to appeal from the judgment in bankruptcy, brought into the record as an agreed exhibit, it will be regarded as rendered, not on the date appearing at the end thereof, in connection with the judge's signature, but on the filing date there appearing and also recited in the order allowing appeal as the date on which the judgment was rendered.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–923; Dec. Dig. ⟸461.]

2. WAREHOUSEMEN ⟸20—RECEIPTS—IDENTIFICATION OF PROPERTY.
No lien was given by warehouse receipts, issued as security by a private warehouseman, for a certain number of bushels of grass seed; he having in his warehouses a greater quantity, and that covered by the receipts not being segregated and identified by mark, as required by Ky. St. § 4769.
[Ed. Note.—For other cases, see Warehousemen, Cent. Dig. §§ 15, 16; Dec. Dig. ⟸20.]

3. BANKRUPTCY ⟸161(1)—PREFERENCE—PRIOR INEFFECTUAL PLEDGE.
The fact that a warehouseman had pledged receipts for grass seed, ineffectual because of the seed not being segregated from the mass and identified, does not prevent delivery of seed by him to the creditor, a few days before bankruptcy, and after there had been shipments from and additions to the seed, from operating as a preference.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261, 262; Dec. Dig. ⟸161(1).]

Appeal from the District Court of the United States for the Eastern District of Kentucky; Andrew M. J. Cochran, Judge.

In the matter of R. B. Hutchcraft, bankrupt. From a judgment affirming, on petition for review, the order of the referee sustaining exceptions of W. L. Yerkes, trustee in bankruptcy, and others, to the claim of the First National Bank of Paris, Ky., and another, said creditors appeal. Affirmed.

Emmett M. Dickson, of Paris, Ky., for appellants.

Geo. R. Hunt, of Lexington, Ky., and Robert C. Talbott, of Paris, Ky., for appellees.

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

PER CURIAM. R. B. Hutchcraft carried on business as a private warehouseman in Paris, Ky., for some 20 years, and at the times of the transactions here in issue conducted at least four warehouses located in that place. October 30, 1914, Hutchcraft executed and delivered a deed of assignment of all his property to James McClure, reciting that he was "indebted in sundry sums to divers persons, which he is unable to pay in full and is desirous of providing for the payment thereof by an assignment of his property and effects for that

purpose not exempt to him by law." November 2d certain creditors of Hutchcraft commenced a bankruptcy proceeding against him in the court below, and on February 2, 1915, Hutchcraft was adjudged a bankrupt; and W. L. Yerkes was selected as trustee of the bankrupt's estate. February 5th an order of reference was made by the court below to the referee in bankruptcy to receive claims against the bankrupt's estate, "to allow or disallow claims, and to pass upon secured and unsecured claims and to adjudicate priorities."

The present controversy arose upon exceptions taken by the trustee and certain creditors to claims filed with the referee by the First National Bank of Paris, Ky., and to liens asserted to secure them. These claims were in form three promissory notes executed by the bankrupt at Paris, Ky., payable at the bank and to its order, and each purported to be secured by a warehouse receipt, executed by the bankrupt, for a named quantity of blue grass seed. The first note, bearing date July 21, 1914, was for $4,000, payable in four months after date, and the warehouse receipt purporting to secure it, No. 127, in terms acknowledged receipt in four different warehouses, "for account of and subject to the order of First National Bank, * * * seven thousand bushels blue grass seed, deliverable only on return and cancellation of this receipt, and payment of all charges and advances due and payable thereon. * * * This receipt is given in pursuance to the Kentucky warehouse law, and is to be governed thereby, as well as by the laws of the United States." The second note, bearing date August 25, 1914, was for $5,000, payable in four months after date, and the warehouse receipt purporting to secure it, No. 126, in terms acknowledged receipt in three of the warehouses named in No. 127, for account of the same bank, "eight thousand bushels stripped and cleaned blue grass seed," and was otherwise in form the same as No. 127. However, it is agreed by the parties that the security in terms given through this warehouse receipt, No. 126, was waived in order to vote the claim at the meetings of the bankrupt's creditors; and, although proof of the claim with this security was filed, as stated, with the referee "as of date May 25, 1915," the court below treated the waiver as effective; indeed, counsel for the bank treats the waiver in the same way. The third note, also bearing date August 25, 1914, was likewise for $5,000, payable four months after date, and accompanied by a warehouse receipt, numbered 130, which in terms acknowledged receipt in the same warehouses as those named in No. 126, for account of the same bank, "eight thousand bushels stripped and cleaned blue grass seed," and in other respects was the same in form as the other warehouse receipts.

June 29, 1915, the referee entered an order disallowing all these notes "as secured claims," and also further disallowing them "as unsecured claims until and unless" the bank "shall first surrender to the trustee" $4,440, which the bank had received from sales of part of the blue grass seed in question, and upon the supposition that the bank held a lien on such grass seed; and the order also requires McClure, as assignee, to pay to the trustee in bankruptcy certain sums, which include $2,031.80 derived from sales made of blue grass seed after

the assignment and held by the assignee for the bank under a like supposition of lien. Upon petition for review the court below affirmed the order of the referee. The First National Bank, in its own behalf, and James McClure, as assignee of Hutchcraft, have appealed from, and have also filed a petition to revise, the order of the court below.

[1] The trustee and the objecting creditors, appellees, have interposed a motion to dismiss the appeal on the ground that it was not taken within 10 days after the judgment of the court was rendered. The date September 15, 1915, appears at the end of the order, or judgment, of the District Court, in connection with the signature of the judge; but the filing date and the signature of the court clerk are shown at the commencement of the judgment under the date September 16th. The apparent reason for so disclosing the dates is that the judgment order was brought into the record as an agreed exhibit, although the exhibit also bears the certificate of the clerk. The appeal was allowed September 27th. It is evident that the appeal was or was not taken within the time prescribed by section 25a of the Bankruptcy Act of July 1, 1898, c. 541, 30 Stat. 553 (Comp. St. 1913, § 9609), according as the 16th or the 15th of September is to be regarded as the date on which the judgment was rendered. If this took place September 15th, the 10 days period within which the appeal might have been taken expired on Saturday, the 25th. If the rendition occurred September 16th, the nominal appeal period ended on Sunday, the 26th, and, according to section 31 of the Bankruptcy Act (Comp. St. 1913, § 9615), was extended to Monday, the 27th, when the appeal was allowed. The natural inference arising from the exhibit which discloses the judgment and the dates in question, as stated, is that the filing date, rather than the other date, there shown indicates the time of rendition of the judgment in accordance with both the appearance docket and the journal of the court.

This view derives support from the order of the court entered September 27, 1915, allowing the appeal and fixing the amount of the appeal bond; it is there stated that the judgment was "rendered on the 16th day of September, 1915," and it is worthy of notice that one of the recitals of the appeal bond states that "on the 16th day of September, 1915, * * * judgment was rendered," etc. There is no apparent reason to believe that the District Judge intended the judgment to become effective until it was regularly filed with the clerk of the court and notation of the filing upon the appearance docket and entry upon the journal had taken place. Hence to treat the date appearing at the foot of the judgment as dominating the express filing date would seemingly be to contradict the journal of the court. The journal imports absolute verity; and it may safely be presumed that the date, September 15th, was written by mistake. In re McCall, 145 Fed. 898, 907, 76 C. C. A. 430 (C. C. A. 6). We therefore conclude that the appeal was seasonably allowed. It should be added that, in view of the issues of fact which were concluded below and are contested here, the remedy sought through the petition to revise was inappropriately chosen; and the petition to revise will, for that rea-

son, as well as in consequence of its inconsistency with the appeal, be dismissed.

[2] The controlling feature of the case made here is dependent upon questions of fact. These questions concern the identity of the blue grass seed which was described in the warehouse receipts. The description appearing in the first receipt, No. 127, is, as we have seen, simply a stated number of bushels of "blue grass seed" stored in four different warehouses of the bankrupt; and the descriptions contained in the other two receipts state that specified quantities of "stripped and cleaned blue grass seed" are stored in three of the four warehouses named in the first receipt. It appears by the evidence that each of the quantities of seed so specified was kept in bags, but nothing was done in respect of any of the bags themselves, or of the groups in which they were placed, to indicate in whose favor the seed was attempted to be pledged; nor does it appear how much of the seed was contained in any one of the warehouses named. The contention of appellants amounts to a concession, as of course it must be conceded, that identification of the seed was in each instance a necessary part of any valid pledge. The contention, however, is that this requisite was met by the claim that, at the time each transaction in issue took place, all the blue grass seed belonging to the bankrupt and contained in the warehouses named was included in the descriptions appearing in the receipts. True, when seed was stored by strangers in the warehouses of the bankrupt, the practice was to identify the seed by display of the depositors' names upon or about the piles of bags containing the seed; but nothing of this kind was done with respect to seed belonging to the bankrupt. It results that the bankrupt's blue grass seed which was kept in any of the warehouses named in the receipts was identifiable only by the absence of name or token of any sort to indicate ownership; and if it were conceded for present purposes that valid pledges of all such seed might have been made through the execution and delivery of warehouse receipts by appropriate descriptions therein of the seed and the warehouses in which it was stored, still no progress would be gained unless it can safely be said that a serious mistake of fact was made alike by the referee and the trial judge; for, in the course of his opinion, Judge Cochran said:

"The referee has reached the conclusion that there was more blue grass seed in the warehouses when the receipts were given than the quantities called for therein, and such is my conclusion from a careful consideration of the evidence."

Further, and concerning an insistence made by counsel for the bank that the decision below has more far-reaching consequences than are involved in the case itself, there is an obvious hazard in Kentucky of employing private warehouse receipts of the vague character here used which may be illustrated by the two transactions disclosed in the receipts of August 25, 1914, where the same quantity and kind of seed were in each instance thus described: "Eight thousand bushels stripped and cleaned blue grass seed." For, as is pointed out in the opinion below, it has been held by the court of last resort of Kentucky that, as respects pledges made by private warehousemen, part of a

"common mass" of a given commodity, such as No. 2 wheat, must be "segregated and designated by some mark," and that, if this is not done, the holder of a warehouse receipt merely describing part of the commodity by its classified name acquires no right under the receipt. Mercer Nat. Bank of Harrodsburg v. Hawkins & Co.'s Assignee, 104 Ky. 171, 176, 46 S. W. 717. Concededly this is opposed to the general rule, recently considered by this court, concerning pledges of units of a commodity which are necessarily the equivalent of each other. Interstate Banking & Trust Co. v. Brown, 235 Fed. 32, 40, — C. C. A. —.

Apart, then, from the question of fact whether all of the "stripped and cleaned blue grass seed" belonging to the bankrupt and stored in the warehouses named was described in the receipts, it is not perceived how, in view of the rule laid down in the Mercer Bank Case, the First National Bank here secured a lien under either or both of the receipts of August 25, 1914. This is strengthened by the fact that pledges made through the issue of warehouse receipts are in large measure regulated in Kentucky by statute (2 Ky. Stat. [Carroll Ed., 1915] p. 2426, et seq.); and this but accentuates the soundness of the trial judge's ruling that his opinion was governed by the decisions of the Court of Appeals of that state (Security Warehouse Co. v. Hand, 206 U. S. 415, 425, 27 Sup. Ct. 720, 51 L. Ed. 1117, 11 Ann. Cas. 789; Taney v. Penn Bank, 232 U. S. 174, 180, 34 Sup. Ct. 288, 58 L. R. A. 558; Dale v. Pattison, 234 U. S. 399, 404, 34 Sup. Ct. 785, 58 L. Ed. 1370, 52 L. R. A. [N. S.] 754; First Nat. Bank v. Guarantee Title & Trust Co., 178 Fed. 187, 189, 190, 101 C. C. A. 507 [C. C. A. 3]).

[3] It is urged that, if the liens intended to be given through the issue of receipts Nos. 127 and 130 (the lien claimed under 126 being waived) failed for lack of constructive delivery of the seed, this defect was subsequently cured to the extent at least of two carloads which were actually delivered to the bank. These two carloads were sold, one on October 26, 1914, for $2,280, and the other on October 29th for $2,160. The sales were made and the seed was shipped to the purchasers at the instance of Hutchcraft and by consent of the bank, given through McClure, its cashier. The bills of lading were issued in the name of the bank, and the sales proceeds were turned over to the bank. The insistence that these transactions were designed to carry into execution the original purpose to pledge the seed overlooks the question whether, at the times the receipts were given and accepted in July and August, 1914, any particular lots of seed were described in the receipts or were segregated from other lots of like seed of the bankrupt, so as to enable the parties in the following October to establish any identity between the seed attempted to be pledged and the two carloads of seed. Both the first quantities of seed and the carloads were equally indeterminate as respects the disputed pledges; and this is destructive of any subsequent delivery theory; indeed, it does not appear that the bankrupt even owned the two carloads of seed at the times the receipts were given. We say this because, in addition to evidence showing the fact, it is frankly ad-

mitted by counsel for the bank that "as a matter of convenience, and in order to carry on his business, he (Hutchcraft) did place other seed in the warehouse while he was not running the cleaner"; and this was after the receipts were given. The shipment transactions, therefore, must be tested with reference to the bankruptcy and the right of the trustee to challenge the validity of the transfer involved on the ground that it amounted to a preference. We observe, in passing, that the facts upon which counsel's contention must be based as to the effect of the shipment transactions, as well as any claim of equitable lien, differ from the controlling facts in Sexton v. Kessler, 225 U. S. 90, 32 Sup. Ct. 657, 56 L. Ed. 995, Gage Lumber Co. v. McEldowney, 207 Fed. 255, 124 C. C. A. 641 (C. C. A. 6), and the cases relied on by the bank.

Pursuing the question of preference, it will be recalled that the assignment by Hutchcraft to McClure was made October 30, 1914, the day immediately following the last one of the two shipments in question, and that the bankruptcy proceeding was commenced November 2d, three days after the assignment. McClure was the officer of the bank who conducted the transactions which resulted in the issue of the warehouse receipts and was also the assignee named in Hutchcraft's deed of assignment. Both the referee and the trial judge considered the facts relating to these shipments; both concluded that Hutchcraft was then insolvent, and that the transfer of the two carloads of seed operated as a preference, and that the bank had reasonable cause to believe that it would so operate. Our consideration of the referee's review of the evidence, in connection with Judge Cochran's opinion and our own examination of the record, satisfies us that their conclusions ought not to be disturbed. The present decision is at last rested upon the opinion below, a copy of which (omitting the statement of facts) follows;[1] and the judgment is accordingly affirmed, with costs.

[1] The claim of lien is based on the warehouse receipts hereinbefore mentioned. The bankrupt was a private warehouseman and it was possible for him by means of warehouse receipts to pledge blue grass seed owned by him and in his possession to secure the payment of his notes. The matter is covered by statutory provisions which have been construed by the Court of Appeals of Kentucky. I am governed by the decisions of that court on the subject. Etheridge v. Sperry, 139 U. S. 266, 11 Sup. Ct. 565, 35 L. Ed. 171.

Section 4769 provides that the receipt shall set forth "the quantity, quality, kind and description thereof, if known" and that the thing for which the receipt is given "shall be designated by some mark." The Court of Appeals has considered the question as to what is essential to be done in order to make the warehouse receipt valid in two officially reported opinions, to wit: Ferguson v. Northern Bank of Kentucky, 14 Bush (Ky.) 555, 29 Am. Rep. 418; Mercer National Bank v. Hawkins, 104 Ky. 174, 46 S. W. 717.

In the Northern Bank of Kentucky Case the receipts had been given for sugar-cured hams, in one instance for 3,600 and the other 8,250. These were not all the hams in the warehouse. All that were therein were in mass and all marked "Krauth, Ferguson & Co. Eclipse." It was held that they passed no title. Judge Pryor said that the brand on each of the hams was "not the mark or distinguishing feature required," and that "it must be such as will enable the party to identify the property and to distinguish it from a similar kind and quality; such is the plain purpose of the statute." He added: "If there were no other hams in the warehouse with the same trade-mark on

them than those contained in the receipt, the description would be sufficient." In the Mercer National Bank Case the receipts were given for specific quantities of No. 2 wheat, part of a common mass. It was held that they passed no title. The court followed the decision in the earlier case and stated that it was therein held that in case of a receipt issued "on property, which was a part of a common mass, it had to be segregated and designated by some mark."

There is nothing left to do but to apply this law to the facts of this case. The petitioners rest their case on the position that when the receipts in question were given the blue grass seed covered by them was all the blue grass seed in the warehouses; i. e., when the receipt for 7,000 bushels was given there was no more than that much therein, and when the two receipts for 8,000 bushels each were given there was no more, in addition to the 7,000 bushels, than 16,000 bushels. They think that thereby they bring the case within the dictum of Judge Pryor in the Northern Bank of Kentucky Case. They seem to concede that subsequent to the giving of the receipts other blue grass seed was placed in the warehouses and mingled with that covered by the receipts, and that thereafter blue grass seed was taken from the common mass and sold or loaned. It cannot be said that Judge Prior had such a case in mind when he uttered this dictum, or any other case than one where the receipt covers all the article in the warehouse at the time it is given and there has been no subsequent change in the quantity therein. The trustee contends that, even if petitioner's contention is right as to the facts, and no other blue grass seed was subsequently placed in the warehouse (i. e., conditions remained as they were when the receipts were given), still the seed covered by the different receipts should have been segregated from each other by mark and there is some force in this position.

But I do not have to go into these questions. It is not the fact that the receipts covered all the blue grass seed in the warehouses when they were given. The bankrupt testified that he had on hand in July and August, 1914, 60,000 or 70,000 bushels, that at the time he issued the receipt for 7,000 bushels he had a great many more bushels, and that when he issued the receipts in August he had an amount much larger than that. These statements are borne out by the books of the bankrupt. I do not find it necessary to go further into details of the testimony on this point. The referee has reached the conclusion that there was more blue grass seed in the warehouses when the receipts were given than the quantities called for therein, and such is my conclusion from a careful consideration of the evidence. This being so, and the quantities covered by them not being segregated from the common mass by designated mark or otherwise, the receipts passed no title. The matter is not affected by the consideration that the bankrupt always asked the bank's consent to what he did in relation to the seed in the warehouses. The case is clearly controlled by the two decisions of the Kentucky Court of Appeals.

It may be thought that the bank acquired a claim to the two shipments made in latter part of October, 1914, by reason of the bills of lading being made in its name. But the bankrupt was then insolvent, the transfer of the seed to the bank operated as a preference and the bank then had reasonable cause to believe that it would so operate. The bankrupt's credit was impaired by the failure of the Alexander Bank in the spring of 1914 and the large claims asserted against the bankrupt by reason of his directorship in that bank. Theretofore the petitioning bank had loaned him money on the notes of which the two given in August were renewals without security. When it made the loan of $4,000 in July and renewed the two $5,000 in August it required security. Before these two shipments it allowed the bills of lading to be made in the bankrupt's name and him to collect the proceeds. The placing of the bills of lading in its name for these two shipments happened just on the eve of the assignment and the assignment was made to the bank's cashier.

I am therefore constrained to affirm the order of the referee.

BRENT et al. v. SIMPSON.

(Circuit Court of Appeals, Fifth Circuit. December 19, 1916.)

No. 2977.

1. EVIDENCE ⟸459(5)—PAROL EVIDENCE—MISTAKE—RECEIPT.
In an action by the trustee of a bankrupt corporation to recover securities pledged for the individual debt of the bankrupt's president, where the pledgee had given a receipt for the securities which was both an acknowledgment of their delivery to him and a contractual statement of the terms under which they were to be held, parol evidence that the receipt was made to read in favor of the corporation, instead of its president, through a mistake of the draftsman, related to the receipt in its character as such, and not in its contractual character, and was admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 2114; Dec. Dig. ⟸459(5).]

2. EVIDENCE ⟸459(5)—PAROL EVIDENCE—MISTAKE—MUTUALITY.
Even though the mistake in a receipt must be shown to be mutual, parol evidence that the deliverer of securities inadvertently placed the wrong name thereon tends to show a mutual mistake and is admissible.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1722, 2114; Dec. Dig. ⟸459(5).]

3. BANKRUPTCY ⟸293(2)—JURISDICTION—RECOVERY OF PROPERTY—FRAUDULENT TRANSFER.
Where a corporation had before its bankruptcy authorized, either expressly or by acquiescence, the transfer of securities belonging to it to secure an individual debt of its president without consideration moving to it, the transaction is only assailable if it was a fraud on the creditors of the corporation; and therefore the court of bankruptcy has jurisdiction of a suit to recover the securities, though it would not have jurisdiction if they had been misappropriated by the president without the corporation's consent.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⟸293(2).]

4. BANKRUPTCY ⟸161(1)—FRAUDULENT CONVEYANCES—TRANSACTION AS SECURITY—RENEWAL OF DEBT.
A corporation, several years before it became bankrupt, permitted its president to transfer notes belonging to it to secure an indorsement of the president's individual note. On the renewal of that note, the payee asked for collateral security, and the indorsee delivered to it the notes previously pledged to him. When the renewal note became due, the payee refused a further renewal, and the president borrowed the amount necessary to pay it from another bank, giving his note indorsed by the same indorser on his written promise that the securities released by the first payee should be transferred to the indorser for his security. Thereafter the corporation became bankrupt, and the indorser was compelled to pay the note, and the trustee sued to recover the amount of the securities transferred to him. *Held*, that the character of the transaction was to be determined as of the date of the first delivery of the notes to the indorser, not the date of the last delivery.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 261, 262; Dec. Dig. ⟸161(1).]

5. FRAUDULENT CONVEYANCES ⟸271(4)—VOLUNTARY CONVEYANCE—INSOLVENCY—EXISTING CREDITORS.
Under the Laws of Florida, a voluntary conveyance by an indebted grantor is prima facie fraudulent as to existing creditors, but proof that

the grantor was solvent, and that the transfer left it ample assets to pay its debt, overcomes the presumption of fraud.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 821; Dec. Dig. ⊂⊃271(4).]

6. FRAUDULENT CONVEYANCES ⊂⊃69(1)—VOLUNTARY CONVEYANCE—SUBSEQUENT CREDITORS.

Actual fraudulent intent on the part of the grantor is necessary to set aside a voluntary transfer at the instance of subsequent creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 178–180; Dec. Dig. ⊂⊃69(1).]

7. FRAUDULENT CONVEYANCES ⊂⊃282—ACTIONS—BURDEN OF PROOF.

In a suit by the trustee of a bankrupt corporation to recover notes belonging to the corporation which had been transferred by its president with its acquiescence before maturity to secure an indorsement of the president's note, the burden is on the trustee to show that the indorser had notice that the president obtained the note from the corporation without consideration and that it was insolvent at the time so that its voluntary transfer was fraudulent.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 817, 818; Dec. Dig. ⊂⊃282.]

8. FRAUDULENT CONVEYANCES ⊂⊃158(1)—VOLUNTARY TRANSFER—INSOLVENCY—NOTICE TO TRANSFEREE.

Under Gen. St. Fla. 1906, § 2958, providing that every negotiable instrument is deemed prima facie to have been issued for a valuable consideration and every person whose signature appears thereon to have become a party thereto for value, notice cannot be imputed to the pledgee of notes belonging to a corporation, before their maturity, to secure the note of its president, that the president paid no consideration for the notes, and that the corporation was insolvent at the time, where all the stockholders of the corporation assented to the pledge, and the corporation continued to do business for more than three years, during which time it paid all of its creditors existing at the time of the pledge, except two who were willing to accept renewals of their claims.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 500; Dec. Dig. ⊂⊃158(1).]

9. CORPORATIONS ⊂⊃387(4)—ULTRA VIRES ACTS—RIGHTS OF CREDITORS.

Creditors cannot assail an ultra vires act of a corporate officer unless it resulted in depleting the assets of the corporation in fraud of creditors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1552; Dec. Dig. ⊂⊃387(4).]

10. BILLS AND NOTES ⊂⊃339—BONA FIDE HOLDERS—NOTICE.

Actual knowledge or willful abstention from inquiry by holders of negotiable instruments for value before maturity is necessary to charge them with notice of defenses; mere negligence or failure to inquire not being sufficient.

[Ed. Note.—For other cases, see Bills and Notes, Cent. Dig. §§ 821–823; Dec. Dig. ⊂⊃339.]

Appeal from the District Court of the United States for the Northern District of Florida; William B. Sheppard, Judge.

Suit by R. B. Simpson, as trustee in bankruptcy of the estate of Knowles Bros., a corporation, bankrupt, against Thomas W. Brent and others, as executors of the last will and testament of F. C. Brent, deceased. Decree for the plaintiff, and defendants appeal. Reversed, with directions to dismiss the bill.

This is an appeal from a final decree of the District Court of the United States for the Northern District of Florida in a case in which the trustee in bankruptcy of the estate of Knowles Bros., a corporation, was plaintiff, and the executors of F. C. Brent, deceased, were defendants. The purpose of the bill was to compel the delivery by the defendants of certain securities, alleged to be the property of the bankrupt corporation, and which were in the possession of the executors. The bill charges that they were transferred by W. H. Knowles, who was the president of the bankrupt corporation, for it, in fraud of its creditors; it being insolvent at the time of the alleged transfer in April 1913, and the transfer having been made without consideration moving to the bankrupt. The purpose of the transfer is alleged to have been to indemnify the intestate, F. C. Brent, upon an accommodation indorsement, made by him at the instance of W. H. Knowles, to secure his personal obligation, the amount of which the executors of the said F. C. Brent, the indorser, have been compelled to pay, and for the reimbursement of which they are holding the securities. The obligation was a negotiable note of the Pensacola Investment Company, payable to W. H. Knowles, which he discounted at the Importers' & Traders' National Bank of New York City and which he and the intestate indorsed. The securities in question consisted of negotiable notes of third parties, secured by realty mortgages.

The answer of the defendant executors denies that the intestate acquired possession of the securities involved in the suit in April, 1913, as alleged in the bill, but, on the contrary, asserts that the intestate came into possession of them first in October, 1910, when they were delivered to him by W. H. Knowles to indemnify him against loss on an accommodation indorsement, then made by him at the request of W. H. Knowles, individually, and discounted at the Sullivan Banking & Trust Company of Montgomery, Ala. The amount of the loan, evidenced by the note, was $50,000. The original face value of the pledged securities was $100,000, reduced by the surrender by intestate to Knowles of a note for $30,000, secured by hotel stock, which left the face value of the remaining securities, which are here in question, $70,000. The answer asserted the validity of the transfer made in October, 1910, alleging that the securities were then pledged with intestate for value, i. e., for his indorsement on the $50,000 note, discounted by the Sullivan Banking & Trust Company; that they were transferred before maturity to intestate; that, at the time of the transfer, the corporation of Knowles Bros. was solvent and had enough assets to fully pay its debts, not including the pledged securities; that the intestate Brent had no knowledge or notice, at the time he accepted the securities for his indemnity, that W. H. Knowles had not given to Knowles Bros. value for them, or that Knowles Bros. was insolvent, if it was then insolvent. The answer also relied upon the Florida statute of limitations of three years, as a defense to the right of the trustee to recover the securities; and denied the jurisdiction of the District Court. The answer alleged, and the evidence showed, that after the original pledge of the securities by Knowles to intestate Brent in October, 1910, upon the occasion of the renewal of the note held by the Sullivan Banking & Trust Company, the bank asked for collateral, as well as personal, security, and, in pursuance of the bank's request, Brent, or Knowles for him, transmitted the securities, which had been pledged with Brent, to the Sullivan Banking & Trust Company. Upon a subsequent maturity of the note at the Montgomery bank, a misunderstanding arose as to its renewal by that bank, and W. H. Knowles thereupon arranged to get the money, with which to take it up, from the Importers' & Traders' National Bank of New York upon a note, indorsed by intestate Brent as stated. Before the indorsement of the note, discounted at the New York bank, and on April 15, 1913, W. H. Knowles, by letter to intestate, agreed that he, in consideration of his indorsement, might hold for his security the securities originally pledged to him, and which he had turned over to the Sullivan Banking & Trust Company as stated. The note to the Importers' & Traders' National Bank was dated April 19, 1916. On April 30, 1913, the securities here in question were received by W. H. Knowles from the Montgomery bank, and delivered by him to the attorney in fact of intestate, pursuant to the letter of April 15, 1913; the receipt given by intestate or his son and attorney in fact for the securities reciting that they were received from Knowles Bros.

W. A. Blount, A. C. Blount, Jr., and F. B. Carter, all of Pensacola, Fla., for appellants.

W. H. Watson and S. Pasco, Jr., both of Pensacola, Fla., for appellee.

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

GRUBB, District Judge (after stating the facts as above). [1, 2] The appeal presents a number of questions upon the admissibility of evidence, only one of which is important under the conclusions we have reached. The appellant offered evidence tending to show that the receipt for the securities in controversy dated April 30, 1913, was made to read in favor of Knowles Bros., instead of W. H. Knowles, through mistake of the draftsman. The court excluded this evidence, upon the ground that its effect was to vary the terms of the receipt, which were of a contractual nature. The receipt was twofold in character. It was an admission by the signer of the receipt of the pledged securities, and it was a contract setting out the terms on which they were to be held by the signer. In the first respect it was explainable by parol evidence. In the latter, it was not. Clearly the personnel of the deliverer of the securities was a matter that related to the instrument in its character as a receipt, rather than in its contractual character. Wayland's Adm'r v. Mosely, 5 Ala. 430, 39 Am. Dec. 335. It may be that the mistake, to be effectual, would have to be shown to be mutual; but the fact, if it was a fact, that the deliverer of the securities, who drafted the receipt, inadvertently placed the wrong name on the receipt, was evidence tending to show a mistake on the part of both parties to it, and competent.

[3] The appellants contest the jurisdiction of the court below, and cite the case of Park v. Cameron, 237 U. S. 616, 35 Sup. Ct. 719, 59 L. Ed. 1147, in support of their contention in that respect. We do not think that case is controlling of this case. In either aspect of this case, certainly if the transaction of October, 1910, is the applicable one, the case is not one in which an officer of a bankrupt corporation has embezzled or misappropriated property of a corporation without its knowledge or consent, recovery of which is sought from him by the trustee. We think, as to both transactions, the record shows that W. H. Knowles' transfers of the securities in controversy was authorized expressly or by acquiescence by Knowles Bros., and is assailable, if at all, because it was a transfer without consideration moving to the bankrupt, and under circumstances making a voluntary transfer a fraud upon its creditors.

[4] The question most seriously contested was that as to which transaction—that of October, 1910, or that of April, 1913—was to be looked to in determining the rights of the parties. The trustee contended, and the District Judge held, that the transfer of April, 1913, was the determinative one. The District Judge held that the transaction with the Importers' & Traders' National Bank of New York City was separate and distinct from that of the Sullivan bank pledge; that it embraced different parties and a different contract; that intestate's indorsement to the Sullivan bank was still subsist-

ing when he indorsed the note subsequently discounted in New York City, and the securities then held by the Sullivan bank; and that intestate by delivering the securities to the Sullivan bank extinguished the bailment and ended his rights as pledgee in the transactions with that bank. It must be conceded, however, that there was but one debt of $50,000 for which W. H. Knowles was always primarily liable, and the intestate Brent always secondarily liable, until it was paid by his executors after the note to the New York bank matured; that the securities in controversy were originally pledged by W. H. Knowles to intestate to secure his secondary liability for said debt; that he surrendered possession of the securities to the Sullivan bank, not in disregard of the object of the original pledge, which was to hold him harmless on his indorsement, but in furtherance of it, since payment of the debt out of the securities would have relieved him from liability on his indorsement; that, when the Sullivan bank was reluctant longer to renew the notes evidencing the original debt, the money to pay the debt was only procured from the New York bank on intestate's agreement to indorse and actual indorsement of the note to that bank, which yielded the proceeds to take up the note at the Montgomery bank; that the indorsement of intestate was given upon a written promise, given by W. H. Knowles, that the securities, released by the payment of the note to the Sullivan bank out of the money obtained from the New York bank on intestate's indorsement, should be pledged with intestate to secure his new indorsement, which was done.

Under the facts, a court of equity should consider the pledge of the securities uninterrupted from the date of their original delivery to intestate in October, 1910. The identity that is essential is the identity of the debt, not that of the parties to the notes evidencing it. The principal debtor in the note to the New York bank was W. H. Knowles, just as he was in the note to the Sullivan bank. That there were additional or different parties for accommodation to the later note, or that the original parties occupied different positions on it, is unimportant, so long as the original debt and the original debtor, secured by the same indorser, are present. It is clear that the intestate would not have consented to surrender the securities to the Sullivan bank, except to accomplish the payment of the debt due it, for which he was secondarily liable. His doing so was pursuant to, not in contradiction of, the original pledge. It is also clear he indorsed the new note for the purpose of taking up with its proceeds the note on which he was already contingently liable. This was the effect of the written agreement between Knowles and intestate. It was also agreed that the securities, held by the Sullivan bank to secure the original debt, should be given intestate, when they were released by payment of that debt, to protect him on the new indorsement. Had it not been so, he would have been the worse for the new transaction, since he would then have been without security for his indorsement in the same amount. There was never a time from the intestate's indorsement of the original note to the Sullivan bank in October, 1910, until the debt was paid by his executors, when he

could have relieved himself from that indorsement. We can discover in the record no evidence of an intention on his part or that of Knowles, either to double the liability assumed by him upon his original indorsement, when he indorsed the note to the New York bank, or to relinquish the protection of the pledge of the securities given to secure his original indorsement. It follows that he was always liable because of his indorsement of the original note of October, 1910, and always protected against liability on that indorsement by the securities, which the trustee now seeks to recover from him. This would make the transaction of October, 1910, the controlling one, and the question of the bankrupt's solvency or insolvency would revert to that date. 32 Cyc. 243; Nesbit v. Worts, 37 Ohio St. 378; Jarboe v. Shiveley, 109 Ky. 402, 59 S. W. 328, 95 Am. St. Rep. 384.

[5, 6] The transaction having occurred more than four months before the petition was filed, its validity is to be determined by the laws of Florida. Under the laws of Florida, a voluntary conveyance by an indebted grantor is prima facie fraudulent as to existing creditors. A showing that the grantor was solvent and that the voluntary transfer left it ample assets to pay its debts overcomes the presumption of fraud. If Knowles Bros. was solvent, in this sense, in October, 1910, the transfer, though voluntary, was valid. Actual fraudulent intent on the part of the grantor is necessary to set aside a voluntary transfer at the instance of subsequent creditors. No such claim is made in this case. The solvency of the bankrupt in October, 1910, is not very satisfactorily established by the record. It is only supported by certain trial balances, which are merely an enumeration of credit and debit items, as shown by the books of the bankrupt, with no showing as to the real value of the credit items. The District Judge found it unnecessary to determine the question of insolvency at an earlier date than April, 1913. If the determination were necessary to a decision of the appeal, we would hesitate to rule on it, on the present record.

[7] However, in order for the trustee to avoid the transaction as against the executors of the intestate, it must appear that intestate was a holder of the negotiable notes pledged, in bad faith or with notice of their infirmities. The intestate in October, 1910, took the negotiable notes from W. H. Knowles, who had possession and apparent title, for a valuable consideration, viz. his indorsement of W. H. Knowles' $50,000 note, and before maturity. In this attitude, the burden was on the trustee to show that the intestate had notice of any infirmity in the notes. This is the settled rule under the Florida and federal decisions. It is conceded that the intestate Brent, when he took the notes from Knowles in October, 1910, knew that they had been the property of Knowles Bros., and were being used by W. H. Knowles for his individual benefit. There is no evidence, however, that intestate then knew either that Knowles had obtained the securities from Knowles Bros., the bankrupt, without paying value for them, or that he knew that the bankrupt was then insolvent. The transaction could be assailed by creditors of the bankrupt only if those facts were true, and, as against a holder for value before

maturity of the notes, only by showing notice to him of those facts, when he obtained the notes.

[8, 9] Conceding that a taker of the notes might be charged from the indorsement on their face of any want of authority from the corporation on the part of the president of the bankrupt to deal with them for his own benefit, there was no such want of authority as to the October, 1910, transfer, since it was assented to by all stockholders of the bankrupt corporation. Nor could creditors assail a merely ultra vires act of a corporate officer, unless it also resulted in depleting the assets of the corporation in fraud of creditors. Force v. Age-Herald Co., 136 Ala. 271, 33 South. 866. Under the Florida statute, section 2958, General Statutes 1906:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

It is also true that the bankrupt, if not actually solvent in October, 1910, continued thereafter to do business for more than three years as a going concern, and paid all its then creditors in full, except two, who were content to renew their claims till bankruptcy intervened. It seems difficult to predicate notice to the intestate of an insolvent condition, if existent, that withstood bankruptcy for that period, and of which the bankrupt's officers and creditors seemed unaware.

[10] Especially is this true in view of the settled rule in favor of holders for value before maturity, adopted by the federal courts, that actual knowledge or willful abstention from inquiry, where inquiry would have disclosed the infirmity, is essential, and that mere negligence, or a failure to inquire, where a reasonably prudent man would have inquired, will not suffice. Applying this rule to the facts in the record, we cannot impute notice to intestate either of the fact that W. H. Knowles paid no consideration for the transfer of the securities in controversy to him to Knowles Bros., in October, 1910, or that the bankrupt corporation was then insolvent or would render itself unable to pay its debts by the making of the voluntary transfer to its president. The following authorities support our conclusion: Doe v. Northwestern Coal Co. (C. C.) 78 Fed. 62; Troy & Cohoes Shirt Co., Bankrupt (D. C.) 136 Fed. 420; Kaiser v. First National Bank, 78 Fed. 281, 24 C. C. A. 88; Union National Bank v. Neill, 149 Fed. 711, 79 C. C. A. 417, 10 L. R. A. (N. S.) 426; National Bank of Commerce v. Sancho Packing Co., 186 Fed. 257, 110 C. C. A. 112.

We find it unnecessary, in view of the conclusion reached, to decide the effect of the statute of limitations upon the transaction of October, 1910, or the claimed want of creditors who are in a position to successfully assail that transaction, and furnish proper representation to the trustee in bankruptcy in his endeavor to do so.

The decree of the District Court will be reversed, with directions to dismiss the bill at the trustee's costs. If there is an equity in the securities in controversy over and above what the executors were compelled to pay on account of their intestate's indorsement, the trustee, on proper application and tender, should be permitted to redeem them from the executors.

CENTRAL OF GEORGIA RY. CO. v. BLOUNT et al.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1917.)

No. 2954.

1. LANDLORD AND TENANT ⟸39—LEASE—CONSIDERATION.

Where an interstate carrier leased to a manufacturer of wagons and buggies a site for his factory which was worth more than $5,000, and had a rental value of $300, for a term of 20 years, with an option for renewal, by a lease which reserved no rent, but provided that the tenant should save the lessor harmless from liability, caused or increased by the tenant's use of the premises, and should furnish, free of expense to the lessor, a lease for the right of way for a spur track from the lessor's line to the factory, which the lessor could use for its own purposes when it was not required for the use of the tenant, and further provided that the tenant would not assign the lease, except to another manufacturer which shipped approximately the same amount of freight, and so far as it could would bill all freight shipped to it and all shipped out by it over the lessor's lines, the consideration for the lease was clearly the business which the carrier expected to derive from the tenant, not the other agreements which the tenant undertook to perform, which were mere incidents of the tenancy.

[Ed. Note.—For other cases, see Landord and Tenant, Cent. Dig. §§ 101–103; Dec. Dig. ⟸39.]

2. CARRIERS ⟸32(2)—RATES—DISCRIMINATION—FREE LEASE OF FACTORY SITE.

Such a lease conferred on the tenant, as shipper, a bonus or benefit which the carrier could not confer on other shippers of like articles, and was therefore illegal under section 2 of the act to regulate commerce (Act Feb. 4, 1887, c. 104, 24 Stat. 379 [Comp. St. 1913, § 8564]), making the carrier guilty of unjust discrimination if by any rebate or other device it charges one person less for any services rendered in the transportation of the property than it does others for a like service, and the Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847), making it an offense to give or receive any rebate, concession, or discrimination in respect to the transportation of property whereby it shall be transported for less than that mentioned in the published tariff, or whereby other advantage is given or discrimination practiced.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 84; Dec. Dig. ⟸32(2).]

3. ESTOPPEL ⟸52—ILLEGAL TRANSACTION.

A party to a transaction prohibited and penalized by law cannot estop himself from setting up its invalidity.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121–125, 127; Dec. Dig. ⟸52.]

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

Suit by the Central of Georgia Railway Company against B. M. Blount and another. From a decree sustaining defendants' motion to dismiss the bill, plaintiff appeals. Reversed.

This is a suit in equity, brought by the appellant, Central of Georgia Railway Company, against the appellees, B. M. Blount and Blount Buggy & Carriage Company, a corporation. The following is a summary of the averments of the bill:

The plaintiff is a common carrier engaged in interstate commerce and in intrastate commerce in Georgia. The defendant corporation is engaged in

the manufacture of wagons, buggies, etc., having its plant on the line of the plaintiff's road at or near the town of East Point, Ga., and both the defendants receive over the plaintiff's road large shipments of material from within and without the state of Georgia, and are constantly engaged in shipping over the plaintiff's road to points both within and without the state of Georgia the finished product of said plant, to wit, wagons, buggies, etc. By written contract entered into in April, 1903, between the plaintiff and the defendant B. M. Blount, the former leased to the latter the tract of land, containing about 5 1/0 acres, upon which the defendant corporation's manufacturing plant is located. This lease was for the term of 20 years, with the privilege of renewal for an additional period of 20 years under the same terms and conditions, at the option of the lessee, his heirs and assigns. The lease stipulated for the erection and completion of said plant not later than January 1, 1904, and that at no time during the term should the leased premises be used for any other purpose than that of the business mentioned, or some other business requiring the receipt and shipment of freight in volume substantially equal to that enterprise. The lessor agreed to construct and furnish all material to lay complete, free of cost to the tenant, except as hereinafter stated, a spur track extending from a point on the lessor's line through property not owned by it to a point on the leased tract. The lessor agreed that, if it was found practicable for it to obtain a release of the leased land from a mortgage covering it at any time during the term, it would sell and convey it to the lessee at the price of $1,000 per acre, but it was stipulated that this provision was not to be considered or construed as binding the lessor, its successors or assigns, to make such sale and conveyance unless it is considered by the lessor entirely practicable and feasible to do so. There was a stipulation forbidding, without the written consent of the lessor, the assignment of the lease and the subletting of the whole or any part of the plant or leased land to any one other than the defendant corporation or the White Hickory Wagon Manufacturing Company, another corporation. At the expiration of the lease the tenant is to own all improvements placed on the premises by him and to remove them from the premises. The lessor was given the right to terminate the lease by giving 30 days' written notice of its desire to do so whenever the tenant failed to carry out in good faith any of its covenants, or to continue the business on the leased land as contemplated by the lease. The tenant agreed to furnish, or cause to be furnished, free of expense to the lessor, a lease to a right of way for said spur track where it ran over land not belonging to the lessor, and the lessor was to have the use of that spur track for all other purposes which shall not interfere with the tenant's use of it. The lessor reserved the right to remove that spur track at its pleasure. The lessee agreed to save and hold harmless the lessor, its successors and assigns, from all damage, injury, or liability that may arise from the destruction or injury of any building, improvement, or personal property of any description, by fire or from any other cause whatever, when such damage, injury, or liability is caused or increased by reason of the occupancy of the leased land and the construction and use of said spur track. There was no rental in terms reserved, and the concluding provision of the lease was the following: "It is also understood and agreed, in consideration of the covenants herein agreed to be kept, that the tenant will route or caused to be routed, whenever the right to do so rests with the tenant, via the lines of the railway company and the Ocean Steamship Company of Savannah, their successors and assigns, all shipments of freight made either by, to, or for account of himself, his heirs or assigns, whenever the lawful rates and facilities are equal, where such shipments of freight are made from or to points reached by the said lines and their connections: Provided, the tenant shall have the routing of shipments (it being understood that purchasers of and sellers to the tenant may direct other routes), and further provided that such routing shall not delay or otherwise interfere with the interests or business of the tenant."

The bill as amended contains the following averments: "The lease in question was granted by the complainant to the defendant in pursuance of a policy of the complainant of encouraging the location of industries along its lines of railroad in order that its traffic might be increased. The consideration of

the lease is grossly less than the fair and reasonable rental value of the premises; its real intention being to give the defendant the premises rent free. The provisions in the lease as to the acquiring of right of way, and as to giving the lessee the conditional option to purchase the property, were for the benefit of the lessee, and not for the benefit of the complainant. Neither the complainant nor the lessee contemplated any other benefit to the complainant than that of increasing its freight traffic. The object of complainant in granting to the defendant the use of its property rent free, or at a nominal rental, was not to create an unjust discrimination; but the lease was made in good faith, and the allowing of the defendant to use its property rent free, or at a nominal rental, was not made with the intention of violating any law or public policy. Nevertheless complainant is advised and believes, and so charges, that the legal and practical effect of its allowing the defendant to use its property rent free and without charging it a fair price for the use of its property is to create a discrimination in favor of the defendant, and to give the defendant an undue and unlawful preference, and to subject other shippers along its line and other localities to an undue and unreasonable prejudice and disadvantage in the respect that, while other shippers of the same and like commodities from different localities on the defendant's lines, in commerce between the several states, have to provide the premises on which to erect their plants at their own cost, the complainant, in effect, by the lease in question, gives to the defendant the use of a portion of its own premises rent free, or at a rental so nominal as to be practically preferential in defendant's favor. There are along the lines of the defendant company a number of other shippers in interstate commerce engaged in like business to that of defendant and shipping over the complainant's lines commodities of the same and similar nature as those shipped by the defendant, and the complainant cannot and does not extend to them the same privilege. Furthermore, the complainant has filed and published the printed tariffs provided for by section 6 of the act of Congress commonly known as the Interstate Commerce Act, and the tariffs so filed do not provide for the extension to shippers of any such privilege as that accorded to the defendant under the terms of the lease in question, nor can the complainant reasonably file a tariff granting such privilege generally to shippers over its lines; and complainant is advised, and so charges, that for this reason said lease is unlawful and void, and that it is violative of said act of Congress for it or for the defendant to comply with." It also was averred that the reasonable rental value of the leased premises is $300, or other large sum, and that the plaintiff has made repeated demands upon the defendants to readjust the lease contract, so that the plaintiff will receive a reasonable rental from the premises, and that these demands have been refused by the defendants. The bill prayed that the lease contract be canceled and delivered up, or, in the alternative, that, if the defendants elect to remain in the leased premises, the lease be reformed, so that it will not allow the defendants a special privilege and will provide for the payment to the plaintiff of a reasonable rental. It also contained other prayers for special and general relief.

The defendants moved the dismissal of the bill upon the following grounds, stated against it as a whole: "The allegations of fact made in said petition, when taken in connection with the provisions of the lease contract, copy of which is attached thereto, do not show that there is no consideration moving to complainant, except the routing of inbound and outbound freight, and do not show that a continuance of the lease is unlawful and amounts to an unlawful preference. The allegations of fact made in said petition, when taken in connection with said exhibit, show that there were valuable and lawful considerations therefor, other than the consideration of the shipments of freight therein mentioned, to wit, the furnishing of the right of way for the spur track mentioned in paragraphs 3 and 8 of said exhibit, the erection of a manufacturing plant on the leased land contained in paragraphs 2 and 7 of said exhibit, the provision as to the sale of said leased land contained in paragraph 4 of said exhibit, and the covenant to save harmless the railway company contained in paragraph 9 of said exhibit. That portion of the consideration of said lease, expressed in paragraph 10 of said exhibit, as to the routing

of freight, was not and is not contrary to law, and did not and does not amount to an agreement for an unlawful preference or for a rebate on freights to and for the defendants, because the same provides for such routing only when the lawful rates and facilities are equal. Because the complainant, having executed the said lease and having thereby induced and moved the defendant to erect the manufacturing plant and build up a business therefrom of great profit, is estopped to claim and obtain, from the court of equity, its intervention to cancel or reform said lease."

This motion to dismiss was sustained, and the plaintiff appeals.

A. R. Lawton, T. M. Cunningham, Jr., and H. W. Johnson, all of Savannah, Ga., and John D. Little, Arthur G. Powell, Marion Smith, and M. F. Goldstein, all of Atlanta, Ga., for appellant.

John L. Tye, Henry C. Peeples, and John A. Hynds, all of Atlanta, Ga., for appellees.

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

WALKER, Circuit Judge (after stating the facts as above). The terms of the motion to dismiss indicate the absence of any intention to question the sufficiency of the bill upon any ground other than its asserted failure to show the legal invalidity of the attacked lease contract, and that the plaintiff is estopped to bring that instrument into question. We shall deal with the controversy as the parties have chosen to present it, confining ourselves to a consideration of the questions raised by the motion to dismiss.

[1] The terms of the lease, and averments in the bill of circumstances attending the making of it, show that the lessee, or his personal representative or authorized assign, was to have the use for the period of 20 years, which at the tenant's option could be extended to 40 years, of a manufacturing site containing more than five acres, presumably worth $1,000 per acre, the price stated in a stipulation evidencing a contemplated sale and conveyance of it by the lessor to the lessee, and having an annual rental value of $300 or more. The contract does not in terms provide for the payment of any rent. It is suggested that a compliance with certain obligations imposed upon the tenant by the lease is to be regarded as a substitute for money rent. The undertaking of the lessee to save the lessor, its successors and assigns, harmless from damage, injury, or liability caused or increased by reason of the tenant's occupancy of the leased premises and use of the spur track, could not have the effect of compensating the lessor to any extent for the use of its manufacturing site. The extent of its operation was to save the lessor from loss occasioned by the tenant's use of the leased land and of the spur track. A compliance with the lessee's obligations to furnish, or cause to be furnished, free of expense to the lessor, a lease to a right of way for the spur track where it ran over land not belonging to the lessor, and to allow the lessor to use that track for its own purposes, when this did not interfere with the tenant's use of it, could not well be mistaken for the equivalent of an annual money rental of $300 or more for the manufacturing site. The spur track belonged to the

lessor, was constructed and maintained by it at its own expense, and was partly on its land and partly on another's. The right of the lessor to use its own track for its own purposes only when this did not interfere with the tenant's unrestricted right to use it is, to say the least, such a contingent and equivocal benefit that its value must be little, if any, more than nominal, considering the lessor's outlay involved. Other provisions of the lease make it plain that the parties to it did not understand or intend that a compliance with the lessee's obligations just mentioned would amount to an agreed reasonable and adequate rental for the leased tract. The right to continue the occupation and use of the leased premises was distinctly made dependent upon the continued operation thereon of the manufacturing plant stipulated for, "or some other business requiring the receipt and shipment of freight in volume substantially equal to such enterprise," and upon the continued carrying out in good faith of the stipulation in regard to the routing by way of the lessor's railway of all shipments of freight made by, to, or on account of the lessee, his heirs or assigns.

It cannot be supposed that the lessee would have bound himself by these stipulations if he had considered that a compliance with other obligations imposed upon him and his assigns by the lease amounted to the payment of an adequate rental. The whole tenor of the lease leaves no room for reasonable doubt that the provisions of it looking to the bringing about of a continued preferential treatment of the lessor by the tenant in the matter of the shipment of freight constituted, if not the sole, at any rate the controlling, substantial inducement to the lessor for allowing its land to be occupied and used without the payment of rent. Nor is it to be doubted that to the extent that the tenant escaped the payment of a reasonable adequate rental there was a deduction from the sum of the tariff rates paid on shipments of freight to and from it over the lessor's railway. It is apparent, from the terms of the lease and from the averments of circumstances attending the making of it and performance under it, that its failure to provide for the payment of rent was a concession to the lessee; and that this concession or discrimination was in respect of the transportation of property in interstate or foreign commerce by the lessor common carrier is to be inferred from the fact that it was to continue only so long as there was a continuance of shipments of that kind to and from the tenant over the lessor's railway. The stipulations just referred to stand in the way of regarding the transaction as merely the furnishing by a landowner of a free site for a manufacturing plant because of the benefits expected to result from a hoped-for enhancement of property values. Here the right to use the site on the stipulated terms ends when it ceases to be occupied by a shipper of freight over the common carrier donor's line of railway, or upon the occupant's failure, when it is reasonably practicable to do so, to continue to route or cause to be routed by way of the donor's railway all shipments of freight under the occupant's control, including such shipments as might be routed otherwise.

[2] It is made to appear that the lease in question operated to confer a bonus or benefit on the lessee, or his assigns, as a shipper of freight, which the carrier did not and could not confer on other shippers, and had the effect of making the rates paid on shipments controlled by the tenant less than those named in the lessor's published and filed tariffs. "By section 2 of the act to regulate commerce the carrier is guilty of unjust discrimination, which is prohibited and declared unlawful, if by any rebate or other device it charges one person less for any service rendered in the transportation of property than it does another for a like service. The Elkins Act makes it an offense for any person or corporation to give or receive any rebate, concession, or discrimination in respect to the transportation of property in interstate commerce whereby any such property shall be transported at a rate less than that named in the published tariff, or whereby any other advantage is given or discrimination is practiced." United States v. Union Stockyard, 226 U. S. 286, 307, 33 Sup. Ct. 83, 89 (57 L. Ed. 226). Averments of facts contained in the bill show that the lease operated to violate the statutory provisions mentioned and summarized in the quotation just made. The conclusion reached that it is invalid, we think, is well supported by authority. United States v. Union Stock Yard, supra; Cleveland, C., C. & St. L. Ry. Co. v. Hirsch, 204 Fed. 849, 123 C. C. A. 145; Louisville & Nashville R. Co. v. Mottley, 219 U. S. 467, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671.

[3] It has not been attempted in argument to support the ground of estoppel stated in the motion to dismiss. A party to a transaction prohibited and penalized by law cannot estop himself from setting up its invalidity. McCutcheon et al. v. Merz Capsule Co., 71 Fed. 787, 19 C. C. A. 108, 31 L. R. A. 415.

In our opinion the bill was not subject to be dismissed on either of the grounds stated in the motion made to that end.

The decree appealed from is reversed.

SANFORD v. FIRST NAT. BANK OF MARYSVILLE, KAN., et al.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1916. Rehearing Denied January 15, 1917.)

No. 4586.

1. MONEY RECEIVED ⟸1—RECOVERY—NATURE OF RIGHT.
The right to recover money had and received is equitable, and to prevail the plaintiff must show that in good conscience he is entitled to the money.
[Ed. Note.—For other cases, see Money Received, Cent. Dig. § 1; Dec. Dig. ⟸1.]

2. CORPORATIONS ⟸376—POWERS—PURCHASE OF OWN STOCK.
In the absence of constitutional or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⟸376.]

3. CORPORATIONS ⟸376—SUIT BY MISTAKE TO RECOVER MONEY PAID.
Payments made by a corporation on notes executed by it in good faith, when solvent, in payment for its own stock, cannot be recovered by its trustee in bankruptcy, representing creditors who became such after the purchase.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1530; Dec. Dig. ⟸376.]

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

Suit in equity by W. H. Sanford, trustee in bankruptcy of the W. O. Craig Manufacturing Company, against the First National Bank of Marysville, Kan., and others. Decree for complainant, from which he appeals. Affirmed.

See, also, 201 Fed. 548.

E. H. Gamble, of Kansas City, Mo., for appellant.

D. R. Hite, of Topeka, Kan. (D. W. Mulvane and C. E. Gault, both of Topeka, Kan., on the brief), for appellees.

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

AMIDON, District Judge. On June 13, 1902, the Siloam Springs Cold Storage & Ice Company was regularly incorporated under the laws of the state of Arkansas. Its capital stock was $50,000, divided into 2,000 shares, of the par value of $25 each. Its powers were to do a general ice and cold storage business. It purchased a seven-acre tract of ground at Siloam Springs, Ark., and erected thereon an ice and cold storage plant, and equipped and operated the same. The stockholders were various persons of Siloam Springs.

June 11, 1909, W. O. Craig and E. F. Pumphrey bought the entire capital stock of the corporation from R. S. Morris, as trustee, and new certificates for 500 shares each were issued to them and their wives.

July 20, 1910, Theodore H. Polack acquired the stock formerly owned by Pumphrey and wife. The new certificates were issued as

follows: 597 shares to Florence E. Polack (wife of Theodore), and 402 shares to Theodore H. Polack. One share was issued to F. E. Davey to qualify him.

During the two or three weeks immediately succeeding his acquisition of this stock, Mr. Polack negotiated with several parties for the sale of the same. Among these was Mr. W. O. Craig, the owner of the other half of the capital stock. An agreement of sale was made between Craig and Polack shortly prior to September 3, 1910. The purchase price was $15,000. Mr. Polack then said to Mr. Craig that, since Mr. Craig's entire interests were centered in the Siloam Springs Cold Storage & Ice Company, he thought the sale should be made to the corporation, and the corporation should secure with its property the payment of the purchase price. To this Mr. Craig assented. Accordingly, on September 3, 1910, a resolution was unanimously passed at a stockholders' meeting of the corporation, at which the entire stock was present, authorizing the purchase of the Polack stock. In payment therefor two notes were given, for $8,750 each, payable in one and two years, with interest at 6 per cent., making an aggregate of $17,500. The $2,500 over and above the $15,000 purchase price for the stock consisted of a $2,500 note owing by the corporation to the Marysville Bank for a loan of money, payment of which was assumed by Polack. The notes were secured by a second mortgage on the entire property of the corporation, and the same was immediately filed for record. The certificate of stock for 597 shares standing in the name of Mrs. Polack was assigned to the corporation and pasted on the stub of the certificate, and has ever since remained in this stockbook. The certificate for 402 shares issued to Polack himself were assigned to the corporation, but were then redelivered to Mr. Polack as additional security for the notes, and the certificate is now attached to the unpaid renewal note still outstanding. This transaction left Craig and wife the sole owners of the stock of the corporation, and from that time on Craig treated the corporation as his alter ego for business purposes. Its name was soon thereafter changed to the "W. O. Craig Manufacturing Company."

Immediately after receiving the notes and mortgage, made in the month of September, 1910, Polack sold and transferred the same, by an unrestricted indorsement and for their face value, to the firm of Fulton & Hohn. Fulton at the time had knowledge of the fact that these instruments had been given by the corporation in payment of the purchase price of its stock.

October 15, 1910, Fulton, representing the firm of Fulton & Hohn, sold to the First National Bank of Marysville the $8,750 note due in one year, for its face value. At the time of this transaction Fulton was cashier of the bank, and acted in its behalf in purchasing the paper. He thus acted in a dual capacity. On the one hand he represented the firm of Fulton & Hohn in the selling of the paper, and on the other he represented the bank as its cashier in its purchase. No other officer or agent of the bank had any notice or knowledge that the note had been given by the Storage Company as a part of the purchase price of its stock. Fulton's interest being adverse, his knowledge

would not be imputed to the bank. This disposes of one of the notes, and places it in the custody of the bank as a good-faith purchaser in the sense that that term is used when applied to property. Counsel for appellant, however, insists that the bank cannot be given the rights of a good-faith purchaser of negotiable paper, because the note contains conditions which render it nonnegotiable. Kobey v. Hoffman, 229 Fed. 486, 143 C. C. A. 554. But, without deciding the question, we shall dispose of the case upon the assumption that counsel's position is correct.

In December, 1910, the plant of the Siloam Springs Cold Storage & Ice Company was partially destroyed by fire. Insurance was collected in the amount of $54,356.56. Out of this the corporation paid all its general creditors, excepting three, holding claims aggregating $430.33; it also paid the note for $8,750 held by Fulton & Hohn, in full, with interest. It paid $1,750 upon the note held by the Bank of Marysville. It has subsequently made payments upon that note until the principal has been reduced to $4,500. The debt is now held by the bank for that amount in the form of renewal notes. After making the payments above referred to, at the time it collected the insurance money, the corporation was clearly solvent. Its only indebtedness was the $7,000 which it owed the bank, as a balance on the $8,750 note, and the $430.33 due to general creditors. It had on hand cash, $19,749.37, and salvage on the plant, and real estate of the value of $15,000, and $5,000 bills receivable. It rebuilt its plant. The new plant had double the capacity of the one that was burnt, and was, in the opinion of the master and the trial court, too large for the business of the community in which it was located. It was completed in May, 1911, and down to that time the corporation continued to be solvent. It afterwards gave a mortgage for $30,000 upon its entire property. The holder of that mortgage in July, 1912, brought suit for its foreclosure, and caused a receiver of the estate of the corporation to be appointed. July 27, 1912, the corporation was adjudicated a bankrupt, and the plaintiff herein was elected trustee.

The present action was brought against the First National Bank of Marysville, Kan., E. R. Fulton, and H. A. Hohn, Theodore H. Polack, and Florence E. Polack, to recover, with interest, all sums paid by the corporation on account of the notes given to Polack as the purchase price of the stock. The case was referred to a master, who made elaborate findings of fact. His conclusion was that judgment should be entered in favor of plaintiff for the $430.33 owing to creditors who were such at the time the stock transaction occurred, and that the action should be dismissed as to the balance of the claim. Exceptions were filed, and the cause was heard before the trial court upon the report and exceptions. The court overruled the exceptions, confirmed the report, entered judgment in favor of plaintiff for $430.33, and disallowed all other claims. The plaintiff appeals.

The brief contains no specifications of the errors upon which appellant relies, as required by rule 24 of this court (150 Fed. xxxiii, 79 C. C. A. xxxiii). Considering the state of the record, and the confused manner in which the case is presented, we might very properly

refuse to examine any of the matters discussed in the brief, and simply affirm the judgment. Sovereign Camp of Woodmen v. Jackson, 97 Fed. 382, 38 C. C. A. 208; City of Lincoln v. Street Light Co., 59 Fed. 756, 8 C. C. A. 253; Western Assurance Co. v. Polk, 104 Fed. 649, 44 C. C. A. 104. We have, however, examined the case sufficiently to satisfy ourselves that no substantial injustice was done by the trial court.

The case may be looked at under two headings: First, the payments made to the bank and to the firm of Fulton & Hohn; second, the liability of Theodore H. Polack and Florence E. Polack by reason of the notes and mortgage given to them by the corporation as the purchase price of their stock.

[1] As to the payments made to the bank and the firm of Fulton & Hohn, there is clearly no ground of liability. They held the promissory notes of the corporation, for which they paid full value. It is possible that the corporation might have resisted their payment. Upon that question we express no opinion, as some of the notes are now in litigation. The corporation, however, did not resist the collection of the notes. It made the payments voluntarily. We are at a loss to understand upon what ground those payments can be recovered. There was no fraud, no mistake, and, as between the corporation and the parties receiving the payments, no illegality. The right to recover money had and received is equitable. To prevail the plaintiff must show that in good conscience he is entitled to the money. That has been established law for more than a century. It was never more plainly stated than by Chief Justice Mansfield in the case of Moses v. Macferlan, 2 Burrow, 1005; s. c., 2 Keener's Cases on Quasi Contracts, 361. The great Chief Justice there said:

"This kind of equitable action to recover back money which ought not in justice to be kept is very beneficial and therefore much encouraged. It lies only for money which, ex æquo et bono, the defendant ought to refund: It does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty, although it could not have been recovered from him by any course of law—as in payment of a debt barred by the statute of limitations, or contracted during his infancy, or to the extent of principal and legal interest upon a usurious contract, or for money fairly lost at play; because in all these cases the defendant may retain it with a safe conscience, though by positive law he was barred from recovering. But it lies for money paid by mistake, or upon a consideration which happens to fail or for money got through imposition (express or implied) or extortion, or oppression, or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances.

"In one word, the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

This language has been quoted and approved in countless decisions both in England and in this country. The cases are collected in Professor Keener's work on Quasi Contracts, page 26 et seq. These payments are not affected by the so-called "trust fund" doctrine, as applied to corporate stock. That doctrine has never been held to forbid a corporation, which is solvent and a going concern, to pay its debts. A corporation thus situated has all the powers over its property which an

individual has. Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 Sup. Ct. 127, 38 L. Ed. 1113.

[2] Appellant has a better case against Mr. and Mrs. Polack. There is considerable conflict in the decisions of the courts as to whether a corporation has power to purchase its own stock. The rule, sustained by the weight of American authority, was stated as follows by this court in Burnes v. Burnes, 137 Fed. 781, 789, 70 C. C. A. 357:

"In the absence of constitutional or statutory prohibition, corporations have inherent power to buy, to sell, and to retire their own stock."

See, also, Allen v. Francisco Sugar Co., 193 Fed. 825, 114 C. C. A. 453; Atlanta, etc., Association v. Smith, 141 Wis. 377, 123 N. W. 106, 32 L. R. A. (N. S.) 137, 135 Am. St. Rep. 42; Fitzpatrick v. McGregor, 133 Ga. 332, 65 S. E. 859, 25 L. R. A. (N. S.) 50, and note.

The statutes of Arkansas do not prohibit such a purchase. Section 860 of the Arkansas Statutes (Kirby's Dig.) provides that:

"Any corporation organized under the laws of this state may reduce its capital stock, either by releasing unpaid subscriptions for stock, or by refunding to shareholders a portion of the amount paid in by them."

Such reduction must be made by resolution, and a copy of the resolution filed as an amendment to the charter, and other published notice given thereof. The statute also contains this provision:

"Provided that no such reduction shall affect or in any way impair the rights of any person *who is a creditor of such corporation at the time* the reduction is made."

[3] We think it is plain, therefore, that the corporation had power to purchase its stock. But that does not take us far in the decision of a concrete case. Whether an exercise of such power will be approved or condemned must depend upon the facts of the particular case. Most of the confusion in the decisions has been caused by attempts to lay down universal rules. Was there a fraudulent purpose to injure existing creditors, or other stockholders, or future creditors? Was the necessary result of the transaction to produce such injury? Did the injury result immediately, or did it result remotely and become commingled with other events, so as to leave the question in doubt as to whether the stock purchase was the real cause of the alleged injury? Was the corporation insolvent at the time, or did the transaction precipitate its insolvency? These are some of the considerations that have controlled courts in condemning or sustaining the purchase of its own stock by a corporation. When the facts of the present case are looked at, we think the case was properly decided. There was no actual fraud upon either creditors or stockholders. The corporation was solvent at the time, and continued to be so for more than a year thereafter. All existing creditors were fully paid, or provision made for their payment, by the decision of the lower court. The real cause of the corporation's insolvency was not the stock purchase, but the branching out into new and improvident business enterprises. All the creditors who are now represented by the plaintiff extended their credit in the promotion of such new enterprises. These are the considerations which ought to control, and we think they sustain the action of the trial court. The

case of Lefker v. Harner (Ark.) 186 S. W. 75, much relied on by appellant, involved a trust company, and turned upon a statute peculiar to such corporations. For that reason it is not in point.

Appellant relies upon some other transactions, but none of them have more merit than the one which we have discussed.

The decree is affirmed.

LAWTON et al. v. DARGAN.

In re HARTSVILLE WOOD MFG. CO.

(Circuit Court of Appeals, Fourth Circuit. December 6, 1916.)

No. 1455.

NOVATION ⊂=10—CLAIMS—RELEASE.

Where the holders of all the stock of a corporation, who also held notes given by it for large amounts, sold the stock to the manager of the business and surrendered the notes in consideration of the manager's agreement to pay the agreed price out of the proceeds of the business and to pledge the stock as security for such payments, the former stockholders could not, after the bankruptcy of the corporation in a year, assert claims against the estate on the theory that they retained their claims against the corporation and that the manager's agreement was that the corporation would pay those claims to the extent and in the manner agreed.

[Ed. Note.—For other cases, see Novation, Cent. Dig. § 10; Dec. Dig. ⊂=10.]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy; Henry A. M. Smith, Judge.

In the matter of Hartsville Wood Manufacturing Company, bankrupt. From an order of the District Court disallowing the claim of J. J. Lawton and another as trustees against the estate of which B. D. Dargan was trustee, the claimants appeal. Affirmed.

F. L. Willcox, of Florence, S. C., and E. O. Woods, of Darlington, S. C. (Willcox & Willcox and S. M. Wetmore, all of Florence, S. C., on the brief), for appellants.

George E. Dargan, of Darlington, S. C., for appellee.

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

ROSE, District Judge. The appellants seek the allowance of a claim against the bankrupt estate. They will be called the "claimants"; the appellee, the "trustee"; the Hartsville Wood Manufacturing Company, the "bankrupt." The last-named is a South Carolina corporation organized in 1903, in which year it began business. It never thrived. Its six stockholders kept it afloat by lending it money with

which to pay what it owed others. For their advances they took its promissory notes. By 1909 these aggregated nearly $54,000. They then made up their minds to stop sending good money after bad and to get back as much as they could of that which they had lent it. The claimants, two of their own number, were selected by them to act as trustees for all. In some informal way the claimants were put in charge of the bankrupt and of its property. It made a deed of its real estate, plant, and machinery to them. These were sold for something under $15,000, and the proceeds were divided among the stockholders. The bankrupt's merchandise and accounts and bills receivable remained. The claimants wanted to turn them into money. One Leon W. Coker had been bankrupt's manager. He thought that its losses had been incurred in manufacturing. Its shutting down threw him out of employment. He was without means of his own. He hoped that, if on easy terms as to payment he could buy its goods and accounts, he could make a living by continuing the merchandising branch of its business, especially if he could do so in its name and with its credit. As its debts to outsiders had always been paid, it had a fair standing in the mercantile world. The claimants did not want to sacrifice its merchandise at a forced sale. They were unwilling to undertake the troublesome and unprofitable task of collecting the accounts of a concern which had gone out of business. Coker, who will be called the "buyer," knew more about its goods and its customers than any one else did. He and the claimants struck a bargain. He was to get all that was still in bankrupt's name. He was to give for it the figure at which it stood on bankrupt's books. He, of course, could not pay for it in cash, or in any other way except as and when he could get the money to do so out of it or out of the profits which his skill and energy enabled him to make from it. The most that he could promise to do was to pay small sums at frequent intervals. Accordingly, he bound himself to give the claimants $350 a month until the purchase price of $13,700, with interest at 7 per cent., was fully paid.

How was he to get title to that which he had bought? That was everything the bankrupt could then sell, its merchandise, the accounts due it, its good will, name, and aught else belonging to it. There was one, and perhaps only one, simple, easy, natural, and certain way of transferring it all to him. If he bought its capital stock, he would have all it could give. No inventories, schedules, notices to debtors or to creditors would be needed. All its capital stock was accordingly assigned to him or to his order. The transaction could not have taken this form if the stockholders had retained their claims against the bankrupt. He would not have agreed to pay $13,700 for the capital stock of a corporation which owed to one group of creditors at least $39,000, that is $54,000 less the $15,000 received or to be received from the proceeds of its real estate and whose net assets over and above its liabilities to persons outside the group referred to were not worth more than he was to pay. If he was to become the owner of that stock, the promissory notes held by its stockholders must first be cancelled. This was done. When one buys stock for which he does not pay in full, it is usual for him to indorse over the purchased certificates to the sellers

to be held by them as collateral security that the balance of the purchase price will be paid. In this case that was what was done.

In support of their contention that the balance of the $13,700 unpaid at the time of the bankruptcy was a debt of the bankrupt, each of the claimants testified, and they put the buyer on the stand. They make mystery and confusion out of a simple matter. The buyer testifies in one breath that he purchased the good will and personal property of the bankrupt, and the next that what he bought was its capital stock. The truth is he wanted the former. The surest way to obtain it was to buy the latter.

One may invest many millions in the purchase of a railroad. He seeks its franchises, its rights of way, its tracks, its buildings, its rolling stock, and the thousand and one other things it has. Its more or less well engraved certificates are in themselves well-nigh valueless, but it is nevertheless these certificates he buys. If he gets all of them outstanding, all the railroad's possessions are added unto them.

There was nothing done or written by the parties at the time the transaction was put through out of harmony with the view that the buyer purchased the capital stock of the bankrupt, except perhaps a phrase in the bond he gave for the price. In it he promised to keep the tangible property coming under his control insured for the protection of the claimants, and in that connection he refers to it as that which he had purchased from the Hartsville Wood Manufacturing Company. The court below was right in holding that this turn of expression is all too slender a foundation to support the contention that the buyer never bought the capital stock.

If is of little significance that he subsequently made such payments as he did make to claimants out of the bankrupt's assets and entered them upon its books. He was not likely to keep two sets of books, and less likely to distinguish closely between what belonged to him in his individual right and what was the property of a corporation all of whose stock he owned. Men of far greater knowledge of corporate affairs and of vastly greater experience in them often lose sight of that distinction.

At the time the bargain was struck between the buyer and the claimants, it seemed to be a good one for both of them. If he made his monthly payments for three years and four months, they would get out of what they sold the most they could hope in any way to realize from it. Even if he ceased to pay after a much shorter period, they might be as well off as they would have been had they auctioned off the merchandise and themselves attempted to collect the accounts. Unfortunately for them, the adjudication of the bankrupt followed in about a year after the buyer came into control of it. As he had no outside resources, his ability to continue payments was gone. He still owed them about $9,800 for which they are now seeking to hold the bankrupt liable.

Some of the suggestions which have been put forward in support of their contentions require but a word. In this proceeding it would profit them naught to show that they had a claim against the buyer trading as the Hartsville Wood Manufacturing Company or against a de facto

corporation which was not the same as the de jure, but in some way had appropriated its name and had come into possession of a part of its property and business. The bankrupt adjudicated is the legally incorporated South Carolina corporation. We are not in this case concerned with claims against anybody or anything else. Indeed, the claimants in their proof of claim say it is against a corporation and that such corporation is the Hartsville Wood Manufacturing Company.

There is no other theory reconcilable with what was done at the time of the transfer to the buyer which will serve them any better. It is true that the bankrupt then owed them $39,000. They might then have said to the buyer we will give you all the stock of the bankrupt if you will take hold of its affairs and try to work out of it enough to pay us $13,700, to which amount we will reduce our claims against it, and we will further agree that so long as it pays us $350 a month we will not press for a more rapid extinguishment of even that diminished principal. They could have made the further condition that he should guarantee or indorse the bankrupt's obligation to pay this $13,700 in the named installments. They say if we had done so our rights as against bankrupt and buyer would have been what we say they are. It is perfectly natural for them, not only to argue that in substance they did these very things, but now to believe that they did.

The evidence as to what actually took place sufficiently establishes that what was done was to sell the buyer the stock and to take his personal obligation secured by the pledge of the stock itself for the price. There may have been reasons at that time apparently good for putting the transaction through in the form actually adopted. It may have been thought that a debt resting on the buyer who was not trading as an individual would far less seriously hamper his efforts to make the bankrupt's business a success, than if such debt remained a burden upon it. The claimants say that none of the general creditors of the bankrupt other than themselves knew anything of their agreement with the buyer or of the form in which it was consummated. They argue that, as no one in extending credit could have been influenced by what was done in these respects, there is nothing to estop them now from asserting that what was done was what they now think they always intended to do. They urge that to say they may not prove their claim against the bankrupt is to deprive them of their last opportunity to save a little of the money they have expended for the bankrupt's benefit. The sufficient answer is that, having given the transaction with the buyer a form which involved certain definite consequences, they would have the unquestionable right there to stand if they would. It follows that they cannot now elect to assume another position, when to permit them so to do would take money from the creditors of the bankrupt to give it to them. Moreover, the relations between a corporation and the individual or group of individuals who own all its stock are so intimate, their actual power over it so absolute, their ability to exercise that power in all sorts of informal ways so complete, that public policy requires that when they have given one form to some transaction between it and them they must not be permitted to say that what they apparently did was not what they intended to do when to allow them

so to say would work harm to third persons who have dealt with the corporation.

It follows that the court below properly held that the claimants were not creditors of the bankrupt, and its order disallowing their claim against it should be affirmed.

FLICKWIR & BUSH, Inc., v. WALKONEN.

(Circuit Court of Appeals, Third Circuit. December 20, 1916.)

No. 2152.

1. TRIAL ⟸178—DISMISSAL OR NONSUIT.

On the test whether a case is for the jury, testimony for plaintiff must be accepted as true.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 401–403; Dec. Dig. ⟸178.]

2. MASTER AND SERVANT ⟸287(8)—INJURY TO SERVANT—NEGLIGENCE—QUESTION FOR JURY.

Evidence in a servant's action for injury from the giving way of a brace on which he stepped, as to his having done so at direction of the carpenter boss to whose orders it was his duty to conform, as to it being unsupported, and this patent on inspection, and as to duty of the boss to see that it was supported, *held* to make a case for the jury, within Employers' Liability Act Pa. June 10, 1907 (P. L. 523), abolishing defense of fellow servant, where an employé's injury is caused by negligence of a person to whose orders he was bound to conform.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1064; Dec. Dig. ⟸287(8).]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Lauri Wilhelm Walkonen against Flickwir & Bush, incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Vroom, Dickinson & Bodine, of Trenton, N. J. (Joseph L. Bodine, of Trenton, N. J., and William G. Wright, of Philadelphia, Pa., of counsel), for plaintiff in error.

J. Alfred Anderson, of Boston, Mass., W. Holt Apgar, of Trenton, N. J., and William A. Pew, of Salem, Mass., for defendant in error.

Before BUFFINGTON and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below Walkonen, a citizen of Russia, brought suit against Flickwir & Bush, Incorporated, a corporate citizen of New Jersey, to recover for personal injuries alleged to have resulted from the latter's negligence. The cause was tried, and resulted in a verdict for the plaintiff. On the entry of judgment thereon defendant sued out this writ.

In the final analysis the 44 assignments of error finally resolve them-

selves into the correctness of the refusal of the court to give binding instructions for defendant. The injury to the plaintiff was suffered in Pennsylvania, and the case was based on the Employers' Liability Act of 1907 of that state (P. L. 523), set forth in the margin.[1] A study of the proofs satisfies us that the case was one for a jury. Without reciting all of them, it suffices to say they tended to show defendant company had contracted to build the piers of a railroad viaduct. These piers were of concrete, which was poured into an opening between frames or molds. These wooden frames, built by carpenters as the work progressed, consisted of sections of outer and inner squares, about 17 feet high, spaced about 4 feet apart. Into such opening soft concrete was poured, which hardened and formed the pier. The outer frame section was movable, and when a 17-foot section of concrete work was finished, the outer frame was raised in sections by crane chains and used to form the next highest section, in conjunction with an inner square which was built up from below to correspond. The weight of the soft concrete as it was poured in tended to spread the forms outwardly where it pressed against them, and to come together higher up. The two forms were kept together by tie rods and kept apart by wooden braces. These braces were about six inches wide and two thick, and in addition to serving as braces they were also used by the workmen to stand on while handling the concrete. They were made stable and secure, either by resting on the tie rods or on cleats nailed to the forms.

It was the duty of Oudine, the boss carpenter, to see that these braces were secure. At the time of the accident Walkonen, who was a carpenter, was helping build the inner wooden frame of a pier which had been built up to a height of about 240 feet. He was working under Oudine's direction, laying a platform on beams which reached across the top of the inner square. On this platform concrete was placed preparatory to its being shoveled into the space between the forms. The carpenter work was being hurried, because the concrete men could not get to work until it was done. Walkonen was bracing the beams when Oudine told him—

[1] "Section 1. Be it enacted, etc., that in all actions brought to recover from an employer for injury suffered by his employé, the negligence of a fellow servant of the employé shall not be a defense, where the injury was caused or contributed to by any of the following causes, namely—

"Any defect in the works, plant, or machinery, of which the employer could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or any other person in charge or control of the works, plant, or machinery; the negligence of any person in charge of or directing the particular work in which the employé was engaged at the time of the injury or death; the negligence of any person to whose orders the employé was bound to conform, and did conform, and, by reason of his having conformed thereto, the injury or death resulted: the act of any fellow servant, done in obedience to the rules, instructions, or orders given by the employer, or any other person who has authority to direct the doing of said act.

"Section 2. The manager, superintendent, foreman, or other person in charge or control of the works, or any part of the works, shall, under this act, be held as the agent of the employer, in all suits for damages for death or injury suffered by employés."

"to brace those beams quickly; that it was in a hurry, because there were so many men out of work. * * * When Oudine saw that I was bracing the beam, and he saw that it was loose, he told me to get down and step on that brace between the inner and the outer form. * * * I was lying on my stomach on this beam here. * * * Oudine called to me that 'you had better get down and hammer that brace on from the other side; to get down onto the brace between the inner and outer form, because you might fall from there and get hurt.'"

What follows Walkonen thus describes:

"Q. Now, what did you do on receiving that order from Oudine? A. I stepped down on the brace. Q. And which brace did you step on? A. The third brace. Q. That would be the one right opposite where you were trying to nail the bracing between the two beams? A. Yes. Q. And was that the nearest brace to where you were working? A. Yes. Q. Now, go ahead from there and tell us? A. When Oudine told me to get down on that brace, I was going down. I had one foot on the brace already, and I was just about to put the other foot on, when it gave way and I fell down. Q. How far did you fall? A. 16 feet. Q. Did the brace go with you? A. Yes. Q. And what did you land on? A. On the reinforcement rod. Q. And what did that do to you? A. Went in through my leg. Q. And how much was that reinforcement rod sticking up above the concrete? A. About three or four feet. Q. Now, before you stepped on that brace that you used, did you know it was unsupported either by a turnbuckle or a cleat? A. No; I didn't. Q. After you went down in between there, after the accident happened, did you see whether there was a cleat or turnbuckle supporting that brace that came down? A. When I fell down, I looked up, and I saw that there was neither a turnbuckle or a cleat there. Q. From where you were standing before the accident, looking down, could you tell whether there was a turnbuckle or a cleat under that brace? A. No; I couldn't see. Q. Could Oudine, standing out on the end where you say he stood—could he tell, by looking over the side, whether there was a turnbuckle under that brace? A. Yes."

[1] There was proof tending to show that the brace had been there for some time, and that it was neither supported by a tie rod nor a cleat. There was contradictory testimony on the part of the defendant, but on the test whether the case is for a jury we must accept the testimony in behalf of the plaintiff as true.

[2] Without, therefore, entering into further details, it sufficiently appears that the proofs tended to show that Walkonen was an employé of the defendant; that his duty was to conform to the orders of Oudine, the carpenter boss; that he was ordered by Oudine to stand on a certain brace in doing a certain piece of work; that he conformed to such orders, and by reason of said brace being unsupported by a cleat or tie rod it gave way and caused plaintiff's injury; that the injury was caused by Oudine's negligence, whose duty it was to see the brace was secured; and that the proof that the brace was not supported at all, a lack which was patent on inspection, all united to bring the case within the Pennsylvania statute quoted, and afforded grounds from which a jury could infer negligence on the part of the defendant.

The judgment below will therefore be affirmed.

FLICKWIR & BUSH, Inc., v. PONTYNEN.

(Circuit Court of Appeals, Third Circuit. December 20, 1916.)

No. 2151.

MASTER AND SERVANT ⊂=286(24)—INJURY TO EMPLOYÉ—NEGLIGENCE—QUESTION FOR JURY.

Evidence in an action for death of an employé from the breaking of a chain used in hoisting heavy loads, as to its condition and infrequent and superficial inspection, *held* to make a case for the jury as to the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1029; Dec. Dig. ⊂=286(24).]

In Error to the District Court of the United States for the District of New Jersey; John Rellstab, Judge.

Action by Anna Pontynen against Flickwir & Bush, Incorporated. Judgment for plaintiff, and defendant brings error. Affirmed.

Vroom, Dickinson & Bodine, of Trenton, N. J. (Joseph L. Bodine, of Trenton, N. J., and William G. Wright, of Philadelphia, Pa., of counsel), for plaintiff in error.

J. Alfred Anderson, of Boston, Mass., W. Holt Apgar, of Trenton, N. J., and William A. Pew, of Salem, Mass., for defendant in error.

Before BUFFINGTON and McPHERSON, Circuit Judges.

BUFFINGTON, Circuit Judge. This is a personal injury case, brought by Anna Pontynen, a citizen of Russia, against Flickwir & Bush, Incorporated, a corporate citizen of New Jersey, to recover damages for the death of her husband, Anton Pontynen, defendant's employé. The cause was tried, and resulted in a verdict for plaintiff. On entry of judgment on such verdict, defendant sued out this writ.

The general work which was being carried on by the defendant, and in which the decedent was killed, we have described in an opinion just filed in Flickwir v. Walkonen, 238 Fed. 307, —— C. C. A. ——, a case in this court. We avoid repetition by reference to such opinion and adding that Pontynen was a carpenter working on the wooden frames between which each pier was constructed. While so at work he was struck by a flying chain, knocked off, and killed by a fall to the ground, about 130 feet, below. At the time of the accident, Pontynen was engaged in helping raise an outer form section. It was about 30x17 feet and weighed several tons. In hoisting it a twin chain, spaced in the middle by a ring which was attached to a block, was used. These free ends, which were some 18 feet long, were fastened to the form which was to be raised. A link in one of these chain sections broke near to where it was fastened to the form, and the loose end snapped around Pontynen, who was standing on the edge of the pier, and threw him down to the ground. Pontynen's duty was to stand at that point and signal the engineer when the form was to be hoisted. When killed, he was just about to give the signal.

The alleged negligence of the defendant was the use of an unsafe chain and the negligent inspection thereof, and the crucial question was whether there was such evidence of negligence as made the case one for a jury. In that regard the proof was that the chain which broke was part of a larger one defendant had bought from a reputable dealer some time before the accident. It had been in general use for some months, and when this shorter length was taken from it a hook with a larger ring to it had been fastened to the end of the chain. It was the last chain link which broke. It was interlinked with the large ring attached to the hook. Whether the last ring on the chain or the ring on the hook had been cut and rewelded to effect the juncture did not appear; but, whichever one was cut, the rewelding was done by the defendant at its shop on the work. These chains were subjected to hard usage, and at times were thrown down from the tops of these high piers. The broken link was found after the accident, and showed a fracture of substantial depth and length, where welded, which bore evidence of not being recent. Expert testimony was produced by plaintiff tending to show that the welding at the break was defective, and that in the new fracture a crystallization from overstrain was shown.

After explaining these matters, an expert witness of large experience testified as follows:

"Q. Before this break occurred, was there anything that would indicate, to any one inspecting that, that there was a flaw there, and that that link was weakened and was unsuitable for use? A. Yes. Q. And was it obvious from inspection from the outside? A. Yes; no human eye can determine the degree of that unsoundness here, but, when that order or condition exists, it is a fair assumption, to those trained in the inspection or testing of such material, that that degree of disorder on the surface is an indication of further disorder within. Q. Would you just describe before this link was broken, if it had been inspected, what would an inspector see there that would indicate to him that that link was defective? A. A sufficient measure of disorder to justify its rejection. Q. Just what was the physical condition he would see there? A. A broken surface of considerable dimension, and a condition externally indicating further disorder within. Q. He would see a break there, and between what points would that break be noticeable? A. At the most critical and tender spot of the link, where the scarf is welded. Q. Yes; but what is the space between? A. In this case it is a quarter of an inch long by an eighth of an inch in depth. That is visible. How much more no one could determine underneath until fractured. Q. That is, you would see this break from the outside? A. Yes. Q. That would appear as a crack, you say? A. Yes; and a disorder at a critical point. Q. And by a critical point, what do you mean by that? A. The point of juncture between each end of the link before welding. Q. It is on the scarf, you say? A. It is right in the scarf, the usual place for ills of that kind. Q. And, if you will, give me those distances again. That crack would have been how? A. About a quarter of an inch long by one-eighth of an inch in length, or diameter, rather. Q. That would be apparent when the chain was new? A. Without any doubt. Q. As the chain was used from time to time, what effect would that have on that exterior crack? A. Further impairment—an extension of the trouble. Q. And would it open the crack at all? A. It would, or it might not open appreciably, but it would burrow underneath—decrease its strength underneath. Q. Now, in looking at—you call this the scarf (indicating)? A. That is the end of the scarf. Q. I notice that the end of the scarf is discolored a brown, and that on the face it is more of a black? A. The brown is a rust that has set in since the fracture. Originally it was bright, by reason of contact with the side opposite. Q. So does that discoloration by rust indicate to you how long that crack had been there? A. Yes, sir; in that case. It was born that

way. Q. And born with a crack in it as deep as the face of that? A. Undoubtedly. * * * Q. Now, you say, when this chain was made, that was imperfectly welded there? A. All my experience points to that deduction. Q. And what caused that? A. Lack of fusion. It may have been caused by dross in the metal, a condition often encountered. It may have been caused by carelessness in the welding, the blacksmith having performed his work imperfectly. * * * Q. Now, do I understand you to say that this crystallization that you notice on the opposite side indicates something about the use that this chain was put to? A. It indicates a condition of fatigue resulting from a severe stressing or impact due to violent use. Q. That crystallization, could that be seen by outward inspection? A. Impossible. Q. Now, can you give us any idea what the life of a chain of that kind is? A. No one can. Q. It depends on the work? A. The measure of work imposed regulates that. Those chains have been known to fail in six months. They have been known to resist excessive wear even for six years. Much depends on the character of the material. * * * Q. Now, there was nothing on the outside to indicate the crystallization? A. Nothing. Q. And you have explained to us the evidences that you see here, which would indicate on inspection that this was a defective link; that is right, is it? A. Yes, sir. Q. And it is the imperfect welding here which you say was apparent from the outside? A. That is apparent from the outside. Q. You cannot say to what extent that imperfection would go into the interior? A. No, sir. Q. No man can say that? A. No; that is regulated by the range of vision only. * * * Q. Now, looking at this broken link, can you tell by the color how long this defect had existed previous to the break? A. Not a part of it, but from the end of the scarfed section up to the flat cross-section. Q. You mean from the end of the scarfed section, this little form here (indicating)? A. Yes; from there throughout its depth that disorder existed from the beginning. We can now see into the fracture, and can reach that conclusion without error. Q. And does the discoloration indicate anything to you? A. It indicates a progressive extension of the fracture. * * * Q. Now, would this, at the time this link was new and fresh, and in a chain like this one down here, and this crack had not occurred here, and it had not been subject to this break, would this flaw that you mention have been revealed to the naked eye? A. It would. Q. Would it have been revealed to the eye of a man less skilled in his profession and calling than you? A. Yes; but its importance might not be appreciated. * * * Q. Would the crystallization in that link have been visible to the naked eye? A. Not outwardly, but, when fractured, yes, unmistakably. * * * Q. And you are speculating as to how that link looked before it broke? A. Not with reference to the defect. Q. But you spoke of a defect. Was that defect as noticeable before the chain broke as it is now? A. I believe it was."

A second witness also testified to the same general effect as follows:

"Q. Is that weld there perfect? A. No. Q. Now, have you got that chain together, the links together? A. Yes. Q. Holding the parts of that link together the way they fit, are there any signs on the exterior of that link which indicate an improper welding? A. There are. Q. And what are those exterior signs? A. The point of the scarf, about one-quarter inch long and one-quarter inch wide, indicates it. Q. What about that scarf? A. When it was scarfed and turned around in that manner (indicating), it was welded down, and something foreign got into it, and the scarf failed to unite, and that we call a 'sprawl.' Q. Is that the same thing that Mr. Cone called a 'peening'? A. I think it is. Q. When that weld was made, what do you say was in there between that prevented a proper welding? A. Some foreign matter; I don't know really what it was—slag, I presume. * * * Q. After that chain was made and was welded, and before it was broken, what do you say the signs were on the exterior part of that link—just describe them—which would indicate that there was an improper or imperfect welding? A. The little cracks on each side of the tongue of the scarf. Q. What is the shape of that tongue? A. It is pointed about, I should say, three-eighths of an inch long, and one-quarter of an inch wide. Q. Were those cracks there after

the welding was done? A. They were. Q. Could they have been seen on inspection? A. They could. * * * Q. In examining that special link, before it broke, what was there on the outside that would indicate any defect to that chain? A. This unwelded sprawl. Q. How would that show? A. It showed by this piece being broken off here; showed this dark color. Q. Take it before the piece was broken at all. A. It showed—just showed two cracks in the scarf. Q. Those cracks could be seen? A. They could. Q. Now, is there any significance in seeing a crack in that part of the link near the weld? A. There is. Q. What is the significance? A. It shows there is something foreign in between that prevented it from uniting. Q. Seeing that crack, that imperfect welding, from the outside, what would that indicate as to the condition of the material inside the link? A. It would indicate that there was a foreign substance there, and be dangerous to use it any further. Q. You couldn't tell how badly it was gone on the inside? A. I couldn't tell how bad it was. Q. It would be a suspicious link? A. It would be a suspicious link. Q. What sort of inspection would reveal that sprawl, that imperfect welding? A. Just lay it on the floor or ground, and take hold of the hook, and go over it link for link, the whole length of it. Q. See it with the eye? A. You can see it with the eye. * * * Q. What is there about that chain that you see that indicates that it has had any rough use, as far as sustaining weight? A. Crystallization. Q. That is on one side? A. On both sides. Q. Anything else about the chain? A. Yes; the wear in the throats of the chain. Q. Wear in where? A. The throat. Q. Is the wearing in the throat of that chain any indication to you of the use it has had? A. Yes. Q. And the crystallization? A. Yes. Q. And what do they indicate to you? A. They indicate to me that they have lifted heavy weights and were used quite a little, a long time. Q. If a chain has been used lifting heavy weights, as this indicates, what would be a practical way of examining that chain? A. Looking it over with the eye, link for link. Q. How often should you say the chain ought to be looked over? A. A chain of this kind, I should say it should be looked over every two or three days. Q. How long would it take to look it over? A. Three or four minutes, a very few minutes to look the chain over."

On cross-examination he said:

"Q. How large would you say this crack was before the links broke? A. I think it was a crack you could run your finger nail along. It was not much of a crack, but it was visible enough so you could stick your thumb nail in. Q. You think so? A. I think so."

In view of this testimony and all the circumstances, the character of the work done, the strains upon these chains, the infrequency and alleged superficial character of such inspections as were made, we think the court would have transcended its powers and province had it held as a matter of law that there was no proof of negligence. The case was peculiarly one for a jury.

The judgment below is therefore affirmed.

DELAWARE, L. & W. R. CO. v. SOUND TRANSP. CO.

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

No. 25.

MUNICIPAL CORPORATIONS ⊂⊃719(4)—WHARVES—LEASE—TERMINATION BY NOTICE—LIABILITY OF SUBLESSEE.

Plaintiff held a lease from the city of New York for certain dock property for the term of 10 years, which it assigned to defendant under an

agreement for the payment by defendant of a stipulated sum periodically in addition to the rental to the city. The agreement further provided that, should the lease be terminated other than by default of defendant, the payments to plaintiff should cease. The dock commissioner served notice on defendant that the property would be required by the city in making contemplated improvements, such right having been reserved in the lease; but the improvements were not made, nor were there any definite plans for the same, and the possession and use of the property by defendant were not interfered with. *Held*, that the notice did not operate to terminate the lease, so as to relieve defendant of liability for the payments to plaintiff.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1532; Dec. Dig. ⟸719(4).]

Hough, Circuit Judge, dissenting.

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

Action at law by the Sound Transportation Company against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Affirmed.

On writ of error to review a judgment entered November 29, 1915, in favor of the Sound Transportation Company, the plaintiff below, and against the Delaware, Lackawanna & Western Railroad Company, the defendant below, in the sum of $44,703.49. The cause was tried before Judge Mayer and a jury and as both sides moved for the direction of a verdict the trial judge was authorized to decide the questions of fact and to direct the verdict accordingly. The parties will be referred to hereafter as they appeared in the District Court—as plaintiff and defendant.

Louis Marshall, William S. Jenney, and A. J. McMahon, all of New York City, for plaintiff in error.

Benjamin G. Paskus, of New York City, and John M. Enright, of Jersey City, N. J., for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. The plaintiff is a New York corporation and the defendant is a Pennsylvania corporation, each transacting business and maintaining an office in the city of New York. On July 2, 1908, the city, acting through its commissioner of docks, leased to the plaintiff a wharf situated in Brooklyn on the East River known and described as "the westerly side and surface of Pier Old 34 (Catherine Slip Pier West) and the bulkhead and small pier between Piers Old 33 and Old 34, together with the right to use the sheds owned by the city on said premises," for the term of ten years from July 1, 1908, at the rent of $8,000 per annum. The complaint alleges that on August 7, 1908, the Sound Company subleased to the Railroad Company all of the property rights and privileges leased to it by the city, "excepting, however, the bulkhead about 30 feet in length lying between the easterly side of Pier Old 33 and the westerly side of the small pier between Piers Old 33 and 34, East River," which parcel was thereby reserved to the use of the plaintiff.

The complaint alleges further that the sublease was made "pursuant to an agreement wherein the plaintiff did agree to use its endeavor to

obtain the consent of the city of New York to the assignment of said lease to the defendant and, upon obtaining such consent, to assign the same, upon the terms hereafter stated." It is also alleged that the Sound Company did obtain such consent and did assign the said lease to the defendant and that the defendant entered into a written agreement dated July 9, 1909, wherein it agreed to assume the said lease and pay the rent as therein stipulated, which obligation the defendant has failed to discharge, to the plaintiff's damage in the sum of $50,000. The defendant insists that its possession and enjoyment of the demised premises were terminated by a cause other than its default.

The testimony shows a complicated situation upon the facts but it clearly appears that the Sound Company possessed valuable rights and privileges in the wharf property heretofore described and known as the westerly side and surface of Pier Old 34. These rights the Sound Company transferred to the Lackawanna Company on August 7, 1908, excepting about 30 feet of bulkhead lying between the easterly side of Pier Old 33 and 34, which parcel was reserved for the use of the Sound Company. The Sound Company having obtained the proper consent assigned its lease to the defendant company, which went into possession under the sublease and assignment and incurred the obligation for which judgment was rendered. We are satisfied that the Sound Company possessed a valid and valuable lease of the pier property in question. The defendant wanted this property and with the co-operation of the city officials it attempted to acquire all the right which the plaintiff had therein by virtue of the lease. It could not accomplish this result without fully complying with the law. The railroad company had assumed the city lease and had agreed to pay to the Sound Company the difference between the rent reserved in the sublease and the rent reserved in the city lease for corresponding periods.

The agreement of July 9, 1909, concludes as follows:

"But it is expressly understood and agreed that if the possession and enjoyment by the party of the first part of the demised premises, is terminated by cause other than the default of the said party of the first part, before the end of the demised term, the party of the first part shall not be liable to pay the party of the second part such difference in rent, and the said party of the first part shall receive from the party of the second part and shall be repaid by it the proportionate amount paid in advance to the party of the second part, as hereinbefore specified."

The dominating question is—Was the possession of the Railroad Company terminated so as to absolve it from paying the specified rent under its written agreement to do so?

The Sound Company had a valid city lease of Old Pier 34 and this was transferred to the Lackawanna Company upon its agreement to assume the said city lease and pay to the Sound Company on rental days prescribed in the city lease the difference between the rent therein reserved and the rent reserved in the sublease. The District Court construed the agreement of July 9, 1909, to mean that the agreement would be ended if the city of New York terminated the lease by the action of its officers authorized to take such proceedings. If the Lackawanna Company by affirmative action on its part or by acquiescence in the acts of others made it possible for the city to terminate the lease

where otherwise it would not have done so, then the attempt to terminate the lease was not within the intent of the agreement. The notice of October 16, 1913, signed by the commissioner of docks, to the Lackawanna Company did not operate to terminate the lease for the reason that the plan therein described was not carried out nor was it in contemplation of being carried out. The plan of improvement was tentative, unsettled and with no definite plan adopted which was binding upon the parties. The Lackawanna Company was not deprived of its property or the use thereof by the notice of October 16, 1913, and its possession and enjoyment of the demised premises was not interfered with.

It is argued that the Lackawanna Company acting in collusion with the commissioner of docks, procured the notice of termination to be served upon the Sound Company in order to avoid the payment of rent. The District Judge found, and we see no reason to doubt the accuracy of his finding, that "there is no suggestion of any conduct to be characterized by impropriety of either the city or the railroad company." Each party was endeavoring to protect its own interests in a lawful and legitimate manner but we see no reason to impute fraud to either. It is enough, in our opinion, that when the notice was served, it was not justified either in fact or in law.

The judgment is affirmed with costs.

HOUGH, Circuit Judge (dissenting). The facts established below are unassailable here, and it was distinctly found that no fraud or wrongdoing existed on the part of the Lackawanna Company. This action is maintainable, however, only upon the ground of wrongdoing. The plaintiff below prefers to say that the "defense is inequitable"; but the phrase means wrongdoing by the defendant, if it means anything.

The situation presented is not complicated; the Sound Company procured a lease of certain New York City wharf property, and subleased a portion thereof to the Lackawanna Company. Later, and with the city's assent, it assigned the entire lease to the Lackawanna. After such assignment the Sound Company had no title, estate or interest of any kind in the leasehold premises; but it had a personal contract with the Lackawanna Company, by which in consideration of said sublease and assignment, the latter agreed to pay the Sound Company certain moneys at stated intervals as long as the assigned lease was in existence, provided, however, that should the Lackawanna's possession and enjoyment of the premises be "terminated by cause other than the *default* of" the Lackawanna Company, "no claim for damages (should) be made by either party against the other, except the cessation of such use and enjoyment be due to the *default* of" the Lackawanna.

The original city lease was made by and through the commissioner of docks, and contained a proviso that if at any time the city should "determine to proceed" with any improvement of the water front that required the use of the demised premises, a notice might be given terminating said lease "from the date of the receipt of such notice." In form such notice was served, nor was it given as the result of any fraud or

wrongdoing on the part of the Lackawanna. Yet judgment was directed, and could have been directed, only on the ground that there had been a *default* on the part of the defendant below; and this court has sustained such judgment because the notice given "was not justified either in fact or in law."

The city was not called upon to justify its conduct in any way; it alone could decide whether the property was wanted for improvement; and, no matter what induced the city's action, the notice itself was perfectly valid. If it had been procured by the Lackawanna for the purpose of terminating its own liability to the Sound Company, an action for damages would have lain under the proviso of the personal contract aforesaid; but such an intent is expressly negatived by the finding of the trial court.

It was proven that the city would probably not have decided to proceed with improvement, if it had not been assured of a solvent tenant, viz. the Lackawanna Company; one that could pay for the improvements and work them out under a long lease of the improved property. Any person or corporation could have done this, and there is nothing in the contract forbidding the Lackawanna to take advantage of the city's purpose and desire. Its conduct was not "unreasonable under the circumstances"—which is certainly the widest definition of *default* suggested. Re Woods, etc., Contract, [1898] Ch. Div. 211.

A reasonable and proper care for its own interest induced and justified the Lackawanna Company in seeking to be the city's new tenant. Delaware, etc., Co. v. Bowns, 58 N. Y. 573, is entirely applicable.

For these reasons I dissent.

INTERNATIONAL RY. CO. v. UNITED STATES.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 21.

1. RAILROADS ⇐229—REGULATION—SAFETY APPLIANCE ACT—APPLICATION.
Railway Safety Appliance Act March 2, 1893, c. 196, 27 Stat. 531, as amended by Act March 2, 1903, c. 976, 32 Stat. 943 (Comp. St. 1913, §§ 8605–8615), which declares it unlawful for an interstate railroad to haul or permit to be hauled or used any car not equipped with automatic couplers, excepting those used on street railways, applies to the hauling of an ordinary freight car by an electric locomotive on an interstate interurban railway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⇐229.]

2. RAILROADS ⇐229—REGULATION—SAFETY APPLIANCE ACT—CONSTRUCTION.
The Railway Safety Appliance Act, while in form penal, is remedial in its purpose, and will not be construed with absolute strictness, but will be given such construction as will effectuate its avowed purpose of protecting the employés and the public, and its spirit and not its letter will be followed.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⇐229.]

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3. RAILROADS ⊂⊃229—REGULATION—SAFETY APPLIANCE ACT—TROLLEY CARS.
Under Railway Safety Appliance Act, § 2, as amended by Act March 2, 1903, c. 976, 32 Stat. 943, making it unlawful for an interstate railroad to haul or permit to be hauled or used any cars not equipped with automatic couplers, excepting those which are used upon street railways, it is not necessary that trolley cars used on an electric railway between two cities in different states be equipped with automatic couplers, where they run singly; but they must be so equipped if they are run coupled together, though each runs by the power of its own motor.
[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 743; Dec. Dig. ⊂⊃229.]

4. STATUTES ⊂⊃181(2)—CONSTRUCTION—ABSURDITY.
One of the surest tests of statutory construction is whether the interpretation contended for will render the statute ridiculous.
[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 259, 263; Dec. Dig. ⊂⊃181(2).]

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

Action by the United States against the International Railway Company to recover penalties for violation of Safety Appliance Act March 2, 1893, as amended by Act March 2, 1903. Judgment for the United States, and defendant brings error. Judgment affirmed, on condition that the United States enter a remittitur of a part thereof; otherwise, reversed, and new trial awarded.

Under nine causes of action the United States alleged and proved: (1) That the railway company moved two cars fastened together, between Lockport and North Tonawanda, N. Y., when neither car was equipped with an automatic coupler; (2) that it moved between the same points a freight car belonging to the Erie Railway having an automatic coupler, which at the time of transport was out of repair and inoperative; and (3) that at divers times, between the same points and over the same line of rails, it moved various single cars, none of which was fitted with automatic couplers. The method of propulsion in every case was electricity operating through an overhead trolley on a motor in the several cars, except in the case of the Erie freight car, which was hauled by an electric motor. All these car movements were admittedly in the transaction of interstate commerce, because the traffic passed over the tracks of the Erie Railroad between the two cities above mentioned, and tickets to and from extrastate points were received for passage on each and every of the cars (except the freight car) referred to in the pleadings, and passengers so entering on or completing interstate passage were on board at the time of the conditions above referred to.

The International Railway is what is technically known under New York statutes as a "street railroad," but had a chartered right to operate, and did operate, this section of the Erie track between North Tonawanda and Lockport. No steam locomotive moved on that stretch of track under the arrangements between the defendant and the Erie Company. The principal business of the International Company is to own or operate a considerable system of city and suburban transport, extending from Buffalo to Lockport and Niagara Falls, and into Canada. Within the city limits of North Tonawanda and Lockport, at some seasons of the year, trains which have run or intend to run over the Erie track aforesaid stop in the usual manner at street corners to take up passengers. On the country run they stop at appointed stations. The trains or cars complained of operated on a regular schedule, but (with the exception of the Erie freight car aforesaid) whenever one car was fastened to another, each car was driven by its own motor, each taking power from the

overhead trolley. With the exception of said freight car, all the cars complained of were of a type well known and habitually used in the city as well as suburban traffic. They were rather heavy "trolley cars."

The trial court directed a verdict in favor of the United States for $100 on each cause of action.

Edward E. Franchot, of Niagara Falls, N. Y., for plaintiff in error.
Stephen T. Lockwood, U. S. Atty., of Buffalo, N. Y.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). [1] The second section of the statute sued upon declares it to be unlawful for any common carrier engaged in interstate commerce by railroad "to haul, or permit to be hauled or used on its line, any car used in moving interstate traffic not equipped with" couplers, that engage each other "automatically by impact," and can be uncoupled "without the necessity of men going between the ends of the cars." The amendment of 1903 declares that the foregoing regulation applies to all cars used on any railroad engaged in interstate commerce "excepting those * * * cars * * * which are used upon street railways"—with other exceptions not pertinent to this cause. That the act of hauling a freight car in interstate commerce, with a locomotive of any type and with its coupler inoperative, exposed the railway to the statutory penalty, is so plain that we pass the incident of the Erie freight car without comment.

[2] The Safety Appliance Act is in form penal, but it is settled that, since the primary object of the legislation "was to promote the public welfare by securing the safety of employés and travelers, and it was in that respect remedial, * * * and the design to give relief was more dominant than to inflict punishment," and that "the act might well be held to fall within the rule applicable to statutes to prevent fraud upon the revenue, and for the collection of customs, that rule not requiring absolute strictness of construction." Johnson v. Southern Pacific Co., 196 U. S. 17, 25 Sup. Ct. 161, 49 L. Ed. 363. These words were used when the court held the statute was not satisfied by the use of a coupler that fastened by impact with another of its own kind, but required manual aid when sought to be joined with one of another sort. Yet the device condemned obviously came within the letter of the statutory language, for it could and did act in the statutory manner, under the expected conditions of use, and did couple by impact.

In Pennell v. Philadelphia & Reading Ry., 231 U. S. 675, 34 Sup. Ct. 220, 58 L. Ed. 430, it was held that a tender need have an automatic coupler only at the end where cars were to be fastened thereto, because the act and its lawful interpretation by the Interstate Commerce Commission required couplers "where danger might be incurred by the employés." 231 U. S. page 680, 34 Sup. Ct. 222 (58 L. Ed. 430). Yet tenders are specifically enumerated in the act, and they do and must couple at both ends. Without extending citations (as might be done) the foregoing is enough to show that the construction of these statutes has been most benevolent, looking carefully to ascer-

tain whether the particular thing complained of came within the mischief of the act.

No decision could more amply illustrate this method of viewing and construing the law, and none more fully demonstrate its propriety, than the case solely relied upon by the plaintiff below—Spokane, etc., R. R. v. United States, 241 U. S. 344, 33 Sup. Ct. 668, 60 L. Ed. 1037. There as here, the railway company operated lines partly on the streets of two cities, but between them lay a stretch of country track. Trains—i. e., aggregations of cars drawn by the same engine (United States v. Boston & Maine R. R. [D. C.] 168 Fed. 148)—were regularly operated between these cities, composed of cars automatically coupled, but cars without automatic couplers, and ordinarily used only within the cities, were, owing to pressure of traffic, and on the day complained of, attached to a train bound from one city to the other. See the case below, 210 Fed. at page 245, 127 C. C. A. 61.

Obviously the word "used," in the proviso relating to street railways, is wide enough to cover any use however temporary, if the act is to be literally construed, with the result that by using a car, perhaps only occasionally, on a stretch of street track, it would thereby acquire license to travel over any length of extraurban lines without the appliances required by statute. But the court held (241 U. S. 350, 33 Sup. Ct. 668 [60 L. Ed. 1037]) that, since the object of the law was to secure safety to employés, such construction must be wrong, because it would "destroy the remedial processes intended to be accomplished by the enactment." Wherefore it was held that the proviso exempted street railway cars only when used on street railways, and not when not so used. Thus it is seen how sedulously the intent of Congress in enacting the statute, and therefore the intent of the act, has been pursued in its exposition and application. The spirit rather than the letter has been followed, in accordance with the "universal rule * * * that the intent of the law, if it can be clearly ascertained, shall prevail over the letter, and this is especially true where the precise words, if construed in their ordinary sense, would lead to manifest injustice." Lionberger v. Rowse, 9 Wall. 475, 19 L. Ed. 721.

[3] The scope of this statute is so wide, and the subject regulated takes such protean forms, that in the decisions under it herein cited, and many others, the application of the act has always been governed by the intent of the law itself. And for this it is not necessary to have recourse to anything outside the printed page, for the title of the act (as has often been pointed out) declared that the intent of the Legislature was "to promote the safety of employés and travelers upon railroads by compelling common carriers * * * to equip their cars with automatic couplers," etc. It is quite impossible to imagine that the safety of any one is secured or advanced by the existence of an automatic or other coupler upon a car that is not fastened to anything, and there is certainly nothing in the evidence at bar to suggest that the dominant remedial intent of the statute is attained or advanced by the presence or absence of any coupler on independently operated trolleys.

[4] There are few surer tests in statutory construction than to observe whether the interpretation contended for exposes the statute itself to ridicule; and to find in this act a requirement that all of the numerous trolleys daily operating singly from one village to another, and crossing state lines in so doing, must carry useless automatic couplers, is absurdity itself, and the argument must go to this extent. To avoid such result it is not necessary to depend on such cases as Riggs v. Palmer, 115 N. Y. 509, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, and Holy Trinity Church v. United States, 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, for it seems to us that a fair reading of section 2, which renders it unlawful for improperly equipped cars "to be hauled or used" on any line engaged in interstate commerce, shows (as does the title of the act) that the mischief intended to be reached consisted in using cars that were to be hauled, and not to vehicles self-propelled, and neither hauled by any other vehicle, nor themselves engaged in hauling. We are therefore of opinion that a verdict should not have been directed against the defendant below in respect of those trolley cars operating singly at the time of the alleged offense, and not shown to be used in trains.

But when such cars are coupled together, and, so coupled, engage in interstate commerce, they are in our opinion within the purview of the statute. The degree of danger attending the coupling of such cars, the difficulty of arranging a proper automatic system, and the amount of hauling done when each car takes power through its own trolley, are not matters for the court. We hold no more than that singly operated cars, not used in trains, nor hauled, are not to be held to the requirement of automatic couplers, for the reason (summarily stated) that there would be no use for such a contrivance if it existed, and that Congress can be held to have decreed no such absurdity.

If within ten days after the filing of the mandate herein the plaintiff below enters a remittitur of $600 of the judgment entered, such reduced judgment will be affirmed, without costs in this court. If such remittitur be not filed, the judgment is reversed, and a new trial awarded.

WIGHT et al. v. HEUBLEIN et al.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1916.)

No. 1443.

1. CORPORATIONS ⟸320(11)—MANAGEMENT BY DIRECTORS—SALARIES OF OFFICERS—EVIDENCE.

In a suit by a minority stockholder, evidence *held* to show that salaries of $15,000 for the president, $7,500 for the secretary-treasurer, and $4,200 for a salesman of the corporation, who composed the majority of the directors and voted the salaries to themselves, and who owned a majority of the stock, were excessive for the services rendered.

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

2. CORPORATIONS ⟸320(1)—MANAGEMENT BY DIRECTORS—SALARIES OF OFFICERS—EQUITABLE RELIEF.

While courts of equity will not assume to act as the managers of corporate affairs, and will not interfere with the judgment of the directors in making expenditures, where they are not interested adversely to the corporation, they will interfere at the suit of a minority stockholder, where the directors, who are trustees for all the stockholders, have voted to themselves as officers salaries which are excessive in view of the services rendered, and which therefore amount to a legal fraud on the minority.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1426; Dec. Dig. ⟸320(1).]

3. CORPORATIONS ⟸320(13)—MANAGEMENT BY DIRECTORS—INJUNCTION.

In such a case, the relief is not limited to requiring a refund of the excessive salaries paid in the past; but an injunction may be granted which will prevent the payment of such salaries so long as they are excessive, in view of the services rendered and the condition of the business.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1430; Dec. Dig. ⟸320(13).]

Appeal from the District Court of the United States for the District of Maryland, at Baltimore; John C. Rose, Judge.

Suit by Gilbert F. Heublein and another against John H. Wight, and others. Decree for the plaintiff (227 Fed. 667), and defendants appeal. Affirmed.

W. H. DeC. Wright, of Baltimore, Md. (Robert R. Carman, of Baltimore, Md., on the brief), for appellants.

Vernon Cook, of Baltimore, Md. (Haman, Cook, Chesnut & Markell, of Baltimore, Md., on the brief), for appellees.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

KNAPP, Circuit Judge. For a detailed statement of facts reference is made to the opinion of the court below. Heublein v. Wight, 227 Fed. 667. The appellants contend, it is true, that these findings are inaccurate or unwarranted in certain particulars; but we are satisfied, after careful study of the record, that everything claimed in that regard might be conceded without affecting the substantial matters upon which the learned District Judge based his decision.

The Sherwood Distilling Company, a Maryland corporation organized in 1882, has always been dominated by the Wights, as was also the prior partnership which the corporation succeeded. It has five directors, namely: John H. Wight, the president; his brother, William H. Wight, the secretary-treasurer; Alpheus H. Wight, another brother; Francis L. Wight, son of John H. Wight, a salesman; and James W. Booth, representing the minority stockholder Heublein, who brought this suit to enjoin the payment of salaries alleged to be grossly excessive. Heublein owns one-third of the capital stock, having bought a sixth about 1905, when the total was only $30,000, and another sixth in 1913, when it had been increased to $700,000. The other two-thirds is owned by members of the Wight family; John H. Wight and William H. Wight together holding a majority. In connection with the increase of stock in 1907, which was a mere re-

capitalization of the business, no additional money being put in, there was an issue of bonds, amounting to $300,000, which were distributed to the stockholders as a dividend. Of these Heublein received one-sixth, corresponding to his stock ownership at the time; but it seems that he obtained no additional bonds with the stock afterwards purchased.

Measured by volume of business the company has fairly maintained its record of prosperity. Taking the 10 years from 1906 to 1915, inclusive, each year ending with the 31st of July, the average has been about $470,000. The lowest years were 1908 and 1909, when it was under $400,000, and the highest was 1913, when it rose above $600,000. The two following years, and notably 1915, showed a marked decline, though even this year was better than 1906, and not much below the average for the decade. But the company's net income, which was around $70,000 in 1906, has not nearly been maintained, and of late has fallen to comparatively low figures. For three years no dividends have been paid on the stock, and in 1915 the surplus over expenses was insufficient by upwards of $4,700 to pay interest on the outstanding bonds, and this without any charge for depreciation. Various reasons are put forward for this shrinkage of profits, and certainly not all of it can be laid to incompetent management; but, giving due weight to the explanations offered, the actual results of operation are still of significant bearing upon the reasonableness of the salaries in question.

These salaries were as follows: John H. Wight, president, $15,000; William H. Wight, secretary-treasurer, $7,500; and Francis L. Wight, salesman, $4,200. The salaries of the first two were voted at a meeting of the board in 1905, when they and a bookkeeper in their employ were the only directors present; and these salaries were continued without change until reduced by the decree now under review. The salary of Francis L. Wight was fixed about July, 1914. Heublein frequently complained of these salaries and insisted upon their reduction, but his protests were wholly without avail. At the directors' meeting in July, 1915, the entire board being present and all the stock represented, the matter was again brought up, and Booth made a motion that the president's salary be reduced to $7,500, and the secretary's to $5,000; but the only affirmative vote was his own. Alpheus H. Wight refrained from voting at all, and the other three Wights voted in the negative. This suit was begun a few weeks afterwards.

[1] The nature of the issue and the range of relevant proof will appear from this brief recital of some of the salient facts. The voluminous testimony brings out in great detail the history and conduct of the distilling business so long controlled by the Wights, and this is supplemented with numerous exhibits, which include reports of the Baltimore Audit Company and a variety of statistical data. Upon all the evidence adduced the trial court has in effect found as a conclusion of fact that the salaries complained of are so excessive, so disproportionate to the value of any services rendered, that their continued payment, under existing conditions, is an injustice to minor-

ity stockholders which amounts to a legal fraud. We are satisfied that this finding is amply supported by the testimony. Indeed, in our judgment, the inference is justified by facts that are wholly undisputed. Certainly there is no such preponderance of opposing proof as would warrant us in reaching a different conclusion. Especially so, since the examination of the Wights in open court gave to the trial judge an opportunity, which the printed record does not afford, to observe these gentlemen at close range, and thus to form a reliable estimate of their business capacity and the reasonable value of their services.

[2] The acceptance of this finding as an established fact is a virtual decision of the controversy, for the law in such case is too well settled for discussion. Two citations will suffice. 3 Clark and Marshall on Corporations, page 2062, says:

"Both the stockholders and directors, in fixing compensation of officers, must act in good faith, and reasonably. While stockholders may vote at corporate meetings in fixing their own salaries as officers, and may elect directors, they cannot take advantage of their ownership of a controlling interest to vote themselves excessive salaries, or cause excessive salaries to be voted to them by directors whom they control. Nor can the directors vote excessive compensation to themselves or others. If they do so, a court of equity will give relief by injunction or decree for an accounting at the suit of the corporation, or of minority stockholders."

The underlying principle is well stated, citing a number of cases, in Wickersham v. Crittenden, 93 Cal. 17, 28 Pac. 788, as follows:

"The directors of a corporation hold a fiduciary relation to the stockholders, and have been intrusted by them with the management of the corporate property for the common benefit and advantage of each and every stockholder, and by their acceptance of this office they preclude themselves from doing any act, or engaging in any transaction, in which their private interest will conflict with the duty they owe to the stockholders, and from making any use of their power or of the corporate property for their own advantage."

It is obviously not the province of a court of equity to act as the general manager of a corporation or to assume the regulation of its internal affairs. If the chosen directors, without interests in conflict with the interest of stockholders, act in good faith in fixing salaries or incurring other expenses, their judgment will not ordinarily be reviewed by the courts, however unwise or mistaken it may appear; but this is far from saying that equity will refuse to redress the wrong done to a stockholder by the action or policy of directors, whether in voting themselves excessive salaries or otherwise, which operates to their own personal advantage, without any corresponding benefit to the corporation under their control. In this case the Wights own a majority of the stock and constitute a majority of the board of directors; and they have continued the salaries in question against the repeated protest of Heublein, and in the face of waning prosperity and an unpromising future. It is quite evident that they have long regarded this business as a purely family affair, with which no outsider, not even a minority stockholder, should be permitted to interfere. This attitude of mind, perhaps in large degree unconscious, may minimize the moral delinquency of their acts, but it cannot serve to avert the legal consequences

of what they have done. After painstaking scrutiny of the record, we are convinced, as the trial court found, that the salaries complained of are so much in excess of the value of the services for which they were ostensibly paid as to make the taking of them a breach of duty to the stockholders, and in effect a misappropriation of the company's funds, which entitles Heublein to the relief sought in this proceeding.

The case turns on this finding, and its affirmance leaves little occasion for further comment. By the decree appealed from the salary of John H. Wight is reduced to $7,500, the salary of William H. Wight to $5,000, and the salary of Francis L. Wight to $3,000; and we are of opinion that in fixing these amounts the treatment of the Wights has been considerate and even generous.

[3] It is argued that in any event the decree should be confined to requiring a refund to the company of salaries paid after a certain date in excess of the sums allowed and that it ought not to include what is said to be a perpetual injunction. But the circumstances here disclosed are peculiar, and, as it seems to us, of a somewhat aggravated character. It is not doubted that a court of equity has power in such a case to grant injunctive relief, and we are by no means persuaded that its exercise in this instance exceeds the limits of judicial discretion. Moreover, it must be assumed that the decree in question is based upon and has application only to existing conditions. If those conditions should undergo material change, so that large earnings were realized under efficient and capable management, it seems clear to us that the payment of proper and reasonable salaries, though greater than the amounts fixed by the decree, would not be prohibited by the injunction now in force. But in the present state of the company's affairs we are satisfied that the Wights have been given the full compensation to which they are entitled.

Affirmed.

SUNDAY CREEK CO. v. GRAY.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1916.)

No. 1445.

1. EVIDENCE ⟸571(9)—EXPERT TESTIMONY—WEIGHT—INJURIES TO SERVANT—CAUSE OF ACCIDENT.

Testimony of plaintiff's witnesses that they were positive that plaintiff's intestate, a miner, was killed by coming in contact with a return electric wire is sufficient to warrant a finding to that effect, notwithstanding testimony by experts that they had never known a return wire to become hot enough to effect electrocution.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2395; Dec. Dig. ⟸571(9).]

2. MASTER AND SERVANT ⟸107(3)—INJURIES TO SERVANT—DUTY OF MASTER—SAFE PLACE TO WORK.

The master is bound to furnish a reasonably safe place to work, and where the duty is hazardous the master is liable, not for the danger to

which the servant is necessarily exposed, but for negligence in failing to make reasonable provision for the servant's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 201, 255; Dec. Dig. ⊂⊃107(3).]

3. MASTER AND SERVANT ⊂⊃226(1)—INJURIES TO SERVANT—ASSUMPTION OF RISK—NEGLIGENCE OF MASTER.

A servant assumes the ordinary risks incident to his employment, but does not assume the risk of his master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 659, 660; Dec. Dig. ⊂⊃226(1).]

4. MASTER AND SERVANT ⊂⊃265(13)—INJURIES TO SERVANT—ASSUMPTION OF RISK—BURDEN OF PROOF.

On the issue of assumption of risk, the burden of proof is on the master.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 892, 907; Dec. Dig. ⊂⊃265(13).]

5. MASTER AND SERVANT ⊂⊃119—INJURIES TO SERVANT—DUTY OF MASTER—USE OF ELECTRICITY.

Where the master employs electricity in his operations, he must exercise an extreme degree of care for the servant's safety.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 210; Dec. Dig. ⊂⊃119.]

6. MASTER AND SERVANT ⊂⊃288(5)—INJURIES TO SERVANT—EVIDENCE—ASSUMPTION OF RISK.

Where there was no evidence that the servant knew that a wire was charged with electricity, and there was evidence that the wire was permitted to sag down over the car in which the servant was riding, it cannot be said as a matter of law that he assumed the risk of injury therefrom.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1077; Dec. Dig. ⊂⊃288(5).]

In Error to the District Court of the United States for the Southern District of West Virginia, at Charleston; Benjamin F. Keller and John C. Rose, Judges.

Action by Basil Gray, administrator of the estate of Paul Jackson, deceased, against the Sunday Creek Company. Judgment for plaintiff, and defendant brings error. Affirmed.

George S. Couch and Brown, Jackson & Knight, all of Charleston, W. Va., for plaintiff in error.

J. Howard Hundley, of Charleston, W. Va., for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and JOHNSON, District Judge.

KNAPP, Circuit Judge. The administrator of Paul Jackson, an employé of Sunday Creek Company, plaintiff in error, brought suit against it, under a West Virginia statute, for negligently causing the death of his intestate, and recovered a judgment which this writ of error seeks to reverse. Jackson was a coal loader in one of the company's mines, and had been so employed for eight or nine months. The place where he worked on the day of the accident was a mile or

so from the mine entrance. At quitting time he, with several others, boarded an empty coal car, drawn by a mule, for the purpose of leaving the mine. This appears to have been the customary way of taking the men to and from their work. When the car reached the point where they got off, and while Jackson was in the act of getting off, his head came in contact with an overhanging electric wire, and he received a shock which killed him almost instantly. This point was at the inner end of a slight curve, about 150 feet from the drift mouth of the mine, and was unlighted at the time. A statement in the amended declaration, which seems to be undisputed, except by the formal plea of "not guilty," is as follows:

"Decedent had a right to assume that the electric power in said mine was off, because it was after working hours, the electric lights were off, and it was the known custom in said mine to turn off the electric power at quitting time, when the motors had stopped running, and before permitting the mule cars, in which employés came from their work, to be driven out and along the motor road."

The wire which is claimed to have caused the death of Jackson was the "return" wire, so called, which came into the entry, where the cars ran, at about the point where the accident happened, and was carried along on insulators near the top of the entry and on the left-hand side going into the mine. The wire itself was not insulated, and defendant asserts, for reasons stated, that insulation was impracticable. The entry was about 15 feet wide, but a trifle less than 5½ feet in height.

[1] There was sharp conflict of testimony upon two points. Witnesses for plaintiff were positive that Jackson was killed by coming in contact with the "return" wire, and they described an experiment, made directly after the accident, which showed it to be heavily charged with electricity, while the trolley wire was found to be without power. Against this was the evidence of defendant's experts, to the effect, in substance, that they had never known or heard of a return wire becoming "hot" enough to effect electrocution. Without enlarging upon this dispute, it seems evident that the jury were warranted in finding that Jackson's death was caused by hitting the return wire in question when it was in a highly charged condition.

The other dispute related to the location of the return wire in the entry, and its actual position at the time and place of the accident. Two of plaintiff's witnesses testified that this wire was about 2 feet from the side or "rib" of the entry; and a third witness confirmed their further statement that it was "sagging down," or "bagged," at that point about 15 or 18 inches, and hung over the right side of the top of the car in which Jackson was riding. On the other hand, the evidence of defendant showed that the wire in question was stretched "tight" along the entry about 6 or 8 inches from the left rib and close to the roof, that it did not "sag" at the place where Jackson met his death, and that it remained in the same position after the accident, without alteration or repairs, until the mine was abandoned. Upon this proof was rested the principal defense at the trial, which is the only ground now urged for reversal, namely, the assumption of risk by the employé.

[2-4] The doctrine of assumption of risk is so clearly recognized in the law of negligence as not to require discussion in this case. The master is bound to furnish a reasonably safe place for the servant to work; the servant takes the ordinary risks incident to his employment. If the work be of hazardous nature, the master is liable, not for the danger to which the servant is necessarily exposed, but for negligence in failing to make reasonable provision for the servant's safety. The servant does not assume the risk of the master's negligence, and upon the issue of assumption of risk the burden of proof is upon the defendant.

[5] In the application of these rules account must be taken, as all authorities agree, of the nature of the work in which the servant is engaged and of the appliances provided for its prosecution. Where operations are carried on with the aid of electricity there is an ever-present element of danger which the servant may not appreciate, and in such case it becomes the duty of the master to exercise an extreme degree of care for the servant's security. Indeed, the modern doctrine seems to go to the extent of charging the master with negligence if electric wires with which the servant is liable to come in contact are not insulated or otherwise properly protected. For example, in Ellsworth v. Metheney, 104 Fed. 119, 44 C. C. A. 484, 51 L. R. A. 389, the syllabus reads as follows:

"Where the miners in a coal mine, with the knowledge and implied consent of the owner, are accustomed to use the passages or entries in the mine as a place for congregating or passing to and fro during the hours of recreation, it is negligence in the owner to introduce and extend along such an entry an electric wire which is dangerous to the life of those who come in contact therewith, without properly insulating or inclosing the same, or giving notice of the danger to those who, he should reasonably apprehend, are likely to be brought in contact with it, and such negligence will render him liable for the death of a miner, who, in the accustomed use of the premises, and without knowledge of the danger or negligence on his * * * part, is killed by coming in contact with such wire."

In 15 Cyc. 473, it is said:

"The exercise of a sufficient degree of care requires a careful and proper insulation of all wires and appliances in places where there is a likelihood or reasonable probability of human contact therewith, and such reasonable and thorough inspection as will preserve such insulation from impairment or detect any defects when occurring."

And again, 26 Cyc. 1120:

"Where a master employs electricity in his business, he must exercise every reasonable precaution known to those possessed of the knowledge requisite for the safe treatment of electricity to protect his servants from injury, and must see to it that his poles and other places for work are in a reasonably safe condition."

To the same effect are several decisions of the Supreme Court of Appeals of West Virgina, the state in which this action arose. Among the latest of these is Humphreys v. Raleigh, C. & C. Co., 73 W. Va. 495, 80 S. E. 803, L. R. A. 1916C, 1270, a case of marked similarity to the one at bar, in which the subject is quite fully discussed. The following is quoted from the opinion:

"Authorities cited abundantly show the user of electricity must provide against all probable contingencies and every possibility that can be readily foreseen or anticipated. If he knows any person is liable, in any way or for any reason, whether on a mission or enterprise of business or pleasure, to come in contact with a heavily charged electric wire he is using, he must insulate it, unless insulation is impossible by reason of incompatibility with the use to which it is devoted."

See, also, Penn. Utilities Co. v. Brooks, 229 Fed. 93, 143 C. C. A. 369.

[6] Reading the testimony in this case in the light of these repeated rulings, it seems clear to us that the trial court rightly refused to direct a verdict for the defendant. There is no evidence that Jackson knew or ought to have known of the presence of the wire in question at the place in the entry where he was killed; and, if the wire was then in the position described by plaintiff's witnesses, it certainly cannot be said as matter of law that he assumed the risk to which he was exposed.

Affirmed.

UNION HOLLYWOOD WATER CO. v. CARTER, Internal Revenue Collector.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2837.

1. INTERNAL REVENUE ⊜9—CORPORATE EXCISE TAX—"GROSS INCOME"—DEDUCTIONS.

Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), requires corporations to pay an excise tax of 1 per cent. of their net income above $5,000, and provides that the net income shall be ascertained by deducting from the gross amount of its income, received within the year from all sources, operating expenses, losses, including depreciation, interest, taxes, and dividends on stock of corporations subject to the tax. Plaintiff was a public waterworks company, which received from its consumers amounts for service connections and extensions, the greater part of which it expended in making the connections and extensions. It sues to recover the tax paid under protest on the amount of such receipts without deduction of the expenditures. *Held*, that such receipts were part of the corporation's "gross income," and did not fall within any of the deductions provided for, and that plaintiff was liable for the tax on the full amount of such receipts, which, in fact, were invested in permanent improvements, adding to the value of the property.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊜9.

For other definitions, see Words and Phrases, First and Second Series, Gross Income]

2. INTERNAL REVENUE ⊜9—CORPORATE EXCISE TAX—CORPORATIONS LIABLE—PUBLIC UTILITIES CORPORATION.

The fact that plaintiff was a public utilities corporation, which, under the laws of the state, was not the owner of the property, but merely intrusted with the use thereof, which it must devote to the public, does not entitle it to more favorable treatment than other corporations; it being a

corporation organized for profit, having a capital stock represented by shares, and the act making no exceptions in favor of public utilities.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.]

5. INTERNAL REVENUE ⊂⊃9—CORPORATE EXCISE TAX—GROSS INCOME—SERVICE CONNECTIONS.

Nor does the fact that the state commission had ruled that service connections paid for by consumers were not to be included within the valuation of the company, on which it was entitled to a fair return, show that payments for those connections are not to be included as part of the corporation's gross income.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.]

In Error to the District Court of the United States for the Southern Division of the Southern District of California; Oscar A. Trippet, Judge.

Action by the Union Hollywood Water Company against John P. Carter, as Collector of the United States Internal Revenue for the Sixth District of the State of California. Judgment for defendant, and plaintiff brings error. Affirmed.

Sheldon Borden and George H. Moore, both of Los Angeles, Cal., for plaintiff in error.

Albert Schoonover, U. S. Atty., and J. Robert O'Connor and Clyde R. Moody, Asst. U. S. Attys., all of Los Angeles, Cal., for defendant in error.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The plaintiff in error, a corporation, having paid under protest certain taxes under Act Aug. 5, 1909, § 38, for the years 1912 and 1913, brought an action in two counts to recover the sums so paid. The facts and the questions involved are the same in the two counts, and it will be sufficient to refer only to the first. It is alleged therein that the plaintiff in error, being a public utility corporation engaged in furnishing water for domestic use and irrigation, received in the year 1912 from consumers, to pay for service connections to be laid in public streets, the sum of $33,024.50, and that it expended in laying such service connections the sum of $31,006.12; that in the same year it received from property owners and persons engaged in the subdivision and sale of real estate, to pay for extensions of the water system to their property, the sum of $52,895.65, and expended in laying such extensions in and through such property the sum of $51,235.12. Upon all of said sums so received for service connections, and for the extension of the system into the lands of others, the plaintiff in error was required to pay a tax, although in its income tax returns, while it had included those receipts in its gross income, it had claimed a credit and deduction for the amount so expended by it for service connections and pipe extensions. The court below denied the right of the plaintiff in error to recover.

[1] The plaintiff in error contends that the moneys so received from property owners were not "gains, profits or income" within the mean-

ing of the statute; that they were moneys contributed solely for the purposes designated, and for the benefit of the contributors of the same, and were not subject to distribution among the stockholders of the corporation as dividends or otherwise, and could be used only for the specific purposes for which they were contributed; that, while the effect of the connections and extensions was to increase the plaintiff in error's plant, it was not to increase its gains, profits, or income. The question so presented does not seem to have been considered in any reported case. The statute provides that for the determination of the amount of the annual excise tax, which is fixed as the equivalent of 1 per cent. of the net income above $5,000, the net income shall be ascertained by deducting from "the gross amount of the income of such corporation * * * received within the year from all sources": (1) Its expense of operation paid out of income; (2) its losses, including a reasonable allowance for the depreciation of its property; (3) certain interest paid by it; (4) taxes paid by it; and (5) dividends on stock of corporations subject to the excise tax.

The plaintiff in error being a public utility corporation, we may assume that in the ordinary course of its business its income consisted principally of the sums paid to it by consumers for the use of water furnished by it. But it may also have other income, and we are of the opinion that contributions paid by consumers of water or owners of land tracts for service connections and pipe extensions are income within the meaning of the act. Such contributions are moneys which come to the corporation in the ordinary course of its business, and they are properly included in a statement of its gross income "received within the year from all sources," and the corporation is liable to pay a tax thereon, notwithstanding that all or nearly all of the sum so received may have been expended within the year in betterments and the extension of its system. Moneys so received for service connections and pipe extensions are not permitted to be deducted from the gross amount of the income, for they do not come within any of the permitted classes of deductions mentioned in the statute. Moneys so expended are invested in permanent improvements, which tend to enhance the rental and the market value of the water system. They are not in the nature of improvements made merely to facilitate the transaction of a growing business, the expenses of which has been held deductible as necessary expenses of the business in computing the taxable net income of the corporation. Connecticut Mut. Life Ins. Co. v. Eaton (D. C.) 218 Fed. 206.

[2] The plaintiff in error claims that it should be distinguished from ordinary business corporations, in that it is a public utility company, and under the laws of California it is not the owner of its plant and property devoted to public use in the sense of personal ownership, but is merely intrusted with the use thereof, which it must devote to the public. But we are unable to see in that fact any ground for holding that it is not subject to the plain provisions of the statute. It is still a corporation "organized for profit and having a capital stock represented by shares." It does not deny that it is subject under the law to pay an excise tax. If so, it is subject to pay the whole of the tax, and it is to

be dealt with precisely as any other corporation. The statute makes no exception in favor of public utility corporations.

[3] Nor do we think that a different conclusion should be reached because of the fact that the Railroad Commission of California has decided that meters and service connections paid for by consumers are not to be included in the valuation of the water company's plant upon which it is entitled to earn a fair return. City of Eagle Rock v. Eagle Rock Water Co., 3 C. R. C. 1054; In the Matter of the Application of the San Gabriel Valley Water Co., 8 C. R. C. 481. In the latter of these cases the Commission said:

"Although these pipes were expressly donated to the company, they are now the property of the water company, and as such the company is entitled to a return on their fair value. On the other hand, the use value is not measured by an estimate of cost, for there are a number of these pipe lines that have only one consumer for a large investment, and it is obviously unfair to permit it to become a burden upon the remainder of the system."

It does not follow from these decisions of the California Commission that moneys contributed for service connections must not be regarded as income, gains, or profits for the purpose of determining the amount of the excise tax under the law of the United States. In Stratton's Independence v. Howbert, 231 U. S. 400, 417, 34 Sup. Ct. 136, 142 [58 L. Ed. 285] the court said:

"Evidently Congress adopted the income as the measure of the tax to be imposed with respect to the doing of business in corporate form, because it desired that the excise should be imposed, approximately at least, with regard to the amount of benefit presumably derived by such corporations from the current operations of the government."

The court further said:

"Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice."

And it further observed:

"It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted; and from this point of view it makes little difference that the income may arise from a business that theoretically or practically involves a wasting of capital."

The judgment is affirmed.

BIG VEIN POCAHONTAS CO. v. REPASS.

(Circuit Court of Appeals, Fourth Circuit. December 13, 1916.)

No. 1469.

1. WITNESSES ⟸321—CROSS-EXAMINING OWN WITNESS—DISCRETION.
How far a party may be allowed to, in effect, cross-examine his own witness, is usually a matter in the sound judicial discretion of the trial judge.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 1094, 1099, 1100; Dec. Dig. ⟸321.]

2. MASTER AND SERVANT ⊂⊃286(19)—SAFE PLACE TO WORK—QUESTION FOR JURY.

Under the evidence in an action for death of a member of the slate gang in a coal mine, killed by the fall of a stone from the roof, *held*, that the question whether the master had performed its duty of seeing that he was given a safe place in which to work was for the jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1026; Dec. Dig. ⊂⊃286(19).]

3. MASTER AND SERVANT ⊂⊃190(1)—SAFE PLACE TO WORK—NONDELEGABLE DUTY.

The master's duty of providing a safe place for work is one that cannot be delegated, so that any negligence in that respect of a boss, to whom the master leaves the determination of the question of safe place, is the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 449, 450, 453, 468; Dec. Dig. ⊂⊃190(1).]

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Sallis C. Repass, administratrix of Charles Repass, deceased, against the Big Vein Pocahontas Company. Judgment for plaintiff, and defendant brings error. Affirmed.

D. Lawrence Groner, of Norfolk, Va., for plaintiff in error.

William H. Werth, of Tazewell, Va., and William G. Werth, of Norton, Va., for defendant in error.

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

ROSE, District Judge. The parties will be described as they were below; that is, the plaintiff in error will be called the defendant, and the defendant in error the plaintiff. The latter sought to recover for the death of her son. He was a boy of 17, but appeared to those who worked with him to be a year or two younger.

At the time of his death, and for not exceeding 10 days before, he had been employed in defendant's coal mine. He was a member of what is called the "slate gang." He worked under the immediate direction of a man who was called the "slate boss," and whose duties, according to the evidence, included the inspection of the mine. Defendant's employés had been engaged in getting out the coal contained in the pillars which had originally been left to support the weight of the earth and rocks above them. As a consequence, in the part of the mine in which the pillars had been so robbed, to use the mining term, there had been some settling; that is, in miners' vernacular, a "squeeze" had taken place. For some while before the day of the accident this squeeze had apparently stopped of its own accord. In order to get at a pillar or stump in this part of the mine, so as to take out the coal contained in it, the slate gang, on the day preceding the death of plaintiff's intestate, had been set to work to clear out the loose débris which in earlier operations had been thrown in front of the pillar.

On the morning of the accident the deceased was working somewhere else in the mine. While he was thus away from the spot at which he subsequently met his death, and at about 10 in the morning, a crack was discovered in the roof under which the slate gang was engaged in removing the débris before mentioned. There followed some discussion between the boss of the gang and the members as to whether this discovery spelled danger. The roof in the vicinity was sounded. Near the edges of the crack it was found to be what the witnesses called "drummy." A pick was inserted, and an attempt made to pull down anything which might be loose; but, beyond bringing away a small piece of the roof, nothing followed. When a portion of the roof is found to be in a dangerous condition, or in a condition which may prove dangerous, prudent people do one of two things. They either prop up the portion of the roof which gives indications that it may fall, so that it cannot, or they cause it to fall at a time and under circumstances in which its descent is not likely to do harm. If the latter course is adopted, the apparently loose portion may be brought down, either by wedging or by blasting. In this case the roof was not propped, nor was it pulled down. Apparently the soundings and the attempts with the pick had satisfied the gang and its foreman that the roof was not likely to fall, at least during the comparatively short time they expected to be working under it.

In the afternoon of the day upon which the crack was discovered, the slate boss summoned the deceased from wherever else in the mine he had been engaged, and put him to work at the place in which some three or four hours later he met his death. It does not appear that his attention was called to the crack, or that he ever knew of its existence. About 5:25 that afternoon a large piece of rock fell upon and killed him. It came from the place at which the crack had been seen. These facts the plaintiff, apparently with some difficulty, extracted from two of the five men who made up the slate gang with whom, at the time of his death, deceased was working.

[1] Several of defendant's assignments of error are based upon its exceptions to the action of the court in permitting the plaintiff in effect to cross-examine her own witnesses. How far a party may be allowed to go in this direction is usually a matter within the sound judicial discretion of the trial judge. We see no reason to think that it was in this case improvidently exercised.

[2, 3] At the close of plaintiff's case, defendant asked for an instructed verdict. Upon the denial of this request, it elected to stand upon the record as it then was, and did not offer any testimony. It says that there was no evidence of negligence upon the part of anybody, or, if any one was negligent, it was the slate boss, and he was a fellow servant of the deceased. The defendant was bound to see that the deceased was given a safe place in which to work. Upon the evidence, it was for the jury to say whether it had done so. So far as the record discloses, the defendant left it to the slate boss to determine whether the place at which the deceased was set to work was safe. As the duty of providing such a place is one which cannot be delegated, the learned judge below was right in instructing

the jury that any negligence of the slate boss in this respect was the negligence of the defendant.

It is earnestly argued that by the Virginia statute the duty of seeing that the mine is safe is imposed upon the "mine foreman," or "boss," or his assistants, and that there is not sufficient evidence that the foreman of the slate gang was any one of these. Conceding, but by no means deciding, that the jury might not have been entitled to find that he was, the defendant is in no better case. There is no evidence whatever that, before putting this boy of 17 to work in that portion of the mine in which it was known a squeeze had taken place, the mine foreman, or any one other than the slate boss and some members of his gang, had ever inspected the roof, to see what the condition was. If, as the defendant apparently contends, such inspection could properly be made by no other than the mine foreman or his assistant, and the slate boss was neither, the jury would have been justified in finding that the plaintiff's intestate came to his death because of the failure of the defendant to have the proper inspection made. The mining law of Virginia differs from that of West Virginia and Pennsylvania in a vitally important respect. It expressly declares that nothing in it shall be "so construed as to relieve mine owners or operators from seeing that all of" its "provisions are strictly complied with, nor from the duty imposed at common law to secure the reasonable safety of their employés, and in the performance of those duties that are nonassignable at common law, as well as those duties required by" the act, "the mine foreman, boss or fire boss, and their assistants, shall be considered as acting for the mine owner or operator as a vice principal."

We find no error in the instructions actually granted by the court. They fairly and fully stated the law. A number of those asked for by defendant were inconsistent with the law applicable to the facts, and were properly refused. Such of them as were unobjectionable were sufficiently covered by the instructions actually given.

Finding no error, it follows that the judgment below must be affirmed.

GARRETT et al. v. MALLARD.

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

No. 1459.

1. COURTS ⊜323—FEDERAL COURTS—JURISDICTION—DIVERSITY OF CITIZENSHIP.

The federal court may take jurisdiction of a suit on the ground of diversity of citizenship, where it was alleged, notwithstanding plaintiff had removed from Virginia, the state of defendant's residence, only a short time before beginning suit, where he testified that he intended to become a citizen of Maryland, the state to which he removed; his citizenship being a question of intention.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 885, 886; Dec. Dig. ⊜323.]

2. COURTS ⊜328(10)—FEDERAL COURTS—JURISDICTION—AMOUNT IN CONTROVERSY.

Where plaintiff in good faith believed he was entitled to recover from defendants a sum greater than $3,000, the federal courts have jurisdiction of his suit, notwithstanding plaintiff recovered a less sum or nothing at all.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⊜328(10).]

3. TRADE-MARKS AND TRADE-NAMES ⊜98 — CONTRACTS — AGREEMENTS — BREACH.

Plaintiff and the individual defendant, who was president of the corporate defendant, entered into an agreement for the formation of a corporation to manufacture soft drinks. Plaintiff agreed to assign his formula to the corporation to be organized, in consideration of one-fifth of the stock to be issued and employment for at least 3 months, the employment then to be terminable by either party upon 30 days' notice. The agreement also provided an arrangement whereby plaintiff might maintain his proportionate share in the stock of the corporation to be formed, in case additional stock was issued. While a charter was obtained, no new corporation was organized, and the corporate defendant began the manufacture of the drink under plaintiff's formula. Some months after the agreement plaintiff was discharged without the notice provided, whereupon he sued to enjoin further use of the formula and name of the new drink and for an accounting. Defendants contended that their expenditures had added to the salable value of the formula and trade-name, but it did not appear whether the expenditures were made after plaintiff's connection with the business was severed. *Held*, that plaintiff was entitled to have the formula and trade-name sold, and to recover one-fifth of the proceeds, less the amount of expenses incurred by defendants in excess of profits, which expenses added salable value to the formula and trade-name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊜98.]

4. TRADE-MARKS AND TRADE-NAMES ⊜98—CONTRACTS—BREACH—RIGHT OF ACTION.

In such case, the expenditures by defendants not having been made pursuant to the contract, plaintiff is not personally liable therefor.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 112; Dec. Dig. ⊜98.]

5. TRADE-MARKS AND TRADE-NAMES ⊜93(1)—CONTRACTS—BREACH—BURDEN OF PROOF.

In such case, defendants have the burden of showing that their expenditures enhanced the value of the formula and trade-name.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 104½; Dec. Dig. ⊜93(1).]

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

Suit by Logan L. Mallard against Paul Garrett and another. From a decree for complainant, defendants appeal. Affirmed.

Walter H. Taylor, of Norfolk, Va. (Loyall, Taylor & White, of Norfolk, Va., on the brief), for appellants.

S. M. Brandt, of Norfolk, Va., for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

ROSE, District Judge. In this opinion the parties will be described as they were below, viz. the appellee as the plaintiff, the appellants as the defendants.

The individual defendant is the president and largest stockholder of the corporation. They had been wine makers. They wanted to take up the manufacture of soft drinks. The plaintiff knew how to compound them. On the 1st of October, 1914, negotiations between him and the defendant Garrett resulted in a written contract. It provided for the formation of a corporation with a maximum capital of $25,000, of which $10,000 was to be at once issued. The plaintiff was to assign his formula to the new corporation, and receive therefor $2,000 in stock and $500 in cash. Garrett was to furnish $7,900 as required for the needs of the company and to receive stock therefor. The remaining $100 of the first issue was to be given to the treasurer of the corporate defendant for services rendered or to be rendered by him. Garrett was to be president and plaintiff vice president of the company. The latter was to receive a salary of $150 a month, beginning October 1, 1914. His employment was to last at least 3 months, and to be thereafter terminable by either party upon 30 days' notice. If within 5 years more stock was issued, Garrett was to lend the plaintiff the money necessary to take up one-fifth of it. On January 8, 1915, in pursuance of this agreement, a charter was obtained for "Garrett's Corporation," but no organization thereunder was ever effected.

Early in February, 1915, the parties, or more strictly speaking the corporate defendant, began to manufacture, under plaintiff's formula, a drink to which they gave the name of "Satanet." On May 15, 1915, defendants peremptorily discharged the plaintiff without giving him the notice provided for in the contract. They went on with the manufacture, advertising, and sale of "Satanet." On July 21, 1915, plaintiff brought this suit. He asked for an injunction against the further use of the formula, and the name "Satanet," and for an accounting for profits already earned. The court below found that no profits had been made, and decreed that the formula and trade-name "Satanet" should be sold, and one-fifth of the net proceeds paid to the plaintiff and four-fifths to Garrett.

[1] It is here urged that the federal court was without jurisdiction, because neither diverse citizenship nor a sufficient amount in controversy was made to appear. Both were properly alleged. The plaintiff swore that some time before the bringing of the suit he had become a citizen of Maryland. Whether he had or had not depended upon the intention with which he had removed from Norfolk to Baltimore. The court below heard his testimony and was obviously satisfied with it.

[2] The record sufficiently shows that the plaintiff, in good faith, believed he was entitled to recover from the defendants money and property rights worth far more than $3,000. Under such circumstances, on the question of jurisdiction it matters not that the plaintiff may actually recover less than $3,000, or nothing at all.

[3-5] Upon the merits, defendants say that the decree below is

inequitable, because it does not charge the plaintiff with any part of the sum by which the expenditures of the defendants for making, advertising, and selling "Satanet" exceeded the receipts from its sales. Defendants' bookkeeper testified that between October 1, 1914, and December 1, 1915, defendants had expended for such purposes the sum of $81,062.03. They received from sales $37,752.86, and when he testified there was on hand in merchandise and accounts receivable $25,969.85. According to these figures the net loss was upwards of $17,000, and that, too, upon the assumption that all the uncollected accounts will be collected.

It appears, however, that the defendants did not organize the corporation for which the contract provided. The plaintiff was not consulted as to what disbursements should be made. A large, and probably the larger, part of the expenditures was made after defendants had severed all connections with the plaintiff, and not a little apparently even after the bringing of this suit. Such sums having not been paid out in accordance with the plaintiff's contract, he cannot be held personally liable for them, or for any part of them.

Nevertheless, defendants were free to prove, if the fact were so, that the money they had paid out had added some definite figure to the salable value of the formula and the trade-name. If they had done so, they would be entitled out of the proceeds of the sale to receive such amount, not exceeding, of course, the sum they are now out of pocket. The burden of making such showing rested upon them. They have not sustained it, or even attempted so to do, very probably because under the circumstances it is impossible to obtain clear and convincing evidence on such a question. If so, they must bear the loss which has come to them in consequence of their having ignored plaintiff's rights.

The case is a peculiar one. It seems to us that the decree below is right, and it is therefore affirmed.

SPANN et al. v. READ PHOSPHATE CO.

(Circuit Court of Appeals, Fourth Circuit. December 15, 1916.)

No. 1460.

1. BANKRUPTCY ⟸388—COMPOSITIONS—DISCHARGE—EFFECT OF.

Where a bankrupt has obtained a release by an ordered composition, the moral obligation of the bankrupt to satisfy his debts in full is sufficient to support a new promise, made after composition, to a creditor voting in favor thereof, the same rule applying as in case of an ordinary discharge in bankruptcy; and subsequent creditors of the bankrupt cannot question a note secured by mortgage given to pay a creditor whose claim was barred by composition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 618; Dec. Dig. ⟸388.]

2. BANKRUPTCY ⟸388—COMPOSITION—NEW PROMISE—CONSIDERATION.

Where a bankrupt, after a composition was approved, executed a note secured by a mortgage to one of his creditors for the full amount of the

debt, subsequent creditors of the bankrupt can attack the obligation as partially without consideration, if the composition creditor had also received a dividend.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 618; Dec. Dig. ⊂=388.]

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

Bill by the Read Phosphate Company against J. A. Spann and others. From a decree for complainant, defendants appeal. Reversed and remanded, with directions.

S. G. Mayfield, of Denmark, S. C. (Mayfield & Free, of Bamberg, S. C., on the brief), for appellants.

J. N. Nathans, of Charleston, S. C. (Nathans & Sinkler, of Charleston, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. When J. A. Spann went into bankruptcy in 1908, he owed $4,000 to his brothers, H. F. Spann, P. N. Spann, and M. S. Spann, comprising the firm of Spann Bros. His creditors voted to accept an offer of composition at 25 cents on the dollar. Spann Bros. aided in effecting this composition, and received, about April 3, 1909, a dividend of $1,000 on their claim. On the 10th of that month, J. A. Spann borrowed from his brothers the sum of $1,450, for which he gave his note at two years. At the same time he gave them another note of $4,000 at three years, for which there was no consideration except the old debt that had been discharged in the bankruptcy proceeding. At various times in the next three years he borrowed additional sums, so that on January 15, 1914, his entire indebtedness to his brothers, including the $4,000 note, with interest from its date, amounted to $14,902.48. This debt he secured by a mortgage, executed that day, but not recorded until March 24, 1915, on certain lands then owned by him in Bamberg county, S. C.

About March 4, 1915, the appellee, Read Phosphate Company, obtained a judgment for $5,620.73 against J. A. Spann for fertilizer sold him under contracts of September 24, 1913, and January 9, 1914. The judgment having been docketed in Bamberg county and execution returned unsatisfied, this bill was filed to set aside the mortgage as fraudulent and void for want of consideration, and to subject the mortgaged lands to the payment of appellee's judgment.

[1] In the court below the issue of fraud was decided against the appellee; the learned District Judge holding that the mortgage "was not made with intent to delay, hinder, and defraud creditors," and that it is "a good, valid, and sufficient mortgage to the extent of $9,382.40"; that is, for its full amount, less so much as represents the $4,000 note and interest. The decree reduces the mortgage accordingly, for reasons stated in the opinion as follows:

"It may be that a bankrupt has the right, under the aspect of some moral obligation, notwithstanding his bankruptcy, afterwards to pay his debts in full. There is a difference, however, between paying in full in the case of a

simple bankruptcy and in the case where a composition has been ordered, and the debt subsequently paid in full has been used to force other creditors by means of a composition to accept less than their debts. No creditor voting to enforce a composition has a right in any way, shape, guise, or pretense, after forcing his fellow creditors to accept a composition, to afterwards have his debt paid in full. The debt is completely discharged. Any payment thereafter made by the bankrupt is a pure donation, and this donation cannot be made under the rules of law to the prejudice of any creditors, whether past or existing."

Since the findings herein eliminate the question of fraud, and affirm the good faith of the transaction under review, the decision appealed from must rest upon the supposed distinction between the debtor who has received a *discharge* in bankruptcy and the debtor who has obtained release from liability by an ordered *composition*. In other words, whilst the moral obligation to pay in full is sufficient to support a new promise made after the bankrupt is discharged, which is undoubted, it is not sufficient to support a like promise made after enforced composition.

We are satisfied that this view is opposed to controlling authority. Indeed, as we read it, the case of Zavelo v. Reeves, 227 U. S. 625, 33 Sup. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914D, 664, involves the precise point and holds distinctly to the contrary. That, also, was an enforced composition, which appears to have been voted for by the creditor to whom the new promise was made, and by whom the offered compromise was afterwards accepted, for the statement of facts shows that the new promise was made after adjudication and before the composition was ordered. Yet the Supreme Court upheld the promise as a binding obligation, although its sole consideration was the original debt. The opinion says:

"It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. The theory is that the discharge destroys the remedy, but not the indebtedness; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of creditors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement."

As this was said in a case of release from liability by an enforced composition, it is obvious that the word "discharge" is used, not merely in a technical sense, but also to describe the freedom from debt which equally results from a confirmed composition; and the whole reasoning of the opinion negatives the idea that there is any difference, as respects the validity of a new promise, between the bankrupt who has been "discharged" and the bankrupt whose offered "composition" has been accepted. It follows that the mortgage in question, as against the appellee's judgment, must be sustained to the extent that it includes the unpaid portion of J. A. Spann's original debt, with interest thereon from April 10, 1909, the date of the $4,000 note.

[2] On the present record it appears that Spann Bros. received a dividend of 25 per cent. of their claim, and also got a note for the whole amount. If this be the fact it is evident that the note included $1,000 for which there was no consideration, and therefore the mortgage should be reduced by that sum, with interest thereon from the date of the note. It may turn out upon further investigation that this dividend was not actually paid in money, but included instead in the note. In that case the mortgage would not be subject to deduction.

The decree appealed from will be reversed, and the cause remanded for further proceedings in conformity with this opinion.

Reversed.

ELLIS v. REED.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2811.

1. ATTACHMENT ⊂=167—RECORDING CERTIFICATE—NECESSITY—RIGHTS OF PURCHASER.

Comp. Laws Alaska 1913, § 974, requiring the marshal to make a certificate of attachment of real property and deliver it to the commissioner for record within 10 days, and declaring that when the certificate is so filed the lien shall attach from the date of the attachment, but if filed afterwards shall only attach as against third persons from the date of the subsequent filing, means that the record of the certificate shall affect only third persons who acquired interests in the property after the date of the attachment, and the failure of the marshal to record the certificate does not invalidate the attachment against a remote purchaser from the attachment debtor, who acquired the land, before the attachment was levied, under a contract on which he owed more than the amount of the attachment debt, and who had actual notice of the attachment within a short time after it was levied.

[Ed. Note.—For other cases, see Attachment, Cent. Dig. §§ 482–485; Dec. Dig. ⊂=167.]

2. FRAUDULENT CONVEYANCES ⊂=315(2)—EVIDENCE—JUDGMENT IN OTHER SUIT.

A prior judgment, setting aside a conveyance of property as a fraud against the creditors, who were plaintiffs therein, invalidates the conveyance only as to those creditors, and is not evidence of fraud in subsequent proceedings by different creditors against one to whom the first grantee had conveyed the property, and who was not a party to an original suit.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 974; Dec. Dig. ⊂=315(2).]

Appeal from the District Court of the United States for the First Division of the Territory of Alaska; Fred M. Brown, Judge.

Suit by J. L. Reed against M. A. Ellis. Decree for plaintiff, and defendant appeals. Reversed and remanded.

On October 25, 1909, Thompson by quitclaim deed conveyed the Battle Axe mining claim to Cummings. On April 25, 1910, Reed, who is the appellee in the present suit, recovered a judgment against Thompson for $1,598.80, for work performed by the plaintiff's assignors. On September 22, 1910, Reed brought a suit to set aside the deed from Thompson to Cummings as fraudulent, and made with intent to hinder and delay creditors. In that suit the

deed was held void as to the plaintiff's assignors. An appeal was taken to this court, and on February 3, 1913, the decree was affirmed. Thompson v. Reed, 202 Fed. 870, 121 C. C. A. 228. In the meantime, on December 7, 1911, Cummings executed to Harper an option to purchase the mining claim for the sum of $10,000 to be paid in installments. On December 19, 1911, Harper assigned his interest in the option to Ellis, the appellant herein. Ellis made the final payment of $3,000 on the option in February, 1913, and on February 28, 1913, Cummings executed to him a conveyance of the mining claim. The present suit was brought to subject the mining claim to the lien of two attachments levied thereon on September 22, 1912, in actions brought by two creditors of Thompson, who had obtained judgments against him, one for $582.68, with interest and costs, the other for $822.30, with interest and costs, which judgments had been assigned to the appellee. The court below found that the deed from Thompson to Cummings was made with intent to hinder, delay, and defraud Thompson's creditors, including the appellee's assignors, and that the same was null and void as to the appellee; that the appellant, prior to making his final payment on the contract, had actual notice of Thompson's fraudulent conveyance, and all the facts affecting Cummings' title, and had actual notice of the appellee's liens by virtue of the attachments of September 22, 1912; that those liens were superior to and unaffected by the conveyance from Cummings to the appellant. Judgment was rendered accordingly, seting aside the conveyance from Cummings to Ellis, in so far as the same conflicts with the appellee's judgments and attachments and liens thereunder, and directing that execution issue accordingly.

Edward Judd and Otto E. Sauter, both of Seattle, Wash., and S. O. Morford and J. J. Finnegan, both of Seward, Alaska, for appellant.

J. L. Reed, John Lyons, and E. E. Ritchie, all of Valdez, Alaska, for appellee.

Before GILBERT, MORROW, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1] The appellant contends that the appellee's assignors obtained no lien upon the mining claim by their attachments, for the reason that no certificate was filed in compliance with section 974, Compiled Laws of Alaska, which provides that, if real property be attached, the marshal shall make a certificate, and within ten days from the date of the attachment shall deliver the same to the commissioner for record in the district in which the real property is situated, and declares:

"When such certificate is so filed for record, the lien in favor of the plaintiff shall attach to the real property described in the certificate from the date of the attachment, but, if filed afterwards, it shall only attach, as against third persons, from the date of such subsequent filing."

We think the statute means that the record of the certificate shall affect only third persons; that is, persons who purchase or acquire interest in the property after the date of the attachment. Dickson v. Back, 32 Or. 217, 223, 51 Pac. 727. The appellant here was not a "third person" within the meaning of the statute. It was his property that was attached. He was still owing on his contract more than enough to satisfy the claims of the attaching creditors. He had actual notice of the attachments within a very short time after they were levied, and he was thereby put upon notice to ascertain the nature of the claims that were asserted against his property.

[2] The principal question in the case is whether there was evidence to sustain the decree. The only proof offered to show that the transfer from Thompson to Cummings was fraudulent was a transcript of the judgment rendered in the case of Reed v. Thompson et al., which was affirmed by this court in Thompson v. Reed, 202 Fed. 870, 121 C. C. A. 228. The appellant objected to the admission of the judgment as not binding upon him, for the reason that neither he nor the assignors of the appellee were parties to that suit, and for the reason that by that judgment the conveyance from Thompson to Cummings was held void only as to the creditors who were represented in that suit. We think the objection should have been sustained. In such a suit to set aside a fraudulent conveyance, all that the plaintiff can demand, and all that the court can award him, is that the conveyance be annulled or removed so far as it obstructs the enforcement of his judgment. A decree in such a suit does not affect the validity of the transfer by the conveyance as between the grantor and the grantee. 20 Cyc. 821, 822. When fraud has been established as to one creditor, it has not the effect to vitiate the conveyance as to all other creditors. The decree in such a suit merely avoids the conveyance as to the plaintiff therein, and as to all the other creditors it remains as though no proceedings had been taken.

On the question whether the conveyance was fraudulent as to the creditors represented in the present suit, the appellant here was entitled to his day in court. The question of fraud is not disposed of by a prior adjudication to which these creditors were not parties nor privies. Byrd v. Hall, 196 Fed. 762, 117 C. C. A. 568; McCalmont v. Lawrence, 1 Blatchf. 232, Fed. Cas. No. 8,676; Sturges v. Portis Mining Co. (D. C.) 206 Fed. 534; Goodwin v. Snyder, 75 Wis. 450, 44 N. W. 746; Bell v. Wilson, 52 Ark. 171, 12 S. W. 328, 5 L. R. A. 370; McDowell v. McMurria, 107 Ga. 812, 33 S. E. 709, 73 Am. St. Rep. 155; Kerr v. Hutchins, 46 Tex. 384.

The decree is reversed, with costs to the appellant, and the cause is remanded to the court below, to afford the appellee the opportunity to take such proceedings as are suggested in Roemer v. Simon, 91 U. S. 149, 23 L. Ed. 267.

WOLFE v. BANK OF ANDERSON.

In re BEATTY.

(Circuit Court of Appeals, Fourth Circuit. December 13, 1916.)

No. 1472.

BANKRUPTCY ⇐165(4)—PREFERENCES—ASSIGNMENT OF ACCOUNTS—SUBSTITUTION.

Where, by the course of dealings between a bank and a merchant, the latter assigned accounts due him to secure his notes to the bank, but was permitted by the bank to collect the accounts and use them in his business, or to apply them on the notes as he saw fit, and it appeared that substantially all the accounts assigned more than four months before the mer-

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

chant's voluntary bankruptcy had been so collected and applied by him before the assignment of new accounts within the four months period, at which time the bank had knowledge of the merchant's insolvency, the latter assignment cannot be sustained on the theory that those accounts were merely substituted for accounts previously assigned, since there were then no assigned accounts for which they could be substituted.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 266; Dec. Dig. ⊂=165(4).]

Appeal from the District Court of the United States for the Western District of South Carolina, at Greenville, in Bankruptcy; Joseph T. Johnson, Judge.

In the matter of Raymond Beatty, bankrupt. From a decree of the District Court, setting aside the report of the referee and allowing the claim of the Bank of Anderson against the estate, S. M. Wolfe, trustee in bankruptcy, appeals. Reversed and remanded.

Ernest F. Cochran and S. M. Wolfe, both of Anderson, S. C. (Quattlebaum & Cochran, of Anderson, S. C., on the brief), for appellant.

J. M. Paget, of Anderson, S. C., for appellee.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. March 16, 1916, Raymond Beatty, a commission merchant and broker of Anderson, S. C., was adjudicated a voluntary bankrupt. For six years and upwards he had been indebted in varying amounts to the Bank of Anderson. To secure this obligation he assigned from time to time certain choses in action, including book accounts against his customers. As to these book accounts, which are the present subject of controversy, the course of dealing was this: Beatty's debt to the bank was evidenced by notes, and when a note came due and was renewed a new list of accounts was delivered to the bank, and the former list taken up. It was understood between the parties that Beatty should collect the assigned accounts and use the moneys as he might elect, either in reducing the bank's claim or in meeting the general needs of his business, and he appears to have all along acted on that understanding. On October 21, 1915, his indebtedness to the bank was represented by two notes, dated that day, one for $6,000, and the other for approximately $2,600. The list of accounts then assigned aggregated $5,051.27, but nothing appears as to the accounts held by the bank prior to that time. On February 19, 1916, the smaller note was reduced by payments to $1,263, for which a new note of that date was executed. The list of accounts assigned at this time amounts to $4,167.18. The bank then knew, and had known long before, that Beatty was insolvent. Within a month afterwards he was declared bankrupt on his own petition.

The claim of the trustee to these accounts was sustained by the referee in bankruptcy, on the ground that the transfer to the bank was a voidable preference; but this ruling was reversed by the learned District Judge, who held that the transfer in question was a valid substitution of new accounts for those previously assigned. From this decision the trustee appeals.

For the purposes of this case it will be assumed, without so deciding, that the transaction of February, 1916, if not a forbidden preference, operated under the law of South Carolina to give the bank, as against other creditors, a good title to the accounts then transferred. It will also be assumed, as counsel for the bank virtually concedes, that this transaction taken by itself was prima facie preferential, and cannot be upheld unless there was an actual substitution of new accounts for those which the bank then held, and had the right to hold because they were acquired in good faith more than four months before the petition in bankruptcy was filed.

But the difficulty is that the undisputed facts refute the claim of substitution. On the assumption above made the bank can retain any accounts it got in October, although they were taken to secure an antecedent debt. But those accounts, for the most part, if not altogether, were not in existence when the accounts in question were transferred in the following February. Beatty in the meantime had collected the former and used the money as he saw fit. And in our judgment it does not matter whether he used it to keep his business going, or for living expenses, or to reduce his debt to the bank. The controlling fact is that the October accounts had been paid to Beatty, practically all of them, and the money expended by him, with the knowledge and consent of the bank, some time before the February transfer. When that transfer took place, the bank had nothing to surrender, for the October accounts had ceased to exist. Obviously there could be no substitution, unless the bank then held something to exchange, and that was not the case.

That this was the real situation appears from the bank's answer in this proceeding, which says, referring to the February transaction:

"That the notes and accounts were accepted in place of the old ones, which had been collected by the bankrupt and used in his business as had been the custom for many years."

It also appears from the fact that the referee, who held the bank entitled to retain the accounts assigned in October, allowed it five days to show "exactly what accounts, if any, on the present list were pledged prior to the four months period and remained pledged continuously since that time." The failure of the bank to avail itself of this offer permits but one inference. To this it may be added that, for aught the record discloses, all the October accounts may have been collected weeks before the February assignment. This being so, it is only repeating to say that there could have been no substitution in February, because the bank then had no accounts to exchange. In short, the presumption that the February transaction was a prohibited transfer is not only unrebutted, but stands confirmed by uncontradicted proof.

It follows that the decree appealed from must be reversed, and the case remanded for further proceedings in accordance with this opinion.

Reversed.

DE FOREST RADIO TELEPHONE & TELEGRAPH CO. v. STANDARD OIL CO. OF NEW YORK.

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

No. 71.

CONTRACTS ⇐83—SALES—CONSIDERATION—ACTION FOR PRICE—INJUNCTION AGAINST USE.

The contract by which plaintiff sold to and installed for defendant wireless apparatus for immediate use is abrogated, and defendant relieved of liability for price; it having by injunction in infringement suit been deprived of the use, which plaintiff cannot furnish, unless the injunction order affirmed by the Circuit Court of Appeals be vacated, and defendant having returned the apparatus.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 388-398; Dec. Dig. ⇐83.]

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

Action by the De Forest Radio Telephone & Telegraph Company against the Standard Oil Company of New York. Judgment for defendant, and plaintiff brings error. Affirmed.

Joseph S. Frank, of New York City, for plaintiff in error.

Morton L. Fearey and Joseph M. Cormack, both of New York City, for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. This cause comes here on writ of error to review a judgment in favor of the Standard Oil Company, which judgment dismissed the complaint of the De Forest Company. The action was brought to recover $10,000, the purchase price of five sets of wireless apparatus installed on the defendant's vessels. The defense is that the apparatus so installed is an infringement of patents belonging to the Marconi Wireless Company, and that the defendant herein has been enjoined from using the apparatus and, pursuant to the command of the injunction, has stopped using the apparatus and has returned it to the plaintiff with the exception of some of the heavier parts which the defendant retained at the plaintiff's request. The order enjoining the use of the apparatus was affirmed by this court. Marconi Wireless Tel. Co. v. De Forest R. Tel. & Tel. Co., 225 Fed. 373, 140 C. C. A. 637.

The situation seems perfectly clear from a common sense point of view. The defendant installed the wireless on its boats for immediate use; it has been deprived of that use for two years and the prospect of securing it in the future is, to say the least, exceedingly doubtful. The defendant is asked to pay for something which it has never received and which it is prohibited from using. In such circumstances it seems to us that the contract is abrogated and the defendant should not be required to pay with the remote prospect of recovering the amount so paid or the use of the apparatus at sometime in the distant

future. The defendant contracted for a wireless installment on each of its five boats and there was a warranty, express or implied, that it should have a right to use what it purchased. It has not received what the plaintiff agreed to furnish and what it cannot furnish except sometime in the future and then only in the event that the injunction order affirmed by this court is vacated.

We think the defendant was fully justified in refusing to pay in such circumstances. The judgment is affirmed with costs.

THE MORRISTOWN.

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

No. 29.

COLLISION ⊂⊃134—DAMAGES.

The cost of repairing injury to rudder from collision is properly allowed, though greater than if repairs had been made continuously; the vessel, to prevent interruption of regular sailing, having proceeded on trip, and been repaired from time to time when in port, and such cost being less than would have been the sum of repairs made continuously and the loss from detention of the ship.

[Ed. Note.—For other cases, see Collision, Cent. Dig. § 288; Dec. Dig. ⊂⊃134.]

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

Suit for collision by the Royal Mail Steam Packet Company against the steam tug Morristown. From the decree, the Delaware, Lackawanna & Western Railroad Company, claimant, appeals. Affirmed.

A. J. McMahon, of New York City, for appellant.

Burlingham, Montgomery & Beecher, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the District Court overruling exceptions to the report of the commissioner assessing damages. The appellant's tow collided with and bent the upper part of the rudder of the steamer Arcardian, lying moored at Pier 14, North River. She is one of a regular line which makes weekly sailings between this port and Bermuda and was about to sail. The damage not being such as to make the steamer unseaworthy, her owners let her proceed to sea and, with a view to maintaining the schedule of their sailings, straightened the rudder from time to time as the vessel was in port, finally putting on a permanent patch. The cost of doing this was $2,066.13. If the work had been done continuously with the vessel in the water, instead of intermittently, the cost together with one day's detention at $1,291.13, would have been $2,111.67. Judge Hough found that one day's detention would have been incurred if the repairs had been so made. The appellant contends that in such

case only the actual cost of repairs would have been awarded, without any allowance for loss of the use of the vessel, and that therefore the libelant should have been given no more. We do not agree with this contention, and think the District Judge rightly allowed the libelant's actual expenditures because they were less than what the repairs, if made continuously, including the loss caused by the detention of the vessel, would have amounted to.

The decree is affirmed.

ARNK BING et al. v. UNITED STATES.

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

No. 75.

HABEAS CORPUS ⊜113(12)—EXPULSION—CHINESE—REVIEW—EVIDENCE.

Decree dismissing writ of habeas corpus granted Chinese laborers without certificates of residence, apprehended when brought into the country from Canada, then stating that they were born in China, but afterwards insisting that they were born in New York, will not be disturbed; the testimony for them not being persuasive and being contradictory in many important details.

[Ed. Note.—For other cases, see Habeas Corpus, Cent. Dig. § 115; Dec. Dig. ⊜113(12).]

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

Habeas corpus by Arnk Bing and others against the United States. Writ dismissed, and relators appeal.

D. M. Silver, of Buffalo, N. Y., for appellants.

S. T. Lockwood, U. S. Atty., of Buffalo, N. Y.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. This is an appeal from an order of the District Court for the Western District of New York dismissing a writ of habeas corpus granted the relators July 23, 1915.

The relators were apprehended November 29, 1914, at a schoolhouse located on Grand Island, New York. They were brought to the river by a white man and placed in a boat. Another white man took them to the schoolhouse on the American shore in Erie county, New York. They were apprehended and taken to Tonawanda and were there questioned by two inspectors, all three of the relators stating that they were born in China. Subsequently Arnk Suen and Arnk Bing insisted that they were born in New York. All of the relators are laborers but without certificates of residence.

This case presents the usual contradictions and inconsistencies which are typical of this species of Chinese cases. The testimony offered for the appellants is not persuasive and is so contradictory in many important details that we cannot assert that the court erred in dismissing the writ.

The order is affirmed and the appeal is dismissed.

ATLAS TRANSP. CO. v. LEE LINE STEAMERS.

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

No. 4490.

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

On petition for rehearing. Denied.

For former opinion, see 235 Fed. 492, —— C. C. A. ——.

O'Neill Ryan and Guy A. Thompson, both of St. Louis, Mo., for respondent.

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

PER CURIAM. Respondent's brief in support of its petition for rehearing urges that the damages should be divided because the Josh Cook was negligent in whistling its assent for the Rees Lee to pass at a dangerous place. The Josh Cook, by its signal of two whistles, did not assent that the Rees Lee could pass recklessly, but only that it could pass safely, if properly navigated. It assented that it could pass at a proper distance and at a proper speed. The Rees Lee ran at full head into shoal water over a reef, and its pilot should have known that the shoal might extend there. The testimony is convincing that the place was safe for passing, if the Rees Lee had passed slowly. The resistance of the shoal water then would have been so little that the rudder would have controlled the boat. There is no evidence that the pilot of the Josh Cook had reason to anticipate that the Rees Lee would undertake to pass at an improper speed.

The petition for rehearing will be denied.

CONRADER et al. v. JUDSON GOVERNOR CO.

(Circuit Court of Appeals, Second Circuit. December 1, 1916. On Motion for Reargument, December 19, 1916.)

No. 304.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—PUMP GOVERNOR.

The Conrader patents, No. 664,468, No. 687,449, and No. 1,072,576, each for a pump governor, the later two being for improvements on the device of the first patent, *held* valid but not infringed, and No. 810,109 *held* void in the present broad form of the claims because of resultant double patenting.

2. PATENTS ⊂=241—INFRINGEMENT—SIMILARITY OF RESULTS.

A similarity of result does not show infringement, if that result is one old in the art and if the general mechanical method of producing the result is not that of an equivalent combination.

[Ed. Note.—For other cases, see Patents, Cent. Dig. § 380; Dec Dig. ⊂=241.]

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

Suit in equity by Rudolph Conrader and the Jarecki Manufacturing Company against the Judson Governor Company. From the decree, both parties appeal. Reversed in part, and affirmed in part.

Both plaintiffs and defendant have appealed from the decision of the District Court holding valid and infringed patents 664,468, 687,449 (except Claim 17), and 1,072,576, holding Claim 17 (supra) valid but not infringed, and holding patent 810,109 invalid. The opinion of the District Court will be found in 226 Fed. 207.

Hugh C. Lord, of Erie, Pa., for Jarecki Mfg. Co. and Rudolph Conrader.

C. Schuyler Davis, of Rochester, N. Y., for Judson Governor Co.

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

CHATFIELD, District Judge. [1] This action was brought by Rudolph Conrader, the patentee, and the Jarecki Manufacturing Company, holding an exclusive license to five patents issued at various times to Conrader.

The earliest patent was issued December 25, 1900, No. 664,468, upon an application filed January 31, 1900.

The second patent was issued upon the 26th of November, 1901, under No. 687,449, upon an application filed September 10, 1900, which it will be noticed was prior to the date of allowance of the first patent.

A third patent was issued February 18, 1913, under No. 1,053,904, upon an application filed October 26, 1910. This third patent was withdrawn from the action at the time of trial.

Another patent to Conrader, issued November 2, 1904, under No. 775,391, on an application filed January 29, 1902, is set forth in the record and has been considered in the development of the art.

These patents are stated by the patentee to cover improvements in governors for pumping or compression engines.

The fourth patent in suit was issued on January 16, 1906, under No. 810,109, upon an application filed January 23, 1905. It shows a form of governor or regulator for a pumping engine to create a vacuum, that is, to pump from a receptacle, containing a medium at less than the atmospheric pressure into a space where the pressure is as much as that of the atmosphere. The District Court held this patent invalid for lack of invention.

A fifth patent was issued upon the 9th day of September, 1913, under No. 1,072,576, upon an application filed October 26, 1910. This patent claims certain improvements in controlling devices for compressors, by describing "a centrifugal governor with improvements within the governor itself, and controlling mechanism operating upon the relief device of the compressor, together with a pressure device acting upon the governor valve."

It will be pointed out later that employment of a relief device was the outstanding feature of this patent, but the general style of the

machine used by the patentee as an illustration, and the application of the ideas shown in his earlier patents to the form of machine described in this latest patent, must be carefully kept in mind in considering the present case. The District Court held this patent valid and infringed as to the claims included in the action, viz. 1, 2, 3, 4, 6, 12, 14, 15, and 16.

The District Court has found and the record shows that a governor for a pumping engine, in the sense of a device which will direct the operation of the pumping engine, so as to restore the desired pressure of the compressed vapor or fluid when this pressure is too greatly increased or reduced by use and withdrawal, was old in the art in mechanical combination with the ordinary centrifugal steam governor which, by the outward movement of the centrifugal balls, shuts off the motive fluid in case the speed of the engine, doing the pumping, becomes excessive.

It is evident that, if the amount of withdrawal was less than the supply compressed by the engine, the pressure would increase, would thereby increase the load or work of the engine piston at each stroke, and might stall the engine, even though the pressure did not reach a dangerous point in so doing. It was also well known that when starting up, that is, when pumping into an empty receiver, the pumping engine could run at its maximum speed without need of interference until the pressure in the compression receptacle had reached a point where the pumping should be checked.

As shown by the prior art, Conrader recognized the then evident proposition that the so-called centripetal force, which opposed the outward motion of the centrifugal balls, consisted of the weight, that is the force of gravity acting upon the mass of these balls, or of a spring, if the center of gravity was as high as the point of suspension and a contracting spring was present. He found in the prior art certain patents and forms of device in which regulation of the supply of motive fluid was accomplished by the operation of a lever which forcibly and directly closed the steam valve by acting upon the stem of the centrifugal governor without regard to the position of the centrifugal balls. Clayton, No. 315,244, April 7, 1885, and Gardner, No. 638,412, December 5, 1899, were of this type. In another form of device the pressure governor, by a separate attachment apart from, and independent of, the speed governor, shut off the supply of motive fluid, as in Reynolds, No. 239,194, of March 22, 1881.

The usual method of accomplishing this result was the use of a weighted lever, which would be required to exert force enough to overcome the mass and velocity of the parts moved, or which would throw upon the engine and the speed governor the effect of stoppage of the engine by means as independent as would be the act of the engineer, if, in response to some signal, he should shut down the engine. The engine would not start itself after stopping and was apt to stop if the speed was slow and the load heavy.

Conrader sought to apply to a speed governor an indirect or automatic control, by which, whenever the pressure of the compressed vapor became too great, no matter what the cause, the centrifugal balls

of the speed governor would be caused to move out, thus closing down the stem of the steam valve, but which, when more compression or greater speed was needed, would raise the stem and set the engine at work.

In discussing these patents we will assume that steam is the motive power, and that the stem of the speed governor is maintained in a vertical position, until it is necessary to consider a different form of device.

Conrader employed a speed governor in which the center of gravity was as high as the plane of rotation of the balls of that governor, and inserted centripetal springs to take the place of gravity. It was still true that the outward movement of the centrifugal balls would cause a downward movement of the stem in shutting off the steam. Conrader reasoned that a weakening of the centripetal spring would cause the balls, under rotation at any given speed, to move further out and to, thus, shut off the steam. In place of the engineer whose mind should direct the shutting off of the steam, or in place of the lever which by overpowering force should overcome the resistance of the parts, when the pressure created by the work of the steam engine became too great, he caused this pressure to exert an influence against the centripetal springs. Thus weakened, these springs would allow the centrifugal balls to move outward, without any increase of speed, the steam would be shut off, and the work which the engine was doing thereby diminished and the pressure then relieved. If the pressure diminished, it would restore the tension of the centripetal spring, the stem would be raised, and the steam would again be supplied for work.

Conrader in his earliest patent, No. 664,468, describes his invention in Claim 1, as follows:

"In a pump governor, the combination of a centrifugal element; a centripetal element arranged to act in opposition to said centrifugal element; and means actuated by the pumped fluid for varying the relative strength of one of the elements within the limits of the power exerted by the other element."

It will be seen that he has indicated the possibility of varying the strength of the centrifugal element, within the limits of the power exerted by the centripetal element, if that seems advantageous; but, in the form used by him as an illustration and in all the devices which we have under discussion, it is more convenient to weaken the centripetal element, so long as we are concerned with the vertical stem carrying the centrifugal balls, or its equivalent.

It is evident that, so long as the centrifugal element shuts off the steam, by an outward movement, it is somewhat easier to lessen this movement, against the force of the engine, than it would be to increase the movement as the engine stops and to diminish it as the engine increases in speed.

The District Court has found this first patent valid, and Claims 1, 2, 3, 6, 9, 10, 11, 12, 13, and 14 sued upon infringed.

In order to avoid abrupt action and to regulate the effect upon the speed governor, in accordance with the need as the pressure gradually increased, Conrader employed what he calls a dash pot effect, by

diminishing the capacity of the port through which the compressed fluid passes when the valve in the compression chamber reaches the point where it is necessary to affect the work of the pumping engine. He distinguishes between the necessities of a single and double engine, in order to avoid the possibilities of stoppage, and states that by varying the strength of one of the elements within the limits of the power exerted by the other element, the governor "remains active as a governor throughout the operation of the engine. In some of the types heretofore used the force of one of the elements has been wholly neutralized by mechanism operating upon the other element with such power as to eliminate the centrifugal action of the governor from the valve entirely."

The capacities of the engine and of the compressor, as well as the expected demands of the work, establish a standard or mean rate of rotation of the centrifugal governor which will indicate the speed of the engine when pumping, so that the load and the demands upon the engine are taken care of and the pressure is kept relatively constant. If the engine is so adjusted that the various parts come to equilibrium and maintain this fairly constant pressure, then the rate of rotation of the speed governor is referred to by the various witnesses and patentees as the "normal speed" under those conditions. The parts when properly adjusted will tend to remain in equilibrium, and, the more constant the equilibrium is maintained, the more nearly will the "normal speed" be steady or constant. If the supply of steam is changed in accordance with the position of the centrifugal balls, and if this position is controlled by the so-called pressure governor, and if thereby the steam is shut off through an outward movement of the balls, it is apparent that as the pressure element allows the balls to move outward the speed of rotation would not be affected, but the supply of steam would be decreased, the speed of the engine would then decrease and the centrifugal balls would tend to draw in, unless the pressure continues to increase and, acting upon the centripetal springs, sends the balls further out, thus continuing to shut off the steam until the pressure decreases. When this pressure decreases, the steam valve is opened and the engine goes to work in the reverse manner.

But the term "normal speed" has been used to indicate also that rate at which the speed governor is rotating when it begins to close the steam valve after the pressure device has reduced the maximum rate of rotation which was reached when the engine was running light. If the engine was adjusted so as to unload during this period, the engine would still be running light, and the action of the centrifugal governor occurs at a time when the pressure device is not exerting an influence to shut off the steam through the action of the speed governor.

Thus Conrader, as found by the court below, had in mind (whether the engine was working or running light) the maintenance of a uniform pressure with as little variation as possible from the uniform standard of speed which would be obtained when the parts were in equilibrium and working steadily. But thus the pressure would

be the constant aimed at, while the speed would, within certain limits, be rapidly changing and oscillating in order to keep the work done equal to the demand. The court below uses the term "normal speed" as if the function of a speed governor was the object of the invention and as if uniformity of rotation of the speed governor, rather than constant oscillation of the stem of the governor, were the norm to be obtained. In other words, the court below seems to have considered that the result of adjustments affecting the average speed shows the purpose of the invention rather than to have kept in mind the achievement of constant pressure with the required amount of work done (with variable speed and variable steam supply) as the object of the pressure governor.

Between January 31 and September 10, 1910, Conrader found that the complete change in centripetal force at each operation of the pressure piston, although gradual in effect, caused the steam engine to stall at low speeds, even when a flywheel was used, if the engine was of the single type. He also found that the increased resistance of the springs as they were compressed had the same effect, and, if anything happened to the belt of the steam governor, danger might arise from an increase of pressure when the means of shutting off the steam had been taken away. He therefore filed the application resulting in the second patent in suit.

This patent has been held valid and infringed as to Claims 1, 3, 8, 13, and 14. In the drawings and specifications it shows an improvement to the governor described in the first patent, by the addition of a nut, which, when used with a single engine, is so placed as to bring to rest that part of the frame extending the centripetal springs, before the piston of the pressure cylinder has entirely completed its action.

In this way Conrader applied the principles of the prior art in leaving the centrifugal governor in control of the valve at low speeds, and thus to avoid stalling or stoppage of the engine. This was covered by Claim 14 of this patent, and all machines put out by Conrader have contained this device.

In this patent, Conrader further planned an arrangement of levers which would give him the benefit of a varying arm and would apply a toggle mechanism in such a way as to furnish increased leverage substantially to the extent that the springs gave increased resistance as they were further compressed.

Conrader also included a claim (17) for the purpose of describing the device used by him to prevent excessive speed in case of accident to the belt causing rotation of the speed governor. As was held in the court below, this particular device, consisting of an idler pulley running at the end of a weighted arm, and maintained in such position as to cause the weight to entirely close the steam valve, if allowed to fall in case of accident, was shown in the prior art and there would seem to be no invention, in the basic or broad sense, in applying such a safety device to the governor in question.

The defendant seeks to show that this Claim 17 is entirely invalid as constituting a mere aggregation of parts instead of a patentable

combination. There seems to be no reason for disagreeing with the finding of the District Court in this respect, and inasmuch as the defendant's device is of an entirely different character, there seems to be no reason for holding it an infringement of the combination described by Conrader in Claim 17. In other words, Claim 17 must be limited to a structure substantially as described, if it be held that Conrader showed invention in making the necessary mechanical arrangements required to apply the principles of the prior art.

This brings us to the third Conrader patent, which was directed toward a means for regulating more closely the effect of a change of pressure in the receiver so as to accomplish a gradual reduction of speed in the pump by "intensifying the change of fluid pressure on the motor over a change of pressure in the receiver."

As this patent has not been sued upon and is not infringed, no description of it is necessary other than to say that it shows, in 1902, the direction in which Conrader felt that improvement was needed, and also shows retention by Conrader at that time of the form of pressure or pump governor which had been set forth in his earlier patents.

In 1905, Conrader applied for his next patent in suit, which was to adapt his pressure governor to the needs of a pump creating a partial vacuum. Here, again, he followed the general style of the pressure governor, and directed his specifications and claims to the needs of a pump which should withdraw from a receptacle holding vapor at less than atmospheric pressure, a portion of that vapor into the outside atmosphere.

The court below has held the claims of this patent sued upon, 1, 2, 3, 4, 5, 7, 8, 9, 10, 11, and 12, invalid for lack of invention. The broad language of his claims would give rise to a case of double patenting if these claims be held valid in addition to the same application of principles expressed in similar language in his first patent describing a pump governor and already held valid therein.

The general style of machine and application of ideas is, as was stated by the District Court, the same as in the former patents, and no inherent difference in principle can be observed in changing from a pump governor to a vacuum governor. As was said by the District Court, the pumping is, in each case, from the receptacle with lower pressure into a receptacle containing a medium with higher pressure. If the defendant be held as an infringer in this case, it must be as an infringer of the claims of the earlier Conrader patent, and Conrader should gain no advantage by repeating his earlier claims in connection with his combination to meet the needs of a vacuum governor. The finding that the broad claims of this patent are invalid will be sustained.

The fifth Conrader patent brings in a new feature, generally known as an unloader, and describes this in use with a type of governor resembling the defendant's structure rather than that of the earlier Conrader patents. It therefore will be advantageous to consider at this time the defendant's device and to state the elements which must be considered in deciding the issue as to infringement.

According to the testimony, the defendant's assignor, Osborne, who had been employed in the plaintiff's factory under Mr. Conrader, and who had been familiar with the construction and assembling of the Conrader governors, left that employment and shortly thereafter proceeded to construct a type of governor which the defendant has placed upon the market and which is involved in this action. He took out three patents, two of which are contained in the record below, and which show the type of governor as to which infringement is charged. The earliest of these three patents was issued July 12, 1910, under No. 963,803, upon an application filed March 5, 1910, and hence was actually available to Conrader at the time of filing the application for the fifth patent in suit.

The second Osborne patent was issued February 17, 1914, No. 1,087,818, and the last Osborne patent was issued April 20, 1915, No. 1,136,607, upon an application filed May 29, 1913. This last Osborne patent is apparently in exact conformity to the device used as an exhibit in this case and which it is claimed infringes the Conrader patents.

But in all three of the Osborne devices we find a pressure governor in which a horizontal stem is used to carry a circular ring (instead of the centrifugal balls of the earlier Conrader governor), and in which a circular spring surrounding the stem and resting upon a fixed abutment furnishes a centripetal force. We find also a rotary steam valve operated by the turning of the stem, rather than by its longitudinal movement, and another spring resisting the rotation of this stem, and hence tending to open the steam valve whenever it is closed. This stem is in turn rotated by the movement of a sleeve which is shifted in the direction to close the steam valve by the opening of the centrifugal ring corresponding to the moving out of the centrifugal balls and which is returned by the force of that spring which also opens the steam valve.

It is not necessary to go into the details of the two earlier patents as the form of the defendant's device is shown by the exhibits and is described in the third patent as to the particular features with which we are concerned, viz. the levers and springs by which the force of the pressure piston and of an unloader device is communicated to the rotary steam valve.

Conrader in his fifth patent applies his unloader device to a governor similar in general style to this Osborne form of governor, and, in considering the defendant's structure from the standpoint of infringement, we must take into account the application of an unloader device to either type of governor. In patent No. 687,449, at line 55, p. 1, Conrader says:

"This feature of the invention is applicable, however, not only to a governor having the varying centripetal element within the limits of the power exerted by the contripetal element, but is also applicable to that class of governors in which the governor valve is directly actuated by the pressure device."

Although not speaking of the unloader in the lines quoted, the application of the language is exactly analogous.

The general purpose of an unloader device was well known in the

prior art, and certain patents such as Prellwitz, No. 689,565, apply this idea, which had been worked out for application to other mechanism, to a compressor governor. The purpose of the unloader device is to save work by the pumping engine, when the pressure in the cylinder reaches a predetermined maximum, and when there is not demand enough upon the compressed vapor to keep the pressure from increasing. The unloading device then allows the engine to run without undergoing the work of further compression or, in that sense, to run light. It is not necessary to speak of this unloader in its ordinary capacity as a safety valve, as any device which will cause relief to the pressure of the compressed fluid, when it reaches a certain maximum, would furnish a safety valve action. But when the object desired is to stop further compression as well, and to leave the engine in such condition that it may not be stalled, and may be started up automatically by the action of the pressure governor, it is apparent that a mechanism would be required which would involve invention if presented in any new form.

As has been said, Prellwitz described an unloader for this purpose, and his patent was issued on December 24, 1901. On February 19, 1907, a patent was issued to one Hill, No. 844,801, which also involved the element of an unloader, and it can be seen from this that the mere idea of the unloader was not of itself new, as applied to air compressors, when Conrader filed the application for his fifth patent, in 1910.

It must further be borne in mind that the physical device embodying plaintiff's patents, used as an exhibit by the District Court upon the trial, did not conform to the particular style of governor described in Conrader's patent, No. 1,072,576, but on the contrary applied the unloader described in that patent to the governors shown in the drawings and specifications of the four earlier patents.

It must also be borne in mind that in order to avoid the possibility of double patenting, we can look only to the first Conrader patent, No. 864,468, for the broad basic claims covering the Conrader idea or method of indirect control of the steam valve, through action upon one of the elements of the speed governor.

The Osborne patents, beginning in July, 1910, developed the ideas which resulted in the particular form of unloader shown in the device as to which infringement is charged. Osborne's patent, No. 1,136,607, was issued on April 20, 1915, after the trial of this suit was had. Both sides have referred to this patent in this court and treated it as a matter of public record. A copy is presented with the briefs, and therefore it has been substantially included in the record in this court, although it adds nothing in particular to the evidence presented by the defendant's machine which was before the District Court.

The District Court says, with reference to the unloader device, that:

"It was not a new expedient to use a relief device in connection with a pressure device, * * * but there is no disclosure of an unloader device in connection with the speed controlling instrumentality to perform the function of the patent in suit, that is, the prior art discloses no centrifugal governor in which the variation of the speed of the engine is the controlling feature. Hence, in my estimation the Conrader adaptation of a speed controlling

mechanism in connection with a control motor or pressure device to control the relieved mechanism on compressors of the type in question was new and novel."

The court based its opinion upon the fact that "the centrifugal mechanism and the relief mechanism are so correlated as to produce practically simultaneous operation," and, also, that the "unloading apparatus which operated to achieve the same result, was an infringement of complainant's."

The testimony relating to the operation of these unloader devices took up a considerable portion of the record. The defendant's expert apparently failed to take into account one express purpose of operation in the defendant's mechanism. After the unloader device has opened the piston valve and lightened the load of the engine, as well as gradually reduced the pressure in the cylinder, the speed governor will still operate to further close or completely shut off the steam, if the speed of the engine shall increase beyond the danger point. The mechanism of the defendant's device is so constructed that the steam valve will not be entirely closed (through the operation of the pressure governor or of the unloader device) in order that a stalling of the engine may not result. When we consider the defendant's unloader and the plaintiff's unloader, it is apparent that they produce the same result, that is, they each lighten the load upon the engine, gradually lessen the pressure in the condenser, and are actuated or set in motion by movements of the mechanism which is operated by the pressure piston in carrying out the work of the pressure governor, whatever that may be. But the devices are not similar in the construction and arrangement of the parts. They resemble each other only in the sense that each one opens one of the valve ports to the compressor, and that each one serves the same general purpose.

[2] Leaving out of consideration the original Conrader invention, it is impossible to agree with the conclusion of the District Court that, because the same result is achieved, the claims of the Conrader patent, No. 1,072,576, are infringed, and that these claims do not require a strict construction. The case of Westinghouse Air Brake Co. v. New York Air Brake Co., 119 Fed. 874, 56 C. C. A. 404, holds that a similarity of result does not show infringement, if that result is one old in the art and if the general mechanical method of producing the result is not an equivalent combination.

Claim 1 of the Conrader patent, No. 1,072,576, is as follows:

"In a controlling device for compressors, the combination of a speed controlling device, controlling the motive fluid; a relief device for the compressor; a fluid actuated controlling motor acting on said controlling device; a fluid actuated relief motor acting on the relief device; and means actuated by the controlling motor for controlling the relief motor."

This court differs with the conclusion of the District Court that the unloader patent shows an improvement over the prior art broadly patenting to Conrader the application of "a fluid actuated relief motor acting on the relief device."

The Conrader patent is valid in so far as it describes as novel the mere use of a "means actuated by the controlling motor for controlling the relief motor." But this claim, in order to be valid, depends upon

the old idea of the earliest Conrader patent and upon the general style of control, using the relief motor only in combination with the other elements of the Conrader device, and this the defendant's device does not infringe, except as we consider the general proposition involved in the earlier patents.

In other words, the Conrader patents are valid as combinations and improvements, dependent upon the idea taught in the Conrader patent, No. 664,468, and almost immediately modified by the Conrader patent, No. 687,449; and, if the defendant's device infringes, it infringes only those two earlier Conrader patents which cover the general principle of the Conrader idea. It would allow double patenting to hold infringement of the last Conrader patent, No. 1,072,576, when the question at issue is the method of control by the pressure device rather than the particular application of a relief motor in connection with that control. But consideration of the testimony and of the exhibits has been greatly complicated by the use of a relief motor with the defendant's structure, and of the particular parts introduced in connection with that relief motor which enter into any operation of the machine.

The evidence finally reached a point of accord upon the proposition that in the defendant's structure, with the relief motor present, the two screws (labeled on the illustrated drawing of the defendant's device as *78* and *80*, which screws were interposed because of the relief mechanism, and which are to effect a positioning of the various levers transmitting the motion under pressure from the relief motor to the rotary steam valve) may be so set as to increase or diminish the amount of rotation which will be produced by the opening of the steam valve, not closed through the relief mechanism or the various parts of the pressure governor, and with the result that the ring (that is, the balls of the speed governor) will begin to open and to complete the shutting off of the steam at a lower rate of rotation.

The experts and the parties to the case finally also reached an agreement in the court below upon the proposition that the speed governor and the pressure governor acted conjointly, so far as physical movement of the parts was concerned, when the position of the steam valve was maintained at any point where the revolution of the speed governor did not exceed the amount of rotation which has just been stated. This amount of rotation would represent the maximum speed of the engine under so-called conjoint control; that is, the maximum speed of rotation before the centrifugal or speed governor took control. It represents the minimum rate of rotation at which the speed governor takes control. This rate of rotation represents, of course, an equilibrium between the parts of the machine resulting from the machine's operation. This rate is ascertainable and would be "normal speed" of the speed governor under those conditions. But this normal rate of speed would immediately change upon any change in the adjustment, either through the operation of the screw *80* or by other conditions which do not concern our discussion of this question.

Much stress was laid in the court below and in the argument upon the appeal, on this sort of deviation of this so-called "normal speed." The parties do not seem to be at variance in describing the condition

to which the words "normal speed" are attached by Conrader, and Osborne in his patents seems to recognize the use of the term. But determination of the issue does not follow from clearing up the dispute as to the use of the words "normal speed."

The screw *78* is used by the defendant in setting the position of the parts operated in connection with the relief device, and would act as a block if allowed to remain in the extreme position to which it had been advanced. The screw *80*, whether the unloader device is or is not present, moves a rocking lever which rotates a so-called "floating lever" and changes its position so as to partially close the steam valve, thus diminishing the working force, and, without reference to the pressure produced, necessarily reduces the speed of rotation which when working the engine would reach.

It is evident that if at this reduced speed the force of the spring forming the centripetal member of the speed governor is not strong enough to prevent any outward motion of the centrifugal ring, then the speed governor would go in and shut steam off further at the lower speed which would be attained by the engine when pumping under the decreased head of steam which would be furnished by the arrangement of the parts with the screw *80* set as just stated.

There is nothing in the record to indicate the minimum speed at which the centrifugal ring would start to move, if it met with no resistance through other parts of the speed governor and its connections. But it seems to be necessary to *assume* that the strength of the so-called centripetal spring *(42)* is not sufficient alone to restrain the ring of the speed governor, when rotating at the lowest speed which is shown as a result of the operation of the screw *80* in the defendant's structure; and that the higher speeds at which the operation of this ring begins (when the screw *80* and the unloader have not prevented) would be due to the position and resistance of the sleeve and of the various parts of the valve closing apparatus, including the spring which acts to open the steam valve, as soon as the obstructing pressure, whatever that may be, is released.

We approach at this point apparently the real issue in the case. In the defendant's structure, the arrangement and proportion of the parts is such that adjustment will allow the steam valve to stand partly open unless the centrifugal speed governor closes the valve because the steam engine is running at a dangerously high rate. This steam valve would again open as soon as the dangerous rate is reduced. But so far as the pressure governor is concerned, it ceases to operate beyond the fixed point desired, when the engine is running light, or until the pressure increases so that the amount of pumping should be diminished. With the unloader device present, the two then furnish a constant protection against undue pressure and undue speed in the defendant's machine.

In Conrader we have presented in the second patent, No. 687,449, the block *H-2*, which interrupts the further operation of the pressure regulator, and when an unloader is present we have the same situation, viz. that undue pressure is relieved by the unloader, and that excessive pressure below the point of unloading will diminish the supply of steam, by operating the speed governor so as to shut off the steam,

while the block *H-2* prevents the pressure governor from completely closing the steam valve and stopping all action of the centrifugal governor. Thus the engine may still run at low speed and not become stalled.

But in Conrader, the centrifugal governor ring moves out as the steam is shut off. The shutting off of the steam is produced indirectly by affecting the operation of the speed governor. The rate of rotation of the speed governor at which the centrifugal ring will begin to move the steam valve, independent of the operation of the pressure governor device, is fixed, but the rate of rotation which will close the steam valve, under the combined action of the pressure governor with the rotation of the speed governor, is lower, up to the point where the block *H-2* cuts out the pressure governor. Hence, in Conrader, the pressure governor and the speed governor are acting conjointly, in the sense that the speed governor is fixing the actual amount by which the steam valve is closed, under the direction of the pressure governor, during the period in which the pressure governor is acting upon one element of the speed governor, viz. the centripetal spring.

In the defendant's device there is conjoint movement of the speed and pressure device, only when the speed and position of the centrifugal governor is changed so as to reach an equilibrium with that arrangement of parts which the pressure governor has directly established, or when the speed governor reaches a rate of rotation which the pressure governor and the unloader cannot change. But this is not within the broad claims of the Conrader patents. In the defendant's structure, the pressure governor and the unloader influence the rotation of the speed governor by physical movement of the parts closing the steam valve, including the spring which tends to open the steam valve independently of the centrifugal governor. But in so doing it increases the compression of this spring (*56*) which the plaintiff insists is a part of the centripetal element. It allows the ring of the centrifugal governor to close in and thus prepares the speed governor for action, but the ring must open again so as to move the sleeve into contact with the levers before it can affect the steam supply. Hence, while the pressure device closes the ring, as the steam is shut off, it also so arranges the parts that the ring must open again to complete the shutting off of the steam. From this the plaintiffs contend that the centripetal force has been weakened and that the ring can move further out, that is, shut off the steam, at a lower rate of rotation than if the pressure device had not acted. But this is not done by weakening the centripetal force or by producing the result through action upon the speed governor. It is accomplished by a physical removal of the parts, through direct closing of the steam valve, and through the establishment of new conditions under which the speed governor may go to work after its period of inactivity. Such a result does not accord with the claims of any of the Conrader patents, and is not caused by the mechanical equivalent of any of his patented devices.

Claim 1 of the earliest patent states in the broadest form the general proposition upon which a pioneer patent is claimed. But in this claim the statement that the "centripetal element is arranged to act in opposition to said centrifugal element" is true with respect to any governor.

The statement, "means actuated by the pumped fluid for varying the relative strength of one of the elements within the limits of the power exerted by the other element," cannot be construed to cover a mechanical arrangement in which some of the parts which would ordinarily enter into the force of the centripetal element are, for a time, moved to a position where they do not affect the centrifugal element in its control of the steam valve. As has been said, it is true that in the defendant's structure, when the centrifugal or speed governor is used purely as a safety governor against excessive speed, the pressure governor and the unloader have already operated and removed from the sphere of action some of the parts, including the spring *56*, which previously retarded the operation of the centrifugal or speed governor.

But the purpose of the Conrader invention and its improvement over the prior art was not in the direction of confining the centrifugal or speed governor to one particular function. With the meaning just stated, Claim 1 above quoted could be applied to a speed governor in its operations at such time as it was not within the control of the pressure governor, and when it was acting in spite of the pressure governor, solely for one limited purpose.

The testimony in the case, the observations of the witnesses based upon variations of speed at which the centrifugal or speed governor began to complete the closing of the steam valve, and the position of the various parts up to that point, as well as thereafter, have caused much discussion. It is admitted by the plaintiff that in Conrader the balls of the centrifugal governor go out as the pressure governor goes into operation, and continue to go out until the pressure governor lets go. During this time the stem moves down. In the defendant's structure, the ring which rotates the centrifugal balls closes or comes in as the pressure governor goes into operation, and the sleeve (or part corresponding to the stem) moves up (that is away from the steam valve). It is evident that the spring *56* offers slightly greater (and not less) resistance when the pressure governor is operating, than when it is not. But it is contended by the plaintiffs that these changes are not the natural consequence of pressure exerted to produce a direct closing of the steam valve. They assert, on the contrary, that the action of the pressure governor so disturbs the equilibrium of the parts that the centripetal element of the speed governor changes more rapidly than the centrifugal element, and that the centrifugal element does not follow, but is still in control.

This contention brings into the so-called centripetal element the various arms and sleeves by which the steam valve is closed, and also the spring *56*, which tends to keep the steam valve open. But assuming that these parts do enter into the general resisting force of the centripetal element, it has been seen that the spring *56*, even if acted upon by the pressure governor, has no force exerted in such a way as to put the centrifugal governor in operation, until the pressure governor ceases to produce the necessary result. The various parts are moved directly by the pressure governor, according to the methods of the patents of the prior art, until the point is reached where the pressure governor goes out or remains stationary and where the speed governor again takes control.

Under these circumstances, we are unable to hold, with the District Court, that the broad claims of the Conrader patents are basic or pioneer claims, covering all changes in controlling the steam valve, through the operation of certain parts of the device which have some effect in fixing the position of the parts moved by the centrifugal governor, when it acts. If these claims be not given that broad basic interpretation, or if their broad language be applied to something other than the basic principle shown in the Conrader method of operation, then the defendant's structure does not infringe. The addition of a safety device, as described in Claim 17 of patent No. 687,449, and the addition of the block *H-2* does not affect this issue of infringement. Even if the Conrader claims describing these structures be held valid as a patentable combination, it would not prevent the use of the defendant's device if it does not infringe the broad idea of the Conrader claims.

There is but one proposition further which is brought in by the claims of Conrader patent, No. 687,449, providing for the use of lever arms of varying length to meet the change in pressure exerted by the various springs as they are contracted and expanded. These claims, again, appear to be valid in the sense that they show the application of a well known principle to the necessities of the Conrader device and present a patentable combination which is basic or general in scope only in so far as it involves the idea presented in Claim 1 of the first patent. In this sense the defendant cannot be held as an infringer. But it must be added that the defendant's structure does not show lever arms of varying length, in the sense in which those terms are used by Conrader. The defendant makes use of changes of position and the rotation of levers and rock shafts with shifting fulcrum points, thus producing different angles to correspond with the change in position, as well as strength, of the springs, but he does not accomplish the result by varying the leverage length of the arms themselves.

Some dispute arose in the case as to the intentions of Osborne in seeking to improve upon the Conrader structure. His statement that in the Conrader machine there was constant oscillation, with wear to the machine, and that he planned to remove the centrifugal governor from control during low speeds, seems to have been inaccurate since Conrader's earliest machines (under Claim 14 of patent No. 687,449) had means for effecting that desired result. But the motives actuating Osborne do not now enter into the issue, nor is this court concerned with the relative advantages of one structure or the other.

The defendant has questioned certain statements by the court below with respect to the operation of the defendant's device and of machines of this nature in general. Inasmuch as it seems to this court that the District Court failed to view the patents from the standpoint of the earliest disclosure, and to separate the basic idea of Conrader from the resultant composite device (which included the ideas of the later Conrader patents), and has found infringement in defendant's machine because of likeness in the result reached without reference to the precise means by which that result is obtained, it is unnecessary to follow further the discussion between the witnesses as to those matters. This

court has already set forth the issues so far as seems advisable, and stated the conclusions according to which decision is rendered.

The various claims sued upon in patents Nos. 664,468, 687,449, and 1,072,576 are held valid, and the decrees of the District Court affirmed in that regard.

The claims of patent No. 810,109 are held invalid in their present broad form, because of the resultant double patenting, but not for lack of patentable invention in the combination described. With this modification, the decree of the District Court is affirmed as to that patent.

The defendant's structure is held to infringe none of the claims of the Conrader patents in suit, and in this respect the decree of the District Court is reversed, except as to Claim 17 of patent No. 687,449, which was held not infringed in the court below.

As the case has been heard on cross-appeals, in which each party has secured some modification, no costs in this court will be allowed.

On Motion for Reargument.

PER CURIAM. The plaintiff-respondent has applied for reargument as to the earlier Conrader patents because of supposed failure of this court to understand correctly the use and application of the block *H-2*, as set forth in Claims 13 and 14 of patent No. 687,449. This is predicated upon the statement in the opinion that, when the extension of the centripetal spring brings the parts into contact with the block *H-2*, the pressure governor ceases to act and the centrifugal or speed governor remains in control at low speeds. This court thus evidently used language, in referring to the block *H-2*, which was not in accord with the facts. The speed governor goes out of control when the block *H-2*, is reached and the pressure governor remains in action at low speed until the block *c5* stops the operation of either governor. But no invention was involved in that application except as the stop was used in making practical the indirect method of control patented generally by Conrader in patent No. 664,468 as well as in No. 687,449. The defendant's governor operates upon a different theory and the correction of statement in the opinion would not affect the result.

Nor does the suggestion that, in the defendant's commercial structure, the sleeve is at all times connected positively with the levers closing the steam valve, make a reargument necessary. If the exhibits used were not correct, it might change the description of the device and of some of its movements, but the application of principle would be the same. Conjoint action is not the sole test of control by one element as affected by modification of the strength of the other element within the limits of the first.

Reargument is also asked because this court referred to the unloader of patent No. 1,072,576 (shown in the drawings in connection with a governor of the Osborne style) as if applied to the pressure governor of the Conrader type offered as exhibits under the earlier patents. The patentability of an unloader in combination was limited to the novel features in its result and in its arrangement of parts. This did not mean parts of the unloader, but those parts adapting or applying the unloader to the operations of the pressure governor and particularly a pressure governor employing the Conrader method of control in so far

as Conrader was inventing a combination of the unloader with his previous disclosures. If the Conrader patents covered the defendant's pressure governor, then the unloader patent would cover the defendant's unloader. The Conrader unloader patent is valid as a combination of an unloader with the indirect Conrader system of control, but it does not patent the old and unpatentable idea of applying an unloader to any pressure governor, upon the theory that the result is the same. The opinion did not exclude the device shown in the drawings of patent No. 1,072,576 but treated the claims as limited to that which Conrader showed by the drawings and specification, viz. an unloader applied to a governor of any style or type, which operated with Conrader's indirect method of control of the steam valve by the governor.

Motion for reargument is denied.

STAHLBRODT CO. v. FORD MOTOR CO.

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

No. 90.

PATENTS ⊂⇒328—INVENTION—WIND GUARD FOR MOTOR VEHICLES.

The Samuel reissue patent, No. 13,574 (original No. 879,195), for a wind guard for motor vehicles, *held* void for lack of invention, in view of the prior art.

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

Suit in equity by the Stahlbrodt Company against the Ford Motor Company. Decree for complainant, and defendant appeals. Reversed.

For opinion below, see 233 Fed. 678.

This is an appeal from a decree holding valid and infringed claims 2, 3 and 5 of reissued letters patent No. 13,574 granted to Henri Saul Samuel June 10, 1913. These claims are as follows:

"2. A wind guard for vehicles consisting of a lower stationary and rigidly supported flat portion extending transversely of the vehicle and inclined rearwardly in proximity to the steering wheel or handle, an upper transparent flat portion adjustably and permanently hinged upon the lower portion and adapted to be folded forwardly against the latter into parallelism therewith, and means for maintaining the portions in one of their positions of relative adjustment, said means being arranged laterally so as to clear the parts when folded.

"3. In a wind shield for a motor or similar vehicle, the combination with the dash or front part of the vehicle, of a lower member fixed to the dash and extending inwardly and upwardly to a level near that of the steering wheel or handle, the rods *D* for maintaining the member in such fixed and rigid position arranged rearwardly of the member and connected thereto and to a rigid part of the vehicle, a second flat and rigid member having a permanent hinged connection with the lower member and extending vertically upward from the lower member in front of the driver's face and means arranged at the ends of the members for adjusting the upper member relatively to the lower member."

"5. In a wind shield for motor or similar vehicles the combination with the dash, of a lower flat member rigidly fixed at its front or lower edges to the upper edge of the dash and extending at an inclination rearwardly and upwardly to a level near that of the steering wheel or handle, the rods *D* for maintaining the member in such fixed and rigid position arranged rearwardly of the member and connected thereto at its respective ends and to a rigid part of the vehicle, a second flat and rigid member having a permanent hinged connection with the lower member to turn relatively thereto on an axis sub-

stantially coincident with its lower edge and with the upper edge of the lower member said upper member normally extending upward from the lower member in front of the driver's face but being adapted to fold forwardly against the lower member, and means arranged at each end of the members for adjusting the upper member relatively to the lower member each comprising interlocking devices connected to the members respectively at points adjacent to their axis of relative movement."

James Whittemore, of Detroit, Mich., and Charles Neave, of New York City, for appellant.

Melville Church, of Washington, D. C., and Frederic F. Church, of Rochester, N. Y., for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

COXE, Circuit Judge (after stating the facts as above). The motor car industry has developed so enormously during the last 15 years that we are apt to regard the completed car of to-day as something akin to the miraculous. The truth is that the perfected structure is due to the evolution of the art by which changes were made and improvements added as the necessity therefor developed. As speed increased, the demand for protection from the wind, rain and dust became urgent. It required no inventive genius to accomplish this result, at least in a primitive manner. As to location, there could be no dispute; the shield must be placed in front of the chauffeur and the other occupants of the car. It must be transparent or the chauffeur cannot see to steer. In other words, the moment the necessity for a wind shield was apparent the location, the material and the dimensions became instantly obvious. No one possessed of ordinary intelligence would think of locating the shield except in front of the person to be protected; no one would think of constructing it of other than transparent material, making it high enough and broad enough to protect the occupants of the car from wind and rain. So too, when the shield became covered with mist, obscuring the vision, of the chauffeur, it required nothing but ordinary common sense to construct the shield so that a view of the road ahead could be afforded. This might be done by making an observation part through the glass or by dividing the shield into two parts so that the upper half could be opened for a short distance, leaving a longitudinal opening through which the road could be seen.

The extreme simplicity of the problem is so obvious that we are unable to discover anything in Samuel's contribution to the art which arises to the dignity of invention. Mounting the lower section with an inward slant was a perfectly natural and obvious thing to do, but Samuel was not the first to adopt it. Lanchester used this same construction in 1901. This patent No. 25,121 is for a dashboard which for the present purposes is sufficiently described in the first claim which is as follows:

"In self-propelled vehicles, dashboards consisting of a lower portion hinged to the vehicle and an upper adjustable portion substantially as described."

Lanchester's object was the same as that of Samuel, viz., to provide protection from the wind and rain in self-propelled vehicles by means of a two-part dashboard which can be adjusted to different conditions of weather. The identity will be apparent by comparing the above

claim with Samuel's second claim. Kerr in 1906 received a patent for wind shields for self-propelled motor vehicles having the same object in view as Lanchester. These patents and other constructions found in the record have the same problem in view which Samuel sought to solve and they did it in substantially the same way.

Lanchester's shield is quite different in appearance from Samuel's, but it will be found on inspection that he had in view the same objects as Samuel and that his structure has substantially every element of the Samuel claims.

The decree is reversed with costs.

KLAUDER-WELDON DYEING MACH. CO. v. GILES et al.

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

No. 81.

PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—DYEING MACHINE.

The Weldon patent, No. 659,906, for a yarn dyeing machine, is not a pioneer, and in view of the prior art is entitled only to a restricted construction and a narrow range of equivalents. As so construed, *held* not infringed.

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

Suit in equity by the Klauder-Weldon Dyeing Machine Company against John H. Giles and the John H. Giles Dyeing Machine Company. Decree for defendants, and complainant appeals. Affirmed.

For opinion below, see 231 Fed. 746.

On appeal from a decree dismissing the bill of complaint based on letters patent No. 659,906 granted to Leonard Weldon, October 16, 1900, for improvements in yarn dyeing machines. The first claim only is in issue. The patent has been considered by this court on an appeal from an order granting a preliminary injunction which was reversed. 228 Fed. 512, 143 C. C. A. 94. The opinion of the District Court granting the injunction will be found reported in 224 Fed. 515.

Frederic P. Warfield and Holland S. Duell, both of New York City, for appellant.

A. D. Salinger, of New York City, for appellees.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

COXE, Circuit Judge. This is a suit upon the Weldon patent No. 659,906. The first claim is as follows:

"1. In a rotary dyeing-machine, the combination with the dye-tub, of a pair of wheels mounted on a shaft to turn in bearings on the dye-tub, an outer and inner circular series of sticks to hold the skeins, the inner series of sticks having bearings for their ends in revoluble adjustable parts, a lever connected with each of the parts to revolve the same, a bolt on the lever, and a rack to engage the bolt secured upon each of the wheels, as set forth."

Judge Ray in his opinions has stated the situation, as we understand it, clearly and concisely as follows:

"Here Weldon was not a pioneer in this art and therefore the complainant is entitled, in view of the prior art as it was when the patent was issued, which was not meager, to a somewhat narrow range of equivalents. I think

the language of the complainant's patent in suit in view of that prior art and its disclosures, and in the light of which we must construe it, forbids the adoption of the contention made by Mr. Hammer which would be quite convincing in case of a pioneer patent."

We are not considering a generic invention but one limited in scope and dealing with well known and not intricate problems. It is unnecessary to restate or elaborate the contentions considered and decided by the District Court and this court in previous hearings; it is enough to say that no broad construction can be given the claim in view of the prior art. We agree with the District Judge in thinking that the defendant does not infringe the claim as it must be construed.

The decree is affirmed with costs.

FETZER v. DEMPSTER MILL MFG. CO.

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

No. 4239.

PATENTS ⊂=328—INVENTION—TRUCK MECHANISM.

The Fetzer reissue patent, No. 12,653 (original No. 723,662), for truck mechanism, *held* void for lack of patentable invention.

Appeal from the District Court of the United States for the District of Nebraska; Page Morris, Judge.

Suit in equity by William Fetzer against the Dempster Mill Manufacturing Company. Decree for defendant, and complainant appeals. Affirmed.

Samuel W. Banning and Thomas A. Banning, both of Chicago, Ill., for appellant.

Robert H. Parkinson, of Chicago, Ill., for appellee.

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

AMIDON, District Judge. This is a suit in equity, brought by Fetzer, as plaintiff, charging infringement of reissue patent No. 12,653, dated May 21, 1907. The trial court dismissed the bill upon the ground that the patent was void for want of patentable invention. The decision is clearly right. The patent is for an improvement in truck mechanism, and the drawings show that it was intended for an improvement in tongue trucks. The evidence shows that such trucks were old in the art, and had been used for many years for precisely the same function as that for which they are used in the Fetzer structure. All he did was to transfer a tongue truck from harvesters, where they had been formerly used, and perhaps would have their highest use on account of the side draft of harvesters. Mr. Fetzer, by reason of the increase in the size of press drills, discovered that there was need of a tongue truck on those farm implements, and transferred the truck from harvesters to press drills, with only such slight mechanical adaptations as would occur to any mechanic.

The judgment is affirmed.

PAGE MACH. CO. v. DOW, JONES & CO.

(District Court, S. D. New York. December 15, 1916.)

1. PATENTS ⟸322—INFRINGEMENT—ACCOUNTING.
The master's report on accounting for infringement of the Joy patents, No. 780,664 and No. 786,294, for printing telegraph receiver, reviewed, and rule for apportionment of profits laid down.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 590–595; Dec. Dig. ⟸322.]

2. PATENTS ⟸312(1)—INFRINGEMENT—ACCOUNTING.
On an accounting for damages for infringement against a user, complainant must show that he would have received the profits which he puts forward as the basis of his damages, and must show therefore that defendant on the balance of preferences would have preferred his invention, with its attendant cost, to the alternatives open to him, and it is of consequence that the "standard of comparison" is an article upon which the plaintiff holds a patent. Where profits are claimed, such proof need not be made, but it must be shown that the profits realized by defendant were made by the use of the invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 544, 545; Dec. Dig. ⟸312(1).]

In Equity. Suit by the Page Machine Company against Dow, Jones & Co. On exceptions to report of master.
See, also, 230 Fed. 164.

J. Edgar Bull and Charles S. Jones, both of New York City, for plaintiff.
Frederick P. Fish and Emerson R. Newell, both of New York City, for defendant.

LEARNED HAND, District Judge. [1] I think that there is no gain in repeating the general outlines of this litigation, which sufficiently appear in the master's report. The most orderly way to approach the accounting is to take up the several phases of the defendant's telegraphs, with a view to seeing just which of the claims have been violated at the different periods. The total period between January 24, 1905, for patent 780,664, and April 4, 1905, for patent 786,294, until that machine appeared in 1912, which avoided the patent altogether, may itself be divided into three subperiods, during which the infringement differed. The first division is from 1905 until September, 1907, during which time the defendants have been held to infringe all the claims of 780,664 which were then in suit and the two claims of 786,294, and during which they are therefore liable for all the profits or damages arising from their use of the positively disengaging clutch of 786,294, the continuous paper feed without feeding the type-wheel of claim 12, of 780,664, and the constant stress on the paper feed of claims 1, 2, 3, 4, 5, 6, 23, and 30.

A change was made in September, 1907, about which there is only a little testimony and that only the testimony of Conger of April 8, 1914 (XQ228), who says that in September, 1907, the constant stress and the positively disengaging clutch were eliminated. As to the con-

stant stress, we have only his word that the "paper-feeding shaft was not under constant stress, but was operated at the proper time by a clutch which was thrown in when the paper was to be fed." As to the positively disengaging clutch, we know what was substituted, because of the diagram in evidence, "Drawing of Defendants' Present Clutch."

To take up the last detail first, I am quite clear that it does not infringe patent 786,294, because there is no such means of positive disengagement as is called for by the claims. In figure 3 of that patent it appears that the disk *4* will be drawn to the right on the thread until the pin *8* clears the ratchet on the disk *3*, and then it will stop. The disk will be wholly disengaged. In figure 1 it is not so clear that the disengagement will be absolute. In that case, after the disk *O* moves to the right on the thread and abuts on the stop *R*, it will still continue and pull away the friction disk *G* of the clutch, from its other disk *F*. The disk *G* will cease rotating when the further tension of the spring balances the remaining friction between *F* and *G*. It is true, therefore, to say that "positively disengaging" of the claims may include a slip between the faces of the clutch. However, it is equally true to say that it necessarily involves some positive diminution of that friction, and it is just this that the defendants have not used. They have used figure 1 about as it stands, but with the stops, *R*, *R*, removed, and the result of their removal is to leave the friction always constant between the disks. This is to avoid the very heart of the invention. I therefore find that there was no infringement of patent 786,294, after September, 1907.

Coming now to the constant stress element, which is the only other factor in the case, besides claim 12, it is concededly absent in the "contempt" machine, and the question is of its presence from September, 1907, to January, 1909. All we have is the statement that the shaft was not under constant stress, but was thrown in by a clutch. Obviously, this does not answer the words of the claims 1, 2, and 3, or of claims 23 and 30, as Judge Hazel construed them. (C. C.) 166 Fed. 479, 480. I am in some doubt as to his meaning touching claims 4, 5, and 6; but, taking the claims as they read, I think that they can include only "constant stress," no matter what the patentee may have tried to cover. A shaft, which is out of connection with the driving shaft by an open clutch, certainly seems to me quite without the language of those claims. Indeed, if not, I cannot see how the Wright patent, 466,858, is avoided. I conclude therefore that, so far as we have any evidence in the case, there is not enough to bring the second machine and the "contempt" machine within any claims of the patent but claim 12. Although upon such an accounting the plaintiff may bring in any other machines than that used as an infringement, of course, the burden of proof lies with it to show that each new machine is an infringement. At least, I must hold that the plaintiff has not shown that the second machine infringes any claim but claim 12.

Since for the period between September, 1907, and December, 1912, only claim 12 is infringed, the next question is whether that claim can be the basis of any damages or profits. I shall, of course, assume that

both the second machine and the "contempt" machine violate that claim, since that is the law of the case; but it by no means follows that the advantage given by the feature involved in the claim had any pecuniary value. The defendants' position is that the claim is for a combination which could not in fact be made to perform what it purported to do. It was for "means for continuously feeding the paper without feeding the type-wheel," and there were no such means, at least none which were capable of any commercial exploitation. The truth of this is certainly established beyond any question; one cannot in practice safely feed the paper in either the plaintiff's or the defendants' machine without advancing the type-wheel. If therefore the claim were for a function, it could not, indeed, have been infringed, and for the matter of that the disclosure would have been insufficient to support it. But, if the claim were functional, it would be invalid anyway; that question is not open before me, though, indeed, it may be thought to be invalid in the Circuit Court of Appeals. As it stands, I must read it as referring to a certain co-ordination of mechanical elements, comprising a definite part of the machine. Whether it will work as the patentee supposes is another matter. The only question is whether, taking it to mean what I must take it as meaning, that combination of parts exists and is of service to the defendants. That it exists I must assume; whether it was profitable is a question having very little relation to the question whether it would perform the function, ascribed to it by the patentee. I conclude that, having organized their machine in direct imitation of that feature covered by claim 12, the defendants cannot so easily escape as by calling attention to the error of the patentee in the functions he thought his machine would perform.

Now, the elements comprised in claim 12, so understood, had not existed before, and there were no standards of comparison which could have been successfully substituted. It makes no practical difference whether under Columbia Wire Co. v. Kokomo, 194 Fed. 108, 114 C. C. A. 186, the time be taken as the date of the patent or the date of the infringement, because nothing appeared in the art from January 24, 1905, to January, 1909, which offered any substitute better than the Essick machine, or Joy, 676,137, or Merritt & Joy, 558,506. Neither of these would have answered. As to the Essick machine, it is quite obvious that the defendants were not disposed to deal with it after the spring of 1900. See their letters of May in that year. They wanted something faster to compete with the new Western Union machine about to be introduced. Joy, in September, 1900, filed an application which resulted in patent 676,137, and this was made the basis of a contract between the parties of November 6, 1901; but, for a reason not altogether clear, it never seems to have been used, because before that date Joy had completed the machine of the patent in suit for which he filed an application in August, 1902. This was in fact substituted for the machine of 676,137, throughout the period of the contract until October, 1905. The plaintiff insists that the defendant could have used any one of these with as much success as either of the three infringing machines, but I think not. As I have said, the Essick machine was too slow to meet competition, and so, too, I think I may

assume was the Essick patent. At least, the defendant has since 1901 shown a persistent preference for a telegraph in which both type-wheel shaft and carriage shaft are driven by a single constantly rotating shaft. As for Joy, 676,137, and Merritt & Joy, 558,506, they were also too slow. In Merritt & Joy, 558.506, it was necessary to move the carriage at least 20 spaces to get an added line space, and this took 12 seconds. I know that Conger says it would take only 5 or 6 spaces, but Joy's testimony is based upon actual measurement of the length of the wire and must be accepted. Considering that the blank lines form nearly one-half the printed page, a loss of over 10 seconds in each blank line was a serious handicap in the Merritt & Joy machines. Moreover, they seem to have been continually causing trouble in Chicago, though used there for eight years, and it is perhaps true that they would not have been possible at all in New York; that question I do not answer.

[2] It is not enough, however, to show that the defendant would have preferred to infringe the patent than to adopt a part of the prior art; the plaintiff must show that that preference would have been strong enough to compel it to pay the reasonable royalty rather than to adopt such patents, since the right to damages depends upon the probability that but for the infringement the plaintiff would not have lost. Hence we have the rule of "standards of comparison," by which, if it be shown that there were substitutes open to the infringer which it would have used rather than pay the patentee, no damages are recoverable, and in that event he must be relegated to such profits as may be shown to have arisen by the use of the infringement over what would have been derived from the substitute. McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 12 Sup. Ct. 40, 35 L. Ed. 817, was a case, not of damages, but of profits, and the rule was that recovery must be limited to the profits arising from the improvement, though the "standard of comparison" was owned by the very patentee. That case gives no color for the assumption that in a case involving damages it is irrelevant that the supposed standard is within the plaintiff's control. We must carefully distinguish the very different questions arising in each case. When we are dealing with damages, the plaintiff must show that he would have gathered those profits which he puts forward as the basis of his damages. He must therefore show that the defendant on the balance of preference would have prefered his invention with its attendant cost to the alternatives open to him. In the choice between such alternatives, we must figure the royalties necessary to secure their use when they are not already in the public domain. Yet it makes no difference whether the supposed patented "standard of comparison" is owned by the plaintiff or third parties. The point is that the existence of a monopoly over such a "standard" is a relevant fact in considering the preference between them.

Such is the explanation of McCreary v. Pennsylvania Canal Co., supra, a decision inevitably following from the facts at bar, but of no application to the discussion of damages here. Now, it is quite apparent here that the plaintiff would not have entertained any offer for the use of Merritt & Joy (which it controlled, even if the legal title

was not in it), which would have been tempting to the defendant as against the patent in suit. Nor did the situation change in this regard after September, 1907, when the positively disengaging clutch and the constant stress features were eliminated, because, as I have shown, the actual organization covered by claim 12, if it be infringed at all, was just what permitted that saving in time to accomplish which had been thought so important in 1900.

There was therefore ground for an attempt at estimating a reasonable royalty; for there was no established royalty, no lost sales, no damage through competition. Moreover, in such an attempt there was justification in making inferences and estimates; this is certainly the presupposition of the later cases. I tried to show the sort of way in which such cases should be treated in Consolidated Rubber Tire Co. v. Diamond Rubber Co. (D. C.) 226 Fed. 455. But this case was not presented on that theory; the whole idea of reasonable royalty was an afterthought of the master, after the case was closed, admirable as such, but without sufficient support, because the presupposition of it all is that the rental of the machines is a basis of royalty, which on reflection is certainly untrue. The service rendered by the plaintiff was to furnish and maintain the machines together with an operating and charging plant. At the very least the interest on the cost of the machines with an allowance for obsolescence must come out of the rental. That these elements are most substantial is apparent at once. Let us assume that the machines cost $100 (Joy says $75 to $100, and the defendant's machines cost $101). The cost of the pedestals we do not know; they may easily have cost $15 with their covers, as the defendant suggested. We start with an investment of $115, on which an interest charge of 10 per cent. at least must be allowed, following the agreement contained in the ninth article of the agreement of November 6, 1901. An allowance of 10 per cent. for obsolescence and decay would be quite within reason; indeed, the defendant's own construction account shows a depreciation in 8 years of 50 per cent., although much greater repairs were put on than on the plaintiff's machine. A yearly allowance of 20 per cent. on $115 is $23, which, with $6 repairs conceded, makes an allowance of nearly 50 per cent. of the gross rentals. We have no knowledge of what other expenses the plaintiffs' business entailed, though we do know that it has expended $150,000 in development. Without some statement from its books of all these matters, obviously nothing can be definitely found; until that has been exhausted, there is no room for the calculation of a reasonable royalty, and the case must stand on the accounting for profits just as it started.

When we come to a consideration of profits, the question of a "standard of comparison" is of little consequence, because the plaintiff need not show that the defendant would have used his patented invention, if he had not infringed. Yet as the plaintiff is pursuing the defendant as a trustee ex maleficio, asserting that some part of those profits are the result of using his patented invention, it is incumbent upon him to show that they were made by using the invention. McCreary v. Pennsylvania Canal Co., supra, was a case where the plaintiff could not do so, because it nowhere appeared that the profits in any sense resulted

from the improvements of the specific patent over the generic. In the case at bar there is some reason to believe that without the improvements of the patents in suit there would have been no profits at all, because it is quite clear, as already mentioned before, that the competition of the new Burry machine the defendants thought very threatening indeed. Such a conclusion, however, cannot be certainly made, and, if the plaintiff had to rely upon it, it might fail. It may have recourse I believe, therefore, to the rule of Westinghouse v. Wagner, 225 U. S. 604, 32 Sup. Ct. 691, 56 L. Ed. 1222, applying to patent causes the rule of liability in other cases of confusion by a trustee ex maleficio. While it may be true, therefore, that other features of this machine besides those patented actually contributed to the total success, it is absolutely impossible to establish quantitatively how much they did contribute. That the profits were in part "attributable" to the improvements allows no reasonable doubt, not only because of the defendants' pressure on the plaintiff to devise a new machine in 1900, but because of their tenacity in clinging to the patent as long as possible. It is apparent that they deemed it of the highest consequence to maintain at once a single rotating shaft for carriage and wheel together with a paper feed which could operate without more than a single advance of the carriage. Under these circumstances, the quantitative ascertainment of the contribution of each element certainly falls upon the defendants, else the desire to do exact justice destroys the power of doing any justice at all.

Coming, therefore, to the calculation of profits, I shall first consider how much of the total profits of the business was attributable to the ticker department, and then how much of the ticker profits were attributable to the machine. That will be as far as I think we can go. The parties are not so far apart in their methods of calculation as might at first blush appear from their results. Each proceeds upon the assumption, as indeed each must, that the gross sum from which the deductions are to be made is the total ticker returns for the period in question, which amount to $932,196. The first item of credit on this account is that of the ticker operating expenses, $396,997. As these are itemized, we know that they contain no items of construction, and the only questionable item is the payments made to Landfear or his heirs. The plaintiff insists that, as these were for devising the very infringement in suit, they should not be allowed. I think not. Landfear at the time of his original efforts did not know, and had no reason to suspect, that he was contriving an infringing machine. The record is a little thin, but I understand the situation to be that a contract was made with Landfear before his patent was issued, in July, 1904, giving him a royalty. In any case, there is no evidence that, when the contract was made, either Landfear or the defendants knew of the plaintiff's patents. There was nothing illegal in this, nor is the case within Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 457, 12 Sup. Ct. 49, 35 L. Ed. 809, where the master refused to credit the infringer with the cost of unsuccessful experiments. These payments seem to me like any other payments made to designers or skilled artisans.

The next element is that of getting the news, $851,363, and the next that of general business or "overhead" charges, $349,033; the two amounting together to $1,200,396. I shall accept the plaintiff's method in reckoning this, taking such a proportion of it as the gross ticker revenue represents of the total gross revenue, 27 per cent. The only dispute between the parties in that respect turns upon whether advertising receipts should be included in the Journal revenue, when apportioning the news disbursement. Advertising is, of course, the direct result of circulation, and circulation, of news. Thus the news in a paper contributes as much to the advertising revenue as to the subscription. The proper percentage of these two items is $324,107.

The next item is "administration" expenses, which means no more than the salaries of executive officers. I quite agree with the plaintiff that there is reason to suppose that after 1908 the defendant's officers, who were the principal owners, decided to distribute actual profits by way of salaries. This event coincides appropriately in time with Judge Hazel's decisions in April and June of 1908 ([C. C.] 166 Fed. 473), and suggests that the purpose was to avoid the showing of high profits. Such devices the court will defeat. Rubber Co. v. Goodyear, 9 Wall. 788, 803, 19 L. Ed. 566. I have not, however, thought it fair to allow only the sums suggested by the plaintiff. It seems to me that as the business had grown from a gross in 1905 of $296,700, to a gross in 1908 of $416,000, an increase in aggregate salaries from $17,300, to $26,600, was most reasonable. As the business still grew a little, I think that for the last four years an average of $30,000 is a fair estimate. This results in a total deduction from the "administration" expenses of $178,800, leaving a balance of $109,620, of which 27 per cent. is $29,597.

The canvassing charge was for so much of such services as were addressed only to the Bulletin and Ticker between whom they were divided equally. One-half of it amounts in all to $15,817.

The total investment in machine construction was $87,111, and the depreciation as estimated by Hopkins was $42,111, which should be added. Thus the total deductions were as follows:

Ticker operating	$396,997
News and business	324,107
Administration	29,597
Canvassing	15,817
Depreciation	42,111
Total	$808,629

The difference between this figure and the total receipts is $123,556. This sum represents the profits made upon a service which included, not only the use of the machines, but the whole news service as such for which the defendants received $30 a month up to May 1, 1909, and $40 thereafter. Obviously, it would be unjust to attribute all this profit to the patented inventions, even if the value of the machines depended wholly upon those inventions. How then may we apportion these profits between the machine and the service as a whole? In the absence of any better method, I think we may make the division upon the basis of the relative cost of the two. This involves the assumption

that the profits on the machine were equal for every dollar spent as for every dollar spent upon the other expenses of the service. The actual cost of the machines, together with that part of the "ticker operating expense" made up of parts or repairs on the machines, amounts to a very small part of the total expenses of the ticker service, as I have found them. Even after we credit to that expense its proportion of business and administration and canvassing expenses, it amounts, as I figure it, to about one-eighth of the whole expense of the ticker service. However, it is impossible to tell with certainty from Hopkins' "Ticket Expense Sheet" just which of the items on that list properly belong to the machines. Some of the other items were unquestionably in part for the machines. A better way is to assume that the cost of the service formerly rendered by the plaintiff of $5 represented the same proportion of the total service of $30 to the customer as it did represent of the total service when the defendant began to manufacture the machines for itself. This would make the profit on the machines one-sixth of the total profits. If one-eighth of the total profits were taken, the proper award would be about $15,500; if one-sixth were taken, it would be $20,593. Exactness is obviously out of the question, and it would be a sham to pretend to it. The matter being in doubt, a doubt caused by the defendants' acts, it is fair to take the resolution of it against them. Therefore I shall award the sum of $20,000 as profits arising from the machines.

It will be urged, perhaps, that consistency might require me to go further and attribute to the invention only so much of these profits as the cost of the patented parts bore to the cost of the whole machine. I am quite aware that the method of dividing the profits of the ticker service as a whole by the division of the cost is itself artificial. The fact is that the relative contribution of two or more essential factors to a common result cannot be ascertained quantitatively. But we must adopt some working rule to avoid instances of grotesque injustice. It shocks the sense of justice of any one to take away the whole of the profits of a business because its owner has used a single small patented detail; for long courts stood powerless before this situation, but now we have a different rule. If, however, we are to apply it with ruthless logic, our second situation will be as bad as our first, and a single patent infringement may become the signal of financial ruin, though it was accompanied by the best of faith. I think that we must show that the law can be more plastic even at the expense of formal consistency. Surely it is a strange habit of mind which at once tolerates the extreme latitude allowed to juries in the assessment of damages, because their processes are not disclosed, while it insists upon an impossible nicety of calculation even at the expense of any justice whatever, when they are.

As respects carrying the rule further, nevertheless, there are good reasons for refusing to do so. As I have said, there is ground to suppose that the patented elements may well have contributed just the differential value which made any profits possible. The defendants at least are unable to prove that this reasonable possibility was not actual, and the proof is with them. Again, the patented combination

neither verbally nor actually consists of the last element of claim 12; it is for that element in juxtaposition with the whole machine. If it were possible to show what the added profit was when the element was used, that would serve; but the defendants' attempts in that direction are too clearly inadequate to need discussion. Their payments to Landfear alone are larger than the savings they admit. To permit a further division upon the basis of the relative costs of the parts to the whole machine would for these reasons, I believe, sacrifice the realities as we can see them from the case as a whole.

As to interest, I shall follow my own ruling in Consolidated Rubber Tire Co. v. Diamond Rubber Co. (D. C.) 226 Fed. 455, 463. This will award interest from June 20, 1908, upon that part of the award for the period before September, 1907, and upon the balance from November 2, 1912. This makes the interest begin from the several dates when it had been decided that the different infringements were such.

The final question is of punitive damages. As I have said, I do not think that up to the issuance of the patents the defendants had any reason to suppose they were wrongdoers. They did go on and put out machines in the face of those patents, but I do not see that in so doing they were guilty of any bad faith. There was no time that I can discover until November 2, 1912, that it could be said they knew they were infringers. Patents are full of casuistry; the test of invention is among the most elusive and fugitive in the law. I should be unwilling to punish one who honestly attempted to avoid a patent, merely because it was eventually determined that he failed. The statute was intended, I think, for persons who know they are wrongdoers. That is not apparent here.

A decree will therefore go with costs of the accounting, but not up to the interlocutory decree, since the plaintiff lost upon some of the claims in suit.

TURNER v. DEERE-WEBBER BLDG. CO. et al.

(District Court, D. Minnesota, Fourth Division. October 4, 1916.)

PATENTS ⟸328—VALIDITY AND INFRINGEMENT—REINFORCED CONCRETE CONSTRUCTION.

The Turner patent, No. 985,119, for steel skeleton concrete construction, claims 1, 2, 4, 6, and 8 *held* void for lack of invention, in view of the prior art, and also not infringed.

In Equity. Suit by Claude A. P. Turner against the Deere-Webber Building Company and the Deere & Webber Company. On final hearing. Decree for defendants.

Charles J. Williamson, of Washington, D. C., for plaintiff.

Amasa C. Paul, of Minneapolis, Minn., for defendants.

BOOTH, District Judge. Plaintiff claims that the Deere & Webber building infringes claims 1, 2, 4, 6, and 8 of plaintiff's patent, No. 985,119, issued to him on the 21st day of February, 1911. The de-

fenses are: First, noninfringement; and, second, invalidity of plaintiff's patent, so far as the claims above mentioned are concerned.

Claims 1, 4, and 6 of said patent were before this court in the case of Turner v. Moore, 198 Fed. 134, and upon appeal before the Circuit Court of Appeals, 211 Fed. 467, 128 C. C. A. 138. The Moore structure involved in that case was substantially the same as the Deere & Webber structure involved in the case at bar. Judge Willard held that the Moore structure did not infringe either of said claims 1, 4, or 6, and dismissed the bill. In the Circuit Court of Appeals it was held that the elements in claims 1, 4, and 6 were all old, and that the bringing of them together, as plaintiff did, into one structure, was not invention, and that the patent No. 985,119, at least so far as claims 1, 4, and 6 were concerned, was void for lack of invention, in view of the prior art. Judge Van Valkenburgh, in his concurring opinion, also held that the Moore structure did not infringe plaintiff's patent. While that decision did not render the question involved in the case at bar res adjudicata, the parties not being the same, yet, in the absence of new evidence, the decision would be controlling in this court in considering the same claims. But it is the contention of counsel for plaintiff that new evidence is before the court in the case at bar, and that if such evidence had been before the Circuit Court of Appeals in the Moore Case the conclusions reached would have been different. Upon a careful consideration of all the evidence in the case and the arguments of counsel, I have reached the same conclusions as to the Deere & Webber structure, as regards claims 1, 4, and 6, as were reached by Judge Willard as to the Moore structure, and I have also reached the same conclusion reached by the Circuit Court of Appeals, as to lack of invention.

Counsel for plaintiff insists that the Circuit Court of Appeals in the Moore Case, as well as in the case of Drum v. Turner, 219 Fed. 188, 135 C. C. A. 74, failed to understand the Turner invention, and that the conclusions reached in both of the cases were wrong, to wit, in the Moore Case that the elements in claims 1, 4, and 6 of Turner's patent were all old, and that Turner merely assembled them; and in the Drum Case that Norcross was the real inventor of metallic concrete flooring without supporting beams, and that Turner's floor structure, in accordance with his patents 985,119 and 1,003,384, was an infringement of Norcross.

A careful review of the evidence which it is claimed leads to different conclusions from those reached by the Circuit Court of Appeals in the cases above cited has not proved persuasive to that end. The evidence is largely in the nature of explanations and opinions by experts touching the efficiency of the Turner structure, and the methods of calculating or demonstrating the strength of the structure; but it has no decisive bearing upon the question whether the elements contained in claims 1, 4, and 6 were new or old, and whether the assembling of them by Turner constituted a patentable combination, or merely an unpatentable aggregation. Most of the contentions now made as to claims 1, 4, and 6 were presented to the Circuit Court of Appeals in the Moore Case, either upon the hearing

of the appeal or upon the application for rehearing. Accordingly I hold that the case at bar, so far as claims 1, 4, and 6 are concerned, is controlled by the case of Turner v. Moore.

Claims 2 and 8 were not involved in the Moore Case, and it is claimed by counsel for plaintiff that each of these claims is infringed by the Deere & Webber structure, and that each of these claims is valid.

Claim 1 contains the following elements:

A. Concrete slab.
B. Concrete columns formed in an integral mass.
C. Cantilever heads.
   1. Situated in the slab.
   2. At the tops of the columns.
   3. Extending into the slab.
   4. Having members extending downward into the column. The members supported in the column reinforcement, and formed of reinforcing material.
D. Column reinforcements other than the portions of the heads therein.
E. Groups of rods extending through the slab in different directions over the heads.

Claim 2 contains the following elements:

A. Concrete slab.
B. Concrete column.
C. Cantilever heads.
   1. In the form of a framework of rods.
   2. A portion of the framework extending laterally into the slab.
   3. A portion of the framework extending downward into the column, but partially therethrough.
D. Column reinforcement other than said rods.
E. Slab reinforcement extending from said framework.

Claim 4 contains the following elements:

A. Concrete slab.
B. Concrete columns in vertical alignment.
C. Column reinforcement extending continuously through vertical line of columns.
D. Cantilever heads separate from column reinforcement, comprising
   1. Crossed rods in the slab extending laterally outward from the column, in different directions.
   2. Rods extending from the head downward into the column.
E. Groups of rods.
   1. Extending crosswise of the head.
   2. Through the slab from column to column.
   3. In direct and diagonal lines.
   4. Being toward the bottom of the slab between the columns.

Claim 6 contains the following elements:

A. Concrete slab.
B. Columns in vertical alignment.
C. Column reinforcement extending continuously through vertical aligning columns.
D. Groups of rods constituting slab reinforcement.
   1. Extending across the columns.
   2. From column to column in different directions.
E. Supplemental slab and column reinforcement, consisting of vertical rods situated in columns which terminate in the slab in outwardly bent ends.

Claim 8 contains the following elements:

A. Plurality of concrete columns with vertical reinforcement therein.

B. Separate and distinct set of reinforcing elements.
   1. Imbedded in the column.
   2. Principally supported thereby.
   3. Ends of the reinforcing elements separated so as to radiate from column into the floor slab toward substantially all parts thereof.

C. Concrete floor slab.
   1. Imbedding said radiating means.
   2. Supported by said radiating means.

If, now, we consider claim 2, we find that element A thereof is found in element A of claim 1, in element A of claim 4, and in element A of claim 6. We find that element B is found in element B of claim 1, in element B of claim 4, and in element B of claim 6. We find that element C is found in element C of claim 1, in element D of claim 4, and in element E of claim 6. We find that element D is found in element D of claim 1, in elements C and D of claim 4, and in elements C and E of claim 6. We find that element E is found in element E of claim 1, in element E of claim 4, and in element D of claim 6. We thus find that all of the elements of claim 2 have their counterpart in claims 1, 4, and 6.

If, now, we consider claim 8, we shall find that element A is found in elements B and D of claim 1, also in elements B and C of claim 4, and in elements B, C, and E of claim 6. We shall also find that element B is found in element C4 of claim 1, in element D of claim 4, and in element E of claim 6; and we shall also find that element C is found in element E of claim 1, in element E of claim 4, and in element D of claim 6. We thus find that each of the elements in claim 8 is found in claims 1, 4, and 6.

This conclusion does not mean that all of the claims are alike, nor that claims 2 and 8 are either of them exactly like any other claim; but it does mean that there is no element in claim 2 which is not found in either 1, 4, or 6, and no element in claim 8 which is not also found in 1, 4, or 6. Further, if, as held in the Moore Case, all of the elements in 1, 4, and 6 were old and their assemblage by plaintiff formed merely an unpatentable aggregation it would seem to follow that the assembling of a part of the same old elements to make up claims 2 or 8, would also be mere unpatentable aggregations. Such is plainly the result here.

It is true that in claim 2, in describing the cantilever head, is found the expression "in the form of a framework of rods," and that this expression does not occur in the other claims. The cantilever head, however, described in claim 1 and in claim 4, and the supplemental slab and column reinforcement in claim 6 (which really amounts to a cantilever head), are each and all of them in reality, framework of rods. The circumferential rings or rods in the cantilever head are no more called for by claim 2 than by claim 1.

Further, the definition given by plaintiff's expert, Mr. Martin, in the Moore suit, makes no distinction between the cantilever head of the several claims. He says:

"Cantilever head, as I have used it, and as I understand it, as used in the Turner patent in suit, refers to the open framework or reinforcement formed at the top of the column in the slab, and extending outward from the column into the slab in every direction."

It would seem, therefore, that there is no such importance to be attached to the use of the word "framework," in claim 2, as would distinguish it from claims 1, 4, and 6.

The suggestion in the memorandum of counsel for plaintiff, "Apparently the Court of Appeals understood it to include such a cantilever head as that of Ellinger or Hennebique where there is no framework, but merely rods running through the beam parallel with each other," has no persuasive force. The Circuit Court of Appeals having before it the two figures of the cantilever head shown in the patent drawings, and the definition of the cantilever head given by the expert, Martin, unquestionably knew that the plaintiff claimed the cantilever head to be in the form of a framework of rods under claims 1, 4, and 6.

It is also true that in claim 8 there is used in relation to a separate set of reinforcing elements, the expression "radiate from the column into the floor slab towards substantially all parts thereof"; whereas, in claim 4 the cantilever head rods are said to extend laterally outward in different directions.

Here, again, the slight difference in the phraseology is not of importance, and was not so considered by the expert, Martin, in the definition given above. In my judgment, there is no such difference between claims 2 and 8 on the one hand, and claims 1, 4, and 6 on the other hand, as would necessitate a different conclusion as to claims 2 and 8, either with reference to the question of infringement thereof by the Deere & Webber structure, or with reference to the question of invention, in view of the decision of the Circuit Court of Appeals in the Moore Case.

The conclusions, therefore, which I reach are: First, that the defendants' structure does not infringe any of the claims 1, 2, 4, 6, or 8. Second, that said claims, and each of them, are void for lack of invention in view of the prior art, as held in the case of Turner v. Moore, supra.

Let the decree be prepared dismissing the bill, in accordance with the foregoing decision, with costs to the defendant.

THE CITY OF ST. LOUIS.

(District Court, S. D. New York. December, 1916.)

1. SHIPPING ⊂=164—CARRIAGE OF PASSENGERS—PERSONAL INJURIES—DUTY OF TREATMENT.

In the absence of any statute requiring it, there is no duty resting upon a coastwise vessel to have a physician or surgeon on board for the treatment of passengers who may be injured.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 533; Dec. Dig. ⊂=164.]

2. SHIPPING ⟸166(1)—CARRIAGE OF PASSENGERS—TREATMENT OF INJURED PASSENGER.

Libelant, while a passenger on a steamship bound from Savannah to New York, fell from her berth and sprained her ankle. The injury was treated by the steward, as shown by the evidence, by the proper application of standard remedies. *Held*, that there was no negligence on the part of the vessel or its steward which rendered it liable for any ill effects which may have followed the injury.

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

In Admiralty. Suit by Nettie H. Mills against the steamship City of St. Louis. Decree for respondent.

Felt & Elias, of New York City, for libelant.

Barry, Wainwright, Thacher & Symmers, of New York City, for claimant.

NETERER, District Judge. Libelant charges that the steamship City of St. Louis is an American vessel, operated as a common carrier of freight and passengers for hire between the ports of Savannah, in the state of Georgia, and the city of New York; that on the 3d day of September, 1915, she took passage thereon at the port of Savannah for the port of New York, and paid for and was provided second-cabin accommodations, and that while the steamship was off the coast of Cape Hatteras, and while libelant was asleep, "the said steamship gave a sudden lurch and tossed said libelant from the berth assigned to her," causing serious injuries, and spraining the ankle of her left foot; and charges that in response to her screams and cries and moans the steward came and treated her for her injuries, and applied lotions, medicines, and other treatment, that he carelessly, negligently, and unskillfully treated her in connection with her injuries, and applied lotions and applications which contained harmful poisons and other dangerous ingredients, and that as the result of such treatment she became sick, sore, and disabled, and still continues, and that she has been damaged.

Claimant admits that libelant became a passenger upon the steamship, but denies that she suffered any injury because of default or negligence on its part, or any of its servants or agents.

The testimony shows that at about 3 o'clock a. m., while the City of St. Louis was off Cape Hatteras, libelant, who was occupying an upper berth in a stateroom as a matter of choice, fell from the berth and sprained her ankle. Her condition was called to the attention of the ship's steward, who treated her injured ankle by washing the foot and ankle in alcohol, and then massaged her instep and applied soap liniment, which he testified had been purchased from a reputable druggist in New York, and which had been frequently used in similar cases without injurious results. A bandage was placed upon the ankle, and later, about 9 o'clock in the morning, the ankle was again examined, the bandage taken off, liniment applied, and a new bandage put on. At this time the foot was not swollen or blistered. Some time during the evening of the same day, upon complaint of libelant, the

steward took off the bandage and found across the top of the instep a place about 2½ inches long and about 2 inches wide that had become blistered in three places. As a remedy for the blister, zinc ointment was applied and a bandage placed upon the ankle. This operation was repeated the next morning. It was shown upon the trial that soap liniment is a standard preparation, and that it is a proper remedy to use in connection with such injuries, as is also zinc ointment, which had been used by the steward.

[1] Libelant contends that, while there is no federal statute requiring a coastwise vessel to have a physician or surgeon on board, it still would be required, under the obligations resting upon it as a common carrier under the common law, to carry a physician, and cites in support of this contention the following quotation from 5 Am. & Eng. Enc. Law, 558:

"The rule may be stated to be that a carrier is bound to exercise the strictest vigilance in receiving a passenger, conveying him to his destination, and setting him down safely."

And the following from Carroll v. Staten Island R. R. Co., 58 N. Y. 128, 17 Am. Rep. 221:

"The gravamen of an action against a carrier of passengers for injuries sustained is the breach of the duty imposed upon him by law to carry safely, so far as human skill and foresight can go, the persons he undertakes to carry."

These authorities have no application to the issue in this case. They clearly refer only to a degree of care as against physical injuries, and do not impose a duty to provide for medical skill in the event injuries are sustained.

[2] The libelant, if she can recover, can recover only upon the ground of negligent conduct on the part of the steward in treating the injured member. The respondent ship was, under the law, required to exercise the utmost diligence and care in maintaining a safe environment for the libelant against the negligent and careless conduct of its servants and agents, and also against the irregular conduct of any other person, from whatever source such irregularities might arise, which might reasonably be anticipated or naturally expected to occur, in view of the surrounding circumstances, taking into consideration the number and character of the persons on board.

No complaint is made, except as to the steward's conduct, other than, as stated, for omission to carry a physician. The testimony does not show that the steward did anything that he should not have done. He acted in a reasonably prudent manner, applied standard remedies, and, so far as disclosure is made by the evidence, did all that a reasonably prudent man could have done under the circumstances. He was not a physician, but he did on behalf of the respondent ship render such first aid as was necessary to any person injured.

The other cases cited do not support libelant's contention. In Compagnie Générale Transatlantique v. Bump, 234 Fed. 52, —— C. C. A. ——, the captain had placed the passenger in a position where she was exposed to injury and under circumstances which made it impossible for her to help herself. In The Kenilworth, 144 Fed. 376, 75 C. C.

A. 314, 4 L. R. A. (N. S.) 49, 7 Ann. Cas. 202, the libelant was a seaman on the vessel, and received a fracture of the leg, and upon recovery it was found that one leg was shorter than the other, and the master was charged for not giving him proper care and attention. The court (144 Fed. at page 378, 75 C. C. A. 316, 4 L. R. A. [N. S.] 49, 7 Ann. Cas. 202), said:

"In considering whether he was or was not * * * careful, we are bound, so far as possible, to put ourselves in his place. He was not required to have the skill or discernment of a surgeon, and the opinion which he formed, if viewed in no clearer light than was afforded * * * to him, does not appear to have been an unreasonable one, and the treatment which he adopted, when considered in connection and conformity with that opinion, was neither negligent nor improper."

The libel is dismissed, and, in view of the fact that the action was prosecuted in forma pauperis, without costs.

CHICAGO, M. & ST. P. RY. CO. v. CITY OF MINNEAPOLIS et al. (MINNEAPOLIS STEEL & MACHINERY CO. et al., Interveners.)

(District Court, D. Minnesota, Fourth Division. August 15, 1916.)

1. RAILROADS ⟸99(2)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—CONSTRUCTION.

A municipal ordinance to compel a railway company to depress its tracks to avoid crossing streets at grade in the manner thereinafter set forth, followed by provisions requiring the streets and avenues to be carried across the tracks by bridges constructed in accordance with the plans and specifications of the city engineer, fixing the width and grades of the bridges, requiring the sewers, water pipes, and similar structures to be removed and restored under the approval of the city engineer, which ordinance was adopted after the city engineer, acting under an earlier resolution of the council, had prepared complete plans for the depression, according to which the tracks were to be 17 feet below their present level, does not permit the tracks to be depressed to a lower level, though the level of the tracks is not mentioned in the text of the ordinance.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 294; Dec. Dig. ⟸99(2).]

2. RAILROADS ⟸99(2)—CONSTRUCTION—STATUTE.

Laws 1913, Minn. c. 307 (Gen. St. 1913, §§ 4272–4280), prohibits a railroad company from constructing any overhead structures across its tracks at a less height than 21 feet above the top of the rail. It was amended by Laws 1913, c. 448 (Gen. St. 1913, § 4277), by adding a proviso excepting from its operation the depression of the tracks of a railway company on which work had theretofore begun. *Held*, that the statute, but not the proviso, applied to the depression of railroad tracks ordered by a municipal ordinance, though on another part of the line of the same company within the city, not affected by the ordinance, the work of depressing the tracks had already begun under a separate and different plan.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 294; Dec. Dig. ⟸99(2).]

3. RAILROADS ⟸99(2)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—EVIDENCE.

In a suit to restrain the enforcement of a municipal ordinance requiring a railway to depress its tracks under plans which called for only 18

feet clearance between the rails and the bridges above, evidence *held* clearly to show that such clearance is insufficient and unsafe in view of the size of freight cars now in common use.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 294; Dec. Dig. ⊂⊃99(2).]

4. RAILROADS ⊂⊃99(1)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—VALIDITY.

A municipal ordinance, requiring the lowering of railway tracks to avoid grade crossings, though within the city's police power, is open to inquiry as to its necessity or reasonableness to determine whether its enforcement will deprive parties of their property without due process of law.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. ⊂⊃99(1).]

5. RAILROADS ⊂⊃99(1)—ABOLITION OF GRADE CROSSINGS—ORDINANCES—PRESUMPTION.

The presumption is in favor of a municipal ordinance, requiring the lowering of railway tracks to avoid grade crossings, and if that is the only method to accomplish the result, it cannot be adjudged unnecessary, unreasonable, or arbitrary, except under most unusual circumstances.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. ⊂⊃99(1).]

6. RAILROADS ⊂⊃99(2)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—EVIDENCE—ALTERNATIVE PLAN.

In a suit to restrain the enforcement of an ordinance requiring the lowering of railway tracks to avoid grade crossings, plaintiff can show that there is another feasible plan to accomplish the result.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 294; Dec. Dig. ⊂⊃99(2).]

7. RAILROADS ⊂⊃99(1)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—SUITS—PARTIES.

Owners of industries along the line of a railway which have spur tracks connected therewith, whether they have vested rights in such facilities or not, are entitled to be heard on the question of the reasonableness of an ordinance requiring the depression of the railway.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. ⊂⊃99(1).]

8. CONSTITUTIONAL LAW ⊂⊃297—DUE PROCESS OF LAW—ABOLITION OF GRADE CROSSINGS—ORDINANCE.

In a suit to restrain the enforcement of a municipal ordinance compelling the depression of railway tracks, evidence *held* to show that the provision, requiring the depression of the tracks a second time after they had reached the natural level at the railroad yards, in order to pass under one street, was unnecessary, unreasonable, and arbitrary to such an extent as to deprive the railroad company and an industrial plant having trackage connections therewith of their property without due process of law.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 832–834; Dec. Dig. ⊂⊃297.]

9. MUNICIPAL CORPORATIONS ⊂⊃111(4)—ORDINANCES—PARTIAL INVALIDITY.

That provision of the ordinance cannot be held separable from the rest of it, so that its invalidity would not affect the provisions for depressing the tracks before reaching the yards, where the proceedings in the council show that the invalid provisions were treated as part of the general scheme.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 248–251; Dec. Dig. ⊂⊃111(4).]

10. MUNICIPAL CORPORATIONS ⊂=111(4)—STATUTES ⊂=64(1)—ORDINANCES—PARTIAL INVALIDITY.

A statute or ordinance can be held valid in part and invalid in part only when the legislative body has manifested an intention to deal with a part of the subject-matter irrespective of the rest.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 248–251; Dec. Dig. ⊂=111(4); Statutes, Cent. Dig. §§ 58, 195; Dec. Dig. ⊂=64(1).]

11. MUNICIPAL CORPORATIONS ⊂=594(1)—POLICE POWER—SCOPE.

The police power can be exercised for the safety, health, morals, convenience, or general prosperity of the public, but an ordinance exercising such power must have some relation to one or more of such objects, must not conflict with the state or federal Constitution, nor with state or federal statutes, and must not arbitrarily, unnecessarily, or unreasonably invade private rights or property.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1316; Dec. Dig. ⊂=594(1).]

12. RAILROADS ⊂=99(1)—ABOLITION OF GRADE CROSSINGS—ORDINANCE—REASONABLENESS—EVIDENCE.

In a suit to restrain the enforcement of an ordinance requiring the lowering of railway tracks, evidence *held* to show that the ordinance unnecessarily and unreasonably imperiled the safety of the railway employés, and imposed unreasonable expense upon the railway company, and other companies having trackage connections, amounting to a practical confiscation of their property in view of the possibility of accomplishing the same result by elevating the tracks.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 293; Dec. Dig. ⊂=99(1).]

In Equity. Suit by the Chicago, Milwaukee & St. Paul Railway Company against the City of Minneapolis and others, to restrain the enforcement of a municipal ordinance which required the railway company to depress its tracks, in which the Minneapolis Steel & Machinery Company and others intervened. On final hearing. Permanent injunction against the enforcement of the ordinance issued.

F. W. Root, Nelson J. Wilcox, and W. H. Norris, all of Minneapolis, Minn., for complainant.

Charles D. Gould, W. H. Morse, and Rome G. Brown, all of Minneapolis, Minn., for defendants.

Stringer & Seymour, of St. Paul, Minn., for Chicago, R. I. & P. Ry. Co.

Lancaster, Simpson & Purdy and Cobb, Wheelwright & Dille, all of Minneapolis, Minn., for interveners.

BOOTH, District Judge. This is a suit brought by the plaintiff railway company against the city and certain of its officers, for a permanent injunction to restrain the defendants from taking any steps to enforce the provisions of an ordinance passed by the city council of said city, requiring the railway company to depress the plane of certain of its roadbed and tracks between Sixth Avenue South, and Thirty-Second Street East, in the city of Minneapolis, in accordance with the terms of said ordinance, and certain plans and specifications prepared

by the city engineer. A motion to dismiss, on the ground that the court was without jurisdiction, has been heard and denied. A motion to dismiss, on the grounds that the complaint fails to state a cause of action, and, further, that the plaintiff has an adequate remedy at law, has also been heard and denied. By petitions duly filed, more than 20 parties, being owners of industries located along the right of way of the plaintiff, and also the Chicago, Rock Island & Pacific Railway Company, whose terminals are adjacent to the tracks of plaintiff company, and are reached over the tracks of the plaintiff company by virtue of contract between the two companies, have sought to intervene, claiming to have an interest in the controversy; they have been allowed to file intervening complaints and take part in the trial of said cause. A motion for a preliminary injunction was heard upon the pleadings and numerous affidavits; and an order has been made granting the motion. Voluminous testimony has been taken on behalf of the various parties, and the cause has been submitted upon final hearing.

The ordinance involved in the controversy is as follows:

An ordinance requiring the Chicago, Milwaukee & St. Paul Railway Company to depress the plane of certain of its roadbed and tracks within the city of Minneapolis, and construct an undercrossing at Sixth Avenue South in said city.

The city council of the city of Minneapolis do ordain as follows:

Section 1. The Chicago, Milwaukee & St. Paul Railway Company is hereby ordered and required at its sole cost and expense, except as herein otherwise provided, to depress the plane of its roadbed and tracks along the main line, and part of the line of the Iowa and Minnesota Division, so-called, within the limits, and in the form and manner, and upon the terms and conditions hereinafter set forth, that is to say: Beginning at the east line of Sixth Avenue South in the city of Minneapolis, and extending southeasterly to Thirty-Second Street East, in said city.

Sec. 2. The following streets and avenues now crossing said railroad within said limits shall be carried by said company over the tracks of said railroad upon bridges of steel or reinforced concrete construction, in accordance with plans and specifications prepared by the city engineer of said city.

Sec. 3. The roadway of every bridge included within this ordinance shall be paved by said company for the entire length thereof, with 4-inches thick creosoted block pavement, and shall have a sidewalk upon either side thereof, constructed of reinforced concrete.

Sec. 4. The width of the roadway and sidewalks of the several bridges and the street grades of same, as well as other new grades of the various streets affected by the construction of said bridges—shall be as follows:

Schedule of Bridges.

Washington Avenue South.

Width of roadway, 64 feet.

Width of each sidewalk, 18 feet.

The street elevation of Washington Avenue South at center line of said avenue in center of block between 6th and 7th avenues shall be 115.25 feet above city datum; northwest corner of bridge at intersection of curb line and railway right of way line shall be 131.20 feet above city datum; northeast corner of bridge at intersection of curb line and railway right of way line shall be 130.35 feet above city datum; southwest corner of bridge at intersection of curb line and railway right of way line shall be 130.35 feet above city datum; southeast corner of bridge at intersection of curb line and railway right of way shall be 129.81 feet above city datum; center line of Tenth Avenue South shall be 121.00 feet above city datum.

The grade of the approach from the bridge will extend to the center of block between Sixth and Seventh Avenues South to the present grade, and to present grade of Tenth Avenue South.

Seventh Avenue South.

The grade of Seventh Avenue South shall be on an unbroken plane, from present grade 117.00 feet above city datum at a point halfway between Washington avenue and Third street, to new grade of Washington avenue at intersection with Seventh Avenue South.

Eighth Avenue South.

The grade of Eighth Avenue South shall be on an unbroken plane from elevation 116.00 feet above city datum at a point 250 feet southwesterly of center line of Washington avenue to new grade of Washington avenue at intersection with Eighth Avenue South.

Ninth Avenue South.

Width of roadway, 50 feet.
Width of each sidewalk, 15 feet.
The grade of Ninth Avenue South shall be on an unbroken plane from Washington avenue to intersection of center line of Ninth Avenue South and northeasterly railway right of way line at an elevation of 127.55 feet above city datum; center line of Ninth Avenue South and center line of railway right of way at an elevation of 128.05 feet above city datum; center line of Ninth Avenue South and southwesterly railway right of way line at an elevation of 127.55 feet above city datum; center line of Ninth Avenue South and Third street at an elevation of 124.00 feet above city datum; center line of Ninth Avenue South and a point 175 feet southwesterly of center line of Third street, 124.90 feet above city datum.
(Here follow similar provisions with reference to the following streets and avenues.)
Third Street South, Tenth Avenue South, Eleventh Avenue South, Fourth Street South, Twelfth Avenue South, Fifth Street South, Thirteenth Avenue South, Fourteenth Avenue South, Sixth Street South, Fifteenth Avenue South, Seventh Street South, Sixteenth Avenue South, Seventeenth Avenue South, Eighth Street South, Cedar avenue, Franklin avenue, East Twenty-Second street and East Twenty-Fourth street.

East Lake Street.

Width of roadway, 50 feet.
Width of each sidewalk, 15 feet.
The street elevation at center line of East Lake street and Hiawatha avenue shall be 131.00 feet above city datum; center line of East Lake street and southwesterly railway right of way line shall be 134.40 feet above city datum; center line of East Lake street and center line of railway right of way shall be 134.90 feet above city datum; center line of East Lake Street and northeasterly railway right of way line shall be 134.40 feet above city datum; center line of East Lake street and Snelling avenue shall be 128.00 feet above city datum.

Sec. 5. The grades of the several streets and avenues upon which bridges shall be constructed as aforesaid, and the grades of the several streets and avenues in which the approaches to any of said bridges shall be constructed, shall be and the same are hereby changed so as to conform to the several grades in the schedule of bridges herein set forth.

Sec. 6. The approaches to bridges shall conform to the grades established by this ordinance and shall be in all other respects restored by said company as near as may be to the condition theretofore existing, including the pavement thereon.

Sec. 7. The grade of Twenty-Eighth Street East shall be and the same is hereby changed so that the elevation of the street at the center of intersection of said street with the railroad shall not exceed 4.2 feet below the present grade thereof, and shall not exceed 127.2 feet above city datum; and the railroad tracks of said railway company shall cross said street at grade.

Sec. 8. The grade of Hiawatha avenue shall be and the same hereby is changed so that the elevation of the same at the center of intersection of said avenue with the railroad shall not exceed 7.7 feet below the present grade thereof, and shall not exceed 122.8 feet above city datum; and the railroad tracks of said railway company shall cross said avenue at grade.

Sec. 9. It is expressly provided, anything in this ordinance to the contrary notwithstanding, that the said railway company shall not be required to restore any part of the paving on or to pave any part of such bridges which, by reason of any existing law or ordinance, it is or will be the duty of any street railway company itself to restore or pave.

Sec. 10. Any street railway company occupying any street or avenue included within this ordinance, shall, whenever by said railway company required, remove temporarily its tracks therefrom, and shall, when and as the grade of such street or avenue shall be changed, as in this ordinance provided, at its own expense, without claim for damages, conform the grade of its track or tracks to the said change of grade of said street or avenue, both during and after the bridging of said street or avenue, and nothing in this ordinance shall operate or be held to relieve such street railway company from any liability now existing, however created of paving such street or avenue between or on either side of the rails of its said tracks, in the manner and form as now required.

Sec. 11. All water pipe, conduits, sewers and other similar substructures belonging to the city that may be disturbed in the prosecution of such work or required to be removed or deflected from the position in which they are found shall be replaced or suitable expedients be devised and provided by said railway company, under the approval of the city engineer, to restore them as fully as may be to their former state of usefulness.

Sec. 12. Whenever, in the prosecution of any of the work required by this ordinance, it becomes necessary to disturb, remove or protect any pipes, conduits, wires or other property belonging to any private corporation or individual, all the work or expense required therein or therefor, as well as all damage occasioned thereby, shall be done or assumed by the owner or owners of such pipes, conduits, wires or other property, and said railway company shall be and hereby is wholly relieved from doing any work, or assuming any expense in connection therewith or paying any damage occasioned thereby.

Sec. 13. The said railway company shall assume and pay any and all damages to which the adjacent property owner may be lawfully entitled, caused by the change of the grade of any such street or avenue; and shall defend any suit or suits which may be brought against the city of Minneapolis for the recovery of any such damages, intervening therein if necessary for such purpose, and shall wholly relieve said city from defending the same, and shall assume and pay all judgments recovered therein.

Provided that in case any such suit be brought against said city it will, before the last day to plead therein, give notice thereof in writing to the said railway company, for the purpose of enabling such defense to be made by said railway company; and, in default of such notice, the said railway company shall not be held liable for any alleged damages.

Sec. 14. The said railway company shall build and maintain a suitable fence, to be approved by the city engineer, upon and along the entire right of way of said railway company when the tracks have been depressed.

Sec. 15. The said railway company shall also carry its tracks where the same cross Twenty-Seventh Avenue South, over said avenue, on a steel or reinforced concrete bridge, in accordance with plans and specifications prepared by the city engineer of said city.

The elevation of Twenty-Seventh Avenue South at the intersection of said avenue with the north line of East Twenty-Seventh street shall be 117 feet above city datum, and at a point 64 feet south of said north line the elevation of said avenue shall be 116.5 feet above city datum, and the elevation of said avenue at the southerly railway right of way shall be 117 feet above city datum. A free clearance between said grade at Twenty-Seventh avenue and the railway bridge shall be not less than 14 feet. The approaches to said under crossing on Twenty-Seventh avenue, from the north line of East Twen-

ty-Seventh street and from the southerly railway right of way line, shall extend on an ascending grade not to exceed 3 feet in 100 feet to an intersection with the present surface of the avenue.

Sec. 16. Permission and authority are hereby given said railway company, whenever the same shall be necessary in the prosecution of the work herein required, to lay and operate temporary tracks upon or across any street or avenue mentioned in this ordinance, and to erect and maintain temporary structures and falseworks therein, and to obstruct or divert traffic from any such street or avenue to such an extent and for such length of time as may be approved by the city engineer. But said railway company shall thereafter restore every such street or avenue as near as may be to its former condition.

Sec. 17. Permission and authority are hereby given said railway company, for the purpose of carrying off the surface or flood waters from its property, to make and maintain connections with all city sewers. The same to be made under the supervision of the city engineer.

Sec. 18. Said Chicago, Milwaukee & St. Paul Railway Company is also hereby directed and required, at its sole cost and expense, to separate the grade of its railway lines, tracks and yards at Sixth Avenue South, in the City of Minneapolis from the grade of said Sixth Avenue South at its intersection with said railway lines, tracks and yards of said company, and for that purpose to make, build and construct an undercrossing or viaduct under its said railway lines, tracks and yards at their intersection with said Sixth Avenue South, upon and along the middle 22 feet in width of said Sixth Avenue South, and extending from Third Street South, in said city, northeasterly to the canal between Second street and the Mississippi river in said city, all in strict conformity with the plans and specifications for such undercrossing or viaduct prepared by and on file in the office of the city engineer of the city of Minneapolis.

For the purpose of constructing said undercrossing or viaduct the grade of the middle 22 feet in width of said Sixth Avenue South at said location is hereby established as follows, to wit:

At the intersection of the center line of Sixth Avenue South with the northeasterly curb line of Third Street South, 117.50 feet above city datum; at the intersection of the center line of Sixth Avenue South with the southwesterly curb line of Washington Avenue South, 100.50 feet above city datum; at the intersection of the center line of Sixth Avenue South with the southeasterly side line of Washington Avenue South, 99.40 feet above city datum; at the intersection of the center line of Sixth Avenue South with the northeasterly curb line of Second Street South, 95 feet above city datum; and at the intersection of the center line of Sixth Avenue South with the southwesterly side line of the canal between Second street and the Mississippi river, 90.72 feet above city datum; and the grade of said middle 22 feet in width of Sixth Avenue South shall be an unbroken plane between the several grade elevation points above established.

Sec. 19. When the said railway companies shall have completed the work required by this ordinance, then and thereupon the several ordinances of the city of Minneapolis relating to the speed of railway trains, cars and engines, the ringing of locomotive bells, and the maintenance of gates and flagmen, watchmen, shall cease to be applicable to any part of said line of railroad between said Sixth Avenue South and said Thirty-Second Street East, save only at said Twenty-Eighth Street East and said Hiawatha Avenue South.

Sec. 20. The work required to be done under this ordinance shall be begun within nine months after publication thereof, and shall be completed within four years thereafter, except that the time during which said railway company shall be prevented from work by strike or strikes, and the time during which they shall be restrained by injunction or other order or process of a court of competent jurisdiction, of which it shall have given notice to the city attorney of the city of Minneapolis, and the time during which the work shall be delayed in consequence of the failure of any street railway company or corporation to pave any part of any such bridge required to be by it paved, or by this ordinance required by it to be performed, shall be added to the date herein fixed for the completion of said work.

And it is further provided that if said railway company shall be delayed in the prosecution of the said work required to be done under the provision of this ordinance by reason of the failure of any private corporation or individual to comply with any requirement mentioned in section 12 of this ordinance, or by reason of any delay on the part of the city of Minneapolis or any of its officers, in performing any of the duties imposed upon it or them by this ordinance, in respect to the work herein required to be done by said railway company, then and in that case the time which said railway company shall be so delayed, as well as the time which said railway company shall be delayed by causes beyond its control, shall be added to the time during which said railway company is required by the terms of this ordinance to complete said work.

Sec. 21. This ordinance shall take effect and be in force from and after its publication.

Passed Sept. 12th, 1913.

Karl De Laittre, President of the Council.

Approved Sept. 18th, 1913.

W. G. Nye, Mayor.

Attest:

Henry N. Knott, City Clerk.

The ultimate question in the suit is whether a permanent injunction shall issue against the enforcement of the ordinance. Since the decision of the Supreme Court of the state of Minnesota in the case of Twin City Separator Co. v. Chicago, Milwaukee & St. Paul Railway Co., 118 Minn. 491, 137 N. W. 193, there can no longer be doubt that the city of Minneapolis has the power to pass an ordinance providing for the separation of street and railway grades.

See, also, Missouri Pacific Railway v. Omaha, 235 U. S. 121, 35 Sup. Ct. 82, 59 L. Ed. 157, and cases there cited.

The necessity in this case for the separation of the street grade from the railway grade along plaintiff's line between the points above named is not in dispute, but is expressly admitted by the plaintiff and all other parties to the controversy.

The present ordinance, however, is attacked by the plaintiff and the interveners as being arbitrary and unreasonable, and as having the effect, if executed, of depriving the plaintiff and the interveners of their property without due process of the law. More specifically, it is claimed on the part of the plaintiff:

(1) That the subsoil along and adjacent to the track sought to be depressed is marshy, and in some places composed of quicksand, and that this condition makes it either impossible, or possible only at enormous expense, to maintain and operate the railway tracks depressed as required by said ordinance.

(2) That the depression of said tracks in accordance with the ordinance would result in a loss of one of the five tracks now located upon the right of way along the route of the proposed depression.

(3) That the depression of said tracks in accordance with the provisions of the ordinance would leave but 18 feet headroom or clearance between the tracks and the bridges over the streets and avenues, and that this clearance is insufficient for the safe and practical operation of the railway, and, furthermore, that it is contrary to the requirements of chapter 307 of the General Laws of Minnesota for 1913 (Gen. St. 1913, §§ 4272–4280), as amended by chapter 448 (Gen. St. 1913, § 4277) thereof.

(4) That the operations of the railway over the tracks affected are largely in the nature of switching operations, and would be seriously interfered with if the tracks were depressed in accordance with the ordinance, and the dangers accompanying operation largely increased, on account of the overhead and side structures, and on account of the frequent accumulation of smoke, steam, and gases in the depression, which would lessen the efficiency of signals, and hinder the carrying out of switching movements.

(5) That the proposed depression would necessitate extensive changes in the city sewers, water mains, conduits, and other underground structures, at a large and unnecessary expense.

(6) That the carrying out of the provisions of the ordinance would destroy or drive away many industries located along the railway between the points in question, and would prevent new industries from locating along said tracks, to the financial loss of the railway company, and that other industries would be put to enormous and unnecessary expense in adjusting themselves to the depressed tracks.

(7) It is also contended by the plaintiff that there is an alternative plan of separating the grades of the city streets from the grade of the railway tracks, namely, by elevating the railway tracks between the points in question; that this latter method would insure, equally with the depression plan, the great object sought in separating the grades, namely, the safety of the public; that it would avoid difficulties due to the character of the subsoil; that it would obviate the loss of one of the railway tracks; that it would not interfere with the sewers, conduits, and other underground structures; that the industries along the tracks could be more readily adjusted to the new conditions, and at much less expense; that the operation of the railway would be much less dangerous to the railway employés, by reason of the absence of overhead and side structures, and freedom from smoke, gases, etc.; that the resulting damages, if any, to abutting owners would be much less upon the elevated plan than upon the depression plan, and that the expense to the railway company upon the elevated plan would be less by upwards of $3,000,000 than upon the depression plan.

The interveners join with the plaintiff in these contentions.

The position of the city may be outlined as follows:

(1) The necessity of separating the grades being conceded, the choice of method lies with the city, and not with the railway company.

(2) That the character of the subsoil is not such as to render impracticable the depression plan.

(3) That the ordinance does not call for an 18-foot headroom, and that if the railway company desires more, it may depress the tracks still lower.

(4) That if the depression plan causes a loss of one of the present tracks of the railway company, additional right of way for replacing said track may be acquired by the railway company through condemnation proceedings.

(5) That industries along the right of way have no vested rights in their present railway facilities; that the expense of adjustment is no

concern of the city; and that if any of them cannot be provided with trackage facilities upon the depression plan, it is a deprivation incident to a necessary public improvement, and must be borne by the owners of the industries.

(6) That the safety and convenience of the general traveling public will be better served upon the depression plan than upon the suggested elevation plan, and that this is of importance paramount to the convenience of the railway company in the operation of its trains, or to the safety of its employés, if their safety would be lessened by the depression plan.

(7) That sightliness is an element to be taken into consideration, and that this makes largely in favor of the depression plan.

(8) That the question of expense, whether in connection with changing the sewers, adjusting the industries, or reconstructing the right of way and tracks, is one of little or no weight in determining the validity of the ordinance in question.

[1] The first question to be determined is, What does the ordinance provide? In other words, what demand is made by it upon the railway company?

The main point of dispute is as to the depth of the depression called for by the ordinance. On the part of the plaintiff it is contended that a 17-foot depression is provided for; on the part of the city, that no particular depth is specified, but that the railway company is at liberty, according to its necessity, to depress to any depth required. The text of the ordinance does not, in terms, provide for any specific depth of depression. Section 1 requires the railway company—

"to depress the plane of its roadbed and tracks * * * in the form and manner, and upon the terms and conditions hereinafter set forth, that is to say: Beginning at the east line of Sixth Avenue South in the city of Minneapolis, and extending southeasterly to Thirty-Second Street East, in said city."

"Sec. 2. The following streets and avenues now crossing said railway within said limits shall be carried by said company over the tracks of said railroad upon bridges of steel or reinforced concrete construction, in accordance with plans and specifications prepared by the city engineer of said city."

"Sec. 4. The width of the roadway and sidewalks of the several bridges and the street grades of the same, as well as other new grades of the various streets affected by the construction of said bridges, shall be as follows [Then follows a schedule of bridges]."

"Sec. 11. All water pipe, conduits, sewers, and other similar substructures belonging to the city that may be disturbed in the prosecution of such work or required to be removed or deflected from the position in which they are found shall be replaced or suitable expedients be devised and provided by said railway company, under the approval of the city engineer, to restore them as fully as may be to their former state of usefulness."

It thus appears that plans are specifically referred to in the ordinance, and that they are referred to for the purpose of indicating how the work is to be done. It is claimed by counsel for the city that these plans have reference to bridges only, and have nothing to do with the depth of the depression; that if the city engineer placed upon said plans figures and drawings showing the depth of depression, he did so without authority from the city council. A brief reference to

some of the steps taken at the time of the preparation and passage of the ordinance refutes these claims.

It is shown by the evidence that on March 14, 1913, a special committee on grade elimination, of the city council, recommended:

"That the city engineer be instructed to draw plans for the depression of the Chicago, Milwaukee & St. Paul main line to the feasible maximum depth, from the Milwaukee Depot to Twenty-Sixth street, and the city attorney be instructed to draw an ordinance to conform with said plans."

The words "Twenty-Sixth street" were stricken out by the city council, and the words "Twenty-Seventh avenue, including the I. & M. Division of the Milwaukee Railway to East Lake street," inserted in lieu thereof. Thereupon a resolution was adopted as follows:

"Moved that the city attorney and the city engineer be directed to prepare plans and ordinance and submit same within sixty (60) days to the city council, for lowering the tracks in accordance with the above report."

"Moved to amend said motion by adding at the end thereof the following: 'And that the city engineer be directed to furnish an estimate of the cost of depressing the tracks.' "

On July 11, 1913, the city engineer made his report (Exhibit C) in accordance with the foregoing resolution. In said report occurs the following language:

"According to your instructions to draw plans for the depression of the Chicago, Milwaukee & St. Paul Railway Company's main line, to the feasible maximum depth. * * *. The depression has been commenced at the east line of Sixth Avenue South on an 0.8 per cent. rate of grade, till the depression reaches about 17 feet at Third Street South. This depression has then been practically maintained, to a little beyond Twenty-Second Street East. * * * From a point midway between Twenty-Seventh and Twenty-Eighth streets the tracks are again depressed on an 0.8 per cent. rate of grade, to reach a 17-foot depression at East Lake street." A clear headroom of 18 feet has been provided for, upon the advice of the city attorney; three feet has been assumed for the space occupied by the bridge floors." The estimated cost of the entire improvement, but without consideration of changes of industrial side tracks and damage to property, if any, is for track depression, complete with bridges, etc., $2,095,000. Cost of change of sewer system, $225,000. Cost of change of water pipe system, $25,000. Total cost, $2,345,000. All required data has been incorporated in an ordinance submitted by the city attorney and accompanying this report."

The plans referred to in the report, and accompanying the same, being Exhibits E1 and E2 were introduced in evidence. The legend upon Exhibit E1 contains the heading "Plan Showing Separation Grade." Upon the plan are shown, with figures given, "Old Elevation of Top of Rail," "New Elevation of Top of Rail," and "New Elevation of Bridge Floor."

It is contended by the city that the textual part of the ordinance would fit plans for a 21-foot depression as well as plans for a 17-foot depression. However this may be, it is clear from the evidence that the city council in passing the ordinance had in mind a 17-foot depression, which, in accordance with the plans, provided for an 18-foot headroom. The textual provisions of the ordinance and the plans, taken together, constituted the demand made by the city upon the railway company. That demand was for a 17-foot depression of the tracks and a raising of the streets at the crossings approximately 4

feet; the thickness of the bridge floors, being approximately 3 feet, would thus leave a headroom of 18 feet.

To hold now that the railway company is at liberty to depress its tracks 21 feet without further action on the part of the city council is to make in part a new ordinance. This is not permissible. The city council was evidently of the opinion that 18-foot headroom was sufficient. To secure this, it was willing to raise the grade of the streets at the crossing 4 feet. If an 18-foot headroom could be obtained by a 21-foot depression, leaving the grade of the streets at the crossings as they are now, it cannot be said with certainty that the city council would be willing that the grade of the streets should be raised 4 feet.

The rearrangement of the sewer system and other substructures was contemplated on a basis of a 17-foot depression. The plans show this, and the figures of estimated cost of rearrangement are on that basis. What action the city council might take if the railway company undertook to make a 21-foot depression, and rearrange the sewer system and other substructures upon that basis, cannot be foreseen. It is certain that the railway company in undertaking to do this would be acting outside of and contrary to the commands of the ordinance. The railway company could not legally demand from the city engineer plans for bridges, and for the rearrangement of the sewer system different from those already contemplated on the basis of a 17-foot depression. The railway company could not legally follow any plans except those furnished by the city engineer.

My conclusion upon this question, after considering all of the evidence bearing upon it, is that the plans are part of the ordinance, and that the ordinance, properly construed, calls for a 17-foot depression and an 18-foot headroom, and that the effect of the ordinance must be discussed upon that basis.

Placing this construction upon the ordinance, it becomes necessary next to examine the objections urged against its enforcement.

1. The question of the subsoil along the route between Sixth Avenue South and Thirty-Second Street East was gone into upon the trial to a very considerable extent. Evidence was given by experts upon behalf of the railway company and the city. Evidence and exhibits were also introduced, showing the results of experimental borings at various points along the route. It is not necessary to go into this evidence in detail. Upon consideration of the whole of it, I have reached the conclusion that the contention of the railway company cannot be sustained. The weight of evidence is clearly to the effect that the subsoil, while not of the best character for depression of tracks, nevertheless is not such as to render depression either impossible or impracticable, even though such depression be carried to a depth of several feet below the proposed 17 feet called for by the ordinance. The subsoil in some places is such as to render the work difficult and expensive, but not beyond the range of modern, practical engineering.

2. As to the loss of one track. It is conceded that the carrying out of the ordinance would result in the loss to the railway company of

one of its present five tracks. The evidence shows that this would be a severe loss. All of the present five tracks are in almost constant use, and it is doubtful whether even the present business of the railway company could be efficiently handled on four tracks only. It is true, as the city suggests, that the railway company could, by condemnation, acquire additional land for a fifth track. This, however, would necessitate the widening of the depression, the lengthening of the bridges over the railway tracks, and a negotiation with the city council for the purpose of obtaining its consent to the necessary changes, or litigation in the absence thereof. Additional right of way would, of course, entail additional expense.

[2] 3. As to the question of headroom, or clearance. According to the constructions above given to the ordinance, a headroom of only 18 feet is thereby provided, and the question arises as to the sufficiency of this headroom. By chapter 307, General Laws of Minnesota for 1913, a headroom of 21 feet from the top of the rail is demanded. But it is claimed by the city that the statute does not apply to the plaintiff railway company when read in connection with the amendment contained in chapter 448 of the Laws of 1913.

The statutes in question have not been construed by the Supreme Court of the state of Minnesota, touching the point here in question. If a construction had been placed upon them by that court, I should, of course, feel bound by that construction; but, in the absence of such decision, I must construe them in accordance with my best judgment.

In my opinion, the exception in the latter statute was intended to apply only to cases where a plan had already been made for depressing certain tracks; and the exception was inserted so as not to interfere with a plan already made and partly executed.

No plan was in existence at that time with reference to the present proposed depression of the tracks here in question. It is true that the plaintiff company had, on its Hastings & Dakota Division, already begun work on depressing the tracks, in accordance with plans agreed upon between the city and the company; but the tracks of the Hastings & Dakota Division were, and are, so far as the present problem is concerned, as separate from the tracks here in question as if owned by an entirely different railway company. No practical reason has been suggested why the plan for the Hastings & Dakota Division, separate and distinct as it was, should be controlling as to all other crossings of the plaintiff company in the city of Minneapolis, and exempt that company from the wise and humane provisions of the statute as to sufficient headroom at crossings.

I, therefore, give such construction to the statutes as best comports with safety to the lives and limbs of the railway employés, and hold that the exemptions in chapters 307 and 448 have no application to the tracks here in question, and that the plaintiff railway company is bound by chapter 307 to provide in the future 21-foot headroom, except as to those crossings included in plans in existence, and being carried out at the time of the passage of the statutes. A different construction would, in my opinion, be open to the serious objections of class legislation.

It would be a remarkable proceeding on the part of the state Legislature to exempt by statute the plaintiff railway company from constructing safe overhead clearances in the city of Minneapolis simply because the company had already adopted, as to certain crossings therein, a plan of clearance which the Legislature by its selfsame act declared insufficient.

The statute applies, and it calls for a 21-foot clearance; and an ordinance which calls for an 18-foot clearance is in plain conflict with the provisions of the statute, and cannot be enforced.

[3] But, quite apart from the statute, and merely as a matter of good railroading, an 18-foot clearance is insufficient and unsafe. The evidence clearly shows that many of the modern box cars are at least 15 feet in height above the rail. It is also in evidence that the present method of switching at times requires a man to take a position on top of the box cars for the purpose of controlling the cars, and also the giving of signals. It is true that evidence was introduced by the city to the effect that in some places signals were given by men stationed upon the ground. No convincing evidence, however, was introduced that this was feasible along the line in question, and under the conditions which would prevail in the proposed depression cut.

Furthermore, the evidence shows that a standard of 22-foot headroom has been adopted on more than 200,000 miles of railway in the United States, and 21-foot on more than 50,000 more. While this does not mean that all of the overhead crossings on these railroads have a clearance equal to the standard, yet the fact that the standard has been adopted is a strong reason for holding an 18-foot clearance insufficient and unsafe. It is true, as shown by testimony on the part of the city, that there are many overhead crossings in the city of Minneapolis not of 22-foot clearance, and a number not even of 18-foot clearance. It is also pointed out that, on the Hastings & Dakota Division of the plaintiff company in the recent depression of tracks made under an agreement between the plaintiff company and the city, the clearances range slightly over 18 feet. As to the crossings other than those on the Hastings & Dakota Division, it is to be noted that they are mostly of old construction. As to those on the Hastings & Dakota Division, the evidence shows that they were put in with the expectation that very little, if any, switching would be done along the stretch of the track where these overhead crossings were made. Owing to litigation, this expectation has not been realized; and the result is that the clearances on that division, although of recent construction, are condemned by practical railroad men as unsatisfactory and unsafe, and admitted to be so by the plaintiff company itself.

My conclusion on this point is that the evidence clearly shows that, with the present size of cars in common use, an 18-foot clearance is insufficient and unsafe. When adopting the ordinance here in question the city council adopted that clearance probably because it was thought to be the greatest practically available, and because it was thought sufficient. The evidence in this case shows that both of these opinions were erroneous.

4. That the difficulties and dangers in the operation of the railway tracks would be increased in the depression beyond what they are at present is clearly shown by the evidence, and is practically conceded. Accumulation of ice and snow at times, accumulation of steam, smoke, and gases at more frequent intervals, interfering with efficient communication by signals, would all tend to increase the difficulty of operation of the trains. The presence of uprights between tracks as supports of bridges would also add to the inconvenience of operation. Change in gradient into and out of the company's yard at Twenty-Sixth street is shown by the evidence to be a matter of serious moment. To what extent the dangers, difficulties, and cost of operation would be increased is not capable of exact computation; that it would be considerable admits of little doubt, under the evidence.

5. As to changes in sewer system, water mains, etc., the estimate of cost agreed upon by both parties is $346,790. The changes in respect to these matters made necessary in connection with Lake street alone amount to $90,000.

6. Considered with reference to the Chicago, Rock Island & Pacific Railway Company, whose freight terminals lie between plaintiff's tracks and Eighth Avenue South, and with reference to the various industries along the tracks of the plaintiff company, the proposed depression is a serious matter. The evidence shows that the cost of the changes made necessary in the Rock Island terminals and freighthouses would be more than $500,000.

The evidence also discloses that the changes necessary to be made to adjust such of the industries along the Milwaukee tracks as can be adjusted to the depression plan would be more than $1,500,000. In the case of the Minneapolis Steel & Machinery Company alone, the evidence shows that the cost of adjustment would be approximately $600,000, and for the Minnesota Linseed Oil Company more than $200,000. The total cost to the plaintiff railway company would be more than $5,000,000.

To many of the industries, trackage facilities could be furnished only by a spur having a considerable grade up from the railway tracks. The evidence shows that such spurs with a downward grade towards the railway tracks are unsatisfactory as to service, and often a source of great danger.

[4] But the city contends that all of these matters, except the statutory obstacle to the 18-foot clearance, are matters merely of increased expense, increased difficulty, and increased dangers in operation; and, it being conceded that the public necessity and the public good demand the separation of street grade from railway grade, these matters of expense, difficulties, and dangers must not be allowed to stand in the way of public improvements which the general public necessity or the public good demands. The contention, in the main, is sound, but there is one consideration that must not be overlooked. An ordinance such as the one here in question is always open to the inquiry:

"Is it unnecessary or unreasonable or arbitrary to such an extent that it can fairly be said that its enforcement will have the effect of depriving the complaining parties of their property without due process of law?"

[5] The presumption is in favor of the ordinance; the burden of proof is upon him who attacks its validity. It being conceded that the object to be accomplished by the ordinance is necessary, it would follow that if there were but a single method to accomplish that result, an ordinance providing that method could not be adjudged unnecessary, unreasonable, or arbitrary, except under most unusual circumstances.

The plaintiff contends, however, that here there is an alternative method of bringing about the separation of the street grade from the railway grade, namely, by elevation of the railway tracks. The plaintiff railway company claims, where there are two methods of separation of grade, each providing equally well for the safety of the public, that the choice lies with the railway company. On the other hand, the city contends that the choice belongs to it. It is not necessary to decide the question which party has the choice of methods; for the purpose of this decision, I assume that the choice of methods lies with the city.

[6] But the plaintiff is entitled to show, if it can, that there is another feasible method, and it claims that the elevation method is feasible. Plaintiff is also entitled to show by comparison, if it can, that the depression method provided by the ordinance is unnecessary, unreasonable and arbitrary. A large amount of evidence has been introduced by plaintiff in support of this contention, and by defendant in opposition thereto. It is at once evident that certain elements of the situation require no attention in considering the elevation plan. The questions of subsoil, clearance, difficulties and dangers of operation due to accumulation of steam, smoke, and gas in the depression, difficulties and dangers from the presence of uprights between the tracks, are all absent on the elevated plan. The evidence also shows that none of the present five tracks would be sacrificed upon the elevated plan. The question of sewers, water mains, and other substructures also practically disappears.

As to the Chicago, Rock Island & Pacific Railway, the evidence shows that adjustment upon the elevated plan would cost about one-half less than on the depression plan.

The evidence also shows that from the standpoint of that railway, the elevated plan is preferable.

As to the industries, the evidence shows that adjustments can be made more readily upon the elevated plan, and the service be better than on the depression plan, and at a cost of one-third to one-half less than on the depression plan.

[7] Whether the owners of the industries have or have not vested rights in their present facilities, they are, in all fairness, entitled to be heard upon the question of the reasonableness of the ordinance.

The spurs leading from the railway tracks to the industries would have a less steep grade, and these would tend away from the railway tracks instead of toward them. This advantage to the railway com-

pany, however, would be offset to some extent by the disadvantage to the industries in having the spurs on a downward grade in their direction.

The total expense to plaintiff railway company of the elevated plan when compared with that of the depression plan shows a difference of more than $3,000,000 in favor of the elevation plan. On the whole, the conclusion cannot be escaped that from the standpoint of the railway company and the industries, the elevated plan is far more satisfactory and cheaper both in initial and in operative cost. However, there is another viewpoint to be considered, namely, that of the general public, either as traveling upon the streets of the city, or as having business or property interests near the line of the railway.

It is claimed by the city that the uprights in the streets supporting the railway trackage over the streets would be a serious obstacle to ordinary traffic, and would interfere with the movement of the fire department and also the sewer apparatus; that the undercrossings would themselves be dark, dangerous, and unsanitary; that the bridges over the streets and the embankment of the elevated structure would be unsightly. It goes without saying that three rows of uprights, two at the curbs and one in the center of the street, would form more or less of an obstruction in the street. The evidence does not justify the conclusion, however, that this would be a serious obstruction to traffic. The evidence also fails to show that the interference with fire or sewer apparatus would be anything more than slight and negligible. Furthermore, the evidence shows that it would not be indispensable to have three rows of upright supports in the street. By having some of the bridge structure project above the railway roadbed some of the supports in the street below might be dispensed with. It is true that the benefit to the street below would be obtained at the expense of the roadbed above; but, after 25 years of conference and negotiation, it must be evident to all parties to the controversy that ideal conditions in every respect are not obtainable as a solution of the problem.

The claim that the undercrossings would be necessarily dark, dangerous, and unsanitary is shown by the evidence to be unfounded in fact.

Whether an embankment with railway tracks thereon is a more unsightly object than a railway cut with similar tracks therein is a question of judgment, upon which, as the evidence shows, men differ. The question, however, is not of controlling importance in this case; and it has been suggested that if it were incumbent on the city to pay any considerable portion of the additional cost of depression over elevation, the embankment might appear less unsightly.

[8] As already stated, the total cost of depression to plaintiff company would be more than $5,000,000. At the Twenty-Sixth street yard the tracks come to their present level, and then going south are depressed a second time to make the Lake street crossing. The evidence shows that the cost of depression made necessary by this one crossing is over $500,000. If the cost of adjusting the Minneapolis Steel & Machinery Company's plant be added, the total cost is over $1,000,000. The evidence shows that the cost of elevation for the crossing at Lake street would be about $150,000; and if to this be

added the cost of adjusting the Minneapolis Steel & Machinery Company's plant on the elevation plan, the total cost is about $400,000. Thus there is a difference of about $600,000 between the plans, due to this one crossing alone.

The evidence fails to show any necessary connection between the Lake street crossing and the depression of the tracks north of the Twenty-Sixth street yard, so far as the physical surroundings or conditions are concerned, and that there is no such necessary connection from an engineering standpoint is also shown by the evidence. Mr. Cappelen, the city engineer, testified in reference to this matter, and his views are so frank and his opinion so well founded in reason, that I quote them here at some length:

"In all these discussions of depression of the main line from Twenty-Fourth street to Sixth Avenue South, Lake street was never considered. It was always considered as a problem of its own. At one of the eleventh-hour motions, a member of the city council said (probably I should not speak about that): 'If we are going to do that, let us slap it on. Let us add Lake street, so as to get it bridged too.' Now, in my opinion, we are, under this ordinance plan at this place, charging up $90,000 to somebody for a sewer system to get that one bridge in. We are charging up a heavy expense on the Milwaukee Road for rearrangement. According to Mr. Record's testimony, we are charging up a tremendous expense to Mr. Record to readjust his plant. Now, it is my firm conviction that we had better erase Lake street. We have only made a difference of 4 feet now. We will take and raise up Lake street 13 feet or maybe a little more, and nobody is going to get hurt at all. You can buy that property along there—you might have to meet legal remedy for damages—but you could get it for a fraction of the $90,000 that it is going to cost you to get that sewer in, which don't do anybody any good. The sewer system there is all right as it is. You can readily see that we will take Lake street over the tracks and adjust it, and instead of going down that 17 feet, or going down 21 feet, we will go up with Lake street, and you can adjust the whole business for a fraction of the money. I say that is what ought to be done."

The other evidence in the case bearing on this matter of the Lake street crossing is equally condemnatory. In fact, the evidence as a whole leaves no conclusion open but that the ordinance, so far as the Lake street crossing is concerned, is unnecessary, unreasonable, and arbitrary to such an extent as to deprive the plaintiff and Minneapolis Steel & Machinery Company of property without due process of law.

[9] But it is claimed on the part of the city that even though this part of the ordinance should be found unreasonable and void, yet the court might so hold, and nevertheless hold the remainder of the ordinance valid and enforceable. The city takes the position that there is no necessary connection of any kind between the provisions of the ordinance in regard to Lake street and the provisions of the ordinance in regard to the remainder of the crossings. But though the evidence fails to show any necessary connection between the plan of depression of the railway tracks at Lake street and the plan of depression north of the Twenty-Sixth street yard from a physical standpoint, or from an engineering standpoint, yet that there was some connection in the minds of the city council is made certain by the testimony of Mr. Cappelen, and also from the record of what took place in the council prior to the time of the passage of the ordinance. Referring again to

Exhibit B, the record of the special committee on grade elimination, we find the following:

"Your special committee on grade elimination respectfully recommend that the city engineer be instructed to draw plans for the depression of the Chicago, Milwaukee & St. Paul main line to the feasible maximum depth, from the Milwaukee Depot to Twenty-Sixth street, and the city attorney be instructed to draw an ordinance to conform with said plans."

Thereafter it was moved:

"That the foregoing report be amended by striking out the word and figure 'Twenty-Sixth street,' where the same appears in the above report, and inserting in lieu thereof, the words and figure 'Twenty-Seventh avenue, including the I. & M. Division of the Milwaukee Railway to East Lake Street,' and moved that the city attorney and the city engineer be directed to prepare plans and ordinance and submit the same within sixty (60) days to the city council, for lowering the tracks in accordance with the above report."

But it is contended by the city that the court has the power to hold, and should hold, that the ordinance is valid as to all the trackage involved, except that connected with the Lake street crossing, even though this part of the ordinance be held invalid.

[10] It is true that statutes and ordinances may be and sometimes are held by the courts valid in part and invalid in part. The test is, Has the legislative body manifested an intention to deal with a part of the subject-matter covered, irrespective of the rest of the subject-matter? If such intention is manifest the subject-matter is separable, otherwise not.

In Poindexter v. Greenhow, 114 U. S. 270, the court in its decision at page 304, 5 Sup. Ct. 903, 922 (29 L. Ed. 185) used the following language:

"It is undoubtedly true that there may be cases where one part of a statute may be enforced as constitutional, and another be declared inoperative and void, because unconstitutional; but these are cases where the parts are so distinctly separable that each can stand alone, and where the court is able to see, and to declare, that the intention of the Legislature was that the part pronounced valid should be enforceable, even though the other part should fail. To hold otherwise would be to substitute for the law intended by the Legislature one they may never have been willing by itself to enact."

In El Paso, etc., Ry. Co. v. Gutierrez, 215 U. S. 87, the court, in its decision at page 97, 30 Sup. Ct. 21, 25 (54 L. Ed. 106), used the following language:

"It remains to inquire whether it is plain that Congress would have enacted the legislation had the act been limited to the regulation of the liability to employés engaged in commerce within the District of Columbia and the territories. If we are satisfied that it would not, or that the matter is in such doubt that we are unable to say what Congress would have done omitting the unconstitutional feature, then the statute must fall."

See, also, Illinois Central R. R. Company v. McKendree, 203 U. S. 514, 27 Sup. Ct. 153, 51 L. Ed. 298; Employers' Liability Cases, 207 U. S. 463, 28 Sup. Ct. 141, 52 L. Ed. 297; Butts v. Merchants' Transportation Co., 230 U. S. 126, 33 Sup. Ct. 964, 57 L. Ed. 1422.

Whatever the rule is in the state courts, in the federal court the rule announced in the above cases is controlling.

If we apply these tests to the case at bar, it is clear that the evidence fails to show any intention on the part of the city council that the ordinance should be enforced as to the trackage north of the Twenty-Sixth street yard, even if unenforceable as to the trackage connected with the Lake street crossing. Indeed, the history of the preparation and passage of the ordinance as shown by the evidence indicates a directly opposite intention. The ordinance was framed for the purpose of solving one problem, namely, track depression between two definite points named in the ordinance.

The position of counsel for the city in regard to the question now under discussion is hardly consistent with the action of the city council itself. Since the commencement of this suit the city council has by its own action eliminated from the ordinance section 18 relating to the Sixth Avenue South crossing. The city council has also passed another ordinance relating to this same crossing. The ordinance has thus been twice under reconsideration. It is apparently the judgment of the city council, and has been since the preparation of the ordinance in suit, that the Lake street crossing is not a separable, but an inseparable, part of the ordinance plan of depression. It is far from certain that the ordinance could or would have been passed without the inclusion of the Lake street crossing therein.

The court is asked in effect to change the reading of section 1 of the ordinance, so that the sentence now reading, "Beginning at the east line of Sixth Avenue South in the city of Minneapolis, and extending southeasterly to Thirty-Second Street East, in said city" shall read, "Beginning at the east line of Sixth Avenue South in the city of Minneapolis, and extending southeasterly to some point to be determined by the court." In my opinion, there is no power in the court to make such a change. The ordinance must stand or fall as a whole.

Much evidence has been introduced on both sides touching the cost of a 21-foot depression, and as to the possibility of adjustment by the Chicago, Rock Island Railway Company to such depression and the cost of adjustment, and the possibility of adjustment of the various industries to such depression, and the cost thereof. The contention of the plaintiff is that a 17-foot depression plan is so unsafe as to make it beyond possibility of adoption, and that nothing less than a 21-foot or a 22-foot headroom ought to be considered. A 22-foot clearance can be obtained by a 21-foot depression. Comparisons have accordingly been insisted upon by the plaintiff between the 21-foot depression plan and the plan of elevation. It goes without saying that such a comparison makes a much stronger case against the depression plan, not only so far as concerns the cost to the plaintiff company, but also in relation to the possibility of adjustment by the industries and the cost thereof, and the possibility of adjustment by the Chicago, Rock Island & Pacific Railway Company and the cost thereof. The evidence shows that the total cost to the railway company under the 21-foot depression plan would be approximately $7,000,000 as compared with less than $2,000,000 under the elevation plan; that the cost to the Minneapolis Steel & Machinery Company

alone would be more than $1,000,000, as compared with $250,000 on the elevation plan. The difficulties of adjusting the spurs and the grades of the spurs would also be increased. The cost and difficulties of operation in the 21-foot depression, due to ice, snow, steam, gas, etc., would also be enhanced. The cost of readjusting the sewers would be increased over the 17-foot depression plan by over $30,000. While recognizing the full force of these figures, I have confined the foregoing discussion of the ordinance to the 17-foot depression plan. This has been done for two reasons: First, because the ordinance plan is the one whose merits and defects are directly before the court, and that plan, as shown above, is a 17-foot plan of depression; second, because even if the city council were convinced that a 21 or 22 foot headroom was required by the statute and good railroading, there is no certainty that it would require a 21-foot depression, even though they might still insist upon the depression plan. It is perfectly possible that a portion at least of the extra headroom required might be furnished by raising the streets to the extra height, rather than by depressing the railway tracks.

Evidence has also been introduced touching the amount of damages to adjoining trackage property on the depression plan and on the elevation plan; also the effect under the two methods upon the value of real estate at some distance from the railway tracks. Opinions of the witnesses, apparently well informed and honest in their convictions, have differed so widely in regard to these estimated damages that I have reached the conclusion that the testimony is too speculative and uncertain to be of any particular value in the present discussion; and such damages have not been included in the foregoing figures.

Many matters other than those discussed here have been covered by the evidence, consisting of more than 2,500 pages of testimony, and several hundred exhibits. These matters have not been overlooked, but, in the interest of reasonable brevity, have been omitted from specific mention.

[11] The police power of the state, whether exercised through the Legislature or municipalities, is very broad. It may be exercised for the safety, health, morals, convenience, or the general prosperity of the public; but it is not without limitation. When the police power exercised by a municipality is by means of an ordinance, such ordinance must have some relation to one or more of the objects above mentioned. The ordinance must not conflict with state or federal Constitution, nor with state or federal statutes. It must not arbitrarily, unnecessarily, or unreasonably invade private rights or property. Yick Wo v. Hopkins, 118 U. S. 356, 6 Sup. Ct. 1064, 30 L. Ed. 220; C., B. & Q. Ry. v. Illinois, 200 U. S. 561, 593, 26 Sup. Ct. 341, 50 L. Ed. 596, 4 Ann. Cas. 1175; City of Emporia v. At., T. & S. F. Ry., 94 Kan. 718, 147 Pac. 1095; Am. Tobacco Co. v. Missouri Pac. Ry., 247 Mo. 374, 157 S. W. 502; Chicago v. Pittsburgh, C., C. & St. L. Ry., 244 Ill. 220, 91 N. E. 422; Murphy v. C., R. I. & P. Ry., 247 Ill. 614, 93 N. E. 381.

In the present case, upon a careful consideration of the whole

of the evidence, I have reached the conclusion that the ordinance in question is unreasonable, arbitrary, and void, and that the enforcement thereof would deprive the plaintiff and the interveners of their property without due process of law: First, because its provisions are in conflict with the statute of the State of Minnesota; second, because it includes within its scope the Lake street crossing, and such inclusion, as shown by the evidence of both the plaintiff and the defendant, is unnecessary, unreasonable, and arbitrary.

[12] Third, because the ordinance, while providing for a separation of railway and street grades, unnecessarily and unreasonably imperils the safety of the railway employés, and imposes unnecessary and unreasonable expense upon the plaintiff railway company, and the intervening railway company and industries, to the extent of several million dollars, amounting to a practical confiscation of their property.

A decree may be prepared in accordance with these views, and directing that a permanent injunction issue against the defendant city, its officers, agents, and servants, restraining and enjoining them from in any manner enforcing, or attempting to enforce, the ordinance in question.

In re VALHOFF.

(District Court, S. D. California, S. D. November 23, 1916.)

1. ALIENS ⊂⊃68—NATURALIZATION—DECLARATION OF INTENTION—STATUTES—"SUCH DECLARATION."

The first paragraph of Naturalization Act June 29, 1906, c. 3592, § 4, 34 Stat. 596 (Comp. St. 1913, § 4352), requires an applicant to declare his intention to become a citizen, and that such declaration shall set forth certain facts, provided that no alien, who, in conformity with the law in force at the date of his declaration, had declared his intention, need renew such declaration. The second paragraph provides that, not less than two years nor more than seven years after he has made such declaration of intention, he shall petition for naturalization. The proviso at the end of the first paragraph was added by amendment to the act as originally introduced for the stated purpose of avoiding injustice to those who had already made declarations and acquired rights thereunder. It was construed, at the time and since, by the Naturalization Bureau and by most of the courts, as not requiring a new declaration, where one had been made under the old law, even if more than seven years had elapsed since the enactment of the new law. Numerous certificates of naturalization had been granted, which would be subject to attack by the district attorneys under section 15 of the act (Comp. St. 1913, § 4374), if such construction were overthrown. *Held*, that the words "such declaration," in the second paragraph, referred only to a declaration filed under that act, and one who had filed a valid declaration under the old law could be naturalized without a new declaration, though more than seven years had elapsed since the new act took effect.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.]

2. STATUTES ⊂⊃217—CONSTRUCTION—HISTORY OF ENACTMENT.

The history of a statute from its introduction to its passage, the reports of committees, the amendments, and the opposition made to its passage in its various forms are legitimate aids to its construction.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. § 293; Dec. Dig. ⊂⊃217.]

3. STATUTES ⊂=219—CONSTRUCTION—CONTEMPORANEOUS CONSTRUCTION BY ADMINISTRATORS.

The contemporaneous and practical construction of a statute by those whose duty it is to carry it into effect, though not absolutely controlling, is entitled to great respect in court, since it is usually made by able men, masters of the subject, and frequently the draftsmen of the statute.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 296, 297; Dec. Dig. ⊂=219.]

Application by Hjalmar Aage Valhoff for naturalization. Petition granted.

TRIPPET, District Judge. The petitioner here made a declaration of intention to become a citizen on the 31st day of October, 1904. He filed his petition to become a citizen on the 31st day of January, 1916. More than seven years had elapsed after his declaration of intention before the application was filed. He made his declaration, as will be seen, prior to the passage of the act of June 29, 1906, and the question of the validity of such declaration under this act is the question at issue. This question was carefully considered in U. S. v. Lengyel, 220 Fed. 720, by Judge Orr of the Western District of Pennsylvania. In that opinion the material parts of the act are set out, and the reasoning to justify the conclusions of the court that the act did not affect declarations made prior thereto, seems unanswerable. Yet there are other reasons why such a declaration is valid.

[1] In order to understand what is here said, it is necessary to quote a part of the act, to wit:

"Sec. 4. That an alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

"First. He shall declare on oath before the clerk of any court authorized by this act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And *such declaration* shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

"Second. Not less than two years nor more than seven years after he has made *such declaration* of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when, and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife, and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place

of birth and place of residence of each child living at the time of the filing of his petition: Provided, that if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting."

The declaration required by the first paragraph above quoted is quite different from the declaration required by law before the adoption of this act. Revised Statutes 1878, § 2165. The phrase "such declaration," as first used in the first paragraph of section 4, must necessarily refer to the declaration previously mentioned. No one could, with reason, contend that it referred to a declaration made under the previous statute. In the second paragraph of section 4, above quoted, the same phrase, "such declaration," is used, and this phrase necessarily refers to the same declaration to which the phrase in the body of the first paragraph refers. It does not seem possible to construe the language to relate to a declaration made previously to the passage of the act. This will appear clearly when the history of the act, hereinafter referred to, is considered. The proviso in paragraph First of section 4, was inserted by amendment. That being so, it must necessarily follow that in the original draft of the bill the word "such" in the second paragraph referred to the new form of declaration contained in the bill.

Coming now to the first part of the second paragraph, which is the language to be construed, it will be noted that the 7 years' limitation commences to run "after he has made such declaration." It does not read, "after the passage of the act," nor "after it went into force." Those who claim that this sentence has relation to declarations made prior to the passage of the act, but did not affect such declarations until the act had been in force for 7 years, must necessarily contend that the sentence should be read as follows:

Not less than two years nor more than seven years after the passage of this act, he shall make and file, in duplicate, a petition in writing, etc.

If this act applied to declarations made prior to the passage of the act, then it cut off all rights existing under such declaration where the same was 7 years old at the time the act went into force. The act, therefore, would only give to holders of such declarations 90 days after its passage within which to file an application, for the act went into force 90 days after its passage.

It was early held—to wit, December 3, 1907—that the act did not relate to declarations made prior to the passage thereof. In re Wehrli (D. C.) 157 Fed. 938. No decision has been called to the attention of the court wherein it was held, prior to September 27, 1913, that this act related to declarations made prior to the passage of the act. It is true that in the case above cited the court made the suggestion that those who had made their declarations prior to the passage of the act "must make their final application within seven years from the enactment of the act," but this statement of the court is obiter dictum. The question could not possibly have been before the court for consideration.

[2] The history of a statute, from the time it was introduced until it was finally passed, may afford some aid to its construction. The re-

ports of committees, the introduction of amendments, and the opposition made to the passage of a statute in its various forms, are legitimate aids to its construction. 11 Ency. of U. S. Sup. Ct. Rep. 143, and authorities there cited. The bill for the act was introduced and was referred to a committee without the provisions hereafter referred to and which appear as provisos in sections 4 and 8 (Comp. St. 1913, §§ 4352, 4364). The committee having the bill in charge reported the following amendments thereto:

"Provided, however, that no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

"Provided, that if he has filed his declaration before the passage of this act, he shall not be required to sign the petition in his own handwriting.

"And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration."

At page 110 of the Appendix, vol. 40, part 10, 59th Cong. 1st Sess., Representative Steenerson, speaking upon the bill, and with reference to said four amendments, and to their effect upon the bill, said, concerning the injustice of the bill without the amendments:

"Such a result was so shockingly unjust that the committee finally agreed to so amend the bill as to make it apply only to persons who shall hereafter declare their intention to become citizens. This, however, in my opinion, does not go far enough, for this so-called 'literary test' should not apply to any who take up homesteads upon the public domain."

A further amendment was offered upon the floor by Representative Wharton, of Illinois, as follows:

"That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot read, write, speak and understand his own or the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States."

The last above proposed amendment resulted in the adoption of section 8, in the following form:

"Sec. 8. That no alien shall hereafter be naturalized or admitted as a citizen of the United States who cannot speak the English language: Provided, that this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: *And provided further, that the requirements of this section shall not apply to any alien who has prior to the passage of this act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, that the requirements of section 8 shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands.*"

The foregoing history of the bill in its progress through Congress certainly tends to show that Congress never intended it to affect declarations made prior to the passage thereof.

[3] The contemporaneous and practical construction of a statute by

those whose duty it is to carry it into effect is entitled to great respect in the court. Though not absolutely controlling, it is not to be disregarded without the most cogent and persuasive reasons, for the reasons that it is usually construed by able men, masters of the subject, and frequently the draftsmen of the statute, that such construction goes a long way to prove that there is some plausible ground or reason for it in the law, or in the historical facts which have imposed a particular construction of the law favorable to such usage, and that such construction has received the implied sanction of Congress in its not passing an act abrogating the construction. 11 Ency. of Sup. Ct. Rep. 138, and the abundant authorities therein cited.

The act created a Bureau of Immigration and Naturalization in the Department of Commerce and Labor. (This was subsequently divided, making a Bureau of Naturalization and a Bureau of Immigration.) The Bureau of Immigration and Naturalization adopted, soon after its creation, regulations which were a construction of the act concerning declarations made prior to the passage of the act. In these regulations the act was interpreted so as not to require a person, who had declared his intention in conformity with the law in force at the date of his declaration, to renew such declaration, notwithstanding the declaration was 7 years old. The courts throughout the country admitted persons to citizenship who had made declarations more than 7 years prior to the passage of the act. Apparently the courts were of the unanimous opinion that such was the proper construction of the act until the act had been in force for a period of 7 years and longer.

On August 20, 1913, at a time immediately prior to the act having been in force for a period of 7 years, and for the guidance of its officers after September 27, 1913, the Bureau of Naturalization issued naturalization regulations in which it was again recognized that any alien who, prior to September 27, 1906, had declared his intention in conformity with the law in force at that date, should not be required to renew such declaration. In harmony with these instructions and interpretations of the Bureau, the courts throughout the country admitted persons to citizenship, without any decision to the contrary, until January 26, 1914. In re Yunghauss (D. C.) 210 Fed. 545.

Notwithstanding such decision by the District Court for the Southern District of New York, in which all the judges of the district concurred, the Bureau of Naturalization, on December 19, 1914, in harmony with its previous interpretation of the law, issued the following instructions, to wit:

"2. Any alien who prior to September 27, 1906, has declared his intention in conformity with the law in force at the date of his declaration, shall not be required to renew such declaration.

"3. Aliens who lawfully declared their intention on and after June 29, 1906, and prior to September 27, 1906, must comply with all of the requirements of the naturalization act of June 29, 1906, in petitioning for naturalization, with the exception that those arriving prior to June 29, 1906, are not required to furnish certificates of arrival.

"Aliens who declared their intention prior to June 29, 1906, in accordance with the requirements of law, must comply with all of the requirements of the naturalization act of June 29, 1906, in petitioning for naturalization, except that they will not be required to file certificates of arrival, sign their petitions in their own handwriting, or to speak the English language."

The Bureau of Naturalization furnishes the court the following statement:

"In compliance with your request there is inclosed herewith a list of the courts in which the question of naturalization on an old-law declaration has been considered. This is taken from the records of the Bureau, and shows that 139 courts have admitted aliens upon old-law declarations, and that 30 courts have declined to admit them. It also shows that, notwithstanding the decision of the United States Circuit Court of Appeals for the Second Circuit, in the case of Yunghauss v. U. S., 218 Fed. 168 [134 C. C. A. 67], the federal court at Buffalo is bound by the letter of the decision, but not by the spirit, in that it will not dismiss petitions pending in the court because based upon old-law declarations, but permits the candidates to withdraw their declarations and take them over to the Supreme Court of New York state, in that city, where they are filed in support of petitions and favorably considered. In addition to this the various state courts of New York are continuing to admit candidates for citizenship, notwithstanding the action of the Second Circuit."

The fact that 139 courts have admitted aliens upon old-law declarations, as against 30 that have declined to admit them, is interesting, if not instructive. This is a country of laws, where every man's act is sustained or controlled by a law, and every man is presumed to know the law. It is unfortunate, therefore, that it is so difficult to determine what the law is. While not saying that the action of a majority of courts on a subject should be authority concerning what the law is, we may note that the gravest questions of law are sometimes determined by a vote of five judges to four, or four judges to three, or three judges to two. Then why is not an interpretation placed upon a statute by a majority of courts a reason for giving it a certain construction? The Bureau of Naturalization informs the court that since the 27th of September, 1913, the date when the 7-year limitation on declarations made prior to the passage of the act, had fully run, there have been filed in the courts of Los Angeles 392 petitions based upon old-law declarations, and such applicants admitted to citizenship, and in the Southern District of California, outside of Los Angeles county, there have been, approximately, 300 of such petitions granted. The Bureau also informs the court that throughout the United States there have been thousands and thousands of persons admitted to citizenship by virtue of these old-law declarations since said date.

By virtue of section 15 of the act, the United States district attorney, in any district, can maintain a suit to cancel a certificate of citizenship where such certificate was illegally procured. The order of the court admitting an alien to citizenship is not a final adjudication. It may be attacked by the United States district attorney, under section 15. It therefore results that the tenure of citizenship of all persons within this district, admitted as above, and all the thousands of people throughout the United States, so admitted, depends upon what the United States attorneys may do. Congress certainly never intended that the right to be a citizen should be so precarious. To place all these people in a status whereby their citizenship might be revoked at any time would surely be keeping the word of promise to the ear and breaking it to the hope. This court cannot give its assent to any such interpretation of the law, except in obedience to the opinion of a higher court.

BLEDSOE, District Judge. I concur. The language of paragraph 1 of section 4, to the effect that an alien making a "declaration" under the old law shall not "be required to *renew such declaration*" means, if words mean anything, that he shall not be required to renew—i. e., make *anew—any* declaration for the purpose of petitioning for citizenship; in other words, that the declaration already made by him shall be sufficient in form whenever he chooses to petition. Careful search of subsequent provisions in the Naturalization Law fails to reveal to my mind any language inconsistent with, or contrary to, this plain, unambiguous, and specific direction of Congress. In view of its presence in the act, general words of limitation must be held to apply only to declarations made after the passage of the act.

In re IRISH.

(District Court, E. D. Pennsylvania. December 22, 1916.)

No. 5611.

BANKRUPTCY ⊜59—"ACTS OF BANKRUPTCY"—FRAUDULENT CONVEYANCE OF TRANSFER—JUDGMENT.

An insolvent debtor who, intending to transfer real estate out of the reach of his creditors and to prefer one creditor, confessed a judgment or was a party to securing a judgment against himself by default for a sum in excess of the value of the property on which execution was withheld more than four months after the entry of the judgment has committed an act of bankruptcy under Bankruptcy Act July 1, 1898, c. 541, § 3a, cl. 1, 30 Stat. 546 (Comp. St. 1913, § 9587), making a conveyance with intent to defraud creditors an act of bankruptcy, and clause 2 making a transfer, while insolvent, of any property to a creditor with intent to prefer such creditor an act of bankruptcy.

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

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

In Bankruptcy. Involuntary proceedings in bankruptcy against Ned Irish. On motion to dismiss the amended petition. Motion denied.

See, also, 228 Fed. 573.

Evans, High, Dettra & Swartz, of Norristown, Pa., for petitioning creditors.

G. Herbert Jenkins, of Philadelphia, Pa., for alleged bankrupt.

DICKINSON, District Judge. Aside from the mere formality of statement in the petition, the real question involved in this motion can be most clearly presented in two propositions. One is whether an insolvent debtor, who is the owner of real estate which he desires and intends to convey or transfer out of the reach of creditors, and intends further to defraud creditors or to prefer one of them, and for the accomplishment of this purpose confesses a judgment for a sum in ex-

cess of the value of the property, execution upon which judgment, however, is withheld until after four months from the entry of the judgment, has committed an act of bankruptcy under clauses 1 or 2 of section 3a. The other proposition is whether such act is a cause of bankruptcy, if, instead of confessing the judgment, the insolvent debtor, for the same purpose and intent as before stated, is a party to the bringing of an action against himself and the entry of a like judgment by default.

The substantial question above stated is formally raised by the petition in this case. It avers an act of bankruptcy in the language of clause 1 and also in the language of clause 2, but the positive averments thus made are qualified by the statement that the conveyance or transfer charged to have been made was made through the expedient or device of the recovery of a judgment such as outlined above. The real question is, we think, involved in the first proposition, because we are of opinion that there is no distinction between the judgments entered in the different ways mentioned.

The weight of the argument in favor of the motion to dismiss is felt in the expression of the thought that Congress has made a distinction between the confession of a judgment and the conveyance or transfer of property similar to that which was recognized by the courts of Pennsylvania under the acts regulating assignments for the benefit of creditors. The distinction is between a conveyance or other transfer through the operation of which title to property directly passes and the confession of a judgment through an execution upon which title to property may indirectly but eventually pass. Based upon this distinction, the courts of Pennsylvania held that a judgment confessed to a trustee for creditors was not an assignment for the benefit of creditors, notwithstanding the fact that the entry of the judgment was immediately followed by the issuing of an execution through and by which the property of the defendant, real or personal, was sold and transferred.

The argument has further weight in the attitude of the professional mind on the subject of confessed judgments unaccompanied with execution, and in the consideration that the mere entry of a judgment left creditors free to pursue all lawful remedies which were theirs. There is also room for the thought that the bankruptcy laws embodied the policy of Congress not to force bankruptcy proceedings upon a struggling debtor unless certain clearly defined causes of bankruptcy existed, and that the thought of Congress was that it would be unwise to make the mere entry of a judgment an act of bankruptcy, because this would hamper needy defendants in getting aid through whatever credit they still retained.

The weight of the argument addressed to us on the other side resides in this: If the real intent and purpose of a debtor was the fraudulent one of withdrawing property from the reach of his creditors, or the unlawful one of securing payment to one creditor to the prejudice of others, and the means through and by which this is sought to be accomplished is, in substance and reality, a conveyance or transfer of his property, it is an intolerable thought that the law will sanction the ac-

complishment of this fraudulent or unlawful purpose out of deference to the mere form which the transaction may be made to assume. Each view is presented through arguments of almost equal strength, and the scales of judgment are left almost on a balance. The device to which this alleged bankrupt has had resort (if his purpose was as averred by the petitioning creditors) is so ancient and so common that at first blush it seems strange that the question has not been before raised and decided. Indeed the very common practice of failing debtors, after they had passed the verge of insolvency, to save their property to themselves or members of their families, or to prefer a friendly creditor through the device of a confessed judgment, has always been advanced by advocates of a bankrupt law as in itself a sufficient reason for the enactment of such a law. The change from a confessed judgment to a recovered judgment is but a step.

The fact that the specific question now raised has never before been definitely ruled is accounted for, on the one hand, by the assertion that no creditors before these petitioners have ever thought the question worth raising, and, on the other, by the conflicting assertion that no debtor has before thought that such a device as that here resorted to would be effective. It has, of course, been frequently ruled that the mere confession of a judgment without an accompanying execution is not a cause of bankruptcy within the meaning of clause 3. This is because of the very terms of that clause. It has indeed, with the present acquiescence of the petitioning creditors, been so ruled in this very case. In re Irish (D. C.) 228 Fed. 573.

All considerations arising under clause 3 have been laid at rest for us by the ruling in Citizens' Bank v. Ravenna Bank, 234 U. S. 360, 34 Sup. Ct. 806, 58 L. Ed. 1352, in which the conflicting views of policy which were settled by Congress are most clearly set forth. It is manifest, however, that the ruling in that case was confined to the quoted section of the act, and leaves untouched (otherwise than by implication) what constitutes a cause of bankruptcy under either clause 1 or clause 2. In order to bring the discussion down to the specific question now raised, it may be observed that the acts of Congress enumerate five distinct separate and different causes of bankruptcy. It may therefore be fairly assumed that Congress had in mind five different things which an alleged bankrupt might have done. Those designated as 4 and 5 we may dismiss as not here involved. The first condemns as a cause of bankruptcy the actual fraud of an insolvent debtor who attempts to put his property beyond the reach of his creditors by any conveyance, transfer, concealment, or removal, or by permitting such concealment or removal by others. The second visits a like condemnation upon the unlawful act of transferring property with the intent to prefer a creditor, although the debt be an honest one and there is no fraud in fact. The third condemnation is aimed at the act (otherwise lawful) of permitting a creditor to secure a judgment and proceed to a sale, coupled with the further negative act of not having prevented such creditor from procuring a preference. It will be observed that the thing which is declared to be a cause of bankruptcy is again one which may come about, not only without any intent on the part of the

debtor to either commit actual fraud or to permit an unlawful preference, but may be something which he is powerless to prevent.

This brings us to the real broad question now presented of whether there may be another thing done by an insolvent, which Congress has not made a cause of bankruptcy, or whether this is included in clauses 1 or 2, to wit, confessing or permitting a judgment with the actual intent to defraud creditors, or with the unlawful intent to prefer a creditor through having the judgment ripen into a transfer of property.

It may be assumed that Congress meant the bankruptcy laws to embrace all proper causes of bankruptcy, and, further, that it had in mind the device of entering judgments in order to defraud creditors or to give a preference, and also the practice of debtors who were struggling against insolvency to resort to confessed judgments as an honest means of raising money, as well as the possibility that a judgment might be entered against such a debtor by an uneasy creditor.

All these considerations constitute the balancing of advantages and disadvantages by Congress before declaring its will, to which reference is made in the opinion in the Citizens' Bank v. Ravenna Bank Case. That of which we are in search is this declared will. The thought is readily grasped that it was the purpose of Congress to include all such fraudulent and unlawful judgments in clauses 1 and 2. The thought is as easily grasped that Congress did not mean to interfere with needy or unfortunate debtors against whom judgments not followed by executions might be entered, and that they left this means of avoiding bankruptcy open to them, notwithstanding the use of such judgments might be abused by debtors actuated by a fraudulent or unlawful purpose.

A review of the authorities which the industry of counsel has brought to our attention may not be out of place, even at the cost of lengthening an already overlong opinion.

We pass the case of Wilson v. Bank, 84 U. S. (17 Wall.) 473, 21 L. Ed. 723, with the comment that it was ruled upon the question of the sufficiency of the evidence to support a finding of unlawful intent in a proceeding to avoid an alleged preference. The phrases quoted by counsel for the alleged bankrupt merely voice the two thoughts that there is nothing wrong in a debtor not resisting the collection of a just debt, nor can any inference of fraud be drawn from the mere fact that he interposed no defense to such an action.

Sleek v. Turner, 76 Pa. 142, and Louchheim v. Henzey, 86 Pa. 350, are to the same effect that "mere passive nonresistance of the defendant to the recovery of a judgment" for an honest debt will not justify (of itself) an inference of actual fraud or unlawful intent.

In considering the language of an opinion, we cannot be too often reminded that it must be read in the light of the subject-matter to which it relates. Some provisions of the acts of Congress discussed deal with the actual intent and purpose of the debtor or creditor, others denounce a particular act as unlawful because against the declared policy of the law, irrespective of the intent of the parties, or the otherwise innocent character of the act. The importance of this distinction is pointed out in the majority opinion in Wilson v. Nelson, 183 U.

S. 191, 22 Sup. Ct. 74, 46 L. Ed. 147, wherein it is held that intent enters into clauses 1 and 2, but has no place in clause 3, which deals wholly with results.

It may be further observed that the broad question with which we are now dealing does not concern itself with the lexical meaning of the words employed, because Congress has carefully defined the sense in which the words are used. Nor is more than very general aid afforded by adjudged cases dealing with a different state of facts.

Pirie v. Chicago Co., 182 U. S. 438, 21 Sup. Ct. 906, 45 L. Ed. 1171, for instance, merely rules that payment of moneys is a transfer of property within the meaning of the preference provisions of the act.

In the Nusbaum Case (D. C.) 18 Am. Bankr. Rep. 598, 152 Fed. 835, there was both a judgment and an execution sale. These were held to be a transfer within the meaning of the act, and to constitute a cause of bankruptcy under clause 1, and also clause 2, as well as clause 3, there being also present the actual intent to defraud and to prefer.

The Tupper Case (D. C.) 20 Am. Bankr. Rep. 824, 163 Fed. 766, is of value to us in the respect of the expression of the opinion that the omission of an averment of intent to defraud prevented the judgment there operating as a cause of bankruptcy under clause 1, and because of the implication that if such intent had been averred, a cause of bankruptcy would have been set forth.

In re Truitt (D. C.) 29 Am. Bankr. Rep. 570, 203 Fed. 550, approaches more closely to a ruling of the question before us. It rules the confession of a judgment to have been a transfer of the real estate of the defendant within the meaning of the bankruptcy law, and the averment of this fact, together with the averment of an intent to prefer, to have been the setting forth of a cause of bankruptcy under clause 2. There is involved as an essential ingredient the positive act of the debtor in the procurement of the judgment. The ruling under the facts there present covers a confessed judgment, but not an adverse one, and because of some expressions in the opinion carries the implication that the ruling would not apply to any other than confessed judgments.

Another case (without the implication) to the same effect is supplied by In re Musgrove Mining Co. (D. C.) 37 Am. Bankr. Rep. 628, 234 Fed. 99 (November, 1916, advance sheets). Judgments there had been confessed, but no executions had issued. It was conceded that no cause of bankruptcy under clause 3 existed. The judgments, however, were held to be transfers under clause 2, the averment appearing of an intent to prefer.

The trend of judicial opinion is therefore with the petitioners upon the main proposition advanced by them that a lien upon real estate, through which a sale can be effected, is a transfer within the meaning of clauses 1 and 2. We by no means regard the question as free from doubt, nor have we found the reasoning upon which the rulings were based to be in all respects convincing. They have, however, been made, and have so far been uniform. It seems, therefore, to us to be

the wiser course to follow them until some commanding voice directs otherwise.

The ruling now made may properly be said to be an advance upon those cited, as in a sense it is. The space between the two classes of cases is, we think, well bridged by the averments of the petition. The act is directly charged to be the act of the alleged bankrupt. It is (according to the authorities quoted) a transfer. This transfer is averred to have been the act of the defendant in the judgment. We see in this respect no difference between the case of one debtor who, in order to defraud his creditors, appends his name to a judgment note upon which judgment is entered by the prothonotary and another who, in furtherance of a like fraudulent purpose, appends his signature to a plain promissory note, upon which is brought an action in which judgment is likewise recovered. The acts differ, of course, in form, but in intent and purpose and final results they are the same. The intent may be better concealed, and therefore more difficult to prove, in the one case than in the other, but we are dealing now with what the petitioners have averred, not with what they will be able to prove, and the act here is averred to have been the affirmative act of the defendant as positively as it could have been had the judgment been confessed. To hold there is no difference between a judgment and a transfer, if each was for an unlawful purpose, and yet balk at ignoring the difference in the mere form of the judgment, savors too much of straining at gnats while swallowing camels.

The motion to dismiss is denied.

In re EASTMAN OIL CO.

(District Court, S. D. Georgia. October 30, 1916.)

1. CORPORATIONS ⊜432(3)—OBLIGATIONS—VALIDITY.

While there is a presumption that a note executed in the name of a corporation by its president, payable to himself as an individual, was not issued for corporate purposes and with lawful authority, the note is not absolutely void, and the presumption of validity can be rebutted, and the note shown to be the obligation of the corporation, by proof of express or implied authority, or by a showing of ratification or estoppel on the part of the corporation.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1728, 1743, 1762; Dec. Dig. ⊜432(3).]

2. CORPORATIONS ⊜414(2)—NOTES—AUTHORITY—IMPLIED AUTHORITY.

Several years before bankruptcy, at a meeting of the stockholders at which the directors were present, a statement was submitted showing, among other liabilities, notes due the president. Thereafter the president continued his practice of making advances to the corporation, and as president executing notes payable to himself as an individual. The corporate by-laws gave the president and treasurer authority to sign such notes as might be necessary to procure funds for the expenses of the corporation, and resolutions of the directors were passed from time to time authorizing the president to borrow such funds as he might deem necessary. *Held* that, though the president was not given express authority to borrow money from himself, nevertheless, in view of the conduct of the

directors and stockholders of the corporation, the president had implied authority to borrow from himself and execute notes from the corporation payable to himself as an individual.

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

8. CORPORATIONS ⊂⊃426(7)—NOTES—EXECUTION—RATIFICATION.

In such case, as the funds borrowed from the president were used for the benefit of the corporation, the continuous course of conduct on the part of the stockholders and directors amounted to a complete ratification of the act of the president in borrowing from himself, and executing notes of the corporation payable to himself as an individual.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1702, 1703, 1713; Dec. Dig. ⊂⊃426(7).]

4. CORPORATIONS ⊂⊃425(3)—ACTS OF DIRECTORS AND STOCKHOLDERS—ESTOPPEL.

In such case, as the directors and stockholders knew of the loans and that the proceeds were used for corporate purposes, their acquiescence estopped the corporation from attacking the validity of the notes executed by the president, payable to himself; such notes at most not being illegal, but simply ultra vires.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1700; Dec. Dig. ⊂⊃425(3).]

5. CORPORATIONS ⊂⊃424—ESTOPPEL—CREDITORS.

In such case, as there was no fraud, creditors of the corporation were equally estopped to question the notes.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 1696; Dec. Dig. ⊂⊃424.]

In Bankruptcy. In the matter of the bankruptcy of the Eastman Oil Company. On petition by the trustee and creditors to review an order of the referee overruling objections to the claims of J. W. Brock. Order affirmed.

John R. L. Smith, of Macon, Ga., for petitioning creditors.
Hardeman, Jones, Park & Johnston, of Macon, Ga., for trustee.
Akerman, Akerman & McManus, of Macon, Ga., for bankrupt.
Bonham, Watkins & Allen, of Anderson, S. C., for claimant.

LAMBDIN, District Judge. This matter is before me upon the petition of the trustee of the Eastman Oil Company, bankrupt, and of certain of its creditors, for a review of the order granted by the referee overruling their objections to the claims of J. W. Brock, of Honea Path, S. C., and allowing said claims. The claims of Mr. Brock, aggregating $46,601.24, are all based on promissory notes held by him against the Eastman Oil Company, and signed "Eastman Oil Company, J. W. Brock, Pres. & Treas.," and payable "to the order of J. W. Brock." The trustee and the creditors objected to these claims on the grounds that it did not appear that said Brock was authorized by the board of directors to sign the notes; that said Brock, in making said notes payable to himself, was acting in behalf of the corporation and himself, and could not, therefore, make any valid and binding contract in behalf of the corporation; and that the act of said Brock in signing the notes as president and treas-

urer and making them payable to himself was without the scope of his authority.

It appears from the record that these notes cover a period of seven or eight years, beginning in 1907, and running through each of the succeeding years up to March 24, 1915, at which time a note for $581.33 was executed; the only other note in the year 1915 being given on January 19, 1915, which was for $5,000. Over $33,000 of these notes were given prior to the year 1914. The date of the adjudication was May 1, 1915.

The referee has filed a full and clear opinion in the matter, and has made certain findings of fact and conclusions of law therein, which the court, after a very thorough examination of the entire record, entirely approves. The referee finds that J. W. Brock furnished to the Eastman Oil Company the money represented by the notes in question, and that it was received by and used for the benefit of the bankrupt corporation; that the directors, as well as the stockholders, had full knowledge of the fact that Brock was himself furnishing this money; that the notes appeared among the liabilities of the company, and were carried in its recognized "bills payable" account, and were brought to the attention of the directors in the financial statements furnished personally by the president and by the audits which were made from time to time of the company's accounts; that the notes were practically all handled through the Citizens' Bank of Honea Path, S. C., of which Mr. L. A. Brock, the vice president of the bankrupt, was president, and Mr. P. W. Sullivan, a director of the bankrupt, the cashier; that with full knowledge that J. W. Brock was himself furnishing the money and executing notes to himself for same, purporting to be the notes of the corporation, the directors made no objection to the transactions; and that the trustee of the bankrupt had a complete audit made of the general accounts of the bankrupt from its organization to the date of its adjudication (which was available to the trustee and creditors objecting to the claims), and that no evidence had been submitted which in any way impeached any of the transactions between Mr. Brock and the bankrupt.

Counsel for the trustee and creditors, however, contend that the notes in question are not the acts of the company, and are therefore absolutely and conclusively void, as matter of law, and that Brock can base no claims on same; that the question of the good faith or the fairness of the transaction has nothing to do with the case; and that, if Mr. Brock has any claim against the corporation, he should base same upon open account for moneys advanced to the bankrupt, and not upon the notes in question. In other words, their contention, as to said notes, is in the nature of a plea of non est factum.

[1] The issue, therefore, is a narrow one. The Court of Appeals of the state of Georgia, in the case of Capital City Brick Company v. Jackson, in 2 Ga. App. 771, 59 S. E. 92, had a similar question before it. In that case the Georgia court held that—

"a note executed in the name of a corporation by its president, payable to himself as an individual, carried no presumption that it was issued for cor-

porate purposes and with lawful authority, but that, on the contrary, this fact raised the presumption that such note is not the auhorized act of the corporation."

The last headnote in the case is as follows:

"The presumption that the note sued on was not the authorized contract of the corporation, not having been overcome, but being confirmed by the evidence, the verdict should be set aside and a new trial granted."

The Court of Appeals of Georgia, in support of its position in this case, quoted extensively from the opinion of the Circuit Court of Appeals of the Eighth Circuit in the case of Park Hotel Company v. Fourth National Bank of St. Louis, 86 Fed. 742, 30 C. C. A. 409. In the body of the opinion of the court in the last-named case, at bottom of page 744, occurs the following language:

"To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract."

A careful reading of the opinions of the courts in the two cases mentioned, as well as the other cases cited by counsel for both sides, leads the court to conclude that a note executed as the one involved in this case is not absolutely and conclusively void, but only presumptively void, and this presumption may be rebutted, and the note shown to be the act and deed of the corporation, by proof of express or implied authority, or by showing ratification or estoppel on the part of the corporation. In other words, the note is only voidable, at the election of the corporation or its creditors; the presumption being that it is void, and the burden being on the holder to show that it is the valid obligation of the corporation. Similarly, and involving the same principle, it has been held by the Supreme Court of Georgia that a sale by an administrator of the property of his intestate to himself as an individual is not void, but merely voidable at the election of those who may be interested in the estate, and that this election must be made within a reasonable time. Smith v. Granberry, 39 Ga. 381, 99 Am. Dec. 464; Grubbs v. McGlawn, 39 Ga. 672. And what is a reasonable time in which to institute proceedings depends upon the peculiar facts of each case. Word v. Davis, 107 Ga. 783, 33 S. E. 691.

In the Jackson Case, cited above from the Georgia Court of Appeals, as well as in the case from the Circuit Court of Appeals of the Eighth Circuit, the holders of the notes in question in those cases were not able to overcome the presumption of want of authority on the part of the officers executing the notes, respectively; but, on the contrary, it was shown that the corporation whose name, in each instance, was signed to the note by such officer, was only an accommodation maker, and received no benefit whatever from the trans-

action, and this fact differentiates the two cases mentioned from the case at bar.

[2-5] From the findings of the referee, and from the evidence in the case, the court is of the opinion that the claimant has successfully carried the burden in this case. As early as June 9, 1908, at a meeting of the stockholders, at which the directors were also present, a statement was submitted, showing, among the liabilities of the corporation, "Notes due Citizens' Bank, $18,000.00; notes due J. W. Brock, $4,000.00;" and from that time to the bankruptcy of the company it is evident that the directors and stockholders knew of the loans made by Mr. Brock to his corporation, and that he was taking its notes to cover same. The by-laws of the corporation gave its president and treasurer authority to sign such notes as he might find necessary to procure funds for the expenses of the corporation, and resolutions of the directors were passed from time to time authorizing the president and treasurer to borrow for the use of the company such funds as he thought necessary. The president and treasurer was not, therefore, given express authority to borrow money from himself; but it was the common knowledge of the directors and stockholders all along that he was doing so, and no objection was ever made. I am clearly of the opinion that, by the conduct of the corporation and its officers and agents in this matter, an implied authority was given to Mr. Brock to borrow from himself and to execute notes from the corporation to himself for same; and, even if this were not the case, their continuous course of conduct in the matter would constitute a complete ratification of the act of Mr. Brock in the matter, and same, in connection with the fact that the money so advanced by Mr. Brock was used in meeting the expenses of the company, would and did work a complete estoppel on the corporation. And I am further of the opinion that whatever bound or estopped the corporation in this matter would, in the absence of fraud (and none has been proven in this case), be equally binding upon the creditors, and that they, in the absence of such fraud, cannot successfully make an attack upon a transaction which the corporation itself could not successfully attack. This principle is stated still more broadly in 7 Ruling Case Law, § 463, on page 483, where the following language is used:

"The rule that a director or other officer cannot act for the corporation in a matter in which he is interested is intended for the benefit of the corporation and its stockholders, who may, like an individual, elect to confirm a transaction which could have been repudiated, in which case the contract becomes fully binding on the corporation to the same extent as any other duly ratified contract entered into by an unauthorized agent. So the rule is for the benefit of the corporation and its stockholders, and does not extend to its creditors, in the absence of fraud, and when a disposition of the property of the corporation is assailed by its creditors, they are not clothed with the right of the corporation or of its stockholders to set it aside solely on the ground that it was entered into by representatives who had put themselves in a relation antagonistic to the interest of their principal."

In the case of Bensiek et al. v. Thomas et al. (decided by the Circuit Court of Appeals of the Eighth Circuit) 66 Fed. 104, 13 C. C. A. 457, it was held that although a loan was obtained in violation of the by-

laws of the corporation, and a deed of trust was made to secure same, yet the corporation, having received and used the money with the knowledge of the stockholders, was estopped to deny the authority of the directors to borrow it, and that—

"when an act done by a private corporation is not per se illegal, or malum prohibitum, but is simply ultra vires, and is not a matter of public concern, but merely affects the interests of the stockholders, the latter may so act as to deprive themselves of the right to challange its validity."

The foregoing principles are also fully established by the decisions of the Supreme Court of the United States. The first two headnotes to the opinion of the Supreme Court in the case of Twin-Lick Oil Company v. Marbury, 91 U. S. 587, 23 L. Ed. 328, are as follows:

"A director of a corporation is not prohibited from lending it moneys when they are needed for its benefit, and the transaction is open, and otherwise free from blame; nor is his subsequent purchase of its property at a fair public sale by a trustee, under a deed of trust executed to secure the payment of them, invalid.

"The right of a corporation to avoid the sale of its property by reason of the fiduciary relations of the purchaser must be exercised within a reasonable time after the facts connected therewith are made known, or can by due diligence be ascertained. As the courts have never prescribed any specific period as applicable to every case like the statute of limitations, the determination as to what constitutes a reasonable time in any particular case must be arrived at by a consideration of all its elements which affect that question."

In the case of Indianapolis Rolling Mill v. St. Louis, Ft. Scott & Wichita Railroad, 120 U. S. 256, at page 259, 7 Sup. Ct. 542, at page 544, 30 L. Ed. 639, Mr. Justice Miller used the following language:

"The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent required that if they had the right to disaffirm it they should do it promptly, and if, after a reasonable time, they did not so disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance, it came too late, as it was commenced some six months after they had knowledge of the release."

Similarly in the case of Railway Companies v. Keokuk & Hamilton Bridge Company, 131 U. S. 371, at page 381, 9 Sup. Ct. 770, at page 773, 33 L. Ed. 157, Mr. Justice Gray, speaking for the Supreme Court of the United States, used the following language:

"When the president of a corporation executes, in its behalf, and within the scope of its charter, a contract which requires the concurrence of the board of directors, and the board, knowing that he has done so, does not dissent within a reasonable time, it will be presumed to have ratified his act. Indianapolis Rolling Mill v. St. Louis, etc., Railroad, 120 U. S. 256 [7 Sup. Ct. 542, 30 L. Ed. 639]. And when a contract is made by any agent of a corporation in its behalf, and for a purpose authorized by its charter, and the corporation receives the benefit of the contract, without objection, it may be presumed to have authorized or ratified the contract of its agent. Bank of Columbia v. Patterson, 7 Cranch, 299 [3 L. Ed. 351]; Bank of United States v. Dandridge, 12 Wheat. 64 [6 L. Ed. 552]; Zabriskie v. Cleveland, etc., Railroad, 23 How. 381 [16 L. Ed. 488]; Gold Mining Company v. National Bank, 96 U. S. 640 [24 L. Ed. 648]; Pneumatic Gas Company v. Berry, 113 U. S. 322, 327 [5 Sup.

Ct. 525, 28 L. Ed. 1003]. This doctrine was clearly and strongly stated by Mr. Justice Story, delivering the judgment of this court, in each of the first two of the cases just cited."

The opinion of the Circuit Court of Appeals of the Fifth Circuit in the case of Augusta, T. & G. R. Co. et al. v. Kittel, 52 Fed. 63, 2 C. C. A. 615, is also in point. The first headnote in that case is as follows:

"When the president of a company chartered by the state of Florida for the construction of a railroad, under the authorization of the board of directors, mortgages the company's land, and the money, which is loaned in good faith, is used by the officers of the company for company purposes, and the validity of the transaction is recognized by payment of interest, and the transaction is brought to the notice of the directors, both actually and by recordation of the deeds, and there is no repudiation of the mortgage or denial of the authority of the president in the premises, a subsequent resolution by part of the directors, made long afterwards, disapproving and annulling the president's authority, does not invalidate the transaction or prevent a foreclosure, since the company tacitly ratified the act of the president, by not promptly disaffirming the transaction."

From the foregoing authorities, it is clear that no express and formal action on the part of the Eastman Oil Company or its board of directors was necessary, in order to make the notes in question binding upon the corporation or its creditors. The continuous course of conduct on the part of the corporation and its officers and agents, with respect to the loans made by Mr. Brock to his company, and the notes taken by him therefor, and their knowledge of such transactions, and the use of the money for the benefit of the corporation in carrying on its operations—all these things, under the principles above enunciated, make these notes valid obligations of the bankrupt, and the referee was right in overruling the objections to same.

In re VONHEE et al.

(District Court, W. D. Washington, N. D. December 18, 1916.)

No. 5699.

1. EXEMPTIONS ⇐63—EXCEPTION OF DEBTS FOR WAGES—CONSTITUTIONALITY OF STATUTE.

Rem. Code Wash. 1915, § 564, which provides that no property shall be exempt from execution for clerks', laborers', or mechanics' wages, is not in violation of Const. Wash. art. 19, § 1, which provides that "the Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

[Ed. Note.—For other cases, see Exemptions, Cent. Dig. § 89; Dec. Dig. ⇐63.]

2. HOMESTEAD ⇐98—EXCEPTIONS OF DEBTS FOR WAGES—CONSTRUCTION OF STATUTE.

Although the comprehensive words "no property" are used in the statute, it does not affect homestead exemptions; the provision having been enacted expressly as an amendment to a section relating to personal property only.

[Ed. Note.—For other cases, see Homestead, Cent. Dig. § 155; Dec. Dig. ⇐98.]

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3. BANKRUPTCY ⇐395(2)—EXEMPT PROPERTY—AUTHORITY OF BANKRUPTCY COURT.

While title to exempt property of a bankrupt does not pass to his trustee for the purpose of being administered as a part of his estate, all his property passes to the trustee for the purpose of having that claimed as exempt identified, appraised, and set apart, and the bankruptcy court has power to determine what property is exempt under the state law as against general creditors, after which its authority over it ceases.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 658; Dec. Dig. ⇐395(2).]

4. BANKRUPTCY ⇐396(1)—EXEMPTIONS—WAGES DUE BANKRUPT.

Rem. Code Wash. 1915, § 703, exempting from garnishment current wages of the head of a family to the amount of $100, is part of the exemption law of the state, and a bankrupt is entitled to its benefit.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 660, 662–665, 667; Dec. Dig. ⇐396(1).]

In Bankruptcy. In the matter of Alfonse Vonhee and Robert Hayes, copartners as Vonhee & Hayes, and Alfonse Vonhee and Louise Vonhee, husband and wife, bankrupts. On petition to review order of referee. Approved in part, and disapproved in part.

Coleman & Fogarty, of Everett, Wash., for bankrupts.
Frank D. Lewis, of Everett, Wash., for trustee.
Sherwood & Mansfield, of Everett, Wash., for excepting creditor.

NETERER, District Judge. The trustee set over to Alfonse Vonhee as exempt from the community property of himself and wife, wearing apparel, household goods, and utensils, one cow, fifteen chickens, two guns, two watches, and the homestead, and disallowed $88 current wages due the bankrupt. Exceptions were filed by the bankrupt and a creditor who had performed labor for the copartnership of Vonhee & Hayes, bankrupt, which had been reduced to judgment, and upon hearing the referee confirmed the report of the trustee as to the homestead, but reversed his order as to the wages due and personal property. Petitions for review are now presented by the bankrupt, alleging that no exception was taken by the creditor to the setting aside of the watches; that the creditor's claim is primarily against the copartnership; that the marital community is entitled to have said personal property set aside as exempt under section 563, Rem. & Bal. Code of Washington; that section 564, under which the creditor claims to subject the property to his claim, is repugnant to the Constitution of Washington, and that prior to the entry of the order the cow and the chickens had been used as food for the family of the bankrupt. Petitions for review are also presented by the trustee and the excepting creditor. The trustee contends that the wages are not exempt, as section 703, under which they are claimed, is not an exemption statute, but a part of the garnishment law. The excepting creditor contends that section 564 is constitutional, and that under its provisions all of the property can be subjected to his labor claim.

[1] The bankrupt has cited no authority in support of his conten-

tion that section 564, supra, is unconstitutional. Article 19, section 1, of the Constitution of Washington provides:

"The Legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families."

The bankrupt's contention that under this section it is mandatory upon the Legislature to set aside property as exempt and that it has no authority to subject property exempt as to general creditors to the payment of claims for wages, cannot be sustained. The amount and kind of property to be exempt from execution is purely a question of legislative policy. While the Supreme Court of Washington has not had this statute before it, the Supreme Court of the United States, in passing upon a Washington statute exempting the proceeds or avails of life insurance policies, which was attacked in Holden v. Stratton, 198 U. S. 202, at page 208, 25 Sup. Ct. 656, at page 657 (49 L. Ed. 1018), said:

"The fallacy which the proposition embodies consists in presupposing that because the Constitution of the state of Washington provides that the Legislature 'shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families,' thereby a limitation was imposed upon the general power of the Legislature to determine the amount and character of property which should be exempt. * * * To the contrary, in California, where a constitutional provision obtains identical with the one we are considering, * * * it has been decided that the character and amount of property which shall be exempt from execution is 'purely a question of legislative policy.' Spence v. Smith, 121 Cal. 536 [53 Pac. 653, 933, 66 Am. St. Rep. 62]."

[2] Nor can the contention of the excepting creditor that the words "no property," in section 564, include real as well as personal property, be sustained. That question has been settled by the state Supreme Court in Ervay v. Hill, 46 Wash. 457, at page 461, 90 Pac. 590, at page 592, in which the court said:

"But, in addition to this and waiving any question of the constitutionality of the amendatory act, it is apparent that the amendment does not in any way affect the law providing for the exemption of homesteads. An examination of the section amended shows that it has no reference to the subject of homestead exemptions, but is applicable only to exemptions of personal property. The legislative announcement is that section 5248a be amended, and while the comprehensive words 'no property' are used in the act, such words must be construed as referring only to the character of property described in the section amended. In this country exemptions are favored by the law, especially homestead exemptions; and it would be doing violence to the spirit of the law and to all well-recognized canons of construction to hold that the repeal of the provisions of a specified section repealed by implication other sections of the same chapter, the subject-matter of which was not embraced in the section amended."

Ballinger's Ann. Codes & St. § 5248a, is section 564, Rem. & Bal. Code.

Homestead exemptions are in no wise affected by the limitation imposed by section 564.

[3] The contention of the bankrupts that the bankruptcy court takes no title to the exempt property and receives it merely for the purpose of setting aside the exemptions, and that it is not within the power of the bankruptcy court to determine the validity, extent, or

priority of liens upon exempt property has been disposed of by the adjudication of the federal and Supreme Court.

In Re Grimes, 96 Fed. 529, the court at page 534, said:

"The title to exempt property does not pass to the trustee; it is vested in the bankrupt. Bankr. Act July 1, 1898, c. 541, § 70a, 30 Stat. 565 (Comp. St. 1913, § 9654). He may sell it or mortgage it. But, while this is true, property of the second class cannot be considered exempt property until it is selected and set apart. * * * It must necessarily pass to the trustee, who has temporary dominion over it until the exemptions are made. His title may be termed a defeasible title. When the exemptions are formally set apart by the trustee, and affirmed by the court, the title of the bankrupts then becomes superior to that of the trustee and absolute. After the exempt property has been designated and set apart to the bankrupts by the trustee, it has been administered, and has passed out of the possession and control of the bankruptcy court. The trustee has no further concern with it, nor has the court any jurisdiction to defend such property from adverse claims or liens that may or may not be distinguished by the bankruptcy proceedings. It will not entertain a proceeding to enforce a lien upon such property. * * * Such a lien may be enforceable in a state court without regard to any pending proceeding in bankruptcy."

In Re Hatch, 102 Fed. 280, the court, after bankrupt's exemptions had been set apart and delivered to him, refused, on the petition of a creditor holding a chattel mortgage on the property, to order the bankrupt to restore the property to the trustee to be sold for the benefit of the mortgagee.

In Re Durham, 104 Fed. 231, at page 233, the court said:

"* * * Where the property is claimed as exempt, no title passes to the trustee, and he is only entitled to the possession thereof for the purpose of ascertaining, by proper appraisement, whether the value of the property does not exceed that allowed as exempt under the laws of the state. As soon as that is ascertained, it is the duty of the trustee to deliver it to the bankrupt."

In Woodruff v. Cheeves, 105 Fed. 601, at page 606, 44 C. C. A. 631, at page 636, in disposing of a petition asking that the court withhold the bankrupt's discharge after his exemptions had been set apart, and take possession of the exempt property and subject it to sale in satisfaction of bankrupt's notes which the petitioners held, and in which the right of exemption had been waived, the court said:

"It seems clear to us that this language of the statute leaves no room for argument to show that the exempt property constitutes no part of the estate in bankruptcy subject to administration by the trustee or by the court of bankruptcy."

In Re Little, 110 Fed. 621, the court in denying the petition filed by a mortgagee after the property had been set apart as exempt, to have the validity of its mortgage determined by the bankruptcy court, at page 226, said:

"By the action of the trustee, confirmed by the referee, the exemptions claimed by the bankrupt were allowed, and the particular property was set apart to him, and passed into his possession and control. When thus separated from the general estate, the exempt property ceased to be in the possession of the trustee or of the court, and under the provisions of section 70 the trustee took no title thereto. Under these circumstances the referee rightly ruled that the court of bankruptcy would not entertain jurisdiction over the exempt property at the request of the claimant bank."

In Re Jackson, 116 Fed. 46, the court said:

"The bankrupt act has expressly excluded from the control of the District Courts such property as the bankrupt may claim by virtue of the exemption laws of the respective states. We have nothing further to do with it than to see that the trustee sets it aside, and to dispose of such questions as may arise incident to that process. After the property exempted has been separated and delivered, its subsequent fate does not concern us. If some one of the bankrupt's creditors has already obtained, or should afterwards obtain, a lien upon it, it is not for this court to interfere with his right. * * * Whether he is to be allowed to appropriate the property at all, or exclusively, or in common with other execution creditors, are questions for the courts of the state."

In Re Culwell, 165 Fed. 828, Judge Hunt, at page 829, said:

"The authority to control property in order to set it aside, if exempt, and to exclude it from the assets of the bankrupt estate, which are to be administered upon, does not in any way extend authority to the trustee to administer upon exempt property as though it were an asset of the estate."

That exempt property constitutes no part of the assets of a bankrupt estate is conclusively established by Lockwood v. Exchange Bank, 190 U. S. 294, at page 299, 23 Sup. Ct. 751, at page 753 (47 L. Ed. 1061) in which the court said:

"We think that the terms of the Bankruptcy Act of 1898, above set out, as clearly evidence the intention of Congress that the title to the property of a bankrupt generally exempted by state laws should remain in the bankrupt and not pass to his representative in bankruptcy. * * * The fact that the act of 1898 confers upon the court of bankruptcy authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language declares shall not pass from the bankrupt or become part of the bankruptcy assets. In other words, it is made as clear as anything can be, that such exempted property constitutes no part of the assets in bankruptcy. The agreement of the bankrupt in any particular case to waive the right to the exemption makes no difference. He may owe other debts in regard to which no such agreement has been made. But whether so or not it is not for the bankrupt court to inquire. The exemption is created by the state law, and the assignee acquires no title to the exempt property. If the creditor has a claim against it, he must prosecute that claim in a court which has jurisdiction over the property, which the bankruptcy court has not."

The parties sought to have the bankruptcy court enforce against the bankrupt's property which had been set aside as exempt, the claims of creditors not having a judgment or other lien, whose obligations to pay contained a written waiver of the homestead exemption. The court said that in such cases "there would exist in favor of such creditor an equity entitling him to a reasonable postponement of the discharge of the bankrupt, in order to allow the institution in the state court of such proceedings as might be necessary to make effective the rights possessed by the creditor." Lockwood v. Exchange Bank, supra.

In C., B. & Q. Rd. v. Hall, 229 U. S. 511, at page 515, 33 Sup. Ct. 885, at page 886 (57 L. Ed. 1306) the Supreme Court said:

"The title to exempt property does not vest in the trustee and cannot be administered by him for the benefit of the creditors. But it can 'pass to the trustee as a part of the estate of the bankrupt' for the purposes named else-

where in the statute, included in which is the duty to segregate, identify, and appraise what is claimed to be exempt. He must make a report 'of the articles set off to the bankrupt, with the estimated value of each article' and creditors have 20 days in which to except to the trustee's report. Section 47(11) and General Orders in Bankruptcy 17 [89 Fed. viii, 32 C. C. A. viii]. In other words, the property is not automatically exempted but must 'pass to the trustee as a part of the estate'—not to be administered for the benefit of creditors, but to enable him to perform the duties incident to setting apart to the bankrupt what, after a hearing, may be found to be exempt."

In Re Wishnefsky, 181 Fed. 896, the court would not direct the trustee to retake possession of exempt property for the benefit of a creditor with a lien for the unpaid purchase price of such property, and to the same effect is the holding of the court in Re Seydel, 118 Fed. 207, at page 208, in which the court said:

"As property which is set apart and delivered to the bankrupt as exempt, of which, being exempt, is never taken possession of by the trustee, is not within the actual possession and control of the court, and as the title thereto does not vest in the trustee (section 70, Bankr. Act), it is difficult to see upon what ground it can be claimed that the trustee can assert any title in, or right to the possession of, the property in question. * * * A creditor who claims that he has a lien upon specific property, or a right to subject the same to the payment of his particular claim, from which liability it is not freed by the exemption laws of the state, cannot rightfully demand that the trustee should undertake to get possession of the property, and to sell it for the benefit of the one creditor only."

To the same effect is In re Soper, 173 Fed. 116.

In Re Maxson, 170 Fed. 356, the court set aside a homestead, though liable for debts contracted prior to its acquisition, and relegated the parties to the state court to determine whether the specific debts were liens upon the property. To the same effect is In re Ingram, 125 Fed. 913, 60 C. C. A. 618.

The court, in Re Brumbaugh, 128 Fed. 971, held the only question to be determined by the bankruptcy court is whether the property is exempt under the laws of the state as against general creditors, and the court would not determine any special claim or lien of an individual creditor. At page 972 the court said:

"If, therefore, the cause of action on which judgment was rendered against the bankrupt was in its nature tortious, the exemption could not be successfully claimed or retained by him if execution were issued upon it. But that does not determine the question whether it is now to be allowed to him. This was considered and conclusively disposed of in the case of Lockwood v. Exchange Bank, 190 U. S. 294 [23 Sup. Ct. 751, 47 L. Ed. 1061], * * * where it was held that property set apart to a bankrupt under his claim to exemption forms no part of his estate in bankruptcy, and that as a result the court has no jurisdiction to administer it or enforce against it the rights of creditors having special claims upon it, by waiver or otherwise, under the state law. It affords no ground, therefore, for opposing the bankrupt's exemption in the present instance that he would not be able to maintain a claim for it against the judgment of Miss Keim. If that be legally true of it, she has simply to issue execution and seize the property set apart to him, and the state courts will then determine her rights. But they must be worked out there, and not here; the only question which now concerns us being whether the bankrupt, as against general creditors, is entitled to his exemption, as to which there can be no doubt."

In Re Yungbluth, 220 Fed. 110, 136 C. C. A. 202, the Circuit Court of Appeals of this Circuit held that a court of bankruptcy is without jurisdiction to order the sale for any purpose of property which it has set apart to a bankrupt as his homestead exemption.

The only question for the court to determine is whether, as against general creditors, the bankrupt's property is exempt. If it is exempt as against general creditors, the control exercised by the bankruptcy court is limited. Whether the property is subject to equities, liens or judgments of individual or special creditors is not the concern of the bankruptcy court, and where special claims are made which take away the right of exemption as to them, the state court is the proper forum in which to proceed for the enforcement of such claims. It follows, therefore, that the referee erred in his conclusions with relation to the claim of Mr. Card for laborer's wages due from the copartnership Vonhee & Hayes, so far as bankrupt's personal property is concerned. I think the facts in this case can be distinguished from the facts in Re Phillips (D. C.) 209 Fed. 490, and whether they can or not, the cases cited are controlling.

[4] The referee's conclusion is right with relation to the current wages, $88, due the bankrupt. The contention of the trustee that section 703, Remington & Ballinger's Code of Washington, in pursuance of which this was set aside is no part of the exemption law, is not approved by the Supreme Court of Washington, in Creditors' Collection Ass'n v. Bisbee, 80 Wash. 358, 141 Pac. 886, and the same conclusion was arrived at by Judge Hanford in Re Holden et al., 127 Fed. 980, some time prior to the decision of the Washington court.

An order may be presented setting over to the bankrupt, the homestead, the personal property set apart by the trustee, and the $88, current wages. If any creditor has a specific claim upon any of this property, it must be enforced in the state court.

UNITED STATES v. PHILADELPHIA & R. RY. CO. (four cases).

(District Court, E. D. Pennsylvania. December 28, 1916.)

Nos. 4280, 4322, 4328, 4330.

CARRIERS ⊂⊃37—TRANSPORTATION OF LIVE STOCK—THIRTY-SIX HOUR LAW—"KNOWINGLY AND WILLFULLY."

Under the law (Act June 29, 1906, c. 3594, 34 Stat. 607 [Comp. St. 1913, §§ 8651–8654]), prohibiting carriers of animals confining them for more than 36 hours without unloading for rest, water, and feeding, unless prevented by storm or other accidental or unavoidable causes which cannot be anticipated or avoided by exercise of due diligence and foresight, and declaring a penalty for a carrier who "knowingly and willfully" fails to comply with such provision, while every confinement for more than such period is prohibited unless it appears with reasonable certainty to come within the exceptions, the penalty is not imposed unless it clearly appears

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

the carrier acted with knowledge that the thing prohibited was being done, but if it had this knowledge, it was acting willfully.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 95, 927; Dec. Dig. ⊂⊃37.

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

Actions by the United States against the Philadelphia & Reading Railway Company, for penalty for confinement of cattle in violation of Thirty-Six Hour Law. Trial by the court. Judgment for plaintiff.

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. There were in all six actions of the same general nature against the same defendant growing out of, in results, similar transactions. As bearing upon the liability of the defendant the circumstances differ. The cases were, however, all tried together, and can be disposed of in one opinion indicating the conclusions reached in each case. This will save reiteration of views and repetition of statements of what are in legal effect the same things. Trial by jury was by agreement dispensed with, and the cases tried by the court without the intervention of a jury under the provisions of the statutes. Two of the cases have been dropped, leaving four to be now decided.

A general view from the standpoint of the evil, the scope and purpose of the remedy proposed, and the specific remedy provided will be of possible assistance in construing the acts of Congress under consideration. The evil was the economic and ethical ill flowing as a consequence from food cattle being confined an undue length of time without food or water. What was proposed was to prevent the economic loss and cruelty to dumb animals involved in such practices. Aside from all constitutional considerations, these laws are police regulations. The general aim of the remedy was to divert the influence of the selfish, commercial interests of those concerned with cattle shipments from operating toward bringing about these evil consequences and turn them so as to operate toward preventing the evils. The primary duty of feeding and watering the cattle was that of the owner. More than that the shipper named the place of destination, and knew, or could learn, the length of time required to reach it. He could not, however, control the shipment after it had been delivered to the carrier, who alone could provide a place for unloading, feeding, and watering if and when required. This fact made the carrier a possible necessary actor. It was, in consequence, necessary to reach both carrier and shipper, and this was proposed to be accomplished by reaching the carrier directly and the shipper indirectly through the carrier. If not a necessary, this was, at least, a convenient, way of reaching both. This brought into the act the provision that the carrier was made responsible for the performance of the duty, with the right of recouping the expense from the shipper. The remedy ap-

plied presents these essential features: A definition of what was required and what forbidden; a recognition of exceptions to the general rule and an enumeration of them; and the imposition of a penalty upon all violators of the law, and a description of those who were to be deemed violators.

The first definition lends itself to easy and accurate statement. The thought of what was within the second, and who within the third, is not easily expressed so as to be always satisfactorily definite. This is because the character of the act and the culpability of the actor varied with the circumstances, and, in consequence, could only be defined in terms more or less general. We get, however, these three thoughts: Confinement, etc., for more than 36 hours is absolutely forbidden. Such confinements, when due to storms or accidents, which could not reasonably be expected to be anticipated, are excepted. The carrier is not to be visited with the penalty unless it "knowingly and willfully" violated the statute. Certain other thoughts follow these. What may be termed the "corpus delicti" appears with the fact of confinement for the prohibited time, unless it also appears, or is shown by way of defense, that it was the result of storm or the kind of accident defined. The guilt of the defendant is not shown by the mere fact that the forbidden thing has been done by it, but by the character of its participation in the thing done. The things which take away criminality from the act done and bring it within the exceptions and the things which relieve the actor from guilty participation in the act done may sometimes blend into each other, but are, if the expression is allowable, distinct as long as they can be distinguished. In each of these cases the cattle had been kept confined. In some instances this can be and is found from the evidence to have been due to storms, and in other instances to wrecks and other casualties, which carry with them the idea of what is practically (although not always in strictness) vis major; in other words, that part of the thought of accident which distinguishes between what happens and what is intentionally or even voluntarily done, but not that part which excludes the idea of fault. In other instances the confinement resulted, not from storms or accidents of the kind attempted to be defined, but from delays which were unanticipated and unavoidable only in the sense that they were caused by conditions of congestion of traffic or otherwise which practically prevented the cattle trains from sooner reaching their destination or the cattle being unloaded.

The defense set up has been presented in a spirit of absolute candor and frankness, and with every effort to get the exact fact situation before the court. It, therefore, merits and should receive as frank a consideration. The thought of it is (as we grasp it) that, excusing conditions of the kind mentioned, whether they bring the thing done within the exceptions or not, do bring into the case such exculpating facts as that the actor cannot be found to have acted "knowingly and willfully." There is this further basis for the distinction made. The definition of the prohibited thing has two purposes. One is to found a duty upon the carrier to unload, feed, and water, and to confer a right to charge the expense to the shipper. The other

is to found the imposition of a penalty upon the carrier. Mere lapse of time gives the right. All delays not within the exceptions create the duty. The penalty, however, is only imposed when the delay is so inexcusable as to justify a finding that it was willful.

The contrast of the view of counsel for the United States with this view of the defendant presents the point in controversy. Justice cannot be done to either view by thus compressing the argument into a sentence, but it will serve the purpose of presenting the contrasting views. Against the view thus expressed is this other. Congress had in mind to define the corpus delicti. This is any confinement not due to storms or accidents, etc. Congress further had in mind to impose a penalty upon the carrier whenever the forbidden thing was done, if the carrier had knowledge it was being done, and that this knowledge carries with it the idea of willfulness. The same thought may be presented in another way. Any defense to an action of this kind must rest upon one of two grounds. One is the absence of a corpus delicti. In this enters the fact of storms or accidents. If such fact is present, the defendant is not liable because no offense has been established. The other is that the offense, although made out to exist and to have been committed by the defendant, was committed unwittingly. If the defendant did not have knowledge, it is not to be penalized, even though its ignorance was due to its own carelessness, and it was misled by the negligence of its own agents or servants.

To resummarize these defenses, they must rest upon the absence of the offense or the want of knowledge on the part of the defendant. The courts, in order to advance the remedy, will give the offense feature of the act a liberal construction, and while in construing the penal clause they will construe it strictly, they will not confuse the one with the other. The ab inconvenienti argument is vigorously pressed by each side, and the discussion pro and con need not be further followed.

Our conclusion is that the proper construction of the act must be found in a search for the will of Congress, and this is best disclosed by the policy which Congress meant to be followed, and that this policy is to place every confinement among those prohibited, unless it appears, with reasonable clearness, to come within the exceptions, and to refuse to impose the penalty unless it clearly appears the defendant acted with knowledge that the prohibited thing was being done, but if it had this knowledge, it was acting willfully within the meaning of the act of Congress. This we think to be the sense in which Congress employed the word, independently of whether "willful" is etymologically a compound of full and wile or full and will. This, we think, would be the conclusion reached if we were construing it without the aid of the adjudged cases. It is reached, however, because we think this meaning to be the one already found for us in United States v. Union Pacific, 169 Fed. 65, 94 C. C. A. 433, and United States v. Lehigh Valley, 204 Fed. 705, 123 C. C. A. 9. In construing this statute we have found the latter case to be most helpful.

Following the distinction attempted to be made, the cases in which the delay was due to storms, wrecks, or other accidents have been

withdrawn, and in the other cases where accident is not set up as a defense, we find the offense to have been committed knowingly and willfully by the defendant, and enter judgment in each case against the defendant, with costs, etc. The parties have leave to prepare and submit findings in accordance herewith in each case, together with such requests for findings as either may wish to submit, and exceptions are allowed to each as indicated.

STEVENSON v. HARRIS et al.

(District Court, S. D. New York. January 9, 1917.)

1. COPYRIGHTS ⊂⊃55—INFRINGEMENT—NOVEL AND PLAY—SIMILAR INCIDENTS.
The novel "Little Comrade" *held* not infringed by the play "Arms and the Girl," the theories thereof being distinctly different, though both are of the time and within the zone of the early part of the European War of 1914, and each has many spies, and in each is the incident of a pretended or forced marriage, and of a stolen or forged passport, and shadows are thrown on a screen; it not being enough for infringement of copyright that an incident here and there is used in a later production which was used in another relation and situation in the early production.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. § 52; Dec. Dig. ⊂⊃55.]

2. COPYRIGHTS ⊂⊃12—INFRINGEMENT—ORIGINALITY.
Where certain kinds of incidents must be found in many books and plays, originality, when dealing with incidents familiar in life or fiction, lies in the association and grouping of those incidents in such a manner that the work under consideration presents a new conception or a novel arrangement of events.

[Ed. Note.—For other cases, see Copyrights, Cent. Dig. §§ 14, 15; Dec. Dig. ⊂⊃12.]

Action by Burton E. Stevenson against William Harris, Jr., and others. On motion for a preliminary injunction. Motion denied.

Max D. Josephson, of New York City, for the motion.
Nathan Burkan, of New York City, opposed.

MAYER, District Judge. [1] On August 1, 1914, Germany declared war against Russia. Other events preceded and succeeded this declaration until as of midnight, August 4th, Great Britain declared war against Germany.

The world then knew that a conflict of extraordinary proportions was under way. Whatever else may have happened or may hereafter take place, it soon became evident that the war was to be a prolific source of literary and dramatic effort. Of course, the spy was much in evidence in the newspaper accounts of the late summer and early fall of 1914. Stage and story male spies are always very villainous persons. When they are humble men, they usually have very heavy eyebrows, a stoop or slouch, and a sinister look. When they are higher up in spydom, they are well groomed and have an erect bearing, but they must also have a sinister look. Female spies usually must

be handsome, or at least attractive. Sometimes they have flashing jewels, although occasionally a minor female spy, who, say, is the landlady of an inn, is permitted to be afflicted with embonpoint instead of jewels. This war added a new class of spies to fiction, and some say to real life. Persons supposed to have been kindly and inoffensive, it seems, are spies. Most of these, it appears, are in some way connected with inns. It is a sad revelation. Can it be that the kindly Teuton at the Hof in Berlin, who saw that your trunks reached America safely, was a French spy? Is it possible that the solicitous and delightful host at Dijon who recommended the juicy chateaubriand was a German spy? Is it true that the genial head of that charming half villa and half inn with the little garden covered with vines at Rudesheim, who claimed that his ancestors for more than a century had lived and died there, was in reality a Russian spy? And, finally, must we believe that the accomplished proprietor of that home-like abode in Biarritz where you are told you will be more comfortable than at the Palais, because with him you are a name and there you are a number, was not, in fact, loyal to France, but was a member of the German secret service? There was also a temporary vogue in a new kind of spy in the early days of the war.

There was a congress of surgeons at Vienna attended by professional men from all over the world. Among others were some young American physicians and surgeons who affected foreign trimmed beards and flowing ties, as do some American ex-patriates who are pleased to be taken for foreigners. Some of the latter had their wish gratified; some of the former have dispensed with the beards and wear ordinary scarves now, since they were examined and, in some instances, temporarily detained by the military and police authorities of the continental countries.

However, with the many incidents exploited by the press and those conjured up by the imagination of the author and the playwright, it has so happened that every well-regulated novel and war play must have a spy. Having acquired a spy, the novel and the play require that the spy must get somebody into trouble. Lost or stolen passports have long been a source of much difficulty and embarrassment. Then, of course, there must be a love affair, which, preferably, should end happily. American readers and audiences like manly American men who court danger for the sake of chivalry, and they like the courageous American girl who, by her quick wit, never fails to extricate everybody from complications after having herself created them; or there may be the charming foreign young woman whose patriotic devotion makes her insensible to danger and excites sympathy and admiration. Then, there must always be at least one gruff general who orders waiters about in a deep bass voice.

There are a few more canons to be observed. The hero must not be named John or James. He must have the kind of name which annoys him through life while, fortunately, the heroine must have a simple name of biblical or historic origin. If possible, there must be an inn, for that makes a good setting, and even war figures must

eat and, besides, there must be waiters or waitresses who hear or impart state and military secrets, as it is quite customary to discuss such matters in a loud voice in restaurants and inns. There are other well-known incidents and expedients, common to all, and as old, at least, as when Virgil sang of arms and the man.

With these well-known ingredients available to those who cared to use them, the plaintiff wrote a novel in the fall of 1914 called "Little Comrade," which was published in the January, 1915, issue of Munsey's magazine. The defendants Stewart and Baker likewise, in the fall of 1914, were collaborating in the writing of a comedy, and in the course of their collaboration it occurred to them that a seasonable play would be one based on the war, and they finally wrote the play which it is now sought to enjoin, to which they gave the title of "Arms and the Girl." The defendant Stewart is an actor and playwright, and defendant Baker is an author and dramatist. They each assert in their affidavits that they did not read "Little Comrade" and did not have any information in respect of the same.

It is not possible, within the limits of an opinion, to give the full details of the novel and the play; but a sufficient outline will disclose the essential features.

"Little Comrade": Bradford Stewart, an American surgeon, returning from the congress at Vienna, stops at the Koelner Hof at Aix la Chappelle (Aachen) on his way to Brussels. After being assigned to his room, he leaves the hotel to visit the Cathedral, and, on his return, he is told by the landlady of the Hof that the police came to question him and would return presently. The landlady is a French spy, although her waiter is a German spy. Stewart finds his baggage disarranged, and in one of the bags discovers a pair of satin ball slippers and other apparel of a woman. In due course, there is a knock on his door, and a young woman appears who immediately embraces him. The young woman turns out to be an Alsatian who is a French spy and who is seeking to reach France to deliver important information to the French officials. Stewart, through a desire for adventure, agrees to pose as the husband of the young woman, and she induces him to add to his passport the forged words "accompanied by his wife."

There are a good many adventures and difficulties from that time on, until finally the pair reaches Belgium and, in a fight between the Germans and the Belgians, in a German village, both are wounded. She is taken to a German hospital, her identity being unknown, and he escapes with the documents and finally delivers them to General Joffre and enters the French military service. Meanwhile, of course, Stewart has fallen in love with the girl, and there is a fair assumption that some time or another he will find her again and that the romance will end satisfactorily, although whether he ultimately discovers where she is, is left to speculation.

In the course of their plans to leave the inn at Aachen, their shadows are thrown on the window of the room in the inn, but that is a mere incident which has no relation to the plot or fundamental theory of the story. The tale is well written and affords pleasant reading, its

central thought being the complications which necessarily result from Stewart pretending to be the husband of the girl who has been thrown in his path in an unexpected way so far as he is concerned, but in a manner carefully planned by the girl spy (who is suspected by the German authorities) and her associates, in order to enable her to reach France.

The unexpected acquisition of a wife, it seems, is not new in novel writing, and it is enough to refer to the story of Richard Henry Savage called "My Official Wife," published in 1891, which was later dramatized. That story, briefly stated, concerns an American who becomes possessed, for the time being, of a wife in the form of a Russian nihilist, and who, as a result, has quite a troublesome time. In that story the nihilist has planned to attach herself to the American for the purpose of carrying out her designs in Russia, and he is the innocent victim of the situation thus carefully planned.

In "Arms and the Girl," Wilfred Ferrers, a young American mining engineer, is stopping at a small hotel in Beaupre, Belgium. Ruth Sherwood, an American girl traveling with her aunt and uncle, has become separated from them and goes to the same inn. Olga Karnovitch, a Russian woman spy, who has been a guest at the hotel, is apprehensive of the advance of the German army. She exchanges passports with Ruth without the latter's knowledge and escapes in Ferrers' motorcar. When the Germans arrive, the General is suspicious that Ferrers is a spy and an accomplice of Olga. Having discovered that Ruth's passport has been substituted for the passport of the Russian woman, Ferrers advises Ruth of that fact and destroys the Russian passport. Thereupon Ferrers and Ruth are arrested by the German officers, and Ferrers is accused of being a spy. Ruth, in order to save Ferrers, claims to be his fiancé and the German General, to test the truth of the story, orders that the Burgomaster of the town marry Ferrers and Ruth at once. That being done, the curtain falls on act I.

It turns out that Ruth is engaged to an inconsequential young man named Martin, who is trying to reach her by motorcar, but is held up by the German occupation. The General orders the newly made Mr. and Mrs. Ferrers to their room, and when Martin arrives he is passed off by Ruth and Ferrers as their chauffeur, much to his disgust and bewilderment. He is considerably annoyed at discovering that his fiancé has a newly found husband, and the problem then is how to make it appear to the German officers that Ruth and Ferrers are occupying the same room, when in point of fact, as agreed with Martin, they are not. It is then that the waitress in the hotel enters Ruth's room dressed as Ferrers. The room is lighted, their shadows are shown upon the curtain, and the officers in the courtyard are deceived by the shadows into believing that the two are Ferrers and Ruth and thus are satisfied that the story told to them was true. Ferrers, disguised as the landlady, passes the sentry at the courtyard gate and escapes. End of act II.

In the third and last act, it seems that Ferrers was injured in a street fight between the Belgians and the German soldiers, and there-

fore returns to the inn, as was perfectly certain he would, in view of the fact that he has fallen in love with Ruth. Everything comes out all right, for Martin is dismissed, and Ferrers and Ruth, having already been married by the Burgomaster, agree to make the status permanent.

Of course, the incidents in both the novel and the play take place at the beginning of the war, and, combined, they have enough spys to have discovered all of the secrets of Europe. The theory of the play is distinctly different from that of the novel. In the play there is mixed with the romance a considerable amount of polite comedy revolving around the complication created by the military-made marriage, and the idea is: How an American girl and an American man can escape and ultimately reach America? In the novel the foundation purpose is the reaching of the French officials by a French spy.

In view of the plot in "My Official Wife," there is no novelty in using as an incident, or as a part of a plot, the idea of an unexpected marriage such as is disclosed either in the novel or in the play, and there is certainly no novelty in a stolen or forged passport. The only other similarity is the throwing of the shadows on the screen, but that is a very old device which has been used a number of times, and it is sufficient to refer to "The Professor's Love Story" played by the accomplished English actor, E. S. Willard, in New York in December, 1894, and, curiously enough, the defendant Stewart is now acting in a revival of this very play. Stewart says he took the idea of the courtyard of the inn, which is the setting of "Arms and the Girl," from the courtyard at the Hotel du Savage in Calais; but he need not be concerned because he has adopted such a setting, for there are a thousand courtyards on the Continent of the same type as that at the Hotel du Savage and some a good deal more attractive.

[2] There is really no merit in this effort to enjoin the production of the play written by defendants Stewart and Baker and now being produced by defendant Harris. Of necessity, certain kinds of incidents must be found in many books and plays, and originality, when dealing with incidents familiar in life or fiction, lies in the association and grouping of those incidents in such a manner that the work under consideration presents a new conception or a novel arrangement of events.

It will never do to hold that, because an incident here or there is used in the later production which was used in another relation and situation in the former copyrighted book or play, therefore the later production infringes the copyright of the former.

It is rarely difficult to determine when there is an infringement, and, when such occurs, the courts are alert to protect the copyright against disingenuous efforts to destroy its value. On the other hand, the courts are equally alert to protect authors and managers against untenable attacks.

This motion could readily be disposed of on the ground that the plaintiff has not made that clear and convincing showing which is required in this circuit in order to justify the granting of an order for a preliminary injunction; but I prefer to place my conclusion on the

broader ground, and to state that, in my opinion, I am satisfied affirmatively that the defendants do not infringe. "Little Comrade" and "Arms and the Girl" each has its place and, as the one is an agreeable novel, and the other an entertaining play, they will doubtless afford the opportunity to many to pass a pleasant evening. In any event, "Arms and the Girl" can proceed on its way with its delightful heroine and its manly hero, its standard spy, its good-hearted gruff general, and all the rest, free from fear of a court order and concerned only with the net result after the box office receipts shall have been counted.

Motion denied.

In re ORDER OF SPARTA.

(District Court, E. D. Pennsylvania. December 26, 1916.)

No. 5933.

1. BANKRUPTCY ⟸70—INSOLVENCY PROCEEDINGS—"COMPANY."

An unincorporated organization to promote fraternity among its members and provide mutual aid and protection through the payment of death benefits is an unincorporated company within the provision of Bankruptcy Act July 1, 1898, c. 541, § 4, 30 Stat. 547, as amended by Act June 25, 1910, c. 412, § 4, 36 Stat. 839 (Comp. St. 1913, § 9588) that any unincorporated company may be adjudged a bankrupt; "company" not being limited to a trading or commercial body.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⟸70.

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

2. BANKRUPTCY ⟸100(2)—INVOLUNTARY PROCEEDINGS—OPENING ADJUDICATION—QUESTIONS PRESENTED.

Where a petition in involuntary bankruptcy proceedings charged an act of bankruptcy, and there had been an adjudication, the only way to question the existence of an act of bankruptcy is by a motion to open the adjudication and permit that defense to be made; it cannot be considered on a motion to open the adjudication and dismiss the petition.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 131, 144; Dec. Dig. ⟸100(2).]

In Bankruptcy. Involuntary proceedings in bankruptcy against the Order of Sparta. On motion to vacate the order of adjudication and dismissing the petition. Motion denied.

Chapman & Chapman, of Philadelphia, Pa., for petitioning creditors.

William S. Wallace and Charles Hunsicker, both of Philadelphia, Pa., for bankrupt.

Emanuel Furth, of Philadelphia, Pa., for objecting creditor.

DICKINSON, District Judge. [1] The ground upon which this motion is based is the absence of jurisdiction in the court. This assertion in turn is based upon the conceded feature of the case that if the court has jurisdiction, it is upheld by the provision of the law that "any unincorporated company" may be adjudged a bankrupt, and the further accord upon the fact that the alleged bankrupt is unincorpo-

rated. The difference is upon the question of whether it is a company or such an organization or body as to be within the intendment of the act of Congress. The controversy is one of that class not infrequently arising out of the use of words or phrases in writings and legislative enactments which may have been used to convey a given meaning or an entirely different one. Usually, as here, the question of the intended meaning is rendered more difficult because a choice of phraseology was open, and significance may be thought to attach to the selection of the word or phrase employed. Usually again, as here, one meaning or another and differing one can be supported by arguments of almost equal strength. Such questions can be set at rest only by the voice of authority, declaring in what sense the words were used, and the ruling must be the child of the necessity for giving a declared meaning to the words, rather than be reached through a satisfying conviction of what was in fact intended.

The alleged bankrupt here belongs to one of the types of legal nondescripts which are brought into existence for certain purposes. The purpose of its existence was to promote fraternity of feeling among its members, and to enable them to be of mutual aid and protection to each other through the payment of death benefits, the payment of which was provided for by levying in case of the death of one assessment upon the survivors. It is this feature which has brought it into, or at least to the threshold of, a court of bankruptcy. There is an agreement upon the necessity of some method of winding up its affairs. One method might, perhaps, be through and by an assignment for the benefit of creditors. This was at least in form attempted. Another would be through and by a receiver to be appointed in a chancery proceeding. A bill for this purpose is pending. Still another might, at least possibly, be through proceedings in bankruptcy. This is what is now sought.

At the hearing of this motion we had the benefit of very clear and helpful arguments both pro and con. To attempt to compress them within the limits of an opinion would do injustice to their merits. We can advert to only one or two features. One in support of the motion is the ab inconvenienti argument. The policy of the bankrupt law is to place the administration of bankrupt estates in the hands and under the control of creditors. The almost initial step is the election of trustees. To hold this election, we must know who the creditors are and the amounts of their respective claims, in order that the electors may be known and the vote taken and the result declared according to the number of the creditors voting and the amount of their claims. The peculiar relation of the members of the alleged bankrupt and what determines the sums payable to the representatives of deceased members make the conduct of such an election extremely difficult, if not impossible. Congress knew of the existence of unincorporated bodies of these many and differing kinds. When, therefore it came to the choice of a word or words which would be definitive of the class intended, it did not use the word of which use has just been made and define it as "any unincorporated body," but used instead the word "company." It might have used one or more of many words. For illustration, it

might have chosen the word "association," or "organization," "league," "brotherhood," "lodge," "society," and the like, or any collocation of them. It chose the word "company." Why this choice? Because this word, as none of the others do, carries with it the idea of a trading or commercial body, and this idea is in consonance with the historic and traditional thought associated with bankruptcy proceedings. On the other hand, we have presented the argument that Congress, with an almost limitless array of words open to it, restricted itself to one, and this the most generic term and the word having the broadest and most comprehensive meaning which it could employ. Further that, whatever was originally the main and primal purpose of bankruptcy proceedings, it is now to assure an equal and equitable distribution of the assets of insolvents among creditors, and what Congress has done is to make it applicable, with some variance of procedure, to four classes of debtors—all natural persons, with some exceptions; all unincorporated companies, with no exceptions; certain classes of corporations, with some exceptions; and all partnerships, without exception and whether existing or dissolved. Words of exclusion are employed, qualifying the broad terms of classification used in two of the four classes, and their absence in the others shows Congress to have meant the other classifications to be all-embracing. The text-writers who are especially well equipped to afford us assistance mutually nullify this aid by a radical disagreement among themselves. Among the cases cited to support these divergent views so far as examined, none are directly in point. Among those usually cited by the text-writers and which may be given as illustrations of all are: Davis v. Stevens (D. C.) 104 Fed. 235; Hercules Atkin Co. (D. C.) 133 Fed. 813; Burkhart v. Bank (D. C.) 137 Fed. 958; In re Seaboard Underwriters (D. C.) 137 Fed. 987; In re Grand Lodge (D. C.) 232 Fed. 199.

Briefly following these back in the inverse order, the Grand Lodge Case was that of a corporation, and the point ruled was that it was not in the excepted class of insurance companies. Certain general expressions might be deemed to help either party here. The only bearing it has is to show that the difficulties of administration are not insuperable.

The Seaboard Case rules the point that an unincorporated body of underwriters is a company within the meaning of the act. Counsel for this motion would concede this. There are some general expressions in the opinion which might be quoted in support of either side of the argument. This is not because of any want of clarity in the expressions, but is an illustration of the wisdom of which one cannot be too often reminded of reading an opinion with reference to the special facts of the case then under discussion. The general proposition laid down may be deemed true as applied to the facts of the case being ruled, but it by no means follows that it would be equally true as applied to an entirely different state of facts.

Burkhart v. Bank ruled that an association of individuals to carry on a banking business under the laws of Ohio, not being a corporation, was subject to be adjudged a bankrupt under the partnership clause of the act. This case, moreover, was ruled before the passage of the act of 1910, c. 412, 36 Stat. 838, which we are now construing, and

perhaps (although this we have not verified) before any act embracing persons having neither partnership nor incorporated relations.

The Hercules Case ruled that a limited partnership association (or joint-stock company), under the provisions of the Pennsylvania statute, might be adjudged a bankrupt no matter to what class it was assigned. Here, again, however, counsel for the motion might well concede all this case rules without conceding that it has any application to the instant case.

Davis v. Stevens Case rules that associated individuals claiming to constitute a corporation would not be found to be a corporation if no letters patent could lawfully issue to them as such, and if they assumed to act as such, they could be adjudged bankrupts as a partnership. It is clear that here again the case is no authority for the act being held to be broad enough to include the organization now before us.

In addition to the above there is reference through citation to a case said to have been ruled in the Wisconsin District in 1907, in which a lodge known as the A. O. U. W. was adjudged a bankrupt. The case is apparently an unreported one, and because of this we do not know whether this is an incorporated or unincorporated body, nor the purposes of its formation otherwise than what would be assumed from its name. As cited, it is in accord with a finding of jurisdiction.

Cleage v. Laidley, 149 Fed. 346, 79 C. C. A. 284, was the case of an individual bankrupt. The case of an unincorporated body was in no way there involved, and the comments of the court are not to be read as a ruling outside of the facts of the case then under discussion. The value they have is as evidence of the view of the profession and of the members of the judiciary so far as they are reflected and expressed.

The Associated Trust (D. C.) 34 Am. Bankr. Rep. 851, 222 Fed 1012, was what might be termed a "syndicate" dealing in real estate, and as the body existed for business and trading purposes, the case would be consistent with the position of each of the parties to the present controversy, and is in fact cited by each.

Brown & Adams v. United Button Company, 17 Am. Bankr. Rep. 565, 149 Fed. 48, 79 C. C. A. 70, 8 L. R. A. (N. S.) 961, 9 Ann. Cas. 445, was a ruling upon what character of claims were provable against the bankrupt's estate. It is of value to us, and, as we understand, is cited for the purpose of showing the trend of judicial opinion to be that bankruptcy statutes were to be construed with the thought in mind that they are primarily, at least, only intended to be in relief of those who had become indebted through commercial, trading, or business ventures, and were not meant otherwise to relieve debtors from the obligation of their debts. Such was undoubtedly the original and may fairly be argued to be the traditional and historic purpose of bankruptcy legislation. It doubtless grew out of the sanctity which was thrown about the obligation of debt, and relief from the obligation was more or less grudgingly and reluctantly given, but the benefits of the act were extended to a wider and still wider class of debtors until it came to be recognized, and this, we think, is the present view that the primary and chief purpose of bankruptcy proceedings is that already indicated, viz. the assurance of a just administration and distribution of the assets

of insolvents. There is, it is true, much more than a trace of the old idea still remaining in bankruptcy legislation, and more especially in the administration of the law and the practice in bankruptcy proceedings, but, as already twice indicated, this is confined to other features than who may become or be adjudged bankrupts, and has no longer a controlling influence in the determination of this latter question.

Our conclusion, therefore, is that the Order of Sparta, as its character is disclosed to us, is an unincorporated company within the meaning of the bankruptcy laws, and therefore a proper subject of bankruptcy proceedings, and the motion to open the decree of adjudication and to dismiss the proceedings on this ground is refused. We recognize that this is more or less of the exercise of an arbitrary judgment in the nature of a rescript, but it seems to have the sanction and approval of the weight of judicial opinion so far as expressed and of the views of accredited text-writers.

[2] The other question of whether or not a cause or ground of bankruptcy exists is not before us, and because of this not ruled. The present motion does not include it, although it has been brought into the argument. There is, in consequence, nothing in the record upon which to base a ruling. Moreover, a cause or ground of bankruptcy is set forth in the pleadings, and is also asserted to exist. Any creditor would have the right to intervene, and if interposed in time assert a defense for the alleged bankrupt. Even if this were done, it would afford no ground for a motion to dismiss, but must be raised as a question of proofs. As the adjudication has already been made, the only way in which the suggested question could be raised is by a motion to open the judgment or decree of adjudication and to let in this defense. If the decree were opened, the parties could submit their proofs, and a new decree be entered in accordance with the findings thereon. This is by no means meant to imply that grounds to open the decree exist, but merely to make clear that the question is not now before us.

KINNEY v. RICE.

(District Court, D. Massachusetts. February 24, 1916.)

No. 412.

COURTS ⊂=347—PLEADING—VERIFICATION.

Under equity rule 18 (198 Fed. xxiii, 115 C. C. A. xxiii), which provides that "unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished," and rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv), providing that every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading, that upon instructions given him there is good ground for the same, and that it contains no scandalous matter and is not interposed for delay, a defendant is not required to sign his answer individually, nor need it be verified by his oath, or that of any person in his behalf.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊂=347.]

In Equity. Suit by Robert D. Kinney against Elmer C. Rice. On motion to strike out amended answer. Denied.

See, also, 238 Fed. 444.

Robert D. Kinney, of Philadelphia, Pa., pro se.

Patton & Sloan and John S. Patton, all of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. This is a bill in equity for discovery in aid of an action at law for deceit arising out of alleged false and fraudulent representations of the defendant in the sale of certain pigeons to the plaintiff. An answer and demurrer were filed to the original bill, setting out certain defects therein and stating certain objections to the interrogatories filed therewith. November 14, 1913, the case came up for hearing on the answer and objections to the interrogatories, and the court, being of the opinion that the defects in the bill, if any, could be cured by amendment, granted leave to the plaintiff to amend his bill in such particulars as he might deem necessary to meet the defendant's objections, and granted the defendant five days after the amended bill was filed within which to file a new or amended answer. An amended bill and answer were subsequently filed, and the case is now before the court on the plaintiff's motion to strike out the answer on the grounds (1) that it is not signed by the defendant; (2) that it is not verified by the oath of the defendant; and (3) that it sets up new matter in pais not made a part of the original answer.

It is conceded by the defendant that, prior to the new equity rules, the practice was to require the defendant to sign his answer and make oath to the truth of the facts set forth therein; but his contention is that, since the new equity rules went into effect, the answer must be signed by the solicitor of record and need not be verified by an oath. In this case the defendant's answer was signed by his solicitor of record.

Rule 24 (198 Fed. xxiv, 115 C. C. A. xxiv) provides:

"Every bill or other pleading shall be signed individually by one or more solicitors of record, and such signatures shall be considered as a certificate by each solicitor that he has read the pleading so signed by him; that upon the instructions laid before him regarding the case there is good ground for the same; that no scandalous matter is inserted in the pleading; and that it is not interposed for delay."

And rule 18 (198 Fed. xxiii, 115 C. C. A. xxiii) provides:

"Unless otherwise prescribed by statute or these rules the technical forms of pleadings in equity are abolished."

No statute of the United States or rule in equity has been called to my attention, and I know of none, which requires the defendant to sign individually his answer, or that it should be sworn to or verified by his oath, or that of any person in his behalf. Luten v. Camp (D. C.) 221 Fed. 424, 427.

Rule 26 (198 Fed. xxv, 115 C. C. A. xxv) prescribes before whom pleadings, which are required by statute or the rules to be sworn to, may be verified. The only occasions, under the rules, where verification

is required, are under rule 25 (198 Fed. xxv, 115 C. C. A. xxv), where, "if special relief pending the suit be desired, the bill should be verified by the oath of the plaintiff, or some one having knowledge of the facts upon which such relief is asked," and on a petition for rehearing, under rule 69 (198 Fed. xxxviii, 115 C. C. A. xxxviii), where it is provided that "every petition for a rehearing shall contain the special matter or cause on which such rehearing is applied for, shall be signed by counsel, and the facts therein stated, if not apparent on the record, shall be verified by the oath of the party or by some other person." Neither of these provisions relate to the question under consideration.

The reason why the answer to a bill of discovery is not now required to be signed and sworn to is probably due to the fact that, under rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), interrogatories looking to discovery may be filed by the plaintiff or defendant without being made a part of the bill or answer, and that the party interrogated is required to sign his answers to the interrogatories and make oath to the same. The interrogatories and answers are not made a part of the pleadings in the case. Luten v. Camp, supra.

Rule 19 provides:

"The court may at any time, in furtherance of justice, upon such terms as may be just, permit any process, proceeding, pleading, or record to be amended, or material supplemental matter to be set forth in an amended or supplemental pleading. The court, at every stage of the proceeding, must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The leave granted to the plaintiff in this case to amend his bill and to the defendant to file a new or amended answer was in pursuance of the power vested in the court under this rule. The fact that the defendant has set up in his answer that the bill cannot be maintained on the ground that the discovery asked, if granted, would tend to incriminate him, was within the leave granted November 14, 1913. Moreover, by rule 29 (198 Fed. xxvi, 115 C. C. A. xxvi) all demurrers and pleas are abolished, and "every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, shall be made by motion to dismiss or in the answer." The new ground of defense set out in the answer presents a question of law, not of fact. And, inasmuch as the defendant could not raise the question by demurrer, he complied with the rule by raising it in his answer.

Under the circumstances of this case, I am of the opinion that the plaintiff's motion to dismiss the answer should be denied; and the order is:

Motion denied.

KINNEY v. RICE.

(District Court, D. Massachusetts. December 9, 1916.)

No. 412.

1. COURTS ⟸351—FEDERAL COURTS—PRACTICE—MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED.
Under equity rule 58 (198 Fed. xxiv, 115 C. C. A. xxiv) a party's right of discovery extends only to facts resting in the knowledge of the adverse party or documents in his possession material to the support of the case of the interrogating party, although the right to discovery as to such matters will not be defeated by the fact that they also involve the ground of defense or action of the interrogated party.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

2. COURTS ⟸351—FEDERAL COURTS—PRACTICE—MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED.
To the extent that discovery may be granted as to material matters of fact, it must be limited to inquiry as to the material facts, and does not extend to the disclosure of evidence, or of facts which merely tend to prove material facts.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

3. DISCOVERY ⟸8—MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED.
As a plaintiff's right of discovery does not extend to the discovery of the manner in which, or the evidence by means of which, the defendant's case is to be established, he is also precluded from ascertaining the names of the witnesses by whom his adversary purposes to prove his case.
[Ed. Note.—For other cases, see Discovery, Cent. Dig. § 10; Dec. Dig. ⟸8.]

4. DISCOVERY ⟸13—MATTERS AS TO WHICH DISCOVERY MAY BE OBTAINED.
A plaintiff cannot require discovery in aid of an action at law of facts of which he has equal knowledge, or equal means of knowledge, with the defendant.
[Ed. Note.—For other cases, see Discovery, Cent. Dig. §§ 23–26; Dec. Dig. ⟸13.]

5. COURTS ⟸351—FEDERAL COURTS—INTERROGATORIES—FORM.
An interrogatory filed under equity rule 58 (198 Fed. xxiv, 115 C. C. A. xxiv) should embrace a single question, and be so framed that it may be clearly seen what the interrogated party is called upon to answer, and if this is not done the court in its discretion should direct that it be not answered.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924; Dec. Dig. ⟸351.]

In Equity. Bill for discovery by Robert D. Kinney against Elmer C. Rice. On motion by complainant to strike out objections to interrogatories and to require defendant to answer the same. Motion denied.

See, also, 238 Fed. 441.

Robert D. Kinney, of Philadelphia, Pa., pro se.

Patton & Sloan and John S. Patton, all of Boston, Mass., for defendant.

BINGHAM, Circuit Judge. November 28, 1913, the plaintiff filed a bill in equity for discovery in aid of an action at law, which he had brought against the defendant, and annexed thereto numerous interrogatories to be answered by the defendant.

The defendant has answered the bill, setting forth, among other things, objections to the interrogatories and his reasons therefor, but now waives his right to insist upon the objection assigned in the seventh paragraph of his answer.

The case is before the court on the plaintiff's motion to strike out the objections taken to the interrogatories and to require the defendant to answer them. The defendant takes the position that the plaintiff's right to discovery is limited to facts within the knowledge of the defendant and to the production of documents in his possession material to prove the plaintiff's case, and does not extend to the discovery of evidence, or of facts which simply tend to prove ultimate facts, or to matters of which the plaintiff has knowledge, or equal means of knowledge, with the defendant, and that he cannot be required to discover facts material to his defense, or the names of witnesses by whom he intends to prove it.

[1-3] Equity rule 58 (198 Fed. xxiv, 115 C. C. A. xxiv) provides that:

"The plaintiff, at any time after filing the bill, and not later than twenty-one days after the joinder of issue, and the defendant at any time after filing his answer, and not later than twenty-one days after the joinder of issue, and either party at any time thereafter by leave of the court or judge, may file interrogatories in writing for the discovery by the opposite party or parties of facts and documents material to the support or defense of the cause. * * *

"The court or judge, upon motion and reasonable notice, may make all such orders as may be appropriate to enforce answers to interrogatories or to effect the inspection or production of documents in the possession of either party and containing evidence material to the cause of action or defense of his adversary."

Since the adoption of this rule it has been held: (1) That "the plaintiff's right of discovery extends only to facts resting in the knowledge of the defendant or documents in his possession material to the support of the plaintiff's case, and the defendant's correlative right of discovery, only to facts and matters material to his defense, and neither is entitled to discovery of an inquisitorial character as to the ground of action or defense of the other, although, as theretofore, the right of such discovery as to matters material to the cause of action or defense of the interrogating party will not be defeated by the fact that such matters also involve the ground of defense or action of the interrogated party"; and (2) that "to the extent that discovery may be granted as to material matters of fact it must be limited to inquiry as to the material facts, and does not extend to a disclosure of evidence or of facts which merely tend to prove material facts" (J. J. Day Co. v. Mountain City Mill Co. [D. C.] 225 Fed. 622; Luten v. Camp [D. C.] 221 Fed. 424; P. M. Co. v. Ajax Rail Anchor Co. [D. C.] 216 Fed. 634); that a disclosure of the "ultimate facts only" can be required (Wolcott v. National Electric Signaling Co. [D. C.] 235 Fed. 224, 228); and that, inasmuch as the plaintiff's right does not extend to the discovery of the

manner in which or the evidence by means of which the defendant's case is to be established (Wolcott v. National Electric Signaling Co. [D. C.] 235 Fed. 224; Sunset Tel., etc., Co. v. City of Eureka [C. C.] 122 Fed. 960; Hooton v. Dalby, [1907] 2 K. B. 18; 1 Danniell's Ch. Pr. 579), he is also precluded from ascertaining the names of the witnesses by whom his adversary proposes to prove his case (Knapp v. Harvery [1911] 2 K. B. 725).

[4] It is also held that, as the right to discovery, in aid of an action at law, depends upon the necessity therefor in the administration of justice, a plaintiff cannot require discovery of facts of which he has equal knowledge or equal means of knowledge with the defendant. Wolcott v. National Electric Signaling Co. (D. C.) (June 7, 1916) 235 Fed. 224; Reynolds v. Fiber Co., 71 N. H. 332, 51 Atl. 1075, 57 L. R. A. 949, 93 Am. St. Rep. 535; Baker v. Biddle, Fed. Cas. No. 764.

[5] An interrogatory filed under this rule should embrace a single question, and be so framed that it may be clearly seen what the interrogated party is called upon to answer, and, if this is not done, the court, in its discretion, should direct that it be not answered. If the interrogatory is so framed, the court can readily determine whether it should or should not be answered, without unnecessary delay or trouble. It is not justified in ordering a party to answer interrogatories not so framed, and thereby require him to take upon himself the burden of being in contempt if he fails to answer fully.

The plaintiff's declaration in the action at law contains allegations that are unnecessary and improper from the standpoint of good pleading. I have carefully examined the plaintiff's interrogatories with reference to the material allegations of the declaration, in the light of the legal principles above stated, and have reached the conclusion that the defendant should not be required to answer any of them. The plaintiff is allowed to withdraw his interrogatories and submit others complying with the requirements herein set forth, provided he does so within 30 days from the filing of this opinion; otherwise, a decree will be entered dismissing the bill.

Motion denied.

In re HORECSNY.

(District Court, D. Idaho, S. D. December 19, 1916.)

ALIENS ⇐68—NATURALIZATION—STATUTE.

Under Act June 25, 1910, c. 401, § 3, 36 Stat. 831, amending Act June 29, 1906, c. 3592, § 4, 34 Stat. 597 (Comp. St. 1913, § 4352), providing that any person qualified to be naturalized who has resided five years continuously in the United States prior to May 1, 1910, and who, because of misinformation regarding his citizenship or the requirements of law, has labored and acted under the impression that he was or could become a citizen, and has, in good faith, exercised the rights and duties of a citizen or intended citizen, may become naturalized without proof of a former declaration of intention, the belief that he could become a citizen and action thereunder, as well as the continuous residence, must have con-

tinued during the five years preceding the date mentioned, not merely during five years preceding the application for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⊂⊃68.]

Application by Joseph Horecsny, otherwise known as Joseph Vogner, to become a citizen. Application dismissed.

E. J. Dockery, of Boise, Idaho, for applicant.

DIETRICH, District Judge. The applicant was born in Bohemia on April 25, 1886, and migrated to the United States in 1895, since which date he has resided in this country. On May 16, 1905, in the circuit court of Multnomah county, Or., he filed his declaration of intention to become a citizen of the United States. He was at that time a few days over 19 years of age. His application here is based upon the provisions of section 3 of an Act of June 25, 1910 (36 Stat. 831 [Comp. St. 1913, § 4352]), amending the general naturalization act of 1906, which is as follows:

"That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May 1, 1910, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory, to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens."

It is not questioned that during the five-year period immediately preceding May 1, 1910, the applicant was a resident in good faith of the United States, or that he had all of the requisite qualifications to be admitted to citizenship other than that during a portion of such period he was a minor. Upon the other hand, it is not pretended by him that during the whole of that period he "labored and acted under the impression that he was or could become a citizen of the United States, and (has) in good faith exercised the rights or duties of a citizen or intended citizen of the United States, because of" wrongful information and belief touching his personal status and rights. He does contend, and has made a sufficient showing to the effect, that during the period of five years immediately preceding his application, which was filed in this court on the 18th day of September, 1916, he had all of the requisite qualifications for citizenship, and acted under the impression that he could become a citizen, and exercised certain rights and duties of citizenship.

I am inclined to think that the applicant does not show a sufficient familiarity with the Constitution and laws of the United States to justify his admission; but that is a deficiency which he could very easily overcome, no doubt, and, if that were the only valid objection to his present admission, I would be inclined to give him further time for study.

The real question which has been argued, and which is not free from difficulty, is whether or not the qualifications prescribed by the amendatory act relate to the period beginning with May 1, 1905, and extending up to the date of the application, or whether, aside from the mere requirement of residence, which it must be and is conceded relates in the first instance to the period beginning with May 1, 1905, the qualifications are required only for a period of more than five years immediately preceding the date of the application. The language of the act is ambiguous, and the legislative intent is elusive; but analysis and reflection tend to confirm my first impression, which was that all of the prescribed qualifications must have existed during the period intervening between May 1, 1905, and the date of the application. By just what specific cases or peculiar circumstances the provision was originally suggested to the legislative mind I am not advised, but doubtless it was intended to be remedial and to give relief to individuals or a class of individuals, the actual status of whom was brought to the attention of Congress. The act does not look to the future, but is concerned with a condition existing when the bill was introduced for passage. If the past tense had been used instead of the perfect, and if therefore the language were, "who resided constantly in the United States," instead of, "who has resided constantly in the United States," and "labored and acted" instead of "has labored and acted," and "exercised the rights or duties of a citizen" instead of "has (in good faith) exercised the rights or duties of a citizen," and "was for a period of more than five years entitled, etc.," instead of "has been for a period of more than five years entitled, etc.," little doubt would be left touching the meaning of the section. But it will be noticed that the same tense has been carried throughout the section, and where it is first used it undoubtedly refers to the period beginning with May 1, 1905, a fact which tends to weaken the argument that its use in the subsequent clauses necessitates the view that the period relates back from the time of the filing of the application or of the hearing. The act, while not approved until June 25th, is to be deemed to be a legislative declaration as of the first day of May, 1910.

The view I have taken seems to find support in In re Urdang, 212 Fed. 557, and In re Peters, 213 Fed. 541. And apparently it is opposed to In re Fleury, 223 Fed. 803.

The application will be dismissed.

TRIPP v. MICHIGAN CENT. R. CO.

(Circuit Court of Appeals, Sixth Circuit. January 2, 1917.)

No. 2863.

1. CARRIERS ⟸307(3)—"PASSENGER FOR HIRE"—DROVER—CONTRACT.
Under a contract for the shipment of live stock, which was part of the company's regulations, duly issued and filed with its rate schedules, and which required an attendant to accompany the shipment, and provided that, in consideration of the carriage of the attendant without charge other than the sum paid for the transportation of the live stock, the shipper agreed to indemnify the carrier against liability for injuries to the attendant, which contract was accompanied by a release signed by the attendant, stating that, in consideration of his carriage without charge except the sum paid for the carriage of the stock, he assumed all risk of injury and released the carrier from liability therefor whether occasioned by its negligence or not, the attendant was a "passenger for hire," payable in money, not a mere gratuitous passenger, so that the limitation of liability was invalid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1254; Dec. Dig. ⟸307(3).]

2. CARRIERS ⟸189—TRANSPORTATION OF GOODS—RATES—REASONABLENESS.
Freight rates must be fixed with reasonable reference to the responsibility and the cost and value of the services which the carrier and the shipper undertake respectively to assume and render.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 162, 854, 855, 859–865; Dec. Dig. ⟸189.]

3. COURTS ⟸365—RULES OF DECISION—DECISIONS OF STATE COURTS—GENERAL LAW.
The determination of whether, under a contract for the transportation of live stock and an attendant, the attendant is a passenger for hire, is a question on which the federal courts are not bound by state decisions.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 950, 952, 955, 969–971; Dec. Dig. ⟸365.]

4. CARRIERS ⟸307(6)—TRANSPORTATION OF PASSENGERS—CONTRACT—CLASSIFICATION.
A provision in a carrier's classification that, with one or more car loads of horses, the owner or agent will be carried free, does not militate against a contract for such shipment, providing that payment for the attendant's transportation is part of the charge for the transportation of the horses.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1257–1259, 1491; Dec. Dig. ⟸307(6).]

5. CARRIERS ⟸307(3)—CARRIAGE OF PASSENGERS—DROVER—CLASSIFICATION—"FREE."
A provision in a carrier's classification that an attendant with a shipment of horses will be carried "free" can be construed to mean only that he is not to be charged an additional fare, so as not to be inconsistent with a contract for such shipment which provides that the freight charge includes the transportation of the attendant within the rule as to limitation of liability.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1254; Dec. Dig. ⟸307(3).

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

6. CARRIERS ⟸307(3)—CARRIAGE OF PASSENGERS—DROVER—DETERMINATION OF RIGHTS.

Unless the contract made between the carrier and the shipper was legally forbidden, the provisions of that instrument, and not the classifications filed by the carrier, determine whether the attendant is carried free or as a passenger for hire.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1254; Dec. Dig. ⟸307(3).]

7. CARRIERS ⟸35—CARRIAGE OF PASSENGERS—PAYMENT FOR TRANSPORTATION —DROVER.

Under the provisions of the act to regulate commerce (Act June 29, 1906, c. 3591, § 2, 34 Stat. 586 [Comp. St. 1913, § 8569]) requiring the schedules of rates filed by the carrier to state any rules or regulations which in any wise affect or determine any part or the aggregate of the rates, thereby recognizing the difficulty of stating in separate schedules the charges affecting the particular rates, a contract for the shipment of live stock which requires an attendant to accompany it, the charge for his transportation being included in the charge for the transportation of stock, does not violate the provision of the act forbidding compensation for the carriage of passengers to be made in any commodity, or in any form other than money.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 94; Dec. Dig. ⟸35.]

8. CARRIERS ⟸307(3)—TRANSPORTATION OF PASSENGERS—DROVERS—FILING TARIFFS.

Even if a carrier is required to file a separate schedule showing the fares charged for the transportation of live stock caretakers, its failure to do so does not entitle it to treat as a gratuitous passenger a caretaker whom it carries under a uniform contract issued by it and presumed to be based on a fair and reasonable compensation, which provided that his transportation was included in the charge for the transportation of the stock.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1254; Dec. Dig. ⟸307(3).]

9. CARRIERS ⟸32(1)—TRANSPORTATION OF PASSENGERS—"FREE PASS"—CONTRACT FOR LIVE STOCK SHIPMENT.

A contract issued to a caretaker accompanying a live stock shipment, which provided that the charge for his transportation was included in the charge for the transportation of stock, is not a "free pass" within the Hepburn Act (Act June 29, 1906, c. 3591, § 1, 34 Stat. 586) as amended by Act June 18, 1910, c. 309, § 7, 36 Stat. 546 (Comp. St. 1913, § 8563[5]), permitting a carrier to issue a free pass to such a caretaker, and a provision therein releasing the company from liability for injuries to the caretaker caused by the carrier's negligence is invalid.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 83; Dec. Dig. ⟸32(1).

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

In Error to the District Court of the United States for the Eastern District of Michigan; Arthur J. Tuttle, Judge.

Action by Everett A. Tripp against the Michigan Central Railroad Company. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed and remanded, with direction to award a new trial.

L. H. Paddock, of Detroit, Mich., for plaintiff in error.
J. W. Dohany, of Detroit, Mich., for defendant in error.

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

WARRINGTON, Circuit Judge. Everett A. Tripp brought an action in the court below against the Michigan Central Railroad Company to recover damages for personal injuries claimed to have been sustained by him through negligence of the railroad, and obtained a verdict and judgment in his favor. Later, upon motion of the railroad, the judgment was set aside and a new trial granted. This ruling was based on the decision in Charleston & West. Car. Ry. v. Thompson, 234 U. S. 576, 34 Sup. Ct. 964, 8 L. Ed. 1476, which had been rendered meanwhile. Thereafter, April 22, 1915, under stipulation of counsel, the evidence and record of the former trial were submitted to the court and jury, and, upon motion of the railroad and solely on the authority of the decision in the Thompson Case, the court directed verdict and entered judgment in favor of the railroad. The writ of error is prosecuted to reverse this action of the trial court.

According to the substantial tendency of the proofs taken at the first trial, Tripp, who was a horse dealer, on February 12, 1913, arranged at Chicago with Moses Wilcove to accompany as attendant a carload of horses owned and ready for shipment by Wilcove from Chicago to Utica, N. Y. The shipment was made under a form of instrument which the railroad company had used for some eight years, called a "Uniform Live Stock Contract"; and this was executed by Wilcove and the railroad company. There is indorsed on this contract, and seemingly as part of the contract, a form of release which in terms absolves the railroad company from all damages that might happen to the attendant through the company's negligence. One of the regulations contained in the company's official classification required the person accompanying the live stock to sign this release. Before starting with the shipment, Tripp signed the release and received from the railroad company a duplicate of the contract including the release; and upon this duplicate he was expected and permitted to accompany the carload of horses as the attendant. The injuries for which recovery was allowed at the first trial occurred in the night of February 14th, on a switch at Welland, Ontario, in the regular course of the shipment and through collision between a train of defendant and the way-car, or caboose, in which Tripp was rightfully sitting.

[1] The controlling question concerns the status of plaintiff at the time he received his injuries. Was he, in view of the live stock contract under which he was being carried, a gratuitous passenger or a passenger for hire? The pertinent features of the contract including the release are in substance and effect shown in the margin.[1]

[1] (1) The shipper was to pay freight at the "lower published tariff rate," subject to condition that the carrier's liability on the horses should be restricted to an agreed valuation of not exceeding $100 each or $1200 for the carload,

Here we have to consider a contract which, by reason of a reduced freight charge, limits the liability of the carrier respecting injury to the live stock or its loss to an agreed valuation either per head or in gross; exempts the carrier from its ordinary duties and responsibilities touching the sufficiency of the car body and from any sort of care of the stock in transit; requires the presence of an attendant for the live stock, and, "in consideration of the premises and of the carriage" of the attendant "without charge other than the sum paid or to be paid for the transportation of the live stock," exacts of the shipper indemnity against liability for personal injury to the attendant regardless of the cause. Whatever else may be said of such a contract as this, it is difficult to perceive why the attendant was not a passenger for hire. It is clear enough that the requirement of an attendant placed the shipper under obligation to the carrier for the fare of the attendant and made the carrier responsible for his safe carriage. The language "without charge other than the sum paid * * * for the transportation of the live stock" fairly implies that the rate charged for the carriage of the live stock, although reduced, had been fixed so as to include a reasonable fare for the carriage also of the attendant. The provision that the shipper should indemnify the carrier against claims for personal injury to the attendant shows that, as between the carrier and shipper, liability for such injury, as well as for the attendant's fare, was assumed by the shipper. This indemnity is in accord, too, with the other provisions, already pointed out, which were plainly designed to lessen the service and responsibility of the carrier. All these provisions tend to

whether loss or damage should occur "through the negligence" of the carrier or connecting carriers or otherwise.

(2) The shipper was required to inspect and satisfy himself of the sufficiency and safety of the body of the car in which the stock was to be transported; also, at his sole risk and expense, to load and care for the horses, to feed and water them in course of transportation, whether delayed in transit or otherwise, and to unload them; he was to see that all doors and openings of the cars were at all times so closed and fastened as to prevent escape of the stock in the course of transit; and the carrier and connecting carriers were alike exempted from all liability or damages touching the subjects of the duties so imposed upon the shipper.

(3) "Shipments of horses must in all cases be accompanied by an attendant to destination." And "in consideration of the premises and of the carriage of a person * * * in charge of said stock upon a freight train * * * without charge other than the sum paid or to be paid for the transportation of the live stock in charge of" the attendant, the shipper in terms bound himself to indemnify the carrier against and save it harmless from all liability "by reason of personal injury sustained" by the attendant, "whether the same be caused by the negligence" of the carrier or any connecting carrier or otherwise. The release provides: "In consideration of the carriage of the undersigned (the attendant) upon a freight train of the carrier * * * named in the within contract without charge, other than the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract, of which live stock he is in charge, the undersigned does hereby voluntarily assume all risk of accidents or damage to his person * * * and does hereby release and discharge the said carrier * * * from every and all claims, * * * for or on account of any personal injury * * * sustained by the undersigned, * * * whether the same be caused by the negligence" of the carrier or otherwise.

strengthen the implication that the rate charged on the live stock was intended to include the attendant's fare.

[2] Surely, freight rates must be fixed with reasonable reference to the responsibility and the cost and value of the service which the carrier and the shipper undertake respectively to assume and render. Albree v. B. & M. R. R., 22 Interst. Com. R. 303, 316; Boileau v. P. & L. E. R. R. Co., 22 Interst. Com. R. 640, 652. See, also, United States v. Balt. & Ohio R. R. Co., 231 U. S. 274, 293, 34 Sup. Ct. 75, 58 L. Ed. 218; Interstate Com. Comm. v. Diffenbaugh, 222 U. S. 42, 46, 32 Sup. Ct. 22, 56 L. Ed. 83. Indeed, the lower tariff rate can be explained in no other way. The design so to exact fare for the carriage of the attendant and to escape liability for his personal injury is extended into the release. It is there stated that he was to be carried "without charge, other than the sum paid or to be paid for the carriage * * * of the live stock," and (in addition to the indemnity required of the shipper as stated) that the attendant should assume all risk of personal injury caused by the negligence of the carrier. It is to be borne in mind, moreover, that the contract (including the release) represented not merely the relations between the carrier and the particular shipper and attendant there named, for the contract was typical; it was part of the carrier's official classification; it was duly issued and filed. Looking then to the provisions of the contract as a whole, apart from certain portions of the interstate commerce law which will be considered later, it is clear that the plaintiff was a passenger for hire. This finds ample support in familiar authorities.

In N. Y. Central R. Co. v. Lockwood, 84 U. S. (17 Wall.) 357, 359, 21 L. Ed. 627, a live stock contract was involved which was much like the present one; though it is to be noted that it was not there provided as it is here that the fare of the live stock attendant (the owner in that instance) was included in the rate charged for the carriage of the live stock. The agreement in the Lockwood Case stated its consideration to be the carrying of the plaintiff's cattle at less than tariff rates; the shipper was required to care for his cattle while in transit and also to attend to the loading and unloading of them; and he assumed all risk of injury to the stock and of personal injury to himself or to any attendant who might go with the cattle. The shipper received a drover's pass which certified that the person to whom it was issued had shipped sufficient stock to entitle him to free passage and stated that the acceptance of the pass was to be considered a waiver of all claims for injuries that might be received by the holder while on the train. Mr. Justice Bradley said of this contract and pass:

"It may be assumed in limine that the case was one of carriage for hire; for, though the pass certifies that the plaintiff was entitled to pass free, yet his passage was one of the mutual terms of the arrangement for carrying his cattle. The question is, therefore, distinctly raised, whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage."

Again, among the conclusions there reached, the fourth one was (84 U. S. [17 Wall.] 384, 21 L. Ed. 627):

"That a drover traveling on a pass, such as was given in this case, for the purpose of taking care of his stock on the train, is a passenger for hire."

In Baltimore & Ohio, etc., Railway v. Voigt, 176 U. S. 498, 505, 20 Sup. Ct. 385, 387 (44 L. Ed. 560), it was said of the Lockwood decision:

"This case has been frequently followed, and it may be regarded as establishing a settled rule of policy."

True, the answer to the question certified in that case negatived Voigt's right of recovery. The contract required an express company to hold the railroad harmless from liability for injuries sustained by the express company's employés through negligence of the railway. Voigt in turn agreed both to indemnify the express company against any liability it might incur under its indemnity to the railroad company, and also to release the railroad from liability for injuries sustained by him while being transported on the express cars; and in consideration of this agreement of Voigt he was employed as an express messenger. This agreement between the two corporations, the railroad company and the express company, respecting their joint transportation business presented a question manifestly different from the one arising between a carrier and a shipper or passenger for hire; in the former the railroad company is acting outside of, while in the latter it is acting within, the scope of its duty as a common carrier. This distinction is further illustrated in the more recent case of Santa Fé Railway v. Grant Bros., 228 U. S. 177, 184, 185, 33 Sup. Ct. 474, 477 (57 L. Ed. 787), where an agreement similar in principle to that of the express company just mentioned was upheld; but the court distinguished and sanctioned the doctrine of Railway Co. v. Lockwood, Mr. Justice Hughes saying in that connection:

"For these reasons, the common carrier in the prosecution of its business as such is not permitted to drop its character and transmute itself by contract into a mere bailee with right to stipulate against the consequences of its negligence."

And in Pierce Co. v. Wells, Fargo & Co., 236 U. S. 278, 283, 35 Sup. Ct. 351, 353 (59 L. Ed. 576) while sustaining a shipping contract which limited recovery in case of loss or damage to an agreed valuation of the freight shipped, the court again recognized the rule of the Lockwood Case preventing a carrier from limiting its liability for loss through its negligence; Mr. Justice Day saying:

"That contracts for limited liability, when fairly made, do not contravene the settled principles of the common law preventing the carrier from contracting against its liability for loss by negligence (Railroad Co. v. Lockwood, 17 Wall. 357, 375), was settled by this court in what is known as the Hart Case (Hart v. Pennsylvania R. R., 112 U. S. 331 [5 Sup. Ct. 151, 28 L. Ed. 717])."

Thus it would seem safe to say that, so far as it is not in conflict with the interstate commerce law, the rule of the Lockwood Case still prevails as respects the right of an attendant of live stock who travels upon a pass issued in connection with a contract like the one there involved, to be treated, not as a gratuitous passenger, but as

a passenger for hire and so to recover for personal injuries sustained, in spite of his release of the carrier from its acts of negligence. We may call attention to further decisions to the same effect: Delaware L. & W. R. Co. v. Ashley, 67 Fed. 209, 212, 14 C. C. A. 368 (C. C. A. 3); Norfolk Southern R. Co. v. Chatman, 222 Fed. 802, 803, 805, 138 C. C. A. 350 (C. C. A. 4); Kirkendall v. Union Pac. R. Co., 200 Fed. 197, 200, 206, 118 C. C. A. 383 (C. C. A. 8); Wiley v. Grand Trunk Ry. of Canada (D. C.) 227 Fed. 127, 128, 129. And see Fitchburg R. Co. v. Nichols, 85 Fed. 945, 947, 29 C. C. A. 500 (C. C. A. 1).

[3] Although in such a case as this the federal courts are not bound by state decisions (Railroad Co. v. Lockwood, supra, 84 U. S. at pages 363, 368, 21 L. Ed. 627; Liverpool Steam Co. v. Phenix Ins. Co., 129 U. S. 397, 443, 9 Sup. Ct. 469, 32 L. Ed. 788; Chicago, Milwaukee, etc., Railway v. Solan, 169 U. S. 133, 136, 18 Sup. Ct. 289, 42 L. Ed. 688; N. Y. C. & H. R. R. Co. v. Beaham, 37 Sup. Ct. 43, decided by Supreme Court December 4, 1916), yet it is well worth while to consider the following decisions which distinctly hold that, under contracts similar to the present one, the attendant of live stock is a passenger for hire: Cleveland, Painesville & Ashtabula R. Co. v. Curran, 19 Ohio St. 1, 4, 11, 2 Am. Rep. 362; I. C. R. R. Co. v. Anderson, 184 Ill. 294, 306, 307, 56 N. E. 331; Rowdin v. Pennsylvania R. Co., 208 Pa. 623, 627, 628, 57 Atl. 1125; Weaver v. Ann Arbor R. Co., 139 Mich. 590, 592, 599, 102 N. W. 1037; Lake Shore, etc., Co. v. Teeters, 166 Ind. 335, 339, 344, 77 N. E. 599, 5 L. R. A. (N. S.) 425; Louisville & Nashville R. Co. v. Bell, 100 Ky. 203, 206, 211, 38 S. W. 3; Buckley v. Railroad Co., 113 Me. 164, 166, 169, et seq., 93 Atl. 65, L. R. A. 1916A, 617; Sprigg's Adm'r v. Rutland R. Co., 77 Vt. 347, 350, 353, et seq., 60 Atl. 143; Willcox v. Erie Railroad Co. (1914) 162 App. Div. 94, 113, 147 N. Y. Supp. 360.[2] And the ruling in Heyward v. Boston & Albany Railroad, 169 Mass. 466, 469, 48 N. E. 773, is to the same effect.

It is to be remembered that there is one important difference between the contract involved in the Lockwood Case and the contract here in issue. The Lockwood contract did not, while the present contract does, provide in express terms that the carriage of the attendant was to be "without charge, other than the sum paid * * * for the transportation of the live stock." In passing upon language like this in Rowdin v. Pennsylvania R. Co., 208 Pa. 628, 57 Atl. 1126, supra, it was held:

"The contract and the release show that the consideration for the transportation of the plaintiff was included in 'the sum paid or to be paid for the carriage upon said freight train of the live stock mentioned in said contract.'"

The same conclusion respecting similar language was reached in Heyward v. Boston & Albany Railroad, supra, 169 Mass. 469, 48

[2] It is to be observed, however, that in the opinion in the Willcox Case attention is called (page 99 of 162 App. Div., page 360 of 147 N. Y. Supp.), to the settled law of New York, that a person riding on a "drover's pass" is a gratuitous passenger; and see remarks of Mr. Justice Bradley on the New York doctrine in his opinion in the Lockwood Case, 84 U. S. at page 363, et seq., 21 L. Ed. 627.

N. E. 773; also in Lake Shore, etc., Co. v. Teeters, supra, 166 Ind. at pages 340, 341, 77 N. E. 599; and in Willcox v. Erie Railroad Co., supra, 162 App. Div. 113, 114, 147 N. Y. Supp. 360.

[4] It results that if the words "without charge, other than the sum paid * * * for the transportation of the live stock," are to be given their natural meaning, the clear implication is, not only that the attendant here was a passenger for hire, as stated, but also that his fare was to be paid in money. In saying this we do not overlook certain provisions of the classification which at first view might seem to modify at least two of the provisions of the contract. The classification provides, for instance:

"With one, two or three cars of horses or mules, the owner or his agent will be carried free on the same train to take care of the animals. * * *"

And yet the contract, as before pointed out, provides:

"Shipments of horses must in all cases be accompanied by an attendant to destination."

Considering these provisions together, it is plain that the presence of an attendant is exacted; and the portion of the first of these provisions which states that "the owner or his agent will be carried free" may be, and possibly under some other form of contract is, given literal effect by actually carrying the owner or his agent "free"; but this does not militate against the present contract, which in effect provides, as we have said, for payment of the attendant's fare in money.

[5] Another way of reconciling the two provisions concerning the carriage of the attendant is shown in Rowdin v. Pennsylvania R. Co., 208 Pa. at page 629, 57 Atl. at page 1127, where the language of the same court in an earlier case (Pennsylvania R. Co. v. Henderson, 51 Pa. 315, 331) is set out:

"As it is absolutely necessary, in carrying stock, that the persons who have charge of them should be carried by the company, the price paid for the freight includes the cost of transporting the drover, who is not therefore a gratuitous but a paying passenger, and the word 'free' is therefore only true so far as that the conductor is not entitled to charge him separately for his passage."

[6] Further, we think the contract itself, in the form in which it was voluntarily delivered to the attendant, should dominate the present situation. It was executed by the company and the shipper and with reference to the attendant's execution of the release; it constituted the only instrument which was given by the company either to the shipper or the attendant; and it was accepted by the officials in charge of the train on which the horses and the attendant were carried as the sole evidence of the attendant's right to transportation. Unless, then, the railroad company was forbidden to enter into such a contract, it ought not to be open to the company to deny either that Tripp was a passenger for hire or that his fare was paid in money.

[7] We may now turn to the question whether the contract is opposed to the interstate commerce law. If our interpretation of the contract is fairly expressive of its true intendment, it certainly is not

violative of the provision forbidding compensation for the carriage of passengers to be made in services, commodities, or in any form other than money. Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 476, 31 Sup. Ct. 265, 55 L. Ed. 297, 34 L. R. A. (N. S.) 671; Chi. Ind. & L. Ry. Co. v. United States, 219 U. S. 486, 496, 497, 31 Sup. Ct. 272, 55 L. Ed. 305; N. Y. Central R. R. v. Gray, 239 U. S. 583, 586, 36 Sup. Ct. 176, 60 L. Ed. 451. One of the reasons for the rule laid down in these cases is that the requirement to make and publish schedules of uniform passenger rates is inconsistent with receiving pay in any other medium than money. It must be conceded that the record in the instant case fails to show that any separate schedule was made or published by the railroad company showing distinct rates of fare for the carriage of attendants of live stock; but admittedly a schedule in respect of the carriage of live stock was formally adopted and maintained, and we need not repeat that the live stock rates so established were designed to include fares for the carriage of live stock attendants. Is it fatal to the validity of the contract that the fares so included were not separated from the live stock charges and made the subject of a distinct schedule? The "uniform live stock contract" treats the presence of the attendant and his fare as essential elements of the transaction. The transaction is manifestly unrelated to the ordinary passenger traffic; it concerns only live stock and live stock attendants embraced in the freight traffic. The contract involved in the transaction contains rules and regulations which affect the rates charged for the transportation of the live stock; and, as we have seen, this contract was part of the company's official classification and was filed and published as required. The act to regulate commerce provides for "schedules showing all the rates, fares and charges for transportation," and further requires that the schedules state "any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares and charges, or the value of the service rendered to the passenger, shipper, or consignee." Act June 29, 1906, c. 3591, § 2, 34 Stat. at page 586 (Comp. St. 1913, § 8569). When the live stock schedule of rates is considered in connection with the "uniform live stock contract" which contains "rules or regulations" requiring the presence of a live stock attendant and the inclusion of his fare in the sum paid for the transportation of the live stock, we do not see why the portions of the act alluded to are not substantially complied with. The necessity of caretakers in the movement of live stock, indeed the unitary character of the transaction, would seem to involve serious difficulty in attempting to separate and distinguish reasonable rates for the carriage alone of the live stock and reasonable fares for the carriage of the caretakers. The very requirement to state in the schedules any rules or regulations affecting rates is in apparent recognition of instances where it is difficult, if not impracticable, to estimate and state in separate schedules reasonable charges as respects the objects so affecting the particular rates. This may be illustrated by the practice of including in through freight rates the cost to the carrier of furnishing transit privileges

(Unlawful Rates in Transporting Cotton by K. C., M. & B. R. R., 8 Interst. Com. R. 121, 135; Lewis Leonhardt & Co. v. Southern Ry. Co., 217 Fed. 321, 324, 325, 133 C. C. A. 237 [C. C. A. 6]); and also by the well-known practice, as also the right, to a reasonable extent, to include in the fares of passengers compensation for the carriage of their accompanying baggage. As Cockburn, C. J., said in Macrow v. Great Western Railway Co., L. R. 6 Q. B. 612, 617:

"The impossibility of traveling without the accompaniment of a certain quantity of luggage for the personal comfort and convenience of the traveler has led from the earliest times to the practice on the part of carriers of passengers for hire of carrying, as a matter of course, a reasonable amount of luggage for the accommodation of the passenger, and of considering the remuneration for the carriage of such luggage as comprehended in the fare paid for the conveyance of the passenger."

See Saunders v. Southern Ry. Co., 128 Fed. 15, 19, 62 C. C. A. 523 (C. C. A. 6); National Baggage Committee v. A. T. & S. F. Ry. Co., 32 Interst. Com. R. 152; C. & R. I. R. R. Co. v. Fahey, 52 Ill. 81, 83, 4 Am. Rep. 587; Wood v. M. C. R. R. Co., 98 Me. 98, 100, 56 Atl. 457, 99 Am. St. Rep. 339; Penna. R. R. Co. v. Knight, 58 N. J. Law, 287, 288, 33 Atl. 845; 3 Hutchinson on Carriers, § 1241.

[8] But even if it were conceded that railroad companies should in every such instance as this file separate schedules showing the fares charged for carrying live stock caretakers, it is to be presumed under the plan this railroad chose to adopt that the fares of the caretakers were both compensatory and uniform, since the contract was one of an established class of instruments; and, whatever was the amount of any given fare, it must have been estimated with reference to the carriage of live stock attendants on freight trains, not passenger trains. Therefore it hardly is conceivable that the company's failure to make and publish a schedule as to fares of caretakers entitles it to treat plaintiff as a gratuitous passenger and to defeat recovery through the provision releasing the company from the consequences of its own negligence; this would permit the company to take advantage of its own wrong in spite of the contractual effort to make the attendant a passenger for hire; moreover, it would seem to be in conflict with the principle of the decision in Southern Pacific Co. v. Schuyler, 227 U. S. 601, 612, 33 Sup. Ct. 277, 43 L. R. A. (N. S.) 901, 57 L. Ed. 662.

[9] We have seen that the court below held that the instant case is ruled by the decision in Charleston & West. Car Ry. v. Thompson, 234 U. S. 576, 577, 34 Sup. Ct. 964, 965 (8 L. Ed. 1476). The course taken by the trial judge was to decide that the "uniform live stock contract" was a "free pass" within the meaning of the Hepburn Act as amended June 18, 1910 (36 Stat. at page 546); for the railroad company delivered only this contract to plaintiff to define his right to transportation. The plaintiff in the case so relied on, Lizzie Thompson, was the wife of an employé of the railroad company, and a free pass exempting the company from liability had been issued to her gratuitiously under the Hepburn Act. We think there is not sufficient analogy between that case and this to justify the conclusion reached below. In the Thompson Case the railroad company issued a free

pass both in form and substance; the railroad company in this case did not; and, as Mr. Justice Holmes said in the course of his opinion in the Thompson Case, "the railroad company was under no obligation to issue the pass." In view of what we have shown in respect of the present contract, discussion would not aid in pointing out the difference between the contract in this case and the free pass in the Thompson Case; the distinction and its breadth and effect are manifest. The present defendant might have exercised its right, as did the defendant in the Thompson Case, to issue a free pass in accordance with the Hepburn Act; but since the defendant here did not see fit to do this and, on the contrary, chose to issue in its place and stead an entirely different instrument, it must have meant to forego its right under the Hepburn Act. We therefore cannot think that the ruling in the Thompson Case could have been intended to govern cases like the present one. Norfolk Southern R. Co. v. Chatman, supra, 222 Fed. at page 807, 138 C. C. A. 350.

The judgment is reversed, with costs, and the cause remanded with direction to award a new trial.

EXAMINER PRINTING CO. et al. v. ASTON.

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

No. 2672.

1. LIBEL AND SLANDER ⟸107(3)—ACTIONS—ISSUES AND PROOF—PROFESSIONAL CHARACTER AND REPUTATION.

In an action for libel, it was alleged and shown that plaintiff was employed as a consulting civil engineer to make a survey of the property of a corporation which owned a water supply and a report upon its availability for furnishing a water supply for the city of San Francisco. A bill pending in Congress to grant to the city the right to use a source of water supply within a government reservation was opposed by the corporation, which desired to sell its property to the city, and plaintiff made statements to members as to the quantity of water which could be supplied from the corporation's property. The alleged libelous publication characterized the scheme of the corporation as advocated by its president and plaintiff as a "gross fraud," and in its answer defendant repeated the charge, alleging that the claims of the company as to the available water supply which were based on plaintiff's report were grossly exaggerated. *Held*, that the pleadings put in issue the professional character and reputation for integrity of plaintiff as a civil engineer, as distinguished from his personal character and reputation; and that plaintiff was entitled to introduce evidence in chief in support of his professional character and reputation.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 302, 303; Dec. Dig. ⟸107(3).]

2. LIBEL AND SLANDER ⟸107(3)—ACTIONS—EVIDENCE.

Such evidence was also admissible on the question of damages which was in issue.

[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 302, 303; Dec. Dig. ⟸107(3).]

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3. LIBEL AND SLANDER ⊂⊃104(3)—ACTIONS—EVIDENCE.
Other similar publications *held* admissible, in an action for libel, as explanatory of the meaning of the matter charged as libelous in the defamatory publication.
[Ed. Note.—For other cases, see Libel and Slander, Cent. Dig. §§ 286, 287; Dec. Dig. ⊂⊃104(3).]

4. APPEAL AND ERROR ⊂⊃1053(3)—CURE OF ERROR—EVIDENCE—INSTRUCTIONS.
Various rulings of the trial court on the admission of evidence in an action for libel considered, and *held* not erroneous when taken in connection with the instructions to which no objection was made.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4180–4182; Dec. Dig. ⊂⊃1053(3).]

5. APPEAL AND ERROR ⊂⊃231(3)—REVIEW—ADMISSION OF EVIDENCE—SUFFICIENCY OF OBJECTION.
Where the only objection made to evidence offered was the general one that it was immaterial, irrelevant, and incompetent, a specific objection cannot be considered in the appellate court unless it be of such a character that it could not have been obviated in the trial court.
[Ed. Note.—For other cases, see Appeal and Error, Dec. Dig. ⊂⊃231(3); Trial, Cent. Dig. § 199.]

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

Action by Taggart Aston against the Examiner Printing Company and William Randolph Hearst. Judgment for plaintiff, and defendants bring error. Affirmed.

For opinion below, see 226 Fed. 496.

Action at law to recover damages for libel. Judgment for plaintiff. Defendants allege error.

The Sierra Blue Lakes Water & Power Company was the owner of certain water rights on the Mokelumne river in California, which were said to be available and adequate as a source of water supply for San Francisco. In May, 1913, Eugene J. Sullivan and his wife, being the owners of practically all the issued capital stock of this company, executed their power of attorney to Richard Keatinge and his son of San Francisco by which they were empowered to make a sale of the stock at their discretion. Thereafter, these attorneys in fact gave a three months' option to Mr. W. J. Wilsey within which he might make a sale and delivery of the entire property and assets of the company. The plaintiff was employed by Mr. Wilsey as consulting civil engineer to make a survey of the company's property and to prepare notes, maps, profiles, and a report of and concerning the availability of the Mokelumne river sources in the Sierra Nevada Mountains in California. This was undertaken by plaintiff, and the report completed in July, 1913. Mr. Wilsey's option expired by limitation in August, 1913, and with its expiration the plaintiff's direct interest in the property ceased.

In March, 1913, Congress convened in special session, at which time there was presented the application of the city of San Francisco for the grant of reservoir and power privileges at Lake Eleanor, Cherry creek, and in the Hetch Hetchy Valley. This application had prior to that time been pending before the Secretary of the Interior; but, that officer having held that Congress possessed the exclusive power and jurisdiction to grant the privileges sought by the city of San Francisco, the application was transferred to that body. In making the application, San Francisco relied very strongly upon a report made by an Advisory Board of Army Engineers, appointed at the behest of the Secretary of the Interior of the United States to make an investigation of the sources of water supply available for San Francisco as a basis of determining whether or not the Hetch Hetchy privileges should be grant-

ed, which report showed the necessity of including these privileges in order to furnish an adequate water supply.

The Sierra Blue Lakes Water & Power Company, through Sullivan and the plaintiff, actively opposed the Hetch Hetchy Bill, contending that the Board of Army Engineers had been deceived in its findings by the fact that the city of San Francisco, upon which had been enjoined the duty of supplying all necessary data to enable the Advisory Board of Army Engineers to make its determination, had not only been remiss in this duty, but had actually suppressed a report which, according to the claim of the plaintiff and Sullivan, proved that the Mokelumne water rights owned by the Sierra Blue Lakes Water & Power Company were ample as a source of water supply for San Francisco; and charged that the city officials had deliberately suppressed this report.

The alleged libel (the subject of this action) was contained in a special Washington edition of the San Francisco Examiner published in the city of Washington, D. C., on December 2, 1913, when there was pending before the Senate the Hetch Hetchy Bill granting to San Francisco the reservoir and power privileges mentioned. This Washington edition dealt with the water supply question in San Francisco and the needs and necessities of San Francisco in that behalf and urged the granting of the Hetch Hetchy privileges.

One of the articles complained of, entitled "Thief with the Nature Lovers," was signed by Representative Kent of California, and read, in part, as follows:

"I want to state here and now that I have read this literature put out by these people. It has only one foundation in fact and that foundation is the letters of this man Sullivan whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary."

Another was entitled "Inspiration of Opposition," reading as follows:

"During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the city of San Francisco, the Army Engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

"But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson (a conservationist who opposed the Hetch Hetchy Bill) got very angry when Sullivan was referred to as his friend, though he admitted receiving information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston."

An amended complaint was filed September 3, 1914, in which it was alleged that by the use and publication of the above language defendants charged and asserted, and were by the readers of the newspaper in fact understood as charging and asserting: (1) That plaintiff was guilty of the fraudulent intent, purpose, and design to combine and conspire with Eugene J. Sullivan to perpetrate a gross fraud upon the city of San Francisco by and through the sale to it of a worthless opposition water supply, and that plaintiff pretended to have such opposition water supply to sell to the city, and that because he pretended with Sullivan to have such opposition water supply to sell to the city he was led to make gross and careless aspersions on the city of San Francisco, the Advisory Board of Army Engineers, and others; (2) that plaintiff had been proved at the hearing before the Committee on Public Lands of the House of Representatives to be guilty of combining and conspiring with Sullivan to perpetrate, and of perpetrating, a gross fraud either upon said committee, or upon the House of Representatives, or upon Congress, or upon the city of San Francisco, or upon some other persons; and (3) that plaintiff was the tool, sycophant, or hireling of Sullivan, and therefore of "a thief" and of "a man who ought to be in the penitentiary," and that as such he would stultify himself and prostitute his personal honor and professional reputation to do the servile bidding of such an employer without reference to truth and right, and that he had so demeaned himself and disgraced his profession in a certain course of conduct with one Mr. Johnson (meaning Robert Underwood Johnson of New York City), by lying and misrepresenting

facts in connection with the Hetch Hetchy project at the bidding and behest of Sullivan. It was further alleged: "That said charges so made and published by the defendants and each of them and so understood, and by them and each of them intended to be understood by the readers of said special Washington edition of said 'San Francisco Examiner' were, and are in every particular false, misleading, defamatory, libelous, unprivileged, and without excuse, and that they had a tendency to and did and do expose plaintiff to hatred, contempt and obloquy by imputing to him the basest, meanest and most untrustworthy traits of character as a man, neighbor and citizen and had a tendency to and did and do injure him in his good name, reputation, and business, occupation and profession and that said charge was published and circulated by said defendants and each of them with express malice on the part of each of said defendants, and with the design and intent on the part of each of them to outrage the feelings of plaintiff and to cause him to be shunned and avoided by his fellow citizens, and to destroy his reputation and character for honesty and integrity; and to hold him out to the people of the United States and elsewhere as being devoid of honesty and integrity and by reason of an alleged business association with a man stigmatized as a 'thief' and 'who ought to be in the penitentiary,' as being unworthy of any personal or professional trust or confidence, and to injure him in his good name, reputation, business, occupation and profession."

The answer of the defendant William Randolph Hearst was a general denial except as to admissions that the Examiner Printing Company was a corporation incorporated under the laws of the state of California with its principal place of business in San Francisco, and that the defendant William Randolph Hearst was a resident and citizen of the state of New York and an inhabitant of the city of New York.

The amended answer of the defendant Examiner Printing Company was also a general denial except as to admissions similar to those contained in the answer of the defendant Hearst; and for a further answer the defendant set up matter in defense by way of justification, and also matter by way of defense in mitigation of damages in the event that the plaintiff should be held entitled to recover.

The matter in justification was, in substance, that the plaintiff at the times mentioned in the complaint was in the employment of the said Sierra Blue Lakes Water & Power Company and had an interest in the alleged water rights owned by said company, contingent upon the sale of said water rights to the city and county of San Francisco; that there was a great disparity between the water rights claimed to be owned by the said Sierra Blue Lakes Water & Power Company and the water rights actually owned by it, and between the amount of water claimed to be available therefrom to the city and county of San Francisco in the event it purchased the same and the amount which would actually be available therefrom in the event of such purchase; that the claims of the said Sierra Blue Lakes Water & Power Company and its president were at all of said times grossly exaggerated, and that said scheme and effort of that company and its president to sell said water rights to the city and county of San Francisco was at all the times mentioned a gross fraud, in the sense that the claims of said company and of the said president were grossly exaggerated, and that there was a great disparity between the water rights claimed to be owned by the said company and the rights actually owned by it and between the amount of water claimed to be available therefrom and the amount actually available.

The matter set up in defense in mitigation of damages was, in substance, that prior to the publication of the article set up in the complaint the defendant had been informed that the plaintiff had asserted that the cost of developing a supply on the Mokelumne river would be "much less than that of the Hetch Hetchy project"; that defendant had been further informed that other competent engineers had reported unfavorably upon the claims of the Sierra Blue Lakes Water & Power Company; that defendant had been further informed that plaintiff had stated that he had prepared, instigated, and was responsible for all statements and charges made by the president of the Sierra Blue Lakes Water & Power Company in his telegrams to the Public Lands Committee of the House of Representatives, and that plaintiff in a

telegram dated June 14, 1913, to William Kent, a member of the House of Representatives, and in another telegram dated June 23, 1913, to the Chairman of the Public Lands Committee of the House of Representatives, had stated that he had been appointed Consulting Engineer by the Sierra Blue Lakes Water & Power Company; that defendant had been further informed that the chairman of the Advisory Board of Army Engineers had stated in a letter to the Honorable William Kent that the board believed that an estimate of 128,000,000 gallons daily was about all that could be counted on from Mokelumne river unless existing water rights were purchased at great expense and unless the land tributary to the river were deprived of water from this source for irrigation; that defendant had been further informed that, as against this finding of the Advisory Board of Army Engineers, the plaintiff had reported to the chairman of the Public Lands Committee of the House of Representatives that 350,000,000 gallons daily of pure water could be economically supplied to San Francisco from said Mokelumne river, and that the taking of the same would not conflict with any irrigation interests. The defendant further alleged that, in the article in question, where it charged that the Sullivan-Aston scheme was a gross fraud, it did not intend to charge or assert that the Sierra Blue Lakes Water & Power Company or the said Sullivan or the said Aston were knowingly engaged in the perpetration of a gross or any fraud, but intended merely to charge and assert that by reason of the disparity between the claims of the company and of Sullivan and Aston and the findings of the Advisory Board of Army Engineers and other competent engineers, and the Committee on Public Lands of the House of Representatives, said scheme was objectively a gross fraud.

The case was tried before the court and a jury, resulting in a verdict and judgment against both defendants and in favor of plaintiff in the sum of $2,800 as compensatory damages.

Defendants allege error in the admission of certain evidence.

Garret W. McEnerney, of San Francisco, Cal. (John J. Barrett and Andrew F. Burke, both of San Francisco, Cal., of counsel), for plaintiffs in error.

Jacob M. Blake, of San Francisco, Cal., for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge (after stating the facts as above). [1] 1. This action was brought by the plaintiff to recover damages from the defendants for the defamatory publication set out in the statement of facts. It is alleged in the amended complaint that the publication was made with "the design and intent," among other things: (1) To destroy plaintiff's "reputation and character for honesty and integrity; and (2) to hold him out to the people of the United States and elsewhere as being devoid of honesty and integrity and by reason of an alleged business association with a man stigmatized as a 'thief' and 'who ought to be in the penitentiary'; (3) as being unworthy of any personal or professional trust or confidence; and (4) to injure him in his good name, reputation, business, occupation, and profession." The answer of the defendant Hearst and the amended answer of the defendant Examiner Printing Company denied all of the allegations of the amended complaint save such allegations as were therein expressly admitted. The allegations referred to above were not admitted, and therefore became issues in the case requiring proof to establish them as facts supporting the cause of action. The burden of proof was on the plaintiff to prove the material facts in his complaint not admitted by the defendants' answers.

Section 2053 of the California Code of Civil Procedure provides as follows:

"Evidence of the good character of a party is not admissible in a civil action * * * until the character of such party * * * has been impeached, or unless the issue involves his character."

The plaintiff came into court with his general good character established by the statute, and it may be conceded that the statute was sufficient for that purpose, and that evidence was not admissible upon that issue, until the character of plaintiff had been impeached or put in issue by the answers. We think that all the allegations of the complaint relating to the character of the plaintiff for honesty and integrity were placed in issue by the answers, but we pass the question of the plaintiff's general character (clauses 1 and 2 of the allegations of the complaint, as above stated) without comment, to take up the question of the plaintiff's professional character (clauses 3 and 4 of the allegations of the complaint, as above stated), which was manifestly the character of plaintiff involved in the defamatory publication. Let us make this perfectly clear.

In the complaint, the publication is charged as referring to "the statement of the plaintiff and the said Sullivan that the said Mokelumne sources of water supply were reasonably available and adequate for all present and reasonably prospective needs of said city of San Francisco and the adjacent bay cities." This was not the statement of an ascertained fact upon which personal veracity could be made an issue, but was a professional statement, based upon professional skill, and whether it was to be accepted as true or not would necessarily depend upon the plaintiff's professional character and his reputation for truth and veracity as an engineer.

The published article then proceeds to impeach the plaintiff's professional integrity by the charge that:

"It (the statement) has only one foundation in fact, and that foundation is the letters of this man Sullivan, whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary."

The publication contained the further charge:

"During the Senate Committee hearing it came out that much of the inspiration for gross and careless aspersions made on the city of San Francisco, the army engineers and engineers generally, came from two men named Sullivan and Aston, who had pretended to have an opposition water supply to sell to San Francisco.

"But at the House hearing it had been so thoroughly developed that the Sullivan-Aston scheme was just a gross fraud that Mr. Johnson got very angry when Sullivan was referred to as his friend, though he admitted receiving the information on which he had attacked the Hetch Hetchy project as a bad jobbery from Sullivan's man, Aston."

That the question at issue was the plaintiff's professional good name, reputation, and character for honesty and integrity as an engineer, as distinguished from his personal character as an individual, is further made plain by the amended answer of the defendant Examiner Printing Company in the matter set up as a defense by way of justification. In this answer it is alleged that there was a great disparity between

the water rights claimed to be owned by said Sierra Blue Lakes Water & Power Company and the water rights actually owned by it, and between the amount of water claimed to be available therefrom to the city and county of San Francisco, in the event it purchased the same, and the amount which would actually be available therefrom in the event of such purchase; that the claims of the Sierra Blue Lakes Water & Power Company were at all of said times grossly exaggerated; and that said scheme and effort of said company to sell said water rights to the city and county of San Francisco was at all of the times mentioned a gross fraud, in the sense that the claims of said company were grossly exaggerated, and that there was a great disparity between the rights claimed to be owned by said company and the rights actually owned by it, and between the amount of water claimed to be available and the amount actually available. The claim of the company here attacked was based upon the report of plaintiff as an engineer, and whether this report was worthy of belief or not depended upon his character as an engineer for honesty and integrity.

In the amended answer of the defendant Examiner Printing Company setting up matter in defense by way of mitigation of damages, the report of the plaintiff was brought forward to impeach his professional reputation and character for honesty and integrity on the charge that he had reported to the chairman of the Public Lands Committee of the House of Representatives that 350,000,000 gallons daily of pure mountain water could be economically supplied to the city and county of San Francisco from the said Mokelumne river without conflicting with any irrigation interests; whereas, the defendant had been informed that competent engineers, whose names are given in the answer, had reported unfavorably upon the claims of the company, and that the chairman of the Advisory Board of Army Engineers had stated that the estimate of 128,000,000 gallons daily was about all that could be counted on from the Mokelumne river unless existing water rights be purchased at great expense and unless the land tributary to this river be perpetually deprived of water from this source for irrigation. Whether this project would supply to the city and county of San Francisco 350,000,000 gallons of pure mountain water daily, or whether it would supply only 128,000,000 gallons daily, was a question to be determined by the professional skill of an engineer; and whether Congress would accept one or the other of these estimates would necessarily depend upon the character of the engineer making the estimate. If his professional character for honesty and integrity was good, his estimate might receive favorable consideration; if it was not good, it would be rejected as unworthy of consideration. It was in this situation of the controversy that the publication appeared in the defendants' paper. It could have but one effect, and that was to impeach the plaintiff's professional character for honesty and integrity, and that it was so intended is distinctly stated by the defendant in its answer that, in the article in question where it charged that the Sullivan-Aston scheme was a gross fraud, it did not intend to charge or assert that the Sierra Blue Lakes Water & Power Company or the said Sullivan or the said Aston were knowingly engaged in the

perpetration of a gross or any fraud, but intended merely to charge and assert that, by reason of the disparity between the claims of the company and of Sullivan and Aston and the findings of the Advisory Board of Army Engineers and other competent engineers and the Public Lands Committee of the House of Representatives, said scheme was objectively a gross fraud.

We find, then, from the pleadings, that a distinct issue was presented as to plaintiff's professional character and as to the truth and veracity of his reports as an engineer, and upon that issue the burden was upon the plaintiff. The plaintiff, to prove his case against the defendants, offered in evidence the deposition of one William J. Wilsey, who testified that he had employed the plaintiff to make an engineering report upon the hydroelectric and irrigation project in California known as the Sierra Blue Lakes Water & Power Company. A report and supplemental report were made to the witness by the plaintiff for use exclusively in making a sale in Europe. The witness was then asked this question:

"Q. 18. State whether or not you know the general reputation of Taggart Aston in the engineering world, meaning thereby among consulting engineers and among construction engineers and those engaged in promoting and constructing engineering projects in this country and in Europe, or in either of said countries, for the truth and veracity of his reports as a consulting engineer."

The question was objected to as immaterial, irrelevant, and incompetent. The court overruled the objection, and the witness answered: "Yes, I do." The witness was then asked:

"State what Mr. Aston's reputation is in the particulars inquired about in interrogatory No. 18, in any or all of the quarters aforesaid."

The question was objected to as immaterial, irrelevant, and incompetent. The court overruled the objection, and the witness answered:

"From all the information that I have been able to secure regarding Mr. Aston, both in America and in Europe, his reputation has been first-class."

The defendant contends that the admission of this testimony offered by the plaintiff in support of his case in chief was error under the provisions of section 2053 of the California Code of Civil Procedure, supra, and cites Davis v. Hearst, 160 Cal. 143, 185, 116 Pac. 530, 548, where the Supreme Court of California, speaking through Mr. Justice Henshaw, said:

"The court allowed evidence upon the hearing of plaintiff's case in chief to the effect that he bore a good reputation. That affirmative evidence of good reputation in advance of any attack upon it by defendant is inadmissible, is supported by a practical unanimity of authority"—citing numerous cases.

There is no question but that the law of the state is here correctly stated; but, as we think, we have clearly shown it does not meet the issue in the present case, where the plaintiff's professional character was involved and the truth and veracity of his reports as a consulting engineer had been put in issue by the defendants' answers. In this aspect of the case, we think the testimony was clearly admissible.

[2] 2. But there is another ground for admitting this testimony: The plaintiff alleged in his complaint that he had been damaged by this publication, and the general denial of the defendants in their answers placed the question of damages in issue. In Turner v. Hearst, 115 Cal. 394, 398, 47 Pac. 129, 130, the action was for damages for libel. The publication purported to be an account of difficulties existing between Lotta, an actress, and Turner, the plaintiff, who was a lawyer. In the account it was stated that Lotta had caused Turner's arrest upon a criminal charge, and that "the case was compromised, together with the settlement of several thousand dollars in notes, given by the Plumas county lawyer to the actress." In that case, Mr. Justice Henshaw, speaking for the court and referring to evidence of plaintiff's standing in his profession, said:

"It was not error for the court to allow proof of the extent of plaintiff's practice. Plaintiff was a lawyer engaged in the practice of his profession. The words of the publication being admittedly libelous per se, and affecting plaintiff's standing in his profession, it was proper for the jury, in estimating the general damages to which plaintiff was thus entitled, to know his position and standing in society, and the nature and extent of his professional practice. 'General damages,' in an action where the words are libelous per se, are such as compensate for the natural and probable consequences of the libel, and certainly a natural and probable consequence of such a charge against a lawyer would be to injure him in his professional standing and practice."

In Press Pub. Co. v. McDonald, 63 Fed. 238, 242, 11 C. C. A. 155, 26 L. R. A. 53, Judge Lacombe, for the Circuit Court of Appeals for the Second Circuit, reviews the authorities upon this question and holds that in a civil action for libel plaintiff's social standing may be shown in the evidence in chief as bearing on the question of damages; and in Morning Journal Ass'n v. Duke, 128 Fed. 657, 661, 63 C. C. A. 459, the same court followed its previous decision, holding that in a libel suit it was not error to admit evidence of plaintiff's reputation as to his social and business standing. In the first case, the court cites Foot v. Tracy, 1 Johns. (N. Y.) 52, where Chief Justice Kent, discussing this question, said:

"In assessing the damages, the jury must take into consideration the general character, the standing, and estimation of the plaintiff in society; for it will not be pretended that every plaintiff is entitled to an equal sum for the worth of character. The jury have, and must inevitably have, a very large and liberal discretion in apportioning the damages to the rank, condition, and character of the plaintiff; and they must have evidence touching that condition and character, so as to have some guide to their discretion."

In that case, Mr. Justice Thompson said (1 Johns. p. 47):

"It cannot be just that a man of infamous character should, for the same libelous matter, be entitled to equal damages with the man of unblemished reputation; yet such must be the result unless character be a proper subject of evidence before a jury. * * *

"As the legal intendment is that the action is brought to repair an injury done to a person's character, in the estimation of the public, the jury must be left very much in the dark in making a just reparation in damages without being furnished with some data by which to estimate its value and susceptibility of injury. Though the inquiry into general character may be, in some measure, vague and uncertain, and in some cases may lead to abuses, yet I have adopted it as being the least objectionable course. Such inquiries

may be legally made of witnesses as to enable the jury justly to appreciate the sources from which they form their opinion of the general character of a party, and thereby prevent very great evil or imposition."

The appellant contends that the law of these cases is not applicable to the present case for the reason that there is a distinction between social standing and general reputation; but we are unable to distinguish any substantial legal distinction that would admit testimony concerning the reputation of the plaintiff in his social standing and exclude testimony concerning the reputation of the plaintiff in his professional standing. We do not think there is any such distinction, and we are of opinion that the evidence was admissible upon the question of damages.

[3] 3. Plaintiff, for the purpose of proving matter alleged in the complaint by way of inducement as an explanatory introduction to the main allegations of the complaint, offered in evidence copies of the Arizona Gazette of July 7, 1913, the Evening World-Herald of Omaha, Neb., of July 7, 1913, and the Herald Republican of Salt Lake City, of July 8, 1913, containing articles of the same general character relating to charges made by Sullivan, president of the Sierra Blue Lakes Water & Power Company, before the House Public Lands Committee, of chicanery, suppression of report, and political bias of the engineers in the interest of the Hetch Hetchy project for supplying San Francisco with water. It was objected that the articles were immaterial, irrelevant, incompetent, and hearsay. They were admitted over the objection of the defendants. It was stated by the plaintiff that they were introduced in evidence to explain to the court and jury the meaning of the matter charged as libelous in the defamatory publication, which they did. The articles had no prejudicial bearing upon the defendants' case and had no reference to the truth or falsity of the alleged libel. For example, in the publication under the heading, "Thief with the Nature Lovers," there was the following statement attributed to a Congressman:

"I want to state here and now that I have read this literature put out by these people. It has only one foundation in fact, and that foundation is the letters of this man Sullivan, whom we proved in the hearings in the House to be a thief and a man who ought to be in the penitentiary."

The "literature put out by these people" and the "hearings in the House" are both explained by way of inducement in the articles admitted in evidence; but this explanation did no more than make the charge intelligible to the court and jury. We see no objection to the evidence.

[4] 4. C. E. Grunsky was produced as a witness on behalf of the defendant. He testified on direct examination: That he was a civil engineer who had practiced his profession since 1878; that during the years 1912 and 1913 he was asked by the board of supervisors to take charge of work that had been in progress in the city engineer's office by Mr. Manson, who was then city engineer, and who by reason of illness was for a time incapacitated; that in connection with this work he was asked by Mr. Freeman, who had been called in to take charge of the water supply investigation of San Francisco,

to make a number of studies relating to quite a number of sources of supply, Eel river, Feather river, Yuba river, Stanislaus river, Mokelumne, and others, as various possible sources of water, indicated by the Board of Army Engineers to the city as desirable of investigation; that he made use of the information that was in the city engineer's office, put a number of assistants at work, and gathered the information together, formulated reports upon these various sources of supply, and finally submitted them to the Army Engineers; that his investigation included what is known as the Mokelumne river and the properties of the Sierra Blue Lakes Water & Power Company.

Upon cross-examination this witness was asked when this report was turned in. The question was objected to by the defendant, which objection was overruled, and the witness answered: "The report was delivered very late." It appears that the report included a statement of the run-off from Alameda creek proper of the Spring Valley Water Company, then supplying water to San Francisco, but the report was not in fact submitted to the Advisory Board of Army Engineers. It was, however, brought out at a hearing before the Secretary of the Interior upon the complaint of a representative of the Spring Valley Water Company that there was such a report in existence. It was objected to this evidence that the letters and telegrams of Sullivan and plaintiff to the House Committee of Congress claimed that a report prepared by Assistant Engineer Bartell had not been delivered to the Board of Army Engineers, and that it was because of the charge that this last report had been suppressed that defendants charged the plaintiff and Sullivan with having made gross and careless aspersions on the city of San Francisco. But the defamatory publication was not so limited. The charge was general, and the subject-matter was general. The question was whether the city had submitted all of the data that was available to enable the Board of Army Engineers to determine all the sources of water supply sufficient for the present and reasonably prospective needs for the city of San Francisco and the adjacent bay cities. The Spring Valley Water Company was then engaged in supplying San Francisco with water, and the run-off of Alameda creek was a source of supply for that company.

The question was pointedly developed when the plaintiff called in rebuttal the witness William Bade, who was present at the hearing before the Secretary of the Interior and who was asked whether or not at that hearing anything came out with reference to the suppression of any engineering reports which had been prepared for or on behalf of the city of San Francisco. The question was objected to by the defendants as extending the scope of the inquiry beyond the alleged suppression of the Bartell report. The court, in passing upon this objection concerning the admissibility of this testimony, said:

"But this is the situation: The question here is whether this Bartell report was suppressed; your witnesses have all testified that they afforded to that Army Board—because that board represented the Secretary of the Interior—all of the data that was available for the purpose. If it should appear in rebuttal that some data was suppressed, the jury would not be bound by their statements that they afforded all that was material in the matter of the Bartell report."

The testimony, we think, was properly admitted as tending to show that there was a suppression of data which should have been submitted to the Board of Army Engineers to enable that board to perform its duty.

5. The plaintiff charged in his amended complaint that the defamatory matter had been published by the defendants with express malice. As tending to prove this charge, plaintiff introduced in evidence the testimony of three witnesses who, on November 5, 1913, at a meeting of the Civic Center League held in the St. Francis Hotel in San Francisco to discuss the Hetch Hetchy water supply, heard the plaintiff make a speech in which he charged the suppression of the Bartell report; and testified that M. M. O'Shaughnessy, the city engineer, was present and stated that Bartell was merely one of 150 assistants. He appears to have been silent as to the truth of the charge. The copy of the Examiner of November 6, 1913, containing an account of the proceedings of the Civic Center League meeting, was introduced in evidence, from which it appeared that plaintiff's name was not mentioned in the article, nor were any of his statements reported or referred to. The defamatory article was published in Washington on December 2, 1913, or less than a month later than the Civic Center League meeting and the report of its proceedings by the San Francisco Examiner on November 6, 1913. It is contended that the omission from the San Francisco Examiner of any reference to plaintiff's statements before the Civic Center League upon a matter of such vital importance in the investigation tended to prove malice on the part of the defendants. But whether it did, or not, does not now appear to be material. The verdict of the jury was for compensatory damages only, which, under the carefully prepared instructions of the court to which no objection was taken, was in effect a finding against the plaintiff that the publication was actuated by malice; or, in other words, the finding of the jury was in effect a specific finding that the publication was without malice. We do not think there was error in admitting the testimony; but, if there were, it would not now justify the court in reversing the judgment.

6. The plaintiff introduced in evidence, over the objection of the defendants, testimony of William J. Wilsey to the effect that the plaintiff was in his employ, and that the reports made by the plaintiff to the witness concerning the properties of the Sierra Blue Lakes Water & Power Company were not made for the purpose of selling the properties to the city of San Francisco, but for offering them for sale in Europe. It was charged in the article complained of that it had come out in the hearing before the Senate Committee that much of the inspiration for gross and careless aspersions made on the city of San Francisco, the Army Engineers, and engineers generally, came from two men named Sullivan and Aston who had pretended to have an opposition water supply to sell to San Francisco, and that it had been thoroughly developed at the House hearings that the Sullivan-Aston scheme was just a gross fraud. The testimony was relevant to that issue and to the questions arising from the inference to be drawn from the charge against the plaintiff.

7. The court permitted the witness Sullivan to testify, over the objection of the defendants, that he had expended on the property of the Sierra Blue Lakes Water & Power Company in construction and other works about $100,000. This testimony tended to prove that the property was of substantial value, and that it was not a gross fraud, as charged in the publication.

8. It is objected on behalf of the defendant Hearst that there was no evidence connecting him with the publication complained of. In the course of the trial, the plaintiff offered in evidence the article in the San Francisco Examiner of November 30, 1913. The article was headed:

"'Examiner' to Publish Water Bill Edition in Washington. Hetch Hetchy Measure to Have Support of Special Issue Printed and Circulated Tomorrow Throughout the East. Stupendous Task is Result of Idea Conceived by W. R. Hearst and Carried Out by Him and Able Staff of Lieutenants."

The article commences with the statement:

"Under the personal supervision of Mr. William R. Hearst a special sixteen-page edition of the San Francisco 'Examiner' will be printed and published in Washington to-morrow."

This statement was substantially repeated in other places in the article. It was objected by counsel for the defendant that this statement in the Examiner did not bind the defendant Hearst. The objection was overruled by the court, with the statement that the article was "admissible with respect to one of the defendants" (the Examiner Printing Company). "The other," said the court, "is to be governed by an instruction, which the jury may understand now, that the statements therein, unless there is something to show that Mr. Hearst is connected with this fellow defendant in some manner, the jury will confine its consideration of this article to the other defendant." At the close of the case, no request was made on behalf of the defendant Hearst to instruct the jury to find for the defendant on the ground that there was no evidence connecting him with the publication, and no argument was made to the jury on behalf of either defendant. The court, in its instructions to the jury, referring to the defendant Hearst, said:

"As to the defendant William Randolph Hearst, the first question for the jury will be whether he made or was responsible for the publication of the article in question; and if you find that he either advised, directed, or instigated the publication, then he is responsible for it the same as if he himself had made it. If you find him responsible for the publication, then the question will be, as with the other defendant, whether the statements published were true. If they were true, there is no ground of recovery; if they were false, then, as with the other defendant, he would be responsible for such damages as the jury may award against him. Whether he is responsible for the publication may be made to appear either by direct evidence of the fact or by circumstances warranting the inference of such fact. As to both defendants, the burden is upon the plaintiff to make out this case entitling him to recover by a preponderance of the evidence; that is, by evidence which satisfies the jury that to some extent it is stronger and more satisfactory as a basis of their verdict than that which is opposed to it."

No exception was taken to this instruction of the court. If this instruction was not justified by direct evidence of the fact or by

circumstances warranting the inference of such fact, the attention of the court should have been called to it at that time. Failing to do so, it must be presumed that there was direct evidence of the fact or circumstances warranting the inference of such a fact, and that the question was properly submitted to the jury for its consideration.

[5] 9. The court admitted, over the objection of the defendants, certified copies of sworn statements required by the Act of Congress of August 24, 1912, to be filed with the Postmaster General by the editor, publisher, business manager, or owner of every newspaper, magazine, periodical, or other publication, setting forth the names and post office addresses of the editor and managing editor, publisher, business manager and owner of such publication. 37 Stat. 553, c. 389. In these statements the name of William Randolph Hearst is the only name given as the owner holding more than one per cent. of the total stock of the San Francisco Examiner, the Los Angeles Examiner, the Atlanta Georgian, the Chicago Evening American, the Boston American, and the New York Evening Journal. The purpose for which these certificates were offered in evidence was stated by counsel for the plaintiff to be to show the connection of the defendant William Randolph Hearst with those newspapers. The objection is now made that the evidence showing that the defendant William Randolph Hearst was a stockholder in the defendant corporation in no manner tended to prove that he was directly or even remotely connected with the publication complained of. This objection is made here for the first time. We think it comes too late. It should have been made in the court below. The objection that the testimony was immaterial, irrelevant, and incompetent, was the only objection made in that court. The attention of the court should have been called to the specific objection now urged upon the court against these certificates, so as to give the other side full opportunity to obviate it at the time, if under any circumstances that could have been done.

In Wood v. Weimar, 104 U. S. 786, 795, 26 L. Ed. 779, the objection to a deed read in evidence in the trial court was that it was incompetent, immaterial, and irrelevant. In the Supreme Court it was objected that the attestation of the recorder of deeds of the correctness of the transcript was not certified to be in due form. Chief Justice Waite, for the Supreme Court, said:

"This was not the objection made below, and it comes too late here. There the attention of the court was called only to the competency, materiality, and relevancy of the deed; here to the form of the authentication of the copy. The rule is universal that nothing which occurred in the progress of the trial can be assigned for error here, unless it was brought to the attention of the court below."

In Noonan v. Caledonia Mining Co., 121 U. S. 393, 400, 7 Sup. Ct. 911, 915 (30 L. Ed. 1061), Mr. Justice Field, for the court, said:

"The rule is universal that where an objection is so general (immaterial, irrelevant, and incompetent) as not to indicate the specific grounds upon which it is made, it is unavailing on appeal, unless it be of such a character that it could not have been obviated at the trial. The authorities on this point are all one way. Objections to the admission of evidence must be of such a

specific character as to indicate distinctly the grounds upon which the party relies, so as to give the other side full opportunity to obviate them at the time, if under any circumstances that can be done."

In District of Columbia v. Woodbury, 136 U. S. 450, 10 Sup. Ct. 990, 34 L. Ed. 472, Mr. Justice Harlan announces the same rule.

"It has therefore been often held," said Mr. Justice Harlan for the court in Sparf & Hansen v. United States, 156 U. S. 51, 57, 15 Sup. Ct. 273, 275 (39 L. Ed. 343), "that an objection to evidence as irrelevant, immaterial, and incompetent, nothing more being stated, is too general to be considered on error, if in any possible circumstances it could be deemed or could be made relevant, material, or competent."

Under these authorities, the objection made by counsel for the defendants is not sufficient with respect to the evidence in question.

Finding no error in the record, the judgment of the court below is affirmed.

HENDRICKSON, County Judge, et al. v. APPERSON.

(Circuit Court of Appeals, Sixth Circuit. December 15, 1916.)

Nos. 2947–2951.

1. COUNTIES ⟸194—COLLECTION OF TAXES—CONSTRUCTION OF STATUTE.
Ky. St. § 4131, as amended by Act March 15, 1906 (Acts 1906, c. 22, art. 8, § 3; Ky. St. 1915, § 4131[3]), by providing that a county collector of taxes "shall only be required to give bond for and collect such taxes or moneys as may be * * * provided for in the order of the county court appointing him," by implication imposes upon the county court the duty of certifying to the collector all county tax levies and providing for their collection. It cannot fairly be construed to empower such court to appoint two or more collectors, and to provide for the collection by each of such levies only as the court shall see fit.

[Ed. Note.—For other cases, see Counties, Cent. Dig. § 306; Dec. Dig. ⟸194.]

2. HIGHWAYS ⟸128—COUNTY OR STATE TAX—CONSTRUCTION OF STATUTE.
By two acts of the Kentucky Legislature (Acts 1914, cc. 86, 87; Ky. St. 1915, §§ 4356w, 4356x) a system of state highways connecting county seats is established, and provision is made to raise by taxation money to be used in their construction or reconstruction. The second act further provides that "any road constructed or reconstructed under the provisions of this act shall forever hereafter be a county road and the duty of keeping the same in repair devolves upon the fiscal court of the county." *Held*, that a tax levied by a county, to be used in connection with state funds in the construction or reconstruction of certain of such roads, is a county, and not a state, tax, and is collectible by the county collector.

[Ed. Note.—For other cases, see Highways, Cent. Dig. § 385; Dec. Dig. ⟸128.]

In Error to the District Court of the United States for the Western District of Kentucky; Walter Evans, Judge.

Separate mandamus proceedings by Lewis Apperson by Elizabeth Creager, by Hugh S. Gardner, by Mildred E. Hocker, and by the Sterling Land & Investment Company against W. T. Hendrickson,

Judge of Taylor County Court, and J. D. Jones, W. H. Bennett, A. W. Miller, L. Morgan, Ruel Eads, and T. E. Wise, Justices of the Peace of Taylor County, Ky. From judgments granting the writs, defendants bring error. Affirmed.

The following is the opinion of Walter Evans, District Judge:

The plaintiff's demurrer to the defendants' answer raises questions which we have often considered and decided in the course of the many years of litigation growing out of the bonded indebtedness of Green and Taylor counties, respectively, incurred by each in aid of the construction of a certain railroad. The indebtedness of both counties is alike, it grew out of the same railroad situation and similar legislation, and the character of the resistance made by each county against the payment of the debts has been the same. We have, therefore, quite a settled jurisprudence in this connection, at least so far as this court is concerned. The validity of the indebtedness must be regarded as having been settled by the decision of the Supreme Court in Green County v. Quinlan, 211 U. S. 582, 29 Sup. Ct. 162, 53 L. Ed. 335.

The routine steps taken in resisting payment after the validity of the indebtedness had been settled by the decision of the Supreme Court have been practically uniform and as follows: First. A contest upon the validity of the bonds being hopeless, the first resistance appears when a writ of mandamus is applied for, requiring the fiscal court to make a levy of taxation to pay the debt. Second. Failing to prevent the writ of mandamus, and after the taxation has been levied and proceedings for its collection have begun by putting or trying to put tax books in the hands of the sheriff, that officer either refuses to qualify, or, having qualified, resigns. Third. A collector of state taxes is then appointed separately, which, under the law of Kentucky, is admissible. Fourth. A collector of county taxes is then appointed, who usually refuses to accept the office if he is required to collect taxation to pay the railroad debts at the same time and under the same bond taken from him for the collection of the other county taxation, or he resigns if that requirement is made after he has qualified.

This brings the creditor to a standstill. It was perceived, however, that the county could not collect taxes for paying its other liabilities, especially the taxes necessary to pay the salaries of its officers, unless a collector should be appointed, and so an attempt became customary to place all the assessments for county purposes in the hands of the collector, except that which levied taxes for the payment of the railroad bonds, and a creditor owning those bonds would find it impossible to obtain a result favorable to himself if he could not have the taxation for his benefit levied and collected simultaneously with the other taxation by the collector, and, as we thought one county debt was as sacred as another, we enforced the Kentucky statute. The county officers who wanted their salaries paid usually found that they could be elected more easily if they opposed the payment of the bonded indebtedness. Their appeal to the spirit which demanded a repudiation of the bonded indebtedness usually secured them popular favor, and it was very plain that, if the taxes for the salaries of the officers and taxes for the payment of the ordinary county expenses could all be collected, and those necessary to pay the railroad bonds could be left out, things would move quite satisfactorily to those who desired to repudiate the county's bonded indebtedness. We did not concur in this plan, and concluded that this state of case should not be tolerated, inasmuch as the bonded indebtedness has been found by the Supreme Court to be a valid one. So it became our habit, under section 4131 of the Kentucky Statutes, to require the county or fiscal court, whichever had control of the matter, to make an assessment covering all, and to require that the collector, under such circumstances, should collect all alike, or else collect none, and in order to accomplish this, our writs of mandamus would require that there should be exacted from any sheriff or collector who collected county taxation a bond which would include alike an obligation to collect the levy for the railroad bonded indebtedness and the taxation for ordinary county expenses, including salaries of officers. In this way, and in this way only, could the creditors who held the bonds of the county have anything but a mere nominal

remedy. Without such a requirement the collector would collect money to cover all the other county expenses, and its officers, who got their salaries, might laugh at such of its creditors as had taken its bonds. The proper local court was also required, when appointing a collector of county taxes, to make his appointment cover all alike.

Section 4131 of the Kentucky Statutes provided a remedy to meet this situation, and in several instances in the course of this litigation we have heretofore endeavored to enforce that remedy in the way indicated. The Court of Appeals in Commonwealth, etc., v. Wade's Adm'r, etc., 126 Ky. 791, 104 S. W. 965, had construed that section, and in our proceedings we have followed that construction. It afforded a good remedy for the creditors who held the county's bonds. But at the instance of the two counties named the Legislature of the state in 1906 (Sess. Acts 1906) amended section 4131 by adding thereto the following words: "But such collector shall only be required to give bond for and collect such taxes or moneys as may be mentioned or provided for in the order of the county court appointing him." In Commonwealth, etc., v. Moody, 150 Ky. 571, 150 S. W. 680, the Court of Appeals upheld the amendment. In this case we are asked to accept and to follow that construction. We have been asked heretofore to do so, and have declined, and must again decline upon grounds similar to those controlling us in previous cases, though if the amendment to section 4131 of the Kentucky Statutes is to be applied only to debts which arise in the future, we see no reason why it might not be enforceable as to them. But as to any indebtedness which existed prior to the amendment of 1906, as the indebtedness in this case did, we must disregard that amendment and will briefly state our reasons for this conclusion:

The meaning of the language of a state Constitution or a state statute, as ascertained by decisions of the court of last resort of that state, is always accepted by the federal courts as binding upon them. So are decisions of such courts as to the validity of state legislation under the provisions of the state Constitution. But the federal courts are not bound by the decisions of any of the state courts as to the validity of a state statute, if the validity of such statute is challenged upon the ground that it is violative of the Constitution of the United States. These propositions are so familiar as to require no citation of authorities. The federal Constitution forbids a state to enact any law which impairs the obligation of a contract. The remedy for enforcing the contract is essentially a part of the contract itself. If a remedy is provided when the contract is created, it may indeed be changed, but only on condition that one equally efficient and equally available is substituted. In this instance the amendment to section 4131 of the Kentucky Statutes took away the only efficient remedy left the holder of any of the bonds of Taylor county, and, instead of providing another equally efficient, left those creditors helpless, or at least dependent upon the caprice of the county court. It is so plain that this cannot be constitutionally done that we have felt constrained to hold that the creditors who held the railroad bonds of the county were entitled to the remedy as it existed previous to the passage of the amendment of 1906, and especially as section 4131 which gave that remedy had been upheld in Commonwealth, etc., v. Wade's Adm'r, 126 Ky. 791, 104 S. W. 965, above referred to, which was decided in 1907, but in an action which arose before 1906. Of course, school taxes (which the Kentucky Court of Appeals has held to be state taxes) will not be affected by this ruling, but will be excepted from it, as will be shown in the judgment herein.

It is insisted that the road taxation provided for in the act approved March 24, 1914 (Acts 1914, p. 441), is a state tax, and stands upon the same footing as the school tax. So far as the taxation of 5 cents on the $100 provided for in section 4 of that act is concerned, the contention is sound, and we cannot and shall not, by our judgment in this case, interfere with that taxation or its collection; but section 21 of the same act provides that any road constructed or reconstructed under its provisions shall forever be a county road, and "the duty of keeping the same in repair devolves upon the fiscal court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said fiscal court." This act refers to state aid roads, which constitute only a small per cent. of the county roads. The expense of

maintaining the roads not aided by the state is, of course, a county matter. It is thus quite clear that the taxation imposed by the fiscal court of a county for the purpose of constructing or reconstructing roads is a county expenditure, and not a state indebtedness, and, consequently, that the school tax decision has no bearing upon the question.

The demurrer to the answer is sustained, and if the defendants do not answer further, or manifest a desire to do so, judgment, as prayed for, will be entered.

Helm Bruce, of Louisville, Ky., for plaintiffs in error.

W. O. Harris, of Louisville, Ky., and Lewis Apperson, of Mt. Sterling, Ky., for defendants in error Apperson and Sterling Land & Inv. Co.

L. A. Faurest, of Elizabethtown, Ky., for defendants in error Creager, Gardner, and Hocker.

Before WARRINGTON, KNAPPEN, and DENISON, Circuit Judges.

PER CURIAM. It is here sought to reverse five judgments in mandamus. They were rendered in separate cases, which involved the same questions and were decided at the same time. The proceedings in error were heard together here and are passed upon in this opinion. The plaintiffs in error constitute the fiscal court of Taylor county, Ky., and the peremptory order in each case in terms requires them and their successors, if any, in office: (1) To convene the court at stated times in 1916, 1917, and 1918, and to levy a tax upon the taxable property of the county, payable in three annual installments, sufficient in the aggregate to pay certain unsatisfied judgments which the defendants in error had severally recovered against the county; (2) to place the appropriate tax bills for collection under each levy in the hands of the sheriff, and his successor, if any, in office; and, upon failure of the sheriff to qualify, the order in each instance directs (3) the county judge, and his successor, if any, in office, constituting the county court, to take steps necessary to collect such tax when appointing a collector of taxes.

[1] The cases, except as to a road tax, are controlled by the decisions of this court in Tucker v. Hubbert, 196 Fed. 849, 117 C. C. A. 365, and Graham v. Quinlan, 207 Fed. 268, 124 C. C. A. 654, unless error was committed, as counsel claim, in the decision in Graham v. Quinlan. The contention is that we there erroneously construed the decision in Commonwealth v. Moody, 150 Ky. 571, 150 S. W. 680, touching the effect of an amendment made March 15, 1906, to section 4131 of the Statutes of Kentucky. Acts 1906, p. 153, § 3; 2 Ky. Stat. (Carroll Ed.) 1915, § 4131(3). The error so claimed concerns a further portion of each order. These orders also provide in substance that when the county judge, or his successor, if any, in office, shall appoint a collector of taxes, he shall embrace in the order of appointment a direction to the officer to collect in addition to the usual levies of taxes also the levies to pay the judgments mentioned, and shall exact of the collector a single bond to secure collection of all the levies. Each order, however, excepts any levy made by the

fiscal court for school purposes, and also "the five cents on each one hundred dollars of state revenue for the construction of public roads."

In Graham v. Quinlan, 207 Fed. at page 272, 124 C. C. A. 654, we considered the decision in the Moody Case, and we do not see any sufficient reason to change the views we there expressed, either as to that decision or the effect of the amendment of 1906. It is true that the amendment in terms relieves the collector of any duty "to give bond for and collect" taxes not "mentioned or provided for in the order of the county court appointing him." Before the amendment no special certification of the county levy was required to be made to the sheriff or collector in order to make the tax collectible by either; it was the duty of each to take notice of levies made by the fiscal court, and to collect and apply the taxes; and the failure of either to do so rendered the defaulting official responsible under his bond. Commonwealth v. Wade's Adm'r, 126 Ky. 791, 801, 104 S. W. 965. The amendment was in form appropriate to ameliorate this condition at least as to the collector. It relieved him, as well as his sureties, from the peril of overlooking existing levies; but the language fails to indicate any purpose to do more than this, save only to impose upon the county court a duty of certification of levies when appointing a collector. The amendment did not change the purport or effect of any levy itself. A tax levy imports a necessity for its existence and a purpose to collect it. The power to impose a tax would be futile in the absence of effective means for its collection. Upon the sheriff's failure to qualify, the county judge, in his capacity as the county court, is empowered to appoint a collector of taxes; and the amended section, by clear implication, devolves a duty upon the county court exercising this power to provide in its appointing order for the collection of the existing county tax levies. This, as it seems to us, is the natural import and meaning of the amended section in its entirety, and, consequently, is expressive of the legislative intent.

It is insisted, however, that the amendment empowers the county court to appoint two or more collectors, and to mention or provide for the collection of such taxes, and such only, in the several orders of appointment, as the court shall deem fit; and, aside from the road tax before alluded to, this is the effect of the only defense here offered. It is particularly to be noticed that no objection is made to the portions of the peremptory orders that require levies to be made to pay the unsatisfied judgments. The complaint is that the orders collectively, as well as separately, restrict the county court to the appointment of a single collector with a single bond. Certainly the words comprised in the amendment itself do not in terms vest any appointing power. The right to appoint a plurality of collectors of taxes ought to be traceable to some distinct legislative authority. The only language expressly creating the power of appointment is contained in the old portion of section 4131 and remains unchanged; and, as already indicated, the construction which that language received in the Wade Case, 126 Ky. 799, 104 S. W. 965, limiting the power of appointment to a single collector to collect the county reve-

nue, including any special assessment, ought to be followed, unless the decision in the Moody Case requires a different construction. The only issue involved in the Moody Case was whether Moody, who had been appointed as a special tax collector after the amendment of 1906, was responsible for failure to collect a tax not mentioned in his order of appointment. Plainly, this did not call for a construction of the appointing power; it concerned only the effect of omission to mention a particular tax in an appointing order. It is clearly to be inferred from the records in the instant cases, not to speak of the records in Tucker v. Hubbert and Graham v. Quinlan, that no person would accept an appointment and furnish a bond, with responsible sureties, to collect simply and solely a tax levy to pay these judgments; in short, the logic of the interpretation urged in behalf of plaintiffs in error is to impute to the Legislature a purpose to sanction repudiation of acknowledged county indebtedness. We cannot accept this view. We cannot believe that language appropriate to require certification of tax levies to a tax collector for the protection of himself and his sureties was intended also to justify multiplying collectors and distributing the items of levy among them at the will or the caprice of the appointing official.

The complaint at bottom is not that the services in themselves are too great for a single collector; it is that they are affected by the existence of bitter opposition to payment of these unsatisfied judgments. The circumstance that such hostility prevails in a particular county against a single item of its tax levy cannot stand as a warrant for severance of the levy. The statute is a general law, and must have uniform operation throughout the state. The plaintiffs in error cannot be heard both to concede the levy to pay these judgments to be right and affirm its collection to be wrong. Simple justice and good conscience, as also the law, require provision to be made for a single agency and guaranty to collect this tax as a unitary portion of the regular county levy; and if collection of those portions of the levy which the taxpayers are willing to pay cannot be effected in this way, the fault must lie with the county itself. Our conclusion, of course, renders it unnecessary to consider the question determined below whether the effect of the amendment was to destroy an existing remedy, without substituting one equally efficacious, to enforce collection of the judgments, and so operated to impair the contracts.

[2] It remains to consider whether the road tax to which allusion has been made is a state tax, and not a county tax. Here again counsel lay stress upon the question of collectorship. If the tax is a county tax, its collection will fall within the province of the county tax collector; but, if it is a state tax, its collection must be made through the state tax collector, who appears to have been appointed by the county court January 24, 1916. The road tax is one of the items of the general county levy, to wit:

"That thirty-five cents on each one hundred dollars, as assessed and equalized for taxation for the year 1916, be used for building bridges and maintaining the county roads of Taylor county for the year 1916, four thousand six

hundred dollars ($4,600) be used in connection with like sum from the state for the purpose of continuing the work on the state roads in the aforesaid county, which are now under construction."

It is the item of $4,600 thus provided for that is in dispute. The statutes that are pertinent here were enacted by the Legislature of Kentucky on March 24, 1914; and since the first act is dependent for its execution upon the second, the two acts must necessarily be considered together. One is entitled "An act declaring certain public roads a system of public state highways, and public works of the state of Kentucky." The other statute is entitled "An act to create and establish a system of public state roads and to provide for the construction and maintenance thereof." Acts 1914, pp. 440, 441; 2 Ky. Stat. (Carroll Ed.) 1915, §§ 4356w, 4356x. The first of these acts provides that the system of highways to which it in terms relates shall consist of roads connecting county seats of adjoining counties within the state, and also county seats of state border counties with those of adjoining counties in the adjacent states. The second act invests the commissioner of public roads with general supervision of all public roads and bridges that "are being constructed, improved or maintained in whole or in part by aid of state money," and would seem to include roads designed to connect county seats provided for in the first act (subsections 1 and 2 of second act). Further provision is made for raising money through taxation for the purpose of furnishing such state aid and for apportioning the money among the several counties applying for state aid. It is not necessary to recite the details of the second act, since it distinctly provides (subsection 21):

"Any road constructed or reconstructed under the provisions of this act shall forever hereafter be a county road and the duty of keeping the same in repair devolves upon the fiscal court of the county to be maintained out of the general county fund as provided by law, and all other powers and duties respecting such road shall be imposed upon and invested in the said fiscal court."

Thus the plan, considered as an entirety, would seem to provide for state aid of county roads rather than county aid of state roads. It is true that both of these acts in general terms call the roads there mentioned "public state highways," yet this is consistent with the specific provision, just quoted, which expressly invests every such road with the characteristics of "a county road," and provides for their maintenance later by the several fiscal courts of the counties. It was manifestly quite as competent for the lawmaking body to provide that these highways should each be a county road as it was to provide that they should receive state aid. All public roads are in one sense state highways, since the general rule is to provide for their construction, improvement and repair through local agencies created in pursuance of legislative enactment; but here the purpose to treat these highways as local roads is distinct. It results, we think, that taxes levied, as here, by county agencies, are county taxes, and are to be collected by the county tax collectors.

We discover nothing in the statutes in question which would pre-

vent any of the counties from securing such state aid under levies and collections of taxes made through purely county agencies. Indeed, the facts alleged in the pleadings of the instant cases, and by general demurrer admitted, set out a plan to secure state aid under these statutes through appropriation and use of the $4,600 in dispute. The plan relates to "the improvement of three (named) roads," which are designed to connect the county seat of Taylor county with the county seats of certain adjoining counties. The aid sought is under an arrangement alleged to have been made with its officials whereby the state is to contribute a like sum ($4,600) for the same object. In other words, the total sum of $9,200 is intended to be secured and applied toward the improvement of these roads. Unless the desired aid is to be obtained in this way, it cannot under the present records be secured. If the plan of Taylor county had been to issue bonds under the acts sufficient to procure the total sum desired ($9,200), and to use the money in the improvement of the three roads before applying for state aid, the county might, after executing the plan, have secured state aid to the same extent as it now proposes, and then have applied the sum so received from the state to ordinary county objects (Mitchell v. Knox County Fiscal Court, 165 Ky. 543, 550–553, 177 S. W. 279); and this tends strongly to support the conclusion that the road tax in question is a county tax, and not a state tax.

The claim of analogy between the instant tax and an ordinary school tax fails. The road tax originates with the fiscal court; the school tax, with the board of education. The object of the road tax is to construct or improve county roads; the object of the school tax is to procure and support an exclusively state system of public schools. City of Louisville v. Commonwealth for School Board, 134 Ky. 488, 494, 121 S. W. 411; Ramsey v. County Board of Education, 159 Ky. 827, 831, 832, 169 S. W. 521.

It follows that the judgment in each of the cases must be affirmed, with costs.

GREAT LAKES TOWING CO. v. SHENANGO S. S. & TRANSP. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. January 2, 1917.)

No. 2871.

1. TOWAGE ⇐12(1)—RELATION AND DUTIES OF TOW TO TUG.
It is the duty of a steamship in charge of tugs, but ready to assist them with her steam if called upon, to conform to and promptly obey the signals of the tugs.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 24–26; Dec. Dig. ⇐12(1).]

2. TOWAGE ⇐15(2)—INJURY TO TOW—PRESUMPTION OF NEGLIGENCE OF TUGS.
A collision between a steamship and a breakwater, while being maneuvered by tugs in a restricted harbor, raises against the tugs a presump-

tion of negligence, and the burden of proof is upon them to show that they exercised due care.

[Ed. Note.—For other cases, see Towage, Cent. Dig. §§ 34–36; Dec. Dig. ⟸15(2).]

3. TOWAGE ⟸11(7)—INJURY TO TOW—LIABILITY OF TUGS.

Two tugs, engaged in turning a large steamship in a small harbor inclosed by breakwaters, both *held* in fault for a collision between the steamer and a breakwater for negligent handling of the vessel.

[Ed. Note.—For other cases, see Towage, Cent. Dig. § 19; Dec. Dig. ⟸11(7).]

4. COLLISION ⟸95(2)—STEAMSHIPS MANEUVERING IN HARBOR—NEGLIGENT HANDLING BY TUGS.

The steamship Shenango, 600 feet long, while being turned by two tugs in a small harbor inclosed by breakwaters, to pass from one pier to another, had her stern grounded on the broken stone at the foot of one of the breakwaters, and her bow was then pushed around by one of the tugs until it came into collision with the steamship Rensselaer, which had just entered the harbor and was proceeding to a pier on the other side. *Held*, that neither of the steamships was in fault; the Shenango being wholly in charge of the tugs, and the Rensselaer having sufficient room to pass safely to her pier if the tugs properly maneuvered the Shenango, on which she had a right to rely, but that both tugs were in fault for the collision for negligent handling of their tow.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⟸95(2).]

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

Suit in admiralty for collision by the Shenango Steamship & Transportation Company, owner of the steamer Shenango, against the Great Lakes Towing Company, owner of the tugs Reidenbach and Sunol, and the Pittsburgh Steamship Company, owner of the steamer Rensselaer. Petition of the Pittsburgh Steamship Company against the Great Lakes Towing Company, and cross-libel of the Pittsburgh Steamship Company against the Shenango Steamship & Transportation Company. Decree in favor of both steamship companies against the towing company, and that company appeals. Affirmed.

H. D. Goulder and T. H. Garry, both of Cleveland, Ohio, for appellant.

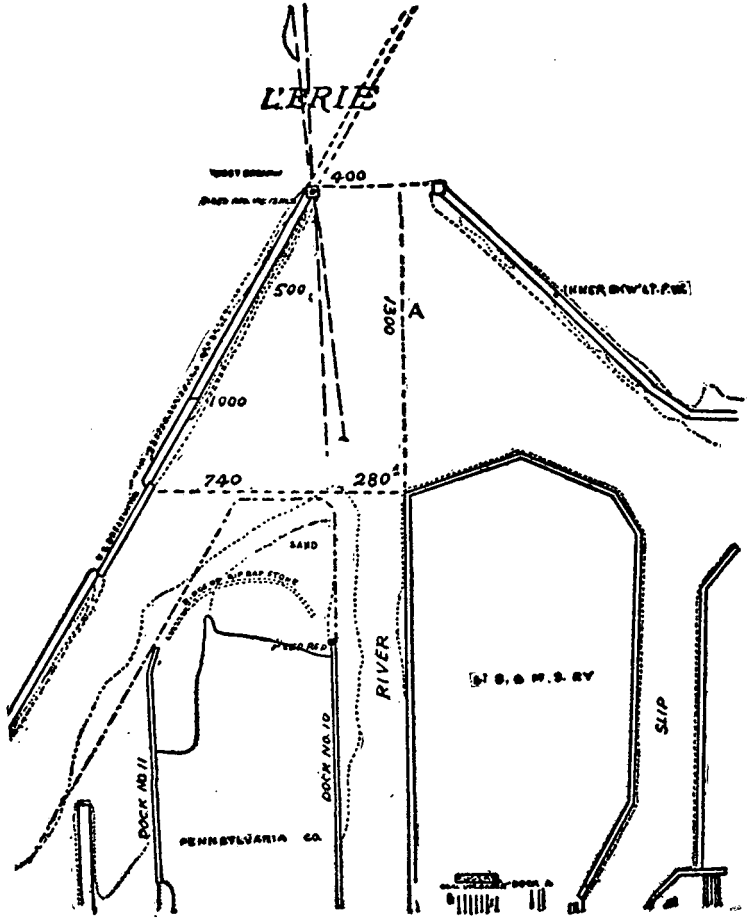
O. D. Duncan, of New York City, and G. B. Marty, of Cleveland, Ohio, for appellee Shenango S. S. & Transp. Co.

H. A. Kelley, of Cleveland, Ohio, for appellee Pittsburgh S. S. Co.

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

HOLLISTER, District Judge. The ultimate question involved is upon whom the responsibility rests for injuries to the steamers Shenango and Rensselaer, growing out of collisions in the harbor at Ashtabula, Ohio, resulting from maneuvers in which these vessels and the tugs Reidenbach and Sunol were engaged at about 9:30 p. m., July 25, 1910.

The harbor at Ashtabula is of artificial construction, and, because of its breakwaters and the projection of docks into the harbor, affords a restricted area within which large vessels may maneuver. The inserted diagram, following the government chart, with some additions, shows the important physical features referred to in the discussion.



The Shenango, 607 feet over all, 58 feet beam, in water ballast, drawing 7 feet forward and 16 feet 8 inches aft, lay with her bow up the Ashtabula River, at dock No. 10. Below her at the same dock lay the Stanton, 530 to 540 feet long, projecting slightly beyond the northern end of the dock. Both vessels carried adequate electric lights. The night was clear, though dark, and there was little or no wind.

The Rensselaer, 476 feet long, 50 feet beam, and heavily laden with iron ore to a draft of 19 feet, was slowly approaching the harbor from

the lake, with the purpose of proceeding to the slip of the Lake Shore & Michigan Southern Railway.

The Shenango, wishing to go to dock No. 11, whistled for tugs. The Sunol and Reidenbach responded. The former tied to her stern, and the latter to her bow, with a line 50 to 60 feet long. The Shenango, with steam up, placed herself in charge of the tugs and did not at any time use her steam, except to assist in clearing the Stanton, and for signaling, and in one other operation to be described. She was strictly in tow. To accomplish the purpose of the contemplated movement, it was necessary for the Shenango to be backed sufficiently into the harbor so that in the winding process she would clear the shallow water northward of the stone ridge; care being taken that her bow should be free of the northwest corner of the dock at the east of the river.

With the exercise of proper care, though the limits of operation were narrow, there is no reason why the Shenango could not have been winded while the Rensselaer was entering into the harbor and proceeding to her slip. In such a harbor vessels maneuver at close quarters, even to the extent sometimes of rubbing against each other. The Shenango and the Rensselaer knew the harbor, and the tugs were intimately acquainted with it.

From the greatly conflicting testimony taken more than four years after the occurrence, it may fairly be gathered that, at or about the time of beginning the winding process, the Sunol blew an alarm blast of three whistles, followed by a similar and louder blast from the larger whistle of the Shenango. The tugs and the Shenango knew the Rensselaer was near the entrance of the harbor. Whether at first the Rensselaer distinguished the lights on the Shenango from the many lights at the dock as she looked in from the entrance is immaterial, for she knew from the signals that a movement of a vessel in the harbor was contemplated, though she may not, at first, have known its purpose. There was no other vessel than the Shenango and the tugs moving in the harbor, and the Rensselaer knew that the movement in progress meant that either a vessel was operating in the harbor or was coming out of it. If it were the latter, there was plenty of room for passing within the 400 feet between the two piers at the harbor mouth; so that there was no reason why she should not proceed into the entrance, slowing down so far as to only maintain her headway. This she did. She then knew, from the stern lights of the Shenango and the lights on the tugs, that a winding process was in progress westwardly, in which case she knew there was sufficient room for her to proceed along the easterly breakwater to her destination, if the winding process was properly carried out.

Events followed in rapid sequence. The entire time between the beginning of the Shenango's movement and the collision between her and the Rensselaer was probably less than 10 minutes. Distances were short, and the ships were long.

The Shenango proceeded into the harbor, pulled stern foremost by the Sunol; the Reidenbach with taut tow line guiding the bow out of the river, now on one side and now on the other. At or about

the time the Shenango's bow had cleared the corner of the dock to the east, the Reidenbach, with her stem against the side of the Shenango and at a distance of the length of her tow line from the Shenango's starboard bow, pushed with all her power. She was a powerful boat. Meanwhile the Rensselaer was proceeding into the harbor at about right angles to its entrance, and at about midway, or a little east of midway, of the piers.

The Sunol was pulling the stern of the Shenango around southwardly. This movement, with the strong pushing force of the Reidenbach, drove the Shenango's bow of light draft rapidly to port, perhaps as much as three miles an hour. The captain of the Sunol, appreciating for the first time how closely the maneuver as carried out by him and the Reidenbach was bringing the stern of the Shenango to the westerly breakwater, signaled to the Shenango to go ahead at full speed. She responded quickly and put on full power, but it was too late to prevent the grounding of her stern upon the submerged broken stone of the breakwater at a point from 25 to 50 feet from the breakwater itself. There her propeller and adjacent underparts were seriously damaged and the engines were stopped.

Whether or not a forward movement was given the Shenango, by thus putting on full steam for the purpose, may not be known certainly from the testimony; but there is strong evidence tending to show that, after striking, she slid off the bottom, and there is every probability that the effect of her action was a forward movement, though not of many feet. Whatever the distance was, the movement took place at a critical time, especially when the point at which the vessel struck the breakwater and the pushing of the Reidenbach are considered. From all the testimony, that point must be fixed nearer to 600 feet from the end of the west pier than 800 feet, and it probably was not much more than 600 feet. Meanwhile the Reidenbach was pushing against the Shenango's bow as hard as she could.

The Rensselaer, after clearing the east pier, putting her helm hard-a-starboard, proceeded to port at full speed, a proper maneuver, which necessarily caused her stern to swing southwardly while her bow bore eastwardly of the knuckle at the north end of the easterly dock, and the light on the west pier showed over her stern. The swinging bow of the Shenango came into collision with the starboard side of the Rensselaer at about midships, and the vessels scraped along each other until clear; each being injured.

These facts are in substantial compliance with the findings of Judge (now Mr. Justice) Clarke, with whom we are in full accord, and there is no occasion for applying the rule which authorizes the adoption of facts found by the trial court when the testimony is conflicting, unless the finding is clearly against the weight of the evidence.

When the Shenango grounded on the ripraps of the breakwater, she lay about east and west. Her bow continued to swing northwardly, and, at the time of colliding with the Rensselaer, must have been certainly as far east as the line projected northwardly from the northwesterly corner of the easterly dock. It is probable that her bow was even further east than that, and at or near the point marked "A"

on the chart, something over 500 feet south of the entrance, and something less than 800 feet north of the corner of the easterly dock. The weight of evidence puts her bow there, and in a position to inevitably bring about a collision with the Rensselaer.

In the court below there was apparently no serious claim made by either the Rensselaer or the owner of the tugs that the Shenango was blameworthy, although in the petition of the Rensselaer that claim was made. Here the claim is reiterated, and the appellant, for the first time, joins in it, although admitting that the Shenango was "in many respects a dead ship," and, while still contending that the entire fault was on the Rensselaer, the appellant takes the position that, "if there is a disposition to hold that the pushing of the Reidenbach on the bow of the Shenango contributed to the accident, then the blame should not fall on the Reidenbach, but should fall on the Shenango for not notifying the Reidenbach to cease."

Thus there were two accidents to the Shenango, variously described as from 10 to 35 seconds apart, and it cannot be doubted that the collision with the breakwater grew out of the conduct of the tugs, without relation to the presence of the Rensselaer, or to any of her movements. That accident would have happened if the Rensselaer had not been there. It was well said by Judge Clarke, concerning this situation, that:

"Since it is not contended by any party to this suit that the collision with the Rensselaer at the bow of the Shenango occurred until after the ship had struck upon the wall of the breakwater, and since there is no movement of the Shenango described other than the winding process, except an attempt to drive her ahead almost at the moment of the collision with the breakwater wall, which effort came too late to be of service, it seems very clear that the movement resulting in her going upon the wall was due entirely to the action of the tugs unaffected by the approach of the Rensselaer, and unaffected by any action on the part of the Shenango."

[1] The Shenango was in charge of the tugs, ready to assist with her steam if called on by them to do so. It was her duty to conform to, and promptly obey, the signals given her. The Margaret, 94 U. S. 494, 496, 24 L. Ed. 146; Rebstock v. Gilchrist Trans. Co., 132 Fed. 174, 176 (D. C.); The W. G. Mason, 142 Fed. 913, 914, 74 C. C. A. 83 (C. C. A. 2).

[2] Admitting that the Shenango would not be relieved of all of the responsibility attending a reasonably prudent master conscious of a danger he might avert even while being towed, yet there is nothing in the record to even suggest a fear on the part of those in her charge that her stern was in danger of collision with the breakwater. That collision, under the circumstances, raised against the tugs a presumption of negligence (The Webb, 14 Wall. 406, 414, 20 L. Ed. 774; The W. G. Mason, 142 Fed. 913, 915, 74 C. C. A. 83; The Kalkaska, 107 Fed. 959, 47 C. C. A. 100); and the burden of proof is upon both the tugs to show that they exercised due care (In. & Sea Coast Co. v. Tolson, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; Rose v. Stephens & Condit Trans. Co. [C. C.] 11 Fed. 438; The W. G. Mason, 142 Fed. 913, 915, 74 C. C. A. 83).

[3, 4] The Sunol had the lead, and her negligence was gross. The Reidenbach, also, cannot escape the charge of negligence with respect to both collisions. Her captain did not even notice what the draft of the Shenango was, and, although he was working on the same side of her as was the Sunol, says he did not see the Sunol that night. He had no idea how near the breakwater the stern of the Shenango had reached, and says he did not hear the signals between the Sunol and the Shenango just before she grounded at the breakwater. He knew the harbor well, and if he had been attentive he would have known that the Shenango was too far down the harbor for safety, knowing, as he did, how rapidly the space for turning fell away at the north. Both tugs were to blame for the first collision, and a consideration of all the facts leads to the conclusion that both were to blame for the second also.

That the officers of the Rensselaer, proceeding into the harbor in the usual way for the operation in which she was engaged, did not apprehend any danger, is clear; for, as pointed out by Judge Clarke, they did not change the course of their ship from what it would have been if the Shenango had not been in the vicinity. He also shows, irrespective of the testimony of the first mate of the Shenango, that the tugs were relied on to do their duty; that "what they did is consistent only with the existence of the conclusion in their minds that there was no danger of a collision between the ships if the tugs did what was expected of them."

Surely the respective masters of these ships had no reason to suppose that the winding process would be carried out by the tugs in a way dangerous to their vessels, and, still less, that the operation would be performed so carelessly as to ground the Shenango's stern at the breakwater. These ships were well manned, and the officers of each were on the lookout. As it was, the Rensselaer nearly cleared the Shenango. It is no excuse for the captain of the Reidenbach to say that the bow of the Shenango, towering above him, stood in the way of his seeing the Rensselaer, and that he did not hear her signal that she intended to take the course she pursued, because the operation of pushing the Shenango's bow around did not begin until her bow was clear of the easterly dock, and, prior to that, in guiding the bow out of the river, he knew, or ought to have known, that the Rensselaer was at the entrance of the harbor for the purpose of coming in. He heard the exchange of the alarm signals between the Shenango and the Sunol at about the time the winding process began. Apparently he thought his sole duty lay in pushing the bow of the Shenango around as fast as possible, and he was thoughtless or regardless of every other consideration. He says he did not see the Rensselaer until her bow shot past the Shenango's bow. Even so, unless he was pushing too hard, he could have backed on his short tow line and controlled the course of the Shenango's bow with his powerful tug. He attempted to do so and failed, because the impetus he had given the Shenango's bow was too great to be overcome in the short time between seeing the Rensselaer's bow and the time the Shenango's bow struck the Rens-

selaer about midships. Not only was a part of the entire movement of the Shenango in his charge, but it was his duty to see to it that he did not take his tow into a situation of danger. Spencer on Mar. Coll. p. 270.

Assuming he did all he could to prevent the accident at the moment, yet "this will not excuse him, if, by timely measures of precaution, the danger could have been avoided." The Syracuse, 12 Wall. 167, 172, 20 L. Ed. 382. It will not do for him to say that the first mate of the Shenango, standing near her bow and apprehending no danger, should have notified him of the Rensselaer's proximity; for he either knew, or ought to have known, that fact. His heedlessness was similar to the lack of attention of the captain of the tug Abbott to the bridge in Great Lakes Towing Co. v. Masaba Steamship Co., 237 Fed. 577, — C. C. A. —, decided by this court December 5, 1916.

The duty sought to be laid upon the Rensselaer of waiting outside the entrance until she saw what the movement inside was to be, for which several shipmasters gave testimony, cannot be arbitrarily laid down. The testimony fell far short of establishing a custom, and such a duty could only be said to exist under circumstances requiring a prudent master to appreciate it. We see no reason why the Rensselaer should not have proceeded as she did, whether the Shenango in fact intended to come out of the harbor, or only make the maneuver of winding in it.

It is claimed, too, that the Rensselaer, after signaling her intention and receiving no response, as was the fact, should, under the rules, have waited until the failure to respond was explained, and would, by so doing, have avoided the collision. The answer is that she did not need a response to her signal when she saw what the maneuver inside the harbor was. See The New York, 175 U. S. 187, 201, 20 Sup. Ct. 67, 44 L. Ed. 126, and cases there cited.

The appellant would have the Reidenbach absolved in any event, likening the case to The W. G. Mason, 142 Fed. 913, 74 C. C. A. 83, which is in a number of respects like this, having the features of common ownership in the tugs and their joint service in the common enterprise. There one of the tugs was exonerated because she was acting independently in what she did. That case was considered and distinguished by this court in Thompson Tow. & Wreck. Ass'n v. McGregor, 207 Fed. 209, 214, 124 C. C. A. 479. Whether or not this court would, in a similar case, adopt the rule established by the Second Circuit in the case of The W. G. Mason, need not be decided, because this case differs from that in the essential feature that here the tug sought to be exonerated was at fault.

The District Court exonerated the Shenango and the Rensselaer, and laid responsibility for the collision upon the two tugs. We think this was right.

The decree below will therefore be affirmed at the appellant's costs

GRAHAM MFG. CO. et al. v. DAVY-POCAHONTAS COAL CO.

(Circuit Court of Appeals, Fourth Circuit. November 29, 1916.)

No. 1442.

1. BANKRUPTCY ⊜92—INVOLUNTARY PROCEEDINGS—MOTION TO DISMISS PETITION—EFFECT.

A motion to dismiss a petition for involuntary bankruptcy is in the nature of a demurrer, and in determining it the facts alleged in the petition will be considered true.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 107, 108, 133–136; Dec. Dig., ⊜92.]

2. BANKRUPTCY ⊜81(1) — INVOLUNTARY PROCEEDINGS — PETITION — SUFFICIENCY.

A petition for involuntary bankruptcy, which alleged that defendant was insolvent, and that within four months preceding the filing of the petition the defendant, while insolvent, committed an act of bankruptcy in that, being insolvent, it applied for a receiver for its property, is sufficient to give the court jurisdiction, though it does not set forth the evidence upon which it relies to establish those facts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 113–116, 125; Dec. Dig. ⊜81(1).]

3. BANKRUPTCY ⊜63—ACT OF BANKRUPTCY—APPOINTMENT OF RECEIVER—APPLICATION BY CORPORATE OFFICER.

Where an insolvent corporation, against which a creditors' suit was brought in the state court, procured the appointment of a receiver therein by an answer and cross-bill filed in the name of its president, who was a defendant, and who with one other stockholder owned the majority of the stock and controlled the corporation, the corporation applied for the appointment of the receiver within the act of Congress (Act July 1, 1898, c. 541, 30 Stat. 544) making that an act of bankruptcy; it not being necessary that the application be by a bill or cross-bill filed in the name of the corporation.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊜63.]

4. BANKRUPTCY ⊜20(1)—INVOLUNTARY PROCEEDINGS—JURISDICTION—CONTROL BY STATE COURT.

The fact that a state court had assumed jurisdiction over the property of an insolvent corporation in a creditors' suit more than four months before the filing of an involuntary petition in bankruptcy against the corporation does not deprive the bankruptcy court of jurisdiction, where the application for the appointment of the receiver in that suit, which was the act of banruptcy relied on, was made within four months of the filing of the petition; the bankruptcy court's jurisdiction being exclusive and supreme.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊜20(1).]

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

Involuntary proceeding by the Graham Manufacturing Company and others, as petitioners, against the Davy-Pocahontas Coal Company. From a judgment granting the alleged bankrupt's motion to dismiss the petition, petitioners appeal. Reversed.

Charles Markell, of Baltimore, Md. (George S. Couch, Jr., and Brown, Jackson & Knight, all of Charleston, W. Va., Jacob France, France, McLanahan & Rouzer, and Haman, Cook, Chesnut & Markell, all of Baltimore, Md., on the brief), for appellants.

James Thomas, of Baltimore, Md., and Buckner Clay, of Charleston, W. Va. (Price, Smith, Spilman & Clay, of Charleston, W. Va., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The appellee, the Davy-Pocahontas Coal Company, against whom the petition in bankruptcy was filed in this case, is a corporation incorporated under the laws of the state of West Virginia, for the purpose of acquiring, owning, and holding coal and other mineral lands, developing, mining, and producing therefrom coal and other minerals, and making sale of its coal and minerals so produced. The capital stock of this corporation is $500,000. The real property of the Davy-Pocahontas Coal Company consists largely, if not entirely, of a tract of land aggregating 4,040 acres, which it owns in fee simple, lying in the very heart of the Pocahontas coal fields of West Virginia. This property is subject to a deed of trust to secure an issue of 300 bonds of the denominations of $1,000 each, of which 297 are outstanding, and a second deed of trust securing an issue of $120,000 of notes, of which approximately $80,000 are issued and outstanding. Upon this property are two coal operations; one on the Welch vein of Pocahontas coal, and the other on the vein locally known as the Davy-Small seam.

On the 10th day of July, 1915, a judgment creditors' bill was instituted by Abney-Barnes Company and others against the Davy-Pocahontas Coal Company, W. L. Taylor, James A. Strother, and the two trustees under the deed of trust before mentioned, and, in compliance with the statutory provisions of the state of West Virginia, all other known lien creditors were also made parties. On the 4th day of November in the year 1915, W. L. Taylor, codefendant in this suit, filed his answer and cross-bill in the same, alleging in substance:

"That the Davy-Pocahontas Coal Company is a corporation organized and doing business under the laws of the state of West Virginia, with its principal office and place of business in the county of McDowell, state of West Virginia; that it is the owner in fee of about 4,000 acres of land in the said county of McDowell, the chief and principal value of the same being for the coal deposits therein and thereunder, and that the value of said lands for coals therein and thereunder and as a coal-mining proposition is very considerable, and largely in excess of the present investment therein, and the debts and obligations due by said company; that for some years past the said Davy-Pocahontas Coal Company has been engaged in the business of mining coal from said lands, and for the purpose thereof has expended very large sums of money in the development of said lands for coal-mining purposes and in improvements placed thereon for that purpose; that the amounts so expended by the said company will approximate the sum of one hundred and fifty thousand dollars ($150,000); that the said land is so situated, and the coal therein and thereunder is of such quality and quantity, that the said lands can be profitably mined for coal and developed as a coal-mining proposition."

On the 13th day of January, 1916, the Graham Manufacturing Company, a judgment creditor of the Davy-Pocahontas Coal Company in

the sum of $66, M. B. Posterwaite, assignee of Hutchinson-Stephenson Hat Company, a corporation, a creditor of the Davy-Pocahontas Coal Company in the amount of $8.65, and J. A. Donahue, assignee of the Bluefield Furniture Company, a corporation, a judgment creditor in the amount of $442.11, filed an involuntary petition in bankruptcy containing the following allegations:

"That within four months next preceding the filing of this petition the said Davy-Pocahontas Coal Company, a corporation, while insolvent, committed an act of bankruptcy, in that it, being insolvent, did apply for a receiver for its property, to wit, on the 4th day of November, 1915, in a certain suit in equity theretofore instituted on the 10th day of July, 1915, by Abney-Barnes Company, a corporation, et al., against said Davy-Pocahontas Coal Company, a corporation, et al., in the circuit court of McDowell county, West Virginia, and then pending, in which suit no application for receiver had theretofore been made in the original bill or otherwise, the said Davy-Pocahontas Coal Company did procure application for a receiver for its property to be made in the form of a so-called answer and cross-bill in the name of one W. L. Taylor, codefendant in said suit then pending, said Taylor being in fact, as alleged in said answer and cross-bill, the president and a large stockholder of said Davy-Pocahontas Coal Company, a corporation, owning, together with one R. E. Wood, a majority of the stock of said company; that said Taylor, said Wood, and their associates in fact were owners of a majority of the stock of said Davy-Pocahontas Coal Company, a corporation, and in fact dominated and controlled said corporation, and the said Davy-Pocahontas Coal Company, a corporation, through said controlling stockholders, directors, and officers, did procure such application for receivers to be made in the name of said Taylor as aforesaid, but in the interest of said corporation and said controlling interests; and said Davy-Pocahontas Coal Company, a corporation, did, upon the presentation of said so-called answer and cross-bill, applying for receivers, appear by counsel before said circuit court of McDowell county, and did assent to and procure on said 4th day of November, 1915, the appointment by said court of William R. Yaeger, George W. Atkinson, and J. Craig Miller as receivers for all the property, real and personal, and all other assets of the Davy-Pocahontas Coal Company, a corporation, of every sort and description, including real estate, all the counsel so appearing before said court as counsel for said Taylor, or for said Davy-Pocahontas Coal Company, a corporation, having for a long time prior thereto been in fact counsel for said Davy-Pocahontas Coal Company, a corporation, and being in fact then so acting in applying for and procuring said appointment of receivers for said property of said Davy-Pocahontas Coal Company."

The above allegations were based upon the averments contained in the answer filed by the alleged bankrupt in the suit in the state court to which reference has been made. The answer, among other things, contained the following:

"That in the process of developing said lands, and installing improvements thereon for that purpose, a large sum of money was required to be expended before profitable returns from said lands could be had, and that prior to the mining operations of said company being placed upon a paying basis, which could be done, there arose amongst the stockholders and directors of the said company serious disagreements and dissensions, which still continue. Such dissensions were and are that various of the stockholders of the said company and certain of the directors thereof would not give any assistance in securing the necessary finances to insure proper and requisite development of the company as a coal-mining property, which was essential in order that profits could be made therefrom; but said stockholders and directors so hampered by their dissensions and nonassistance the other stockholders, directors, and managers of the company that said development could not be carried on to the requisite extent, nor to the extent of the company meeting its current obligations and the discharge of its past-due obligations, and such acts and do-

ings resulted in the said company being largely indebted to various persons in the prosecution of the development work and the mining work carried on during said period of development, the mines of said company still being in a state of development. The said company, therefore, became largely indebted to various people, in various amounts, and various of its creditors instituted against it suits of various kinds and character, which were pursued to the extent of execution and sale, thereby materially crippling and hampering its successful mining of coal and causing great sacrifice of the property and assets of the company."

The court below dismissed the petition and entered a decree accordingly, from which an appeal was taken to this court.

The court below held that, inasmuch as the application for the appointment of a receiver was not made in the form of a bill or cross-bill and in the name of the Davy-Pocahontas Coal Company as plaintiff or cross-plaintiff, the facts set forth therein do not constitute an act of bankruptcy.

[1] The motion to dismiss the petition being in the nature of a demurrer, the facts set forth therein, which clearly present the questions involved, will be considered as true. Therefore, in order to reach a correct conclusion, we must determine the question, "Can a debtor being insolvent apply for a receiver for his property" and thereby avoid the consequences incident to committing an act of bankruptcy, by making the application in the name of another?

[2] The petition in this instance does not allege the evidence upon which it relies to establish the facts as set forth in the petition, nor do we think necessary for a proper determination of the questions now at issue between the parties; the jurisdictional averments being sufficient, as we think, to bring the case clearly within the purview of the statute, to wit: That the defendant is "insolvent" in the sense in which the term is used in the statute, and "within four months next preceding the filing of this petition" the defendant, "while insolvent," committed the respective acts of bankruptcy as alleged, and "that, being insolvent, it did apply for a receiver for its property." These averments are, in our opinion, sufficient to give the court jurisdiction of the subject-matter of this controversy.

[3] However, it is insisted further, as we have stated, that the court below was not in error in holding that this petition should be dismissed upon the ground that the application for the appointment of a receiver in the state court was not made in the form of a bill or cross-bill in the name of the Davy-Pocahontas Coal Company as plaintiff or cross-plaintiff. This question was decided by the Circuit Court of Appeals for the Sixth Circuit in the case of James Supply & Hardware Co. v. Dayton Coal & Iron Co., 223 Fed. 991, 139 C. C. A. 367. The court in discussing the matter said:

"There was thus substantial testimony tending to show that the receivership was procured at the instance of and by concert between Peat, Whitaker, and Miller. If the receivership was so procured by actual authority of the Dayton Company, and on its behalf, it was as effectively an act of bankruptcy as if the suit had been directly in the name of that company as complainant (Exploration Co. v. Pacific Co., C. C. A. 9, 177 Fed. 825, 839, 101 C. C. A. 39), and the District Court so held. Wheeler v. Denver, 229 U. S. 342, 33 Sup. Ct. 842, 57 L. Ed. 1219, contains nothing to the contrary. What is there said re-

specting collusion relates merely to jurisdiction. Similar holdings are found in Re Metropolitan Ry. Receivership, 208 U. S. 90, 110, 28 Sup. Ct. 219, 52 L. Ed. 403, and American Brake, etc., Co. v. Pere Marquette R. R. Co. (C. C. A. 6) 205 Fed. 14, 18, 125 C. C. A. 322. Here the question of intent to evade the provisions of the Bankruptcy Act is involved. It is immaterial that the receivership was not ordered because of insolvency. If the corporation was actually insolvent at the time receivership was applied for, it is enough. Hill v. Electric Co. (C. C. A. 6) 214 Fed. 243, 130 C. C. A. 613.

"We are not impressed by the proposition that the application for a receiver by this corporation would not be an act of bankruptcy, unless shown to have been expressly authorized by formal action of its board of directors or stockholders; and the District Judge did not so decide. Not only is there nothing in the record to indicate that the managing director of this British corporation lacked authority to direct such action, but the testimony is inferentially to the contrary, and is specifically that he had complete control of the company's affairs. If Donaldson individually lacked full control, there was testimony that Watson & Co. represented the stock control, and, inferentially at least, had whatever control Donaldson lacked; and it is perhaps of some interest in this connection that the amended bill in the insolvency proceeding by implication treats the members of Watson & Co. as Whitaker's principals. We think the record did not impugn the existence of full authority on the part of Donaldson and Watson & Co. to direct the receivership, and thus the commission of an act of bankruptcy. Exploration Co. v. Pacific Co. (C. C. A. 9) 177 Fed. 825, 839, 101 C. C. A. 39; In Re Maplecroft Mills (D. C.) 218 Fed. 659, 673; 1 Remington on Bankruptcy (2d Ed.) 152. Moreover, if those placed in full charge of the company's affairs were thus clothed in fact with sufficient power to actually accomplish a legally effective receivership, we cannot think the application therefor was any the less an act of bankruptcy because those responsible therefor had no right, as against the stockholders, to so act. A somewhat contrary holding was had in Re Wm. S. Butler Co. (C. C. A. 1) 207 Fed. 705, 713 [125 C. C. A. 223]. How far that decision may have been affected by the law under which the corporation was organized does not appear."

Also in the case of Exploration Mercantile Co. v. Pacific H. & S. Co., 177 Fed. 825, 101 C. C. A. 39, the Circuit Court of Appeals for the Ninth Circuit decided this question adversely to the contention of appellee. In the meantime in the District Court for the Western District of Arkansas in the case of Doyle-Kidd Dry Goods Co. v. Sadler-Lusk Trading Co., 206 Fed. 813, and in the case of In re Muir, 212 Fed. 495, the question was decided in the same way.

It is strongly insisted by counsel for appellee that the case of In re Wm. S. Butler Co., Inc., 207 Fed. 705, 125 C. C. A. 223, decided by the Circuit Court of Appeals for the First Circuit, is decisive of this question, and that the decision of that court sustains the contention of appellee in the present suit. From a careful reading of that case we find that the principal question decided was whether the term "insolvency," contained in the third clause of section 3, subsec. 4, implies insolvency as defined in section 1 (15) of the act (Act July 1, 1898, c. 541, 30 Stat. 544 [Comp. St. 1913, § 9585]), or whether it also relates to the appointment of receivers by a state court owing to insolvency in the commercial sense. It is true that in the Butler Case it was held as a matter of law that an act of bankruptcy or applying for a receiver could be committed only when the application was made in the name of the debtor as plaintiff. The court in that case cited the Exploration Mercantile Company Case, but did not disapprove the same. At any rate we find ourselves more in harmony with the decisions of the court from

which we have just quoted than the rule announced in the Butler Case as respects this point.

While it is true that this court in the case of Maplecroft Mills v. Childs, 226 Fed. 415, 141 C. C. A. 245, quoted with approval from a portion of the Butler Case, nevertheless the question as to the power of the president of a corporation, in a case like the one at bar, by his acts to bind a corporation, was not involved in that case. In the Maplecroft Mills Case there was but a single act of bankruptcy alleged in the petition, which the lower court held had been proven. There the petition did not charge that the Maplecroft Mills, "being insolvent, had applied for a receiver." The record of the state court wherein the receiver had been appointed was the only evidence considered by the court below, an examination of which disclosed the fact that the property of the creditor was not placed in the hands of the receiver "because of insolvency" as defined by the Bankruptcy Act. Thus it will be seen that the questions presented in that case pertained solely to the construction and effect of the evidence considered by the court below, which, as we have stated, consisted of the record in the proceedings had in the state court. This court in that case, under the circumstances, however, deemed it advisable to permit the petitioners to amend their petition, so as to allege insolvency as contemplated by the Bankruptcy Act, if so advised.

It is manifest that Congress, in employing the term "being insolvent, applied for a receiver," intended to reach any and all cases wherein it should appear that a debtor being unable to pay his indebtedness—i. e., insolvent as contemplated by the Bankruptcy Act —should apply for a receiver that such action on his part would constitute an act of bankruptcy. The framers of the act were no doubt concerned more about the doing of the act rather than the method by which it might be accomplished. To hold otherwise would lead to confusion, and permit, in many instances, an evasion of the express purpose of the statute. Such being the case, we are more favorably inclined to the rule announced in the case of James Supply & Hardware Co. v. Dayton Coal & Iron Co., supra, 223 Fed. 991, 139 C. C. A. 367. From what we have said, it follows that the court below had jurisdiction, and was therefore in error in dismissing the petition on this ground.

[4] The appellee also based its motion in the court below upon the following ground:

"That the petition affirmatively shows that more than four months prior to the institution of these proceedings a creditors' suit was instituted in the circuit court of McDowell county, West Virginia, requesting that court to assume jurisdiction over and take in its custody the property of the said Davy-Pocahontas Coal Company and administer the same for the benefit of those entitled, and the petition does not show any impelling reason which would cause this court to supersede the jurisdiction of said state tribunal."

In view of the present state of the record, we do not deem it necessary to enter into an extended discussion of this point, further than to say that, once a bankruptcy court assumes jurisdiction in a case like the one at bar, it necessarily draws unto itself, in the administration of the person's or corporation's affairs, jurisdiction and supreme

control of the estate of such bankrupt; and this is undoubtedly true in this instance, inasmuch as the alleged acts of bankruptcy occurred within four months prior to the filing of the petition. Chief Justice Fuller, in the case of In re Watts, 190 U. S. 1, 23 Sup. Ct. 718, 47 L. Ed. 933, in disposing of the same, among other things, said:

"And the operation of the bankruptcy laws of the United States cannot be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily, when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit; but that rule can have only a qualified application where winding-up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent. Still it obtains as a rule of comity, and accordingly the receiver of the district court brought his appointment to the knowledge of the Floyd circuit court and requested the delivery of the assets."

This court, in the case of Bank of Andrews v. Gudger, 212 Fed. 49, 128 C. C. A. 505, follows the rule announced in Re Watts, supra; among other things saying that:

"The case, then, comes to this: Does the pendency of a suit in a state court instituted against a corporation by stockholders for the protection of their rights, and the possession of the corporate property by a receiver appointed in such suit, deprive creditors of the corporation of the superior right conferred on them by the federal statute to have the corporate assets brought into the federal court for administration under an adjudication in bankruptcy, when they have duly asserted the right and had the corporation declared bankrupt as soon as it was known to be insolvent and had committed an act of bankruptcy? It seems clear that to this question there can be only a negative answer. An affirmative answer would mean that the stockholders of a corporation or the members of a partnership could at their will deprive creditors of the right conferred upon them by the federal statute to have the property of an insolvent debtor administered by the bankruptcy court. Such a case is entirely apart from those cases in which a creditor has gone into the state court and established or acquired by his suit a legal or equitable lien on the property in the hands of the court four months before the filing of the petition in bankruptcy. In such cases the courts have held that the creditor is entitled to enforce his lien in the first court that acquired jurisdiction. The distinction is also evident between this case and those cases where the state court held the property by its receiver, and there was no question of the subsequent coming into existence of facts giving rise to the right to invoke the exclusive jurisdiction of the federal court."

It is further contended by counsel for appellant that, it appearing that "within four months next preceding the filing of the petition, while insolvent, the Davy-Pocahontas Coal Company, a corporation, committed an act of bankruptcy, in that it did suffer and permit, while insolvent, certain of its creditors to obtain a preference without legal proceedings, and did not, at least five days before sale or final disposition of any property affected by such preferences, vacate or discharge such preferences," the court should have held that these facts

were sufficient to constitute an act of bankruptcy. In view of our disposition of the first assignment of error, as well the seventh ground upon which defendant moved to dismiss the petition in the court below, we do not deem it essential to decide this or the other questions raised, in order to reach a correct determination of the controversy.

For the reasons stated, the judgment of the lower court is reversed.

SNOWDEN v. FT. LYON CANAL CO.

(Circuit Court of Appeals, Eighth Circuit. December 14, 1916.)

No. 4644.

1. APPEAL AND ERROR ⊜254—REVIEW OF RULING ON DEMURRER—NECESSITY OF EXCEPTIONS.
   An exception is not necessary to open a question of law arising in the sustaining of a demurrer to a complaint.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1486, 1487; Dec. Dig. ⊜254.]

2. PLEADING ⊜418(1)—RULING ON DEMURRER—EFFECT OF PLEADING OVER.
   Error in the sustaining of a demurrer to a complaint is not waived by the filing of an amended complaint, where the latter is stricken from the files.
   [Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1399, 1403; Dec. Dig. ⊜418(1).]

3. APPEAL AND ERROR ⊜870(5)—ASSIGNMENT OF ERRORS—RULINGS ON DEMURRER.
   A ruling sustaining a demurrer to a complaint, where no amended complaint is filed, is reviewable on an assignment of error to the judgment dismissing the action.
   [Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3496, 3506–3508; Dec. Dig. ⊜870(5).]

4. EMINENT DOMAIN ⊜270—REMEDIES OF OWNER OF PROPERTY—RECOVERY OF COMPENSATION.
   Where an irrigation company authorized to condemn land for its works, without instituting such proceedings or the payment of compensation, constructed a permanent reservoir on the land of another, the owner, in the absence of a statute requiring him to proceed under the condemnation statute, may waive the tort and maintain an action on an implied contract to recover the value of the land so taken and held.
   [Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 706–716, 741; Dec. Dig. ⊜270.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Howard Snowden against the Ft. Lyon Canal Company. Judgment for defendant, and plaintiff brings error. Reversed.

John Campbell, of Denver, Colo. (A. H. Felker and John T. Barnett, both of Denver, Colo., on the brief), for plaintiff in error.

Henry A. Dubbs, of Denver, Colo. (Henry C. Vidal, of Denver, Colo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. The plaintiff, Snowden, a citizen of Pennsylvania, sued the defendant canal company, a Colorado corporation, and stated his cause of action as follows:

"(2) That the defendant has the authority, under and by virtue of the laws of the state of Colorado in such case made and provided, and upon compliance with the laws of said state, to exercise the right of eminent domain to acquire all the necessary privileges, easements, and rights of way for the purpose of constructing the ditches, canals, and reservoir hereinafter mentioned.

"(3) That said Howard Snowden is now, and at all times herein mentioned has been, the owner in fee and entitled to the possession of the following described tract or parcel of land, situate, lying, and being in the county of Bent and state of Colorado, and more particularly described as follows, to wit: The S. W. ¼ of section 8 in township 21 south, range 52 west of the Sixth principal meridian; and that the said Howard Snowden is the only person interested in the said property as owner, or otherwise, as appears of record in the office of the clerk and recorder of Bent county, Colo.

"(4) That during the years 1910 and 1911, or thereabouts, the said defendant, by its agents, servants, and employés, without the knowledge or consent of the plaintiff herein, and without any right or authority so to do, wrongfully entered upon said land of the plaintiff herein, and constructed upon parts thereof hereinafter described a reservoir for the purpose of storage of water, and erected for that purpose a large dam of dirt and rock about 20 feet wide at the top and about 16 feet in height, and is making claim of a permanent occupation of said premises for the purpose herein mentioned.

"(5) That the defendant, for the purpose above mentioned, wrongfully appropriated for its own use, and took possession of and occupied, and now continues to so wrongfully appropriate and to so hold possession of and occupy, about 122.5 acres of land belonging to said Howard Snowden, lying in the said S. W. ¼ of section 8, township 21 south, range 52 west of the Sixth principal meridian, and being more particularly described as follows, to wit: Beginning S. W. cor. Sec. 8; thence N. 89° 51′ E., 895.9 ft.; thence N. 43° 05′ E., 2,524.8 ft.; thence N. 88° 45′ E., 19.6 ft., to center line Sec. 8; thence north 800.2 ft. to center Sec. 8; thence S. 89° 51′ W., 2,640 ft., to W. ¼ cor. Sec. 8; thence south 2,640 ft. to place of beginning. That said 122.5 acres was, at the time it was so taken and appropriated, as herein set forth, of the value of $13,965, and that by reason of the acts of said defendant the said Howard Snowden has sustained damages to his land in the sum of $13,965.

"(6) That the said defendant has not paid for any part of the land herein above described, so taken by it, and has not paid said damages, nor any part thereof, to the said plaintiff, and no proceedings have been instituted for the purpose of ascertaining the damages due said plaintiff for the property so taken and damaged."

There was, of course, a demand for judgment.

The defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained and no exception taken to the ruling. An amended complaint was filed which on motion was stricken from the files for the reason that in legal effect it in no way differed from the original complaint. The order which struck the amended complaint from the files also dismissed the action. The paragraph of the order which struck the complaint from the files preceded the paragraph dismissing the action. To this order the plaintiff ex-

cepted and sued out a writ of error to review the judgment of dismissal.

It is assigned as error that the court erred in rendering judgment in favor of the defendant, or, in other words, in dismissing the action. The argument of counsel for plaintiff is chiefly directed to showing that the trial court erred in sustaining the demurrer to the original complaint. Counsel for defendant insist that the ruling on the demurrer is not open for consideration because: (1) That the ruling was not excepted to; (2) that the plaintiff waived the error, if any, in the ruling by filing an amended complaint; (3) the ruling is not assigned as error.

[1] In regard to the first objection, it may be said that no exception is necessary to open the question of law arising on the sustaining of the demurrer. Denver v. Holmes Savings Bank, 236 U. S. 101, 35 Sup. Ct. 265, 59 L. Ed. 485; Nalle v. Oyster, 230 U. S. 165, 33 Sup. Ct. 1043, 57 L. Ed. 1439.

[2] In regard to the second objection, it may be said that the reason for the rule that when one amends his pleading after it has been attacked successfully by demurrer thereby waives any error in the ruling, is that by so doing he voluntarily accepts the ruling and seeks to cure the defect in the pleading by substituting a new pleading for the old, thereby rendering the ruling immaterial, but if the new pleading is stricken he ought not to be held to have waived the error in the ruling sustaining the demurrer, as there is no new pleading which can be said to have taken the place of the old. The attempt to do what would have amounted to a waiver has not been accomplished. Moreover, according to the record there was no amendment of the complaint.

[3] When the case was dismissed there was only of record the original complaint, the demurrer thereto, and the order sustaining the demurrer. The case was dismissed for the reason that a demurrer had been sustained to the complaint, and no amended complaint filed; therefore, we think, that to assign as error the entry of the judgment of dismissal was sufficient in this case to permit the consideration of the question as to whether there was error in the ruling sustaining the demurrer. We will now proceed to consider that question.

[4] The complaint, in brief, is this: The defendant having the right of eminent domain under the laws of Colorado to acquire land for the construction of a reservoir for the storage of water, without plaintiff's consent, took possession and occupied, and now continues to appropriate and occupy, a tract of land belonging to the plaintiff containing 122.5 acres, and constructed thereon a reservoir for the storage of water, and in the construction of said reservoir erected a dam of dirt and rock about 20 feet wide at the top and about 16 feet in height, with the intention to permanently occupy the same. The value of the land taken is alleged and judgment demanded for said value. That the complaint alleges a taking of the land in question seems clear, and that plaintiff is entitled to just compensation for the land taken necessarily follows. Counsel for defendant, however, insist that the plaintiff can-

not recover the value of the land as damages. Their position stated in their brief is as follows:

"The correct view of the situation is that defendant was a trespasser and as such was liable in damages in a proper suit for its past unlawful occupancy if any such were claimed, and that it was also subject to a judgment ousting it from possession or restraining its operations until condemnation. This was the extent of its liability, but the action before this court is not of that character."

We have not been referred to any legislation of the state of Colorado, nor have we been able to find any, which would compel the land owner to proceed under the condemnation statute to recover his damages; and, the complaint having alleged that no proceedings had been instituted by the defendant for the purpose of ascertaining the damages due said plaintiff for the property taken and damaged, the defendant is not at liberty on the present record to claim the benefit of any provision of the condemnation statute. The question then is: May the plaintiff waive the tort, conceding the facts pleaded show a trespass on the part of the defendant, and sue as upon an implied contract for the value of the land? The case of United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846, was a case where the Great Falls Company had recovered a judgment in the Court of Claims against the United States for the sum of $15,692, as compensation for all past and future use and occupation by the United States of certain land, water rights, and privileges, claimed by that company. The damages recovered in the Court of Claims were for land and water rights taken and used by the officers and agents of the government without condemnation proceedings and without any compensation having been made therefor to the Great Falls Company. The question propounded by the Supreme Court was:

"By what authority have they (officers and agents of the government) appropriated to public use the property of the claimant? The answer to this question will determine whether the present demand of the claimant arises out of an implied contract, and therefore enforceable by suit against the United States in the Court of Claims."

The court then proceeded to answer the question as follows:

"It seems clear that these property rights have been held and used by the agents of the United States under the sanction of legislative enactments by Congress; for the appropriation of money specifically for the construction of the dam from the Maryland shore to Conn's Island was, all the circumstances considered, equivalent to an express direction by the legislative and executive branches of the government to its officers to take this particular property for the public objects contemplated by the scheme for supplying the capital of the nation with wholesome water. The making of the improvements necessarily involves the taking of the property; and if, for the want of formal proceedings for its condemnation to public use, the claimant was entitled, at the beginning of the work, to have the agents of the government enjoined from prosecuting it until provision was made for securing, in some way, payment of the compensation required by the Constitution—upon which question we express no opinion—there is no sound reason why the claimant might not waive that right, and, electing to regard the action of the government as a taking under its sovereign right of eminent domain, demand just compensation. Kohl v. United States, 91 U. S. 367, 374 [23 L. Ed. 449]. In that view, we are of opinion that the United States, having by its agents, proceeding under the authority of an act of Congress, taken the property of the claim-

ant for public use, are under an obligation, imposed by the Constitution, to make compensation. The law will imply a promise to make the required compensation, where property, to which the government asserts no title, is taken, pursuant to an act of Congress, as private property to be applied for public uses. Such an implication being consistent with the constitutional duty of the government, as well as with common justice, the claimant's cause of action is one that arises out of implied contract, within the meaning of the statute which confers jurisdiction upon the Court of Claims of actions founded 'upon any contract, express or implied, with the government of the United States.' * * *

"In the present case, there were, it is true, no statutory proceedings for the condemnation of the claimant's property rights. Such proceedings, as has been stated, were instituted by the United States in one of the courts of Maryland, in which the property rights of the claimant were expressly recognized. But they were abandoned. One reason, perhaps, for such abandonment, was that, in the judgment of the officers of the United States, a fair assessment of damages could not be had in the mode prescribed by the Maryland statute. Be this as it may, it is clear, from the record, that the government did not assert title in itself to this property, at the time it was taken.

"Having abandoned the proceedings of condemnation, the proper officers of the government, in conformity with the acts of Congress, constructed the dam from the Maryland shore to Conn's Island, the doing of which necessarily involved the occupation and use of the property, as contemplated in what was called the fourth plan for bringing water from the Great Falls to Washington and Georgetown. In such a case, it is difficult to perceive why the legal obligation of the United States to pay for what was thus taken pursuant to an act of Congress is not quite as strong as it would have been had formal proceedings for condemnation been resorted to for that purpose. If the claimant makes no objection to the particular mode in which the property has been taken, but substantially waives it, by asserting, as is done in the petition in this case, that the government took the property for the public uses designated, we do not perceive that the court is under any duty to make the objection in order to relieve the United States from the obligation to make just compensation."

In Great Falls Mfg. Co. v. Attorney General, 124 U. S. 581, 8 Sup. Ct. 631, 31 L. Ed. 527, it was said:

"Even if the secretary's survey and map, and the publication of the Attorney General's notice, did not, in strict law, justify the former in taking possession of the land and water rights in question, it was competent for the company to waive the tort, and proceed against the United States, as upon an implied contract; it appearing, as it does here, that the government recognizes and retains the possession taken in its behalf for the public purposes indicated in the act under which its officers have proceeded."

In the case of United States v. Lynah, 188 U. S. 445, 23 Sup. Ct. 349, 47 L. Ed. 539, it was decided that where the government of the United States, by the construction of a dam or other public works, so floods lands belonging to an individual as to totally destroy its value, there is a taking of private property within the scope of the fifth amendment; that, when the government appropriates property which it does not claim as its own, it does so under an implied contract that it will pay the value of the property it so appropriates; that the flooding of the land was an actual appropriation of the same, including the possession and the fee, and, when the amount awarded as compensation is paid, the title, the fee, and whatever rights may be adjudged thereby pass to the government, which becomes henceforth the full owner. In the case last cited it was also said:

"It does not appear that the plaintiffs took any action to stop the work done by the government, or protested against it. Their inaction and silence amount to an acquiescence—an assent to the appropriation by the government. In this respect the case is not dissimilar to that of a landowner who, knowing that a railroad company has entered upon his land and is engaged in constructing its road without having complied with the statute in respect to condemnation, is estopped from thereafter maintaining either trespass or ejectment, but is limited to a recovery of compensation. Roberts v. Northern Pacific Railroad, 158 U. S. 1, 11 [15 Sup. Ct. 756, 39 L. Ed. 873]; Northern Pacific Railroad v. Smith, 171 U. S. 260 [18 Sup. Ct. 794, 43 L. Ed. 157], and cases cited in the opinion."

This seems to be the law in Colorado: Denver & S. F. Ry. Co. v. School District, 14 Colo. 327, 23 Pac. 978; Denver & R. G. R. R. Co. v. Doelz, 49 Colo. 55, 111 Pac. 595; Edwards v. Roberts, 26 Colo. App. 538, 144 Pac. 856; Stuart et al. v. Colo. Eastern R. Co. (Colo.) 156 Pac. 152.

It is the rule generally: Zimmerman v. Kansas City N. W. Co., 144 Fed. 622, 624, 75 C. C. A. 424 (8th Circuit); 2 Elliott on Railroads (2d Ed.) pars. 1049 and 1049B; Smith v. Chicago, A. & St. Louis R. Co., 67 Ill. 191; McClinton v. Pittsburgh-Fort Wayne & C. R. Co., 66 Pa. 404; Wichita & Western R. Co. v. Gette Fechheimer, 36 Kan. 45, 12 Pac. 362; A. Cohen v. St. Louis, Ft. Scott & W. R. Co., 34 Kan. 158, 8 Pac. 138, 55 Am. Rep. 242; C., B. U. P. R. Co. v. Andrews, 26 Kan. 702, 710; Parsons Water Co. v. Knapp, 33 Kan. 752, 7 Pac. 568; United States v. Great Falls Mfg. Co., 112 U. S. 645, 5 Sup. Ct. 306, 28 L. Ed. 846; Blanchard v. Kansas City (C. C.) 16 Fed. 444; Strickler v. Midland Ry. Co., 125 Ind. 412, 25 N. E. 455.

It is admitted by counsel for defendant that, in railroad cases where the railroad corporation is charged with a public duty, the rule limiting the landowner to a suit for damages where he has acquiesced in the taking, even though the taking be unauthorized and unlawful, is as stated, but where the claim is made in a case like the one at bar there would be no reason for the rule. We do not think counsel would make this claim if this was an action seeking to oust the defendant from the possession of the land and remove its structures therefrom; on the contrary, we are of the opinion that counsel would be here urging that the plaintiff's remedy was one for damages. We think that upon reason and authority plaintiff had the right to waive the tort committed by the unlawful taking of his land by the defendant and sue upon the implied contract for the value thereof. The defendant may have many good defenses to this action, but until they are pleaded and proved we may not consider them. The court erred in sustaining the demurrer to the complaint, and the judgment below should be reversed, and the case remanded, with instructions to the trial court to overrule the demurrer, with leave to the defendant to answer if it shall be so advised.

And it is so ordered.

MORTON et al. v. FT. LYON CANAL CO.

(Circuit Court of Appeals, Eighth Circuit. December 14, 1916.)

No. 4645.

EMINENT DOMAIN ⇐289—JOINDER OF PLAINTIFFS.

The complaint, in an action to recover damages for the wrongful appropriation of right of way over a tract of land by an irrigation company, *held* not subject to demurrer for misjoinder of plaintiffs because of the joinder of a plaintiff whose part interest in the land had been disposed of to her coplaintiff, where it did not appear from the pleading whether defendant entered upon the land before or after such disposition.

[Ed. Note.—For other cases, see Eminent Domain, Cent. Dig. §§ 789–796; Dec. Dig. ⇐289.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Nellie W. Morton and Frances Kent Wells against the Ft. Lyon Canal Company. Judgment for defendant, and plaintiffs bring error. Reversed.

John Campbell, of Denver, Colo. (A. H. Felker and John T. Barnett, both of Denver, Colo., on the brief), for plaintiffs in error.

Henry A. Dubbs, of Denver, Colo. (Henry C. Vidal, of Denver, Colo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This case is ruled by our opinion in No. 4644 (238 Fed. 495, — C. C. A. —), this day filed, except that the demurrer in this case stated as one of the grounds of demurrer that there was a misjoinder of parties plaintiff. The complaint alleges that title to the land taken vested in the plaintiffs May 12, 1899, and continued in them until June 17, 1911, when Frances Kent Wells conveyed all her right, title, interest, and right of possession to the property to the plaintiff Nellie W. Morton.

The complaint also alleged that the property was taken during the years 1910 and 1911, or thereabouts. It does not, therefore, clearly appear whether the land was taken while the title was in both of the plaintiffs; but it might have been. For this reason we do not think there was a misjoinder of parties plaintiff. If it shall happen at the trial that the land was taken when one of the plaintiffs had no interest therein, of course that plaintiff could not recover; but we do not think the complaint was bad for misjoinder of parties.

The judgment is reversed, and the case remanded, with instructions to overrule the demurrer, with leave to the defendant to answer if it shall be so advised.

SMITH v. FT. LYON CANAL CO.

(Circuit Court of Appeals, Eighth Circuit. December 14, 1916.)

No. 4646.

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action by Clara V. Smith against the Ft. Lyon Canal Company. Judgment for defendant, and plaintiff brings error. Reversed.

John Campbell, of Denver, Colo. (A. H. Felker and John T. Barnett, both of Denver, Colo., on the brief), for plaintiff in error.

Henry A. Dubbs, of Denver, Colo. (Henry C. Vidal, of Denver, Colo., on the brief), for defendant in error.

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

CARLAND, Circuit Judge. This case is ruled by our opinion in No. 4644 (Snowden v. Ft. Lyon Canal Co., 238 Fed. 495), this day filed. The judgment herein is reversed, and the case remanded, with instructions to overrule the demurrer with leave to the defendant to answer the complaint if it shall be so advised.

MERCHANTS' NAT. BANK OF MANDAN et al. v. FIRST NAT. BANK OF DULUTH.

(Circuit Court of Appeals, Eighth Circuit. December 12, 1916.)

No. 4639.

1. BANKS AND BANKING ⟸178—DISCOUNT—NATURE OF TRANSACTION—"LOAN."

A transaction, whereby a bank indorsed to another without recourse a number of notes under an agreement that the indorsee would credit the indorser with the amount of the notes and interest less the agreed discount, and that whenever any of the notes fell due the account was to be charged with the amount and the note sent to the indorser for collection, was a "loan" with collateral security, not a sale of the notes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 656–666; Dec. Dig. ⟸178.

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

2. BANKS AND BANKING ⟸96—PLEDGE—STATUTE—"DISPOSING."

Rev. Codes, N. D. § 4639, subd. 8, prohibiting a bank association, in selling or disposing of loans made on real estate security, from guaranteeing the payment or collection thereof, and providing that a contract guaranteeing such payment shall not be binding on the bank, does not apply to a pledge of a note secured by real estate mortgage to secure a loan to the bank, since "disposing," as used in the statute, means to part with, to alienate.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. § 230; Dec. Dig. ⟸96.

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

3. BANKS AND BANKING ⟸113—AUTHORITY OF CASHIER—ESTOPPEL.

Where a bank had without question received and applied to its own use money loaned by another bank on security of notes indorsed by its

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

cashier, it cannot question the cashier's authority to agree that the amounts of those notes when due should be charged against it.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 273–276; Dec. Dig. ⊂=113.]

4. BANKS AND BANKING ⊂=237—TRANSFER OF ASSETS—LIABILITY FOR DEBTS. Where the stockholders of a state bank organized a national bank which took over the assets of the state bank for a consideration of one dollar and its agreement to pay the deposits, time certificates, cashier's checks, and certain bills payable of the state bank, and the state bank returned to its principal stockholders the amount of the assessment levied against all the shares a few years before which had all been paid by the principal stockholder, and the sum so returned was used by him to repay the loan of the money necessary to organize the national bank and to purchase additional stock in the national bank, the transfer of the assets rendered the national bank liable for the amount of a loan made to the state bank secured by a note pledged as collateral.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 894–897; Dec. Dig. ⊂=237.]

Appeal from the District Court of the United States for the District of North Dakota; Charles F. Amidon, Judge.

Suit by the First National Bank of Duluth against the Merchants' National Bank of Mandan and others. Decree for plaintiff, and defendants appeal. Affirmed.

W. H. Stutsman, of Mandan, N. D. (Edward Engerud, Daniel B. Holt, and John S. Frame, all of Fargo, N. D., on the brief), for appellants.

W. D. Bailey, of Duluth, Minn. (Jed L. Washburn, Oscar Mitchell, A. C. Gillette, and J. A. Sinclair, all of Duluth, Minn., on the brief), for appellee.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. The appellee, the First National Bank of Duluth, Minn., brought this action against appellants, the Farmers' & Merchants' Bank, and the Merchants' National Bank, both of Mandan, N. D., and F. S. Graham, to recover the sum of $4,860 with interest at 6 per cent. per annum from October 10, 1914. By stipulation the case was tried to the court as an equitable action. Judgment was rendered in favor of appellee, and appellants appeal.

The facts appearing in the record are substantially as follows: In the spring of 1913, the Farmers' & Merchants' Bank was in need of funds with which to carry on its business, and its cashier, E. H. McHugh, on March 3, 1913, went to appellee to arrange therefor and took with him certain notes of the Farmers' & Merchants' Bank bearing interest at rates from 6 per cent. to 12 per cent. per annum. Mr. McHugh stated that he would like to indorse the notes for the Farmers' & Merchants' Bank without recourse, whereupon it was agreed that the notes should be delivered to the appellee, the interest thereon figured to their respective maturities at the respective rates which they bore, and that the total sum of principal and interest to the respective maturities should be discounted at 6 per cent. per annum back to March 3, 1913, and the Farmers' & Mer-

chants' Bank given credit on the books of appellee accordingly. It was also agreed that the Farmers' & Merchants' Bank would always maintain an account with appellee to the extent of at least 75 per cent. of the amount for which the Farmers' & Merchants' Bank had been given credit, and when the notes fell due the respective amounts thereof were to be charged to the account of the Farmers' & Merchants' Bank; the appellee allowing interest on daily balances at the rate of 2½ per cent. per annum.

Pursuant to this arrangement, the appellee gave the Farmers' & Merchants' Bank credit for an amount equaling the principal and interest of said notes at the rate which they bore, making a total of $26,918.45, less 6 per cent. per annum to the maturities of the several notes. The Farmers' & Merchants' Bank received the full amount of the credit so obtained. The notes were indorsed by the Farmers' & Merchants' Bank by McHugh without recourse, and McHugh also indorsed them individually. The transaction was entered on the books of appellee under an account with the Farmers' & Merchants' Bank, and the notes there listed. The last of the notes on the list was one made by the Mandan Hospital to the Farmers' & Merchants' Bank, dated October 10, 1912, due on or before two years from date for $4,500 and drawing interest at 8 per cent. per annum. The Farmers' & Merchants' Bank continued to carry a balance in its account with appellee, and, when the amount represented by any note fell due, the appellee charged such amount to this account and forwarded the corresponding note to the Farmers' & Merchants' Bank.

In a few cases the Farmers' & Merchants' Bank forwarded drafts for the amounts due on some of the notes as they became due. In no instance did the original makers of the notes pay directly to the appellee, and all dealings with reference thereto by the appellee were with the Farmers' & Merchants' Bank. All of the notes became due on or before November 29, 1913, except that of the Mandan Hospital for $4,500. The credit given by appellee on its books to the Farmers' & Merchants' Bank was all repaid by the latter except the credit for the Mandan Hospital note. On this note the Farmers' & Merchants' Bank paid one year's interest amounting to $360 in October, 1913. When the note fell due on October 10, 1914, there was due the appellee an amount equal to the principal of $4,500 and one year's interest $360, making a total of $4,860, the amount to recover which this suit was brought.

The amount due is made plain when we consider that the Farmers' & Merchants' Bank had received the principal and interest of the note less 6 per cent. per annum on March 3, 1913. About March 2, 1914, the Farmers' & Merchants' Bank became involved in financial difficulties, and its doors were closed by the state bank examiner of North Dakota. The appellant Graham, who had been a national bank examiner, was called in with others to go over the bank's paper. As a result of this examination, $47,908.26 of the paper was charged off as worthless, thereby wiping out the surplus of $10,000, the capital stock of $30,000, undivided profits of $5,882.29, and loans and discounts $1,814.42.

At this time, also, one J. P. Ernster went to the various stockholders, and obtained $23,000 of the total capital stock of $30,000, giving them a guaranty to protect them against liability. Ernster was thereupon on March 11, 1914, elected president of the bank and was acting as such at the time of the following transaction. Graham and Ernster were in constant consultation regarding the affairs of the bank, and on March 11, 1914, at the same meeting when Ernster was elected president, a resolution was passed by the stockholders levying a 100 per cent. assessment on the stock of the bank. Ernster paid in the full amount of $30,000, $10,000 of which was advanced to him by Graham therefor. $23,000 of this was paid in by Ernster and Graham on account of the stock acquired by them, and $7,000 was paid in by them on account of other stockholders who did not respond. The bank then opened its doors for business. Five days later, while Mr. Ernster was still president and while he and Graham controlled $23,000 of the $30,000 capital stock, a resolution was passed by the three directors who had been elected at the meeting of March 11, 1911, after Ernster and Graham had acquired control, accepting the offer of F: S. Graham to purchase certain assets of the bank as per list for $27,863.10. The list of assets referred to at their face value appears from the evidence to have been $80,193.07. The evidence shows that Graham did not pay any money to the Farmers' & Merchants' Bank for said assets, and the bank did not receive any consideration therefor except the sum of $22,863.10, which was paid by the First National Bank of Fargo for some of the best paper in the list of assets which were sold to Graham. It further appears in the evidence that Graham realized out of the assets other than those sold to the First National Bank of Fargo between $17,000 and $18,000. About June 1, 1914, Graham was elected president of the Farmers' & Merchants' Bank. The bank continued in business until August 31, 1914, on or about which date it was decided to form a national bank and take over the assets of the Farmers' & Merchants' Bank. Graham borrowed of the Farmers' & Merchants' Bank $17,500 for the purpose of aiding in the organization of the appellant Merchants' National Bank, and this loan was approved by the directors of whom Graham was one by resolution of August 25, 1914. Graham used this money and proceeded to obtain a charter for the Merchants' National Bank.

When the national bank was organized, and on August 31, 1914, the three directors of the Farmers' & Merchants' Bank, of whom Graham was one, passed a resolution to sell to the new bank all of its assets of every nature in consideration of $1 and the agreement of the new bank to pay the deposits, time certificates, cashier's checks, and $20,000 of bills payable and two other small items of the old bank. The stockholders' meeting which was held August 29th, controlled by Graham through his own stock and proxies, voted "to dispose of its assets provided said assets shall be sold for enough to pay off the liabilities of this bank as shown by its books on date of sale of said assets." By this same resolution the Farmers' & Merchants' Bank was to return to Ernster and Graham the special assessment levied on the stock in the spring and the emergency fund,

both amounting to $30,000. Graham had in the meantime become the owner of Ernster's interest in the stock and everything else, so he received the whole $30,000. He used this $30,000 to pay for that much more stock in the Merchants' National Bank of Mandan; that is, having a credit by this resolution with the Farmers' & Merchants' Bank of $30,000, he applied $17,500 of it to cancel his note given for the loan of that amount with which he had already purchased stock and paid in the balance for more stock. He transferred some of this stock to other stockholders in the old bank. The $30,000 refunded for the stock assessment of the old bank was not taken over directly by the new bank, but was refunded to Graham and by him turned in to the bank for new stock, or, as he says, "The new bank took $50,000 for the Merchants' Bank and used it as capital stock."

The $30,000 paid in to the old bank as an assessment belonged to that bank, and was a part of its funds. The Merchants' National Bank on the morning of September 1st opened its doors for business in the building of the old bank with the same set of clerks, equipment, and all the assets of the old bank; the only difference being that they brought in $20,000 more capital and proceeded with $50,000 instead of $30,000 capital. There was no closing of the doors except over night. By this transaction the defendant Merchants' National Bank got into its treasury about $30,000 of the assets of the Farmers' & Merchants' Bank which was a trust fund of the old bank for its creditors.

The claim of appellee is about $5,000, and the only other possible claim against the old bank does not exceed $5,000. The evidence shows that the Mandan Hospital note is secured by a mortgage in the ordinary form, dated October 10, 1912, executed by the Mandan Hospital by W. A. Lanterman, president, and E. H. McHugh, secretary, to Lyman N. Cary, trustee, and mortgages all of block 4, Heartview addition to the town of Mandan, to secure the note in question.

On this state of facts, the Farmers' & Merchants' Bank claims: (1) That the transaction of March 3, 1913, between McHugh as its cashier and appellee, constituted a sale of the notes to appellant, and the transaction ended there, so far as it was concerned; (2) admitting the transaction to have constituted a loan, and that the agreement on the part of McHugh that the notes at their respective maturities should be charged to the Farmers' & Merchants' Bank constituted a guaranty of payment, then the guaranty was void by reason of section 5150 of the Statutes of North Dakota; (3) that, if the transaction constituted a loan by appellee to the Farmers' & Merchants' Bank, there is not sufficient evidence to show that F. S. Graham or the Merchants' National Bank received the assets of the Farmers' & Merchants' Bank under such circumstances as would render them liable for appellant's claim.

On the other hand, appellee claims: (1) That the transaction between McHugh and it on March 3, 1913, constituted a loan to the Farmers' & Merchants' Bank of the amount for which the latter received credit, and the notes were taken by appellee as collateral security; (2) that appellants F. S. Graham and the Merchants' National Bank have received all the assets of the Farmers' & Merchants'

Bank under such circumstances as would make them liable to pay the claim of appellee.

[1] The trial court sustained the claim of appellee and rendered judgment accordingly. We are of the opinion that the trial court was clearly right in holding that the transaction of March 3, 1913, constituted a loan by appellee to the Farmers' & Merchants' Bank of the amount of the credit given the latter on the books of the former. No argument can make the case any stronger or different than the facts appearing in the evidence. These facts show to our mind beyond question that the transaction constituted a loan, and that the parties thereto in all their dealings treated it as such.

[2] Section 5150, subd. 8, North Dakota Compiled Laws 1913, quoted in the brief of appellants, did not become effective until July 1, 1913. The law which was in force on March 3, 1913, is found in subdivision 8 of section 4639, Civil Code North Dakota, and reads as follows:

"No such association shall have or carry among its assets at any one time loans dependent wholly upon real estate security, (and they shall only be upon first mortgages) in an amount exceeding one-half of its capital stock and surplus, and in selling or disposing of said loans so made upon real estate security, no such association shall have power to guarantee the payment or collection thereof, and any such guaranty made in violation of this provision shall not be binding upon such association, but shall be upon the person or officer making the same."

As we decide that the transaction between McHugh and appellant constituted a loan with a pledge of the notes as collateral, we are of the opinion the law quoted does not apply.

[3] The loan represented by the Mandan Hospital note was not sold nor disposed of within the meaning of the statute. The word "disposing" as used in the statute means to part with; to alienate. This must be so for the reason that there would be no occasion for the Farmers' & Merchants' Bank to guarantee the payment of a loan, which was simply transferred as collateral security for the payment of a debt for which the bank was already liable according to the result reached by us in this case. No question is made by counsel for appellants as to the authority of McHugh to agree that the notes might be charged to the Farmers' & Merchants' Bank at their maturity. We mention this as the point seems to have been raised in the trial court, but counsel no doubt were convinced that there would be no benefit to be derived from contending that McHugh had no such authority in view of the settled law that, whereas in the case at bar the bank has without question received the money which it is sought to recover and applied the same to its own use and benefit, it could not be heard to question the power and authority of its cashier. Citizens' Bank v. Appleton, 216 U. S. 196, 30 Sup. Ct. 364, 54 L. Ed. 443; Rankin v. Engel Emigh, 218 U. S. 27, 30 Sup. Ct. 62, 54 L. Ed. 915; American Nat. Bank v. Nat. Wall-Paper Co., 77 Fed. 85, 23 C. C. A. 33 (8th Cir.); Planters' Bank v. Union Bank, 16 Wall. 483, 21 L. Ed. 473; Wald v. Wheelon, 27 N. D. 624, 147 N. W. 402; First National Bank v. State Bank, 15 N. D. 594, 109

N. W. 61; Emerado, etc., v. Farmers' Bank, 20 N. D. 270, 127 N. W. 522, 29 L. R. A. (N. S.) 567.

[4] We are also of the opinion that the facts in this case in regard to the transfer of the assets of the Farmers' & Merchants' Bank to Graham and the Merchants' National Bank show a liability upon the part of Graham and the Merchants' National to pay the claim of appellee under the well-known rule established by Louisville Trust Co. v. Louisville, etc., Co., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; Chicago, R. I. & P. Ry. Co. v. Howard, 74 U. S. (7 Wall.) 392, 19 L. Ed. 117; Chicago, Mil. & St. P. Co. v. Third Nat. Bank of Chicago, 134 U. S. 276, 10 Sup. Ct. 550, 33 L. Ed. 900; Central Imp. Co. v. Cambria Steel Co., 201 Fed. 811, 120 C. C. A. 121 (8th Cir.); Central Imp. Co. v. Cambria Steel Co., 210 Fed. 696, 127 C. C. A. 184 (8th Cir.), and cases cited.

It is assigned as error that the complaint does not state facts sufficient to constitute a cause of action; but, as this question was not raised in the court below and is not specified as error or argued by counsel for appellants, we must treat the assignment as abandoned.

It results from what we have said that the judgment below must be affirmed, and it is so ordered.

ADAMS, Circuit Judge, concurred in the decision of this case, but deceased before the opinion was prepared.

DUNN et al. v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1917.)

No. 2877.

1. GRAND JURY ⇐8—SELECTION.

Judicial Code, § 276 (Act March 3, 1911, c. 231, 36 Stat. 1164 [Comp. St. 1913, § 1253]), declares that all jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box in which the names shall have been placed by the clerk of the court, and a commissioner appointed by the judge, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing and a well-known member of the principal political party opposing that to which the clerk may belong, the clerk and the commissioner each placing one name in the box alternately until the whole number required shall be placed therein. The clerk, although a resident of the district, did not officiate or participate in the selection of the names and the drawing of the grand jury, which was conducted by a deputy clerk and a jury commissioner, who were members of the same political party. *Held*, in view of the provisions of the statute as to the appointment of a jury commissioner who should be a member of a political party different from that with which the clerk was affiliated, the statute must be deemed mandatory, and the clerk cannot delegate the duty of selecting names and drawing the grand jury to his deputies; hence the grand jury so drawn was not a lawful grand jury, and the indictment found thereunder is subject to attack.

[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16–20; Dec. Dig. ⇐8.]

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2. GRAND JURY ⊂⊃8—JURY ⊂⊃66(2)—SELECTION—DELEGATION OF RIGHTS.
A duty as that of selecting the persons to act as grand or petit jurors must be performed by the persons authorized by the statute to make the selection, and cannot be delegated to others.
[Ed. Note.—For other cases, see Grand Jury, Cent. Dig. §§ 16–20; Dec. Dig. ⊂⊃8; Jury, Cent. Dig. § 284; Dec. Dig. ⊂⊃66(2).]

3. CRIMINAL LAW ⊂⊃1049—APPEAL—PRESENTATION OF GROUNDS OF REVIEW IN COURT BELOW.
Where accused, by plea in abatement to the indictment, attacked the mode of selecting the grand jury, and the overruling of that plea is shown by the record proper, the question is sufficiently reserved for review; exceptions being unnecessary.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2656; Dec. Dig. ⊂⊃1049.]

4. CRIMINAL LAW ⊂⊃1186(4)—APPEAL—HARMLESS ERROR—"DEFECT IN MATTER OF FORM."
Where the clerk of the District Court did not participate in the selection of the grand jury, as required by 36 Stat. at L. § 1164, which provides for the selection of names for the grand jury by the clerk and a commissioner who shall be a member of the opposite political party, the error is prejudicial; the statute being intended to prevent the pollution of the stream of justice at its source, and an indictment, found by a grand jury so selected, must be set aside, the error not being a mere defect in matter of form, which Rev. St. 1025 (Comp. St. 1913, § 1691) declares shall be disregarded.
[Ed. Note.—For other cases, see Criminal Law, Dec. Dig. ⊂⊃1186(4).]

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

Tom Dunn and others were convicted of crime, and they bring error. Reversed.

This is a writ of error from a judgment of conviction on two indictments which, by order of the court, were consolidated. The indictments were filed on September 2, 1915, and September 6, 1915, respectively. To each of them, as stated in a bill of exceptions, before any other plea presented or entered, and before any announcement, and before the cause was called for trial, the defendants, during the term at which the indictments were found and returned, filed and presented in open court to the court for its action a plea in abatement, which alleged, as ground of abatement, in addition to alleged nonconformity with the requirement of the statute (Judicial Code, § 276 [U. S. Comp. Stat. 1913, § 1253]) as to the manner of placing names in the box from which grand and petit jurors are drawn, that the grand jury that found and returned the indictment was not a lawful grand jury, in that the clerk of the court, L. C. Masterson, did not act, officiate or participate in the selection or drawing of such grand jury, but was absent from the city of Corpus Christi, where the jury was drawn, and in no wise supervised or conducted the selection and drawing of the grand jury, which was drawn by J. A. Mount, a deputy clerk of the District Court, and J. C. McGill, who had been appointed by the court as jury commissioner for the Corpus Christi division, in the place and stead of E. C. Lasater, the jury commissioner of that division, who was absent from the state, from names selected and placed in the box by said Mount and McGill, who were members of the same political party. The plea averred that L. C. Masterson, the clerk of the court at the time of selecting the names and placing them in the jury box and of drawing the grand jury, was living and residing within the district, and was not disqualified or disabled from acting as clerk of the court, and that he and the said McGill belonged to the same political party. On the hearing of this plea by the court the evidence without dispute showed that the names which the jury

box contained when the grand jury was drawn by Mount and McGill were selected and placed therein by them substantially in the manner and under the circumstances alleged in the plea, some by one of them and some by the other, and that several of the names of those composing the grand jury were selected and placed in the box by Mount. The court overruled the plea in abatement. Its action in so doing is assigned as error.

Marshall Hicks, of San Antonio, Tex., Jacob F. Wolters, of Houston, Tex., James R. Dougherty, of Beeville, Tex., and B. W. Teagarden, of San Antonio, Tex. (Lane, Wolters & Storey, of Houston, Tex., Edward R. Kleberg, of Corpus Christi, Tex., James B. Wells and Harbert Davenport, both of Brownsville, Tex., G. R. Scott, Boone & Pope, of Corpus Christi, Tex., Hicks, Hicks, Teagarden & Dickson, of San Antonio, Tex., and Dougherty & Dougherty, of Beeville, Tex., on the brief), for plaintiffs in error.

John E. Green, Jr., U. S. Atty., of Houston, Tex.

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

WALKER, Circuit Judge (after stating the facts as above). [1] With reference to the selection and drawing of grand and petit jurors the statute provides as follows:

"All such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing, at the time of each drawing, the names of not less than three hundred persons, possessing the qualifications prescribed in the section last preceding, which names shall have been placed therein by the clerk of such court and a commissioner, to be appointed by the judge thereof, or by the judge senior in commission in districts having more than one judge, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong, the clerk and said commissioner each to place one name in said box alternately, without reference to party affiliations until the whole number required shall be placed therein." 36 Stat. L. 1164.

In the opinion rendered in the case of United States v. Chaires et al. (C. C.) 40 Fed. 820, it was said in reference to the provision just set out:

"An inspection of this statute shows that the work of preparing the names of the persons possessing the qualifications of jurors, and placing them in the box, is to be done by the clerk of the court and a jury commissioner to be appointed by the judge. The duty to be performed by these parties is clearly and specifically prescribed in the statute. It may be considered, and probably is, mandatory. * * *"

The facts of that case did not call for a decision of the question presented in the instant case. The terms of the statute leave no room for reasonable doubt that it is the clerk himself, not his deputy or any other person acting in his stead, who is designated as one of the two officials who are to act together in selecting the names and placing them in the jury box. The requirement as a qualification of the commissioner to be appointed that he be "a well-known member of the principal political party in the district in which the court is held opposing that to which the clerk may belong" is convincing evidence of an intention to impose upon the latter the duty of par-

ticipating in person in the performance of the duty prescribed. Where such an intention is disclosed by the statute which imposes the duty, the rule which generally prevails that a deputy of a ministerial officer can do every act which his principal might do (The Confiscation Cases, 20 Wall. 92, 111, 22 L. Ed. 320) can have no application.

[2] Even in the absence of such a clear manifestation of a purpose to require the official designated to perform in person the duty imposed, the generally, if not universally, prevailing rule is that such a duty as that of selecting the persons to act as grand or petit jurors must be performed by the persons appointed to make the selection, and cannot be delegated by them to another or others. State v. Newhouse, 29 La. Ann. 824; Klemmer v. Mount Penn Gravity R. R. Co., 163 Pa. 521, 30 Atl. 274; Hulse v. State, 35 Ohio St. 421; Commonwealth v. Graddy, 4 Metc. (Ky.) 223; Clare v. State, 30 Md. 163; 24 Cyc. 212; 12 R. C. L. 1016, 1017. This view was plainly expressed in the opinion in the case of United States v. Greene (D. C.) 113 Fed. 683, 692. The plea in abatement under consideration in that case did not show that the names in the jury box were not lawfully selected by the clerk and jury commissioner as contemplated by the act.

In the case of United States v. Gale, 109 U. S. 65, 71, 3 Sup. Ct. 1, 27 L. Ed. 857, Mr. Justice Bradley, delivering the opinion of the court, spoke of an indictment found by a grand jury selected by persons having no authority whatever to select them as fundamentally defective. While it was disclosed that there was no complaint of that kind against the indictment under consideration in that case, the court's enumeration of some of the fundamental requisites of a valid indictment is not to be disregarded. The expression there used was explicitly referred to, and certainly without disapproval, in the opinion in the case of Rodriguez v. United States, 198 U. S. 156, 25 Sup. Ct. 617, 49 L. Ed. 994. In the latter case it appeared that an objection to the indictment very similar to the one made in this case existed; but it was not passed on by the court, because no exception was reserved to the overruling of the motion in arrest of judgment by which alone it was raised.

[3] In the instant case the objection was duly and seasonably made by plea in abatement prior to arraignment, and the overruling of that plea is shown by the record proper, which is presented for review, and, besides, was unnecessarily excepted to. Crowley v. United States, 194 U. S. 461, 24 Sup. Ct. 731, 48 L. Ed. 1075.

[4] The statute designates the officials who are to select the names to be drawn from for jury service. A body made up of persons not so selected is not the grand jury contemplated by the law. An obvious purpose of the enactment was to provide protection against unfounded, partisan, and malicious prosecutions by confining the selection of those who can serve as grand jurors to designated officials, required to be members of opposing political parties. It is a means adopted to secure fair dealing and impartiality in the body intrusted with the power of making criminal charges. There can be no certainty that the purposes of the statute will not frequently be de-

feated if an indictment, which is seasonably impeached on the ground that it was found by grand jurors selected by persons having no authority whatever to select them, may be sustained because the evidence adduced with reference to it is such as to make it appear that the defendant was not actually prejudiced as a result of the selection of those who preferred the charge having been made without legal authority. Without regard to other obstacles which may confront one situated as a defendant in a criminal case not infrequently is, the secrecy of grand jury proceedings often must stand in the way of existing evidence being available to him to prove that improper influences were effective in bringing about the finding of the indictment against him, or to rebut untrustworthy evidence adduced to prove the absence of such influences. With reference to the participation of unauthorized persons in the selection of the names to go in the jury box, from which panels for service are to be drawn, it was said, in the opinion in the case of United States v. Murphy (D. C.) 224 Fed. 554, 564:

"The law has specified who is to make the selection of jurors, and it is unsafe and unwise to permit a departure from its provisions. Courts cannot stop to inquire in each case whether such participation, however indirect, has been harmful in a given case. The only safe rule is to prohibit and condemn it absolutely."

The designation made by the statute of the officials charged with the duty of selecting the names to be drawn from to make up grand and petit juries is a means adopted to prevent the pollution of the stream of justice at its source. The provision was intended to guard the administration of the criminal law against improper influences. The court is not vested with a discretionary power to dispense with a compliance with an essential feature of a safeguard prescribed by law. An impeachment of an indictment because of a noncompliance with the requirement that the names put in the jury box be selected by specified officials is not a suggestion of a defect or imperfection in matter of form only (U. S. Rev. Stat. § 1025 [Comp. St. 1913, § 1691]), but goes to the vital question of the legality of the existence of the body by which the charge was made, and of its right or power to make a charge which the party charged can be required to defend against. United States v. Lewis (D. C.) 192 Fed. 633. The conclusion is that the averments of the plea in abatement, which were sustained by uncontradicted evidence, showed that the indictment was bad because of a noncompliance with a fundamental requisite in the creation of the grand jury which returned it. Because of the error committed in overruling that plea, the judgment under review is reversed.

COCA-COLA CO. v. BENNETT et al.

(Circuit Court of Appeals, Eighth Circuit. December 8, 1916.)

No. 4605.

1. TRADE-MARKS AND TRADE-NAMES ⟸68—RIGHT OF OWNER OF TRADE-MARK —UNAUTHORIZED BOTTLING OF GOODS.

A manufacturer of a syrup used with carbonated water to produce a beverage which was sold either at soda fountains or in bottles, whose registered trade-mark covered both the syrup and the beverage, but who bottled none of the beverage, having contracted with others therefor under contracts requiring the purchase of syrup from the manufacturer and its preparation under regulations to protect the quality, can prevent one who has not the manufacturer's consent from bottling the syrup with carbonated water, even in accordance with the regulations, and selling it under the trade-mark, since otherwise the manufacturer would have no means for protecting the quality of the goods sold under his trade-mark.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⟸68.]

2. TRADE-MARKS AND TRADE-NAMES ⟸68—RIGHTS OF OWNER—SALES IN BULK.

When a manufacturer of an article of food or drink sells it in bulk, and also puts it up in bottles bearing a distinctive trade-mark, the purchaser of the article in bulk cannot legally bottle it and affix the manufacturer's label to the bottle.

[Ed. Note.—For other cases, see Trade-Marks and Trade-Names, Cent. Dig. § 79; Dec. Dig. ⟸68.]

3. MONOPOLIES ⟸21—VIOLATION OF ANTI-TRUST ACT—RIGHTS OF OWNER OF TRADE-MARK.

The invalidity, under Sherman Anti-Trust Act July 2, 1890, c. 647, 26 Stat. 209 (Comp. St. 1913, §§ 8820–8830) of contracts by which the owner of a trade-mark covering both a syrup and the beverage made therefrom granted the exclusive right to bottle the beverage, does not affect the owner's right to prevent the sale of the beverage under the trade-mark by one who bottled it without consent.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 15; Dec. Dig. ⟸21.]

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

Suit by the Coca-Cola Company against Charles G. Bennett and another, copartners doing business as Bennett Mineral & Distilled Water Company. Judgment for the defendants (225 Fed. 429), and plaintiff appeals. Reversed and remanded, with instructions to grant the injunction prayed for.

Frank F. Reed and Edward Rogers, both of Chicago, Ill. (Candler, Thompson & Hirsch, of Atlanta, Ga., Holmes, Yankey & Holmes, of Wichita, Kan., Harold Hirsch, of Atlanta, Ga., and Charles G. Yankey, of Wichita, Kan., on the brief), for appellant.

C. M. Williams, of Hutchinson, Kan., for appellees.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

CARLAND, Circuit Judge. Appellant brought this action against appellees to restrain an alleged trade-mark infringement and unfair

competition. The trial court, upon consideration of the pleadings and certain stipulated facts, dismissed the complaint for want of equity. The facts upon which appellant relies for relief are substantially as follows:

Appellant is a corporation of the state of Georgia, with its principal place of business at Atlanta, in said state. Appellees are copartners doing business under the firm name of Bennett Mineral & Distilled Water Company at Hutchinson, Kan. Appellant is the owner of the trade-mark "Coca-Cola" and the business of the manufacture and sale of two kinds of syrup in connection therewith. The trade-mark covers both the syrups and beverages made therefrom. It was registered in the Patent Office of the United States January 31, 1893, and again October 31, 1905. The name "Coca-Cola" has been exclusively used by appellant and its predecessors, since on or about the year 1886, for the purpose of identifying the syrups manufactured by it and its predecessors as their own product, and to distinguish it from all other articles marketed and sold by others. The name "Coca-Cola" has been used by said appellant exclusively in connection with its product, by attaching and applying said name to all barrels, kegs, jugs, bottles, and other receptacles containing said product, and also by placing said name on labels in connection therewith.

Great care, skill, and judgment have at all times been used by appellant and its predecessors in the manufacture of said product, Coca-Cola, in order to protect it from contamination and impurities, and in the barreling and putting up of said product, so that the product should reach the consumer in a clean and wholesome condition, and great pains have also been taken by appellant that the bottles and other receptacles in which the product has been placed are free from dirt or objectionable matter, and great amounts of time and labor have been expended by appellant in marketing and selling its product under the name "Coca-Cola" throughout the United States and in foreign countries. Coca-Cola is universally known, and large sums have been expended in advertising said product. The product Coca-Cola is received by the consuming public in two ways—over the soda fountain, and in bottles. The syrup as such is not consumed by the public. At the soda fountain it is mixed with carbonated water, and in bottles it is similarly mixed.

Appellant does not bottle its bottling product itself, but its entire bottling product is sold under contract to two Tennessee corporations, viz. Coca-Cola Bottling Company and The Coca-Cola Bottling Company, which in turn have given the privilege under contract to certain other corporations and individuals to bottle the syrup made for bottling purposes and to use in connection therewith the trade-mark "Coca-Cola." Among the corporations having the privilege of bottling is the Western Coca-Cola Bottling Company. Any person or corporation receiving authority by contract to bottle and sell bottled Coca-Cola in a prescribed territory agrees to bottle the same in the following manner:

To prepare and put in bottles using a crown stopper thereon, a mixture of Coca-Cola syrup and of water charged with carbonic acid gas

under pressure of not less than one atmosphere, said Coca-Cola syrup and said water in said mixture to be used in proportions of not less than one ounce of Coca-Cola syrup to each seven or eight ounce bottle of carbonated water, making thereof a carbonated drink of the strength stated. Said person or corporations also agree not to add any compound, syrup, color, flavoring matter, acid, headings, sugar, or other sweetener, or any other preservative of any name or nature, or any other substance or ingredient whatsoever, or any water, other than pure carbonated water, commonly called soda water, to the syrup furnished by the plaintiff or to the water used for carbonating, and also agree not to use for said Coca-Cola syrup any substitute whatever, or to make any other drink and sell same under the name Coca-Cola.

Coca-Cola Bottling Company and The Coca-Cola Bottling Company of Tennessee take the entire output of the product of the appellant manufactured for bottling purposes. No other person, firm, or corporation buys or can buy the same from the appellant. The appellant is in no way directly or indirectly interested in the two Coca-Cola Bottling Companies, above described, or interested in any of their profits; but the contract between them provides that appellant shall retain control over its trade-mark and have the right of inspection and supervision, for the purpose of securing the bottling of its product according to contract as hereinbefore stated. The two bottling companies, with the consent of appellant, have divided the territory described in the contract between them, and said companies have entered into contracts with other companies, by which contracts local bottling companies are given the exclusive right within certain restricted territory to bottle and sell the bottled product, Coca-Cola.

The Western Coca-Cola Company, organized under the laws of the state of Illinois, is one of these companies. Its territory embraces several states, including Kansas. The bottling companies do not enter into a contract with more than one person, firm, or corporation in the territory allotted to any local bottler. The contracts between the two Coca-Cola Bottling Companies, sometimes referred to as the parent companies, and the various local bottling companies, are always approved and consented to by the appellant. The appellant has no financial interest in the local bottling plants. The appellant sells its bottling product to the parent bottling companies above described, and will not accept any order for said product, except from these two bottling companies, and no other person, firm, or corporation can buy Coca-Cola syrup from appellant for bottling purposes than the companies above described. The local bottling companies are supplied direct from the factories of the parent bottling companies, but the order comes to the appellant through the parent bottling companies, and these bottling companies pay appellant for the bottled product so distributed to the local bottling plants. The shipments of bottling syrup are made both in interstate and intrastate commerce, aggregating a large volume of business.

The defendants are using the trade-mark "Coca-Cola" on a bottled product without the authority or permission of appellant. The prod-

uct so bottled by defendants is the Coca-Cola syrup as manufactured by appellant for bottling purposes, bought by the defendants partly from the Western Coca-Cola Bottling Company and partly from vendees of appellant and in the open market. The said Coca-Cola syrup is mixed by defendants with carbonated water and sold as a beverage under the trade-mark Coca-Cola, and defendants have no contract with or authority from the Coca-Cola Bottling Companies or appellant for bottling the same, and no restriction as to the use of said syrup is agreed upon by defendants with the jobbers or wholesalers from whom they purchase said syrup. All of the Coca-Cola which defendants have manufactured and sold has been made from the Coca-Cola syrup manufactured and sold by appellant in the usual and ordinary way which appellant authorizes and permits consumers and patrons to manufacture and sell Coca-Cola as a beverage. Paragraph 16 of the complaint, which is admitted by the answer, is as follows:

"That by reason of the premises your orator is rightfully and equitably entitled to the sole and exclusive use of the trade-mark 'Coca-Cola,' and to protection in the use thereof as applied to its products, and in equity and good conscience to protection against all manner and form of fraudulent use and imitation of said trade-mark, and that the public generally has at all times acknowledged and acquiesced in the aforesaid rights of your orator and of your orator's predecessors aforesaid in and to said trade-mark."

[1] The question arising on the facts as above stated is: Have the defendants, without the authority or permission of the appellant, the right to manufacture Coca-Cola as a beverage by mixing the bottling syrup of appellant with carbonated water and sell the same to the public under the trade-mark Coca-Cola? The trade-mark "Coca-Cola," covering as it does both the bottling syrup and the beverage made therefrom by adding carbonated water, entitles the appellant to the exclusive right to manufacture and sell its syrup, and also to make and sell the beverage known as "Coca-Cola." Certainly, if the appellant has the exclusive right to make and sell under its trade-mark the beverage called "Coca-Cola," it can grant the right and privilege to others to do that which it might do itself; and it necessarily results from this state of the case that no person or corporation can manufacture the bottled beverage called "Coca-Cola" and sell the same under appellant's trade-mark without its consent or authority.

It is true that the appellant has no money directly invested in the business of the bottling companies; but it is very plain that, as the syrup manufactured by the appellant is not itself consumed by the public as such there could be no sale of the syrup unless there was a sale of the beverage made therefrom, and so it is apparent that the appellant is directly and greatly interested in having its bottled product delivered to the consuming public under such circumstances and in such manner as will promote the sale thereof. It is also apparent that the only way the appellant can secure the right to supervise the manner of the bottling of its product is to refuse to grant the privilege of bottling, except upon condition that certain prescribed regulations are complied with. It would, therefore, seem to be too plain for argument that both under the law of trade-mark and upon sound reason defendants in the case at bar may not, without the con-

sent and authority of the appellant, manufacture the bottled beverage and sell the same under the appellant's trade-mark, "Coca-Cola."

Counsel for the defendants argue that, as it appears that defendants use the bottling syrup of the appellant and mix the same with carbonated water in the same way that appellant authorizes other persons and corporations to do, they have the right to manufacture and sell under the appellant's trade-mark. But suppose that other persons and corporations without number should be of the same opinion; it would result that appellant would have no control over the integrity of its trade-mark, which is its guaranty that the beverage is as represented, and its business might be ruined. It is true the defendants might sell the bottling syrup which they buy under the appellant's trade-mark; but, since they change the syrup into a beverage without the permission and authority of appellant, they have no right to sell the same under appellant's trade-mark. The argument advanced is also faulty, as it would permit persons other than the owner of the trade-mark to control its use.

[2] The law seems to be settled that when a manufacturer of an article of food or drink sells it in bulk, and also puts it up in bottles, the latter bearing a distinctive trade-mark, a purchaser of the article in bulk will be guilty of unfair competition and be enjoined from bottling and affixing the manufacturer's distinctive label upon the goods bottled by him. Coca-Cola Co. v. J. G. Butler & Sons (D. C.) 229 Fed. 224; Krauss v. Peebles Co. (C. C.) 58 Fed. 585, 592; People v. Luhre, 195 N. Y. 377, 89 N. E. 171, 25 L. R. A. (N. S.) 473; Hennesy v. White, Cox, Manual of Trade-Mark Cases, 377; Brown on Trade-Marks, §§ 910, 759, and authorities there cited. One of the reasons given for this rule is that:

"Unless the manufacturer can control the bottling, he cannot guarantee that it is the genuine article prepared by him."

And as said by Judge Trieber in Coca-Cola Co. v. J. G. Butler & Sons, supra:

"To this may be added that he cannot tell whether it is bottled in so careful a manner as is essential to the preservation of the article and the maintenance of its good reputation."

It would seem that to uphold the contention of counsel for the defendants would be to destroy all the value that the appellant's trade-mark has. It would open the door to any person or corporation to adulterate the beverage sold as Coca-Cola without any right in the appellant to prevent it.

"The greatest value of a trade-mark is the reputation established by the excellence of the article, and the knowledge and appreciation of that fact by the consuming public. An article without any merit can derive no benefit from a trade-mark, and only a temporary benefit from the most extensive advertisement. It is like the value of a 'good will' in an established going concern. It depends upon the successful operation of the business. Without that there is no value to it. Who would pay for the good will of a business conducted at a loss?" Coca-Cola Co. v. Butler & Sons, supra.

The cases of Russia Cement Co. v. Frauenhar, 133 Fed. 518, 66 C. C. A. 500, and Appollinaris Co. v. Scherer (C. C.) 27 Fed. 18,

are cited as sustaining the position of counsel for defendants; but an examination of these cases show that in the Cement Case the same cement without any addition or subtraction was resold under the trade-mark name. If the defendants in this case had simply resold the syrup, it would be within the reasoning of the case cited; but they did not do that. They changed the syrup into a beverage, and they say that they changed it in the same manner that the appellant authorized other persons to do. But the trouble with this argument is that it destroys appellant's exclusive right to its trade-mark, and the resulting right to say who may use it. In the Appollinaris Case the same water, without subtraction or addition, was sold under its true name. Without prolonging the discussion further, we do not think the defendants have the right to manufacture and sell Coca-Cola under the trade-mark name of appellant without its consent.

[3] Counsel for defendants further urge that the contracts which appellant has made with the Tennessee corporations, and which the Tennessee corporations have made with appellant's consent with local persons and corporations, are in violation of the Sherman Law. The trial court seems to have based its ruling in dismissing the complaint partly upon this proposition, it appearing to that court that this suit was one to enforce these contracts. We do not think the validity of the contracts are in any wise brought into question on this record. The appellant simply claims that the defendants have no right to manufacture and sell Coca-Cola under appellant's trade-mark without its consent, and our decision in this case goes no further than to hold that the claim of appellant is well founded. We do not decide that the whole or any part of the contracts made by appellant with the bottling companies are valid. The granting of the consent of appellant to the defendants to manufacture and sell the product Coca-Cola under its trade-mark could be manifested without the contracts mentioned in the evidence. It will be time enough to decide as to the validity of the contracts when a suit arises in which their validity is involved, and when some person is sued who has a contract. Manifestly, if the consent and authority of appellant is necessary in order to manufacture and sell Coca-Cola under its trade-mark, then appellant has the right to impose any such reasonable condition to the granting of such consent as will protect the integrity of the trade-mark.

It results from what we have said that the judgment dismissing the complaint should be reversed, and the case remanded, with instructions to the trial court to grant the injunction prayed for. The question of damages was not considered in the lower court, and that question will be left open to be dealt with as law and justice may require.

ADAMS, Circuit Judge, concurred in the decision of this case, but deceased before the opinion was prepared.

WEILAND, State Engineer, et al. v. PIONEER IRR. CO.

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

No. 4512.

1. STATES ⟸191(2)—SUIT AGAINST STATE—WHAT CONSTITUTES.
A suit against state officers, to enjoin them from doing acts beyond the authority vested in them by law, and in violation of the laws of the state and the rights of complainant, is not one against the state, and is within the jurisdiction of a federal court, where there is the requisite diversity of citizenship and amount involved.
[Ed. Note.—For other cases, see States, Cent. Dig. § 181; Dec. Dig. ⟸191(2).]

2. COURTS ⟸308—JURISDICTION OF FEDERAL COURTS—CONTROVERSIES BETWEEN CITIZENS OF DIFFERENT STATES—JOINDER OF DEFENDANTS.
The joinder of defendants, who are citizens of the same state as complainant, will not oust a federal court of jurisdiction, where they are not indispensable parties, and a decree may be entered between the other parties without affecting their rights.
[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 855, 856; Dec. Dig. ⟸308.]

3. APPEAL AND ERROR ⟸757(3)—REVIEW—FAILURE TO COMPLY WITH RULES.
A Circuit Court of Appeals will not review rulings on the admission or rejection of evidence, where the brief of appellant does not, in compliance with its rules, set out the evidence admitted or excluded, nor specify the objections to such rulings.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3092; Dec. Dig. ⟸757(3).]

4. APPEAL AND ERROR ⟸984(2)—REVIEW—MATTERS WITHIN DISCRETION OF COURT.
An appellate court will not ordinarily interfere with the discretion of the trial court in adjudging costs in a suit in equity.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3882; Dec. Dig. ⟸984(2).]

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

Suit in equity by the Pioneer Irrigation Company against Adelbert A. Weiland, as State Engineer of the State of Colorado, and others. Decree for complainant, and defendants appeal. Affirmed.

Charles L. Allen and Fred Farrar, both of Denver, Colo. (George P. Steele, of Denver, Colo., on the brief), for appellants.

Edwin H. Park, of Denver, Colo., for appellee.

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

CARLAND, Circuit Judge. The Pioneer Irrigation Company, a Nebraska corporation, hereafter called the plaintiff, commenced this action against John E. Field, state engineer, Filmore Cogswell, division engineer, and Dwight L. Bower, commissioner of water district No. 65, as officers of the state of Colorado, having official duties to perform in reference to the distribution of water from the streams of said state for irrigation purposes, and against the owners of other irrigating

ditches diverting water from the North fork of the Republican river in Colorado; said defendants being citizens of said state. After a hearing upon pleadings and proofs, a decree was entered for the plaintiff, and defendants appeal.

The complaint alleged: That the plaintiff was the owner of an irrigating ditch diverting water from the North fork of the Republican river, a natural stream arising in the state of Colorado and flowing in its natural state in at least some quantity into the state of Nebraska. That said ditch had been constructed with reasonable diligence commencing April 4, 1890, and diverted water from the river aforesaid at a point in Colorado, some miles distant from the line between Colorado and Nebraska, and irrigated some lands in Colorado and some in Nebraska. That the plaintiff and its predecessors in title had maintained the ditch for irrigation and domestic purposes from the date of its construction to the commencement of the present action on August 8, 1913, without complaint on the part of any one. That said ditch had a carrying capacity of 92 cubic feet of water per second of time, diverted and applied as follows: Fifteen second feet in Colorado, and 77 second feet of water for the irrigation of lands in Nebraska. That said 92 feet had been carried and put to beneficial use by said ditch for lands in Colorado and Nebraska without hindrance during the time above mentioned. That the value of said ditch was $200,000; the portion thereof in the state of Nebraska being of the value of $150,000. That the defendants, who were ditch owners, failed to maintain headgates as required by the laws of Colorado on their ditches through which water could be measured. That the defendants, state officers, failed to require said ditch owners to maintain headgates as required by law, although often requested so to do by plaintiff. That plaintiff had requested said officials to allow 92 cubic feet to be turned out from the Republican river to plaintiff's ditch, but that said officials had refused to allow more than 15 feet as a priority to plaintiff's ditch, and also refused the right of plaintiff to divert water for use in the state of Nebraska. Said state officials did allow, however, ditch owners junior to that of the plaintiff to divert and apply water, regardless of the rights of plaintiff. That said officials allowed the owners of ditches prior in right to plaintiff to divert more water than they could put to beneficial use; the complaint alleging specifically excessive diversions by ditches having an earlier date of priority than that owned by plaintiff, and that the water so diverted by them could not be measured on account of the failure to install proper headgates and measuring weirs.

The plaintiff prayed for an injunction restraining the defendants who were owners of ditches from diverting water until headgates were placed in their ditches, and restraining said state officials from interfering with the right of plaintiff to divert 77 feet into its headgate for use in the irrigation of lands in Nebraska, and restraining ditch owners prior in right to that of the plaintiff from diverting more water than necessary for the irrigation of the lands under said ditches.

[1] After the filing of the complaint the defendant state officials interposed a motion to dismiss the same on the ground, among others,

that the court had no jurisdiction of the action or of the persons of the defendants, for the reason that the suit was one against the state of Colorado without its consent, in violation of the provisions of the Eleventh Amendment to the Constitution of the United States. The motion was denied, and this ruling is assigned as error. In discussing the point raised by the ruling of the court, counsel on both sides have by elaborate arguments gone into the question as to whether the state of Colorado is the owner of all the water flowing in the streams of Colorado. The defendants claim that the state is such owner, and that the state officials, who are made defendants, are simply the agents of the state; hence the state is the real defendant, and the action cannot be maintained for the reason above stated.

We do not think, however, that it is necessary to decide, in determining the question before us, as to whether the state of Colorado is the owner of all the unappropriated water flowing in the streams of that state, as, conceding (without deciding) that Colorado is the owner of such waters, still we think the present action was not one against the state. The plaintiff alleges that it is the owner of a ditch which has diverted a certain number of feet per second of water from the North fork of the Republican river in Colorado, and has used said water in the irrigation of lands in Colorado and Nebraska for more than 20 years without any complaint or hindrance from any one; that said waters so diverted have been used in the proportion of 15 feet in Colorado and 77 feet in Nebraska during the time mentioned. It also alleges that the officers of the state who are made defendants refuse to allow the plaintiff to divert more than 15 feet, and required said 15 feet to be used in the state of Colorado.

The suit is not one to compel the state officers to act in violation of the laws of the state of Colorado or to control the performance of their general duties, but is a suit which seeks to compel said officers to cease violating what is claimed to be the law of Colorado and the rights to which the plaintiff claims it is entitled. In support of the contention of the defendants the recent case of Lankford v. Platte Iron Works, 235 U. S. 461, 35 Sup. Ct. 173, 59 L. Ed. 316, is cited. That case, however, is very much different than the case at bar. In the case cited it was decided that the banking board created by the laws of Oklahoma had been given jurisdiction to supervise and control the distribution of the depositors' guaranty fund, and that a court of equity could not take the power of control from the banking board, as, in the absence of any showing to the contrary, the court must assume that the banking board would faithfully manage and apply the funds. In this case the plaintiff simply asks that the state officers cease interfering in violation of law with the rights of the plaintiff. In Weyman-Bruton Co. v. Ladd, 231 Fed. 898, 146 C. C. A. 94, this court said as follows:

"Whatever might have been the rule at an earlier date, it is now beyond question that, if the acts of an officer are beyond the authority vested in him by law, an action against him for trespass, in an action at law, or to enjoin him in equity, is within the jurisdiction of the national courts, if there is the proper diversity of citizenship, and the amount involved exceeds $3,000, both of which appear from the face of the complaint in the instant case. Ex parte Young, 209 U. S. 123, 28 Sup. Ct. 441, 52 L. Ed. 714, 13 L. R. A. (N. S.)

932, 14 Ann. Cas. 764; Western Union Tel. Co. v. Andrews, 216 U. S. 165, 30 Sup. Ct. 286, 54 L. Ed. 430; Harrison v. St. Louis & San Francisco R. Co., 232 U. S. 318, 34 Sup. Ct. 333, 58 L. Ed. 621, L. R. A. 1915F, 1187."

See, also, Magruder v. Belle Fourche Valley Water Users' Ass'n, 219 Fed. 72, 135 C. C. A. 524 (8th Cir.); Wadsworth v. Boysen, 148 Fed. 771, 78 C. C. A. 437 (8th Cir.); Morris v. Bean (C. C.) 146 Fed. 423; Anderson v. Bassman (C. C.) 140 Fed. 14.

[2] It is our opinion that the case cannot be said to be one against the state of Colorado within the meaning of the Constitution. F. D. Johnson, one of the original defendants, moved to dismiss the bill because it appeared from the face thereof that other appropriators of water, namely, the owners of the Carroll and Gilmore ditch and the Chicago, Burlington & Quincy Railroad Company were not made defendants. In denying the motions of the other defendants to dismiss, the court ordered that the complaint be amended by making C. A. Phillips, W. A. Sharp, F. H. Johnson, owners of the Carroll and Gilmore ditch, and the Chicago, Burlington & Quincy Railroad Company as the owner of the Chicago, Burlington & Quincy pipe line ditch, defendants. At the trial the defendants offered to prove that the owners of the Carroll and Gilmore ditch, at the time of the commencement of the action were, and ever since had been, citizens of the state of Nebraska, the same state as that of the plaintiff. Counsel for plaintiff admitted that such was the fact. The court ruled that, conceding the facts to be as stated, it did not oust the court of jurisdiction. We do not think there was error in this ruling, as the defendants brought into the case by order of the court, were not indispensable parties, without whom no decree could be rendered. In Minnesota v. Northern Securities Co., 184 U. S. 236, 22 Sup. Ct. 322, 46 L. Ed. 499, in speaking of the classes of parties to a bill in equity, it was said:

"They are: (1) Formal parties. (2) Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. (3) Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience."

See, also, Hawes v. First National Bank, 229 Fed. 51, 143 C. C. A. 645, a decision by this court, where most of the cases upon the subject are cited.

It also appears from the record that the owners of the Carroll and Gilmore ditch never appeared or answered, and the decree rendered did not affect their rights, as said ditch was admitted to be junior to that of the plaintiff. We therefore conclude there was no error in deciding that the court had jurisdiction. At the trial, the defendants offered to prove that senior ditch owners were using only the amount of water necessary for the irrigation of the lands lying under such

ditches, without waste. The court denied the offer, for the reason, as the court stated, that it only intended to fix the relative priority of the plaintiff's ditch, and that whether or not other appropriators were diverting more water than they were entitled to would not be decided, but left open for some future proceeding, and the decree in this case does leave that question undecided. In view of this disposition of the case, there was no error in this ruling.

The decree entered by the court established the ownership of the plaintiff to the Pioneer canal and ditch; that the carrying capacity of the ditch at its headgate was 50 cubic feet of water per second of time; that the carrying capacity of said canal at the point where it crosses the Colorado and Nebraska state line is 20 cubic feet of water per second of time; that said amount of water had, since the day of construction of the ditch, been put to a beneficial use for the parties entitled thereto in the irrigation of lands within the state of Nebraska, and that by reason of such continued beneficial use a vested right of property to the continued use thereof existed in the plaintiff; that the plaintiff was entitled to divert from the North fork of the Republican river that quantity of water at its headgate as would with reasonable care deliver at the Colorado-Nebraska state line, to be measured at the measuring weir in said canal at the Colorado-Nebraska state line, 29 cubic feet of water per second of time for the use and benefit of parties lawfully entitled thereto in the irrigation of lands lying under said gate within the state of Nebraska.

The court in its decree followed the decision of the district court of Colorado sitting in Phillips county as to the right of the plaintiff in point of time to divert water to be carried in said canal for the purposes of irrigation. The judgment of the district court was to the effect that the plaintiff's date of priority was April 4, 1890, and in order of time No. 6. The decree then enjoined the state officials and their successors in office from interfering with the right of the plaintiff to said water as therein adjudged, and from treating plaintiff, in the distribution of water in said water district and division, otherwise than it would be treated if said canal were wholly within the state of Colorado, and all lands irrigated therefrom were in the said state. It further decreed that any other question that might be included in the issues joined under the pleadings would not be considered or determined, but would be considered as withdrawn and expressly left open for consideration and determination in any controversy that might thereafter arise.

[3] The brief of counsel for appellant does not comply in any respect with rule 24 of this court. In no place where the error alleged relates to the admission or rejection of evidence is the full substance of the evidence admitted or rejected, or any part thereof, quoted. It is said in the brief as to assignments 4 to 19 that they might be considered together, and did not require extended discussion; that if the court was without jurisdiction, the rulings of the court were of no importance, but if the court did have jurisdiction, that it was obvious from what had already been said that the court should have decided the whole case, rather than to adjudge it in only one of its aspects;

that it was manifest from the testimony ruled out, the exhibits rejected, and the offers of proof refused that all had important and essential bearing upon the question as to how much water plaintiff was entitled to in Nebraska, if the court had jurisdiction.

[4] We cannot review the admission and rejection of evidence on any such discussion as this. Complaint is made that the court adjudged all the costs against the defendants. This was an action in equity, and in adjudging costs the court was exercising its undoubted discretion, with which we will not interfere.

That the decree rendered by the court below is erroneous in whole or in part, assuming the court had jurisdiction, and we decide that it had, is neither assigned as error nor argued in brief by counsel for appellants.

The decree appealed from, therefore, must be affirmed; and it is so ordered.

DORRANCE v. DORRANCE et al. *

(Circuit Court of Appeals, Third Circuit. December 14, 1916. Rehearing Denied February 23, 1917.)

No. 2106.

1. WILLS ⟸479—CONSTRUCTION—LONG-CONTINUED CONSTRUCTION.
Where for more than 25 years a will has been accepted as creating a valid trust, the court, though such construction is not controlling, should be cautious in determining that no valid trust was created.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1000–1003; Dec. Dig. ⟸479.]

2. WILLS ⟸456—CONSTRUCTION—TERMS.
In construing a will, the ordinary meaning of language must prevail.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 974; Dec. Dig. ⟸456.]

3. WILLS ⟸446—CONSTRUCTION—DOUBTFUL WORDS.
Doubtful words in a will should be construed so that it may stand, rather than fall.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 962; Dec. Dig. ⟸446.]

4. WILLS ⟸453—CONSTRUCTION—REASONABLE CONSTRUCTION.
A will should be reasonably construed.
[Ed. Note.—For other cases, see Wills, Cent. Dig. § 971; Dec. Dig. ⟸453.]

5. PERPETUITIES ⟸4(7)—VESTING REMAINDER—RULE AGAINST PERPETUITIES.
A testator devised land in trust for the sole and separate use of his married daughter for life, and upon her death for the use of any child or children then living, and the issue of any deceased child or children, until the arrival at majority of the youngest of such children, and upon arrival then in trust to convey the same to such child or children, with directions, in event of the death of the daughter without leaving her surviving any child or issue of any deceased child, then in trust for the testator's other children upon the same trusts set forth as to their respective shares. Other portions of the will, dealing with gifts to other children, contained similar bequests and devises in trust to pay the income to such children for life, with remainders over to their children or issue, while the residuary clause to the children followed the provisions

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⟸For other cases see same topic & KEY-NUMBER in all Key-Numbered Digests & Indexes
*For opinion on petition for rehearing, see 238 Fed. 924, — C. C. A. —.

of the devise to the married daughter, and declared that, in event of the death of the residuary devisees without issue surviving, the net rents, profits, and income should be paid to testator's children for and during their respective lives, and upon the death of any child his or her share should be paid to his or her children then living, the issue of any deceased child taking by representation, until the arrival at majority of such child, or, if more than one, of the youngest of such children, and upon arrival then in trust to convey the share of its or their parents to such child absolutely. *Held*, that none of the devises and bequests violated the rule against perpetuities, for, giving the words "child" and "children" the natural meaning, the estates would vest within a live or lives in being and 21 years thereafter.

[Ed. Note.—For other cases, see Perpetuities, Cent. Dig. § 12; Dec. Dig. ⟸4(7).]

Appeal from the District Court of the United States for the Middle District of Pennsylvania; Chas. B. Witmer, Judge.

Suit by Estelle Dorrance against Benjamin F. Dorrance and others. From a decree for defendants (227 Fed. 679), complainant appeals. Affirmed.

Sigmund Zeisler, of Chicago, Ill., William Jay Turner, of Philadelphia, Pa., and Leonard B. Zeisler, of Chicago, Ill., for appellant.

John G. Johnson, of Philadelphia, Pa., for appellees.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. [1] In this action—which was begun in January, 1915, between citizens of different states—the plaintiff contends that the will of Charles Dorrance, Sr., violates the rule against perpetuities and is therefore void. If this be true, much and perhaps all of his property passed under the intestate laws, and the plaintiff (the childless widow of Charles, Jr., a son, who died intestate) has succeeded to an interest in her husband's share, and is entitled to relief. The will is an elaborate instrument, and shows the hand of a competent and careful lawyer. The controversy turns on the meaning of the trust provisions, and the fact that these have been accepted as valid for almost 25 years, while it is not controlling, calls upon us to be cautious in weighing the contention that a fatal mistake has been acted on for nearly a generation. Nothing is in dispute except the construction of the will; the District Court heard the case on bill and answer, and rejected the plaintiff's claim. 227 Fed. 679.

[2-4] Charles Dorrance, Sr., a resident of Luzerne county, Pa., died in January, 1892, leaving the following children and grandchildren: (1) Annie Reynolds, and her son, Dorrance; (2) Benjamin, and his daughters, Ann and Frances; (3) Ford, and his children, Susan, Sturges, and Charles; (4) Charles, Jr.; (5) John, and his daughter, Stella. It may perhaps be more satisfactory to examine the will by taking up its relevant paragraphs in succession, and while doing so we must, of course, bear in mind that we are striving to reach the meaning of this particular will, and that in such an effort we are to be guided by the well-known rules—as far as possible, the ordinary meaning of the words must prevail; and doubtful words must be so

construed that the will may stand, rather than fall. In a word, the will is to be reasonably construed; after its meaning has thus been ascertained, the question whether all or any of its provisions violate the rule against perpetuities will probably appear with sufficient plainness.

[5] We may say at once that an attentive study has satisfied us that the general scheme of the trust provisions is as follows: The testator was aware of the rule against perpetuities and tried to obey it. If he has failed, the failure is due to inadvertence and not to design; but in our opinion he did not fail, but succeeded in carrying out his purpose. He intended the trusts he created to last as long as the rule would permit, and with that end in view he began by giving a life estate to each of his surviving children (and to one of his grandchildren). Then, as each child should die, he provided for the two possible contingencies that should then be presented: (1) The child might die without leaving children or remoter descendants; in that event, the share should pass to the testator's other children, or to their designated representatives, and should swell these other trust estates. (2) The child might die leaving children or remoter descendants; and, in that event, the trust should continue for the benefit of such children or remoter descendants. But, whichever contingency might happen, the respective trusts should last no longer than 21 years after the end of the lives in being at the time of the testator's own death. He could not know who would enjoy the benefits after his own children should die, and therefore, when he came to describe these possible beneficiaries, he used terms—"children" and "issue"—that would certainly be broad enough to include them all; but these terms were not intended to prolong the trust by indirection, and they did not prolong it beyond the limit he was careful to set in every instance. The terms referred to were mainly used to describe the persons that were to enjoy his bounty during the interval between the death of his own children and the arrival of the date when the trust must end.

In the fifth paragraph a farm in Lehman township is devised in trust for the sole and separate use of the testator's married daughter Annie during her natural life, and upon her death—

"* * * in trust for the use of any child or children then living, and the issue of any deceased child or children (such issue taking always by representation) upon the same trusts, until the arrival at majority of the youngest of such children; and upon such arrival, then in trust to convey the same to such children, if there be more than one, as tenants in common, or to such child, if there be but one, as sole tenant.

"And in the event of the death of my said daughter without leaving her surviving any child or the issue of any deceased child, then in trust for my four other children hereinafter named, share and share alike and upon the same trusts as hereinafter set forth as to their respective shares."

We find nothing objectionable in this paragraph. The trust cannot continue longer than the life of Annie and 21 years thereafter. She died in 1905, leaving Dorrance as her sole heir, and as he was living in 1892 he must already have attained his majority. But, if Dorrance had died in his mother's lifetime leaving "issue" to represent him, the trust would determine when the youngest of such "chil-

dren" should arrive at majority, and (as all Dorrance's "children" or "issue" would have been living at Annie's death in 1905) the trust would cease within 21 years after that date. And this is true, whether we give a broad or a narrow meaning to the word "issue."

The seventh section has several paragraphs and disposes of the residuary estate. It deals first with the personalty (except a designated part), bequeathing it to a trustee, who is to pay over four-fifths of the net income in equal shares to Annie, Benjamin, Ford, and Charles, Jr., and is to divide the remaining fifth in certain proportions between John and his daughter, Stella. All these shares are to be paid during the natural lives of the six beneficiaries named, and upon the death of any one of the six his or her share of the income is to be paid—

"* * * to his or her child or children then living, and the issue of any deceased child then living (such issue taking by representation), until the arrival at majority of such child, or if there be more than one the youngest of such children, and upon such arrival then in trust to transfer such shares of such personal estate and investments and of said leases of coal to such children, if there be more than one, share and share alike and as tenants in common, or to such child if there be but one absolutely and as sole tenant.

"And in case of the death of any or either of my said children or of my said grand-daughter Stella Dorrance, without leaving him or her surviving any child or children or the issue of any deceased child, then in trust for my other children and my said grand-daughter Stella in the same proportions and shares on the same trusts as are herein expressed and declared as to their several shares" (adding a spendthrift clause).

Of the testator's children, Annie (as already stated) died in 1905, and Charles, Jr., and John died in 1914. All the grandchildren named are still living, and as far as appears no others have been born. Does the foregoing disposition of the personalty offend against the rule? In our opinion it does not. This trust also must determine within 21 years after the end of a life already in being at the time of the testator's death. To take one example: John is dead, leaving Stella as his only heir. If she had married, and had died before her father, leaving "children" or the "issue" of children, these "children" or "issue" would of course have been living when John died, and the trust would determine when the youngest of such "children" or "issue" should reach the age of 21 years—in other words, the trust would end within 21 years after John's death.

The residuary section then devises certain real estate in trust. There are four paragraphs, but as they are alike in meaning we shall consider one only—the devise for the benefit of Charles, Jr. He is to receive the net income of a farm in Kingston township during his natural life, and upon his death the trust is continued—

"* * * for any child or children and the issue of any deceased child living at his death (such issue taking always by representation), until the arrival at majority of such child, or if there be more than one the youngest of such children, and upon such arrival then in trust to convey said farm to such child if there be but one, or to such children if there be more than one as tenants in common.

"And in case of the death of my said son without leaving him surviving any child or children, or the issue of any deceased child or children, in trust for my other children share and share alike and the issue of any deceased

child (such issue taking always by representation). Said net rent, profits, and income to be paid to my said children for and during their respective natural lives, and upon the death of any such child his or her share of the same shall be paid to his or her child or children then living and the issue of any deceased child then living (such issue taking always by representation), until the arrival at majority of such child, or if more than one of the youngest of such children, and upon such arrival then in trust to convey the share of its or their parents to such child or children absolutely" (adding a spendthrift clause).

In our opinion these provisions also do not violate the rule. No "children" or other "issue" survived Charles, Jr.; but, even if he had left children or remoter descendants, the trust would nevertheless end when the youngest of these "children" or other "issue" should reach the age of 21 years—that is, at some date during a period measured by the life of Charles, Jr., and a maximum of 21 years thereafter.

It seems to us that the plaintiff may have been led to what we regard as a mistaken view of the will by laying too much emphasis on the language describing the persons that are to benefit after the estates for life. Perhaps some of this language might have been more definite; but, even if we concede so much, the plaintiff's position is not materially improved. We are not concerned at present with questions of distribution, either of income or of principal; and of course we cannot forecast the situation when the several trusts reach the limit fixed by the testator. When that time arrives, the proper tribunal will determine to whom the principal is to go, and will decide all questions of distribution that may then arise. At present, we think it comparatively unimportant to consider who may be entitled to receive the principal, or of what age, mature or immature, the ultimate beneficiaries may chance to be when full ownership is cast upon them; the only question for decision now is this—How long did the testator direct the trusts to last? If in every case he fixed the farthest limit (and we think he did) at the expiration of 21 years after a life in being at the time of his own death, the will is valid. When this particular limit shall be reached in a given case, the principal must then be distributed to the persons described by the testator, whoever these ultimate takers may be, and whether they be adults or very young children. And, if disputes arise meanwhile concerning the proper distribution of the income, these also can be settled by the proper tribunal. If the will is valid, the plaintiff has no interest in any of these matters.

We have not followed in detail the argument in the briefs of counsel and in the opinion below. These contain a much fuller discussion of the subject, but we have thought it sufficient to confine ourselves to a general statement of the conclusions reached.

For the reasons thus given the decree is affirmed.

BOLLAND v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. July 6, 1916. Rehearing Denied November 28, 1916.)

No. 1448.

1. CRIMINAL LAW ⟸535(2)—CONFESSION—SUFFICIENCY OF CORROBORATION.
On the trial of a defendant for knowingly receiving in pledge from a soldier an automatic pistol, the property of the United States, in violation of Pen. Code, § 35 (Act March 4, 1909, c. 321, 35 Stat. 1095 [Comp. St. 1913, § 10199]), the confession of the defendant that he received the pistol in pledge from a soldier was sufficiently corroborated to justify the submission of the case to the jury by evidence showing that the pistol was issued to a soldier, and that it was found in the possession of defendant, whose place of business was very near the reservation on which such soldier was stationed.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1226; Dec. Dig. ⟸535(2).]

2. ARMY AND NAVY ⟸40—PROSECUTION FOR PURCHASING ARMS FROM SOLDIER —EVIDENCE.
Evidence that the pistol was found in defendant's possession was sufficient to sustain a verdict of guilty under Rev. St. §§ 1242 and 3748 (Comp. St. 1913, §§ 1973, 6941), which make such possession by one not an officer or soldier of the United States prima facie evidence that it was obtained in violation of the statute.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 83–87; Dec. Dig. ⟸40.]

3. ARMY AND NAVY ⟸40—PROSECUTION FOR PURCHASING ARMS FROM SOLDIER —EVIDENCE.
Evidence offered by defendant to show that the pistol had been charged to the soldier was properly excluded, where the evidence did not show that he was the owner at the time it was pledged, but that the charge was made after its loss was known.

[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 83–87; Dec. Dig. ⟸40.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. M. Smith, Judge.

Criminal prosecution by the United States against J. W. Bolland. Judgment of conviction, and defendant brings error. Affirmed.

Geo. F. von Kolnitz, Jr., of Charleston, S. C., for plaintiff in error.

Francis H. Weston, U. S. Atty., of Columbia, S. C. (J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C., on the brief), for the United States.

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

PRITCHARD, Circuit Judge. This is a criminal action instituted in the District Court of the United States for the Eastern District of South Carolina. The defendant was tried for a violation of section 35 of the federal Penal Code of 1910. The portion that relates to this case is in the following language:

"* * * And whoever shall knowingly purchase or receive in pledge for any obligation or indebtedness from any soldier, officer, sailor, or other person

called into or employed in the military or naval service, any arms, equipments, ammunition, clothes, military stores, or other public property, whether furnished to the soldier, sailor, officer, or person, under a clothing allowance or otherwise, such soldier, sailor, officer, or other person, not having the lawful right to pledge or sell the same, shall be fined not more than five hundred dollars, and imprisoned for not more than two years."

The indictment charged the defendant with knowingly receiving in pledge from a soldier certain property of the United States, to wit, a certain Colt automatic pistol.

The witness for the government testified that the pistol in question was found in the store of the defendant, which is a small grocery store on Sullivan's Island, S. C., near the government reservation; that the pistol was government property; and that the defendant confessed to receiving the same in pledge from a soldier. It was sought to be proven by one of the witnesses that the pistol, when its loss was discovered, had been charged to and paid for by the soldier to whom it was issued. The court excluded this testimony, to which defendant excepted. The defendant offered no further evidence, but moved the court to direct a verdict of not guilty on the ground that the corpus delicti had not been established by evidence independent of the extrajudicial confession of the accused. The court below overruled this motion upon the ground that there were circumstances corroborative of the confession made by defendant, and that therefore the same should be submitted to the jury for its consideration, to which defendant excepted. The jury found the defendant guilty, and upon which judgment was entered. The case comes here on writ of error.

[1] The first assignment of error is to the effect that the presiding judge erred in overruling and refusing a motion of defendant for the direction of a verdict of not guilty at the close of the government's evidence. This motion was based upon the contention that the corpus delicti of the crime had not been established by evidence independent of the confession of the accused. We think that this assignment is without merit for the following reasons: In addition to the defendant's confession, the government established the fact that the pistol in question was issued by the quartermaster sergeant to one Cartlidge, a musician and member of the 145th Company of the United States Coast Artillery. It was further shown that defendant's grocery store was located very near the government reservation on Sullivan's Island, where the company to which we have referred was stationed. It is true that some of these facts were only circumstantial, but, nevertheless, they tended to corroborate the confession of the defendant.

In the case of United States v. Williams, 1 Cliff. 28, Fed. Cas. No. 16,707, the Supreme Court said:

"All that can be required is that there should be corroborative evidence tending to prove the facts embraced in the confession; and, where such evidence is introduced it belongs to the jury, under the instructions of the court, to determine upon its sufficiency."

We think the evidence offered to corroborate the confession of the defendant was such as to warrant the jury in inferring that the defendant knew that Cartlidge was a soldier, and also that the pistol was government property.

[2] This leaves the remaining point as to whether the pistol was actually pledged to the defendant. Section 1242 of the Revised Statutes is as follows:

"The clothing, arms, military outfits, and accoutrements furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and the possession of any such property by any person not a soldier or officer of the United States shall be prima facie evidence of such sale, barter, exchange, pledge, loan, or gift. Such property may be seized and taken from any person, not a soldier or officer of the United States, by any officer, civil or military, of the United States, and shall, thereupon, be delivered to any quartermaster or other officer authorized to receive the same."

Also, section 3748 is as follows:

"The clothes, arms, military outfits, and accoutrements furnished by the United States to any soldier shall not be sold, bartered, exchanged, pledged, loaned, or given away; and no person not a soldier, or duly authorized officer of the United States, who has possession of any such clothes, arms, military outfits, or accoutrements, so furnished, and which have been the subjects of any such sale, barter, exchange, pledge, loan, or gift, shall have any right, title, or interest therein; but the same may be seized and taken wherever found by any officer of the United States, civil or military, and shall thereupon be delivered to any quartermaster, or other officer authorized to receive the same. The possession of any such clothes, arms, military outfits, or accoutrements by any person not a soldier or officer of the United States shall be presumptive evidence of such a sale, barter, exchange, pledge, loan, or gift."

In the foregoing it is provided that all clothes, arms, military outfits, etc., furnished by the United States to any soldier or officer is not to be sold, bartered, exchanged, etc., and that the "possession" of any such property by any person not a soldier or officer of the United States shall be prima facie evidence of such sale, barter, exchange, pledge, loan, or gift. The fact that the pistol was found in the possession of the defendant, who was not a soldier or officer of the United States, was presumptive evidence that the same had been pledged to the defendant.

[3] By the second assignment of error it is insisted that the court below erred in excluding the testimony sought to be adduced from the witness Green upon cross-examination. The defendant offered to show that the pistol had been charged to and paid for by the musician to whom it was issued. If the defendant had offered testimony tending to show that at the time the pistol was pledged the soldier had purchased the pistol from the government, and was therefore the owner of the same at the time he pledged it to defendant, then such testimony would have been very material to the issue. Indeed, if the defendant had established that fact, it would have been a complete defense, and he would have been entitled to acquittal. The defendant did not offer to show that the musician purchased, and was therefore the actual owner of the pistol at the time the same was pledged. He simply offered to show that the value of the pistol was charged to the musician when its loss was discovered, but this was only in the nature of a penalty upon the soldier for his failure to observe the rules and regulations, and could not have the effect of vesting the title in the soldier, nor could it relieve the party who knowingly received it in

pledge from the penalty imposed by the statute. The fact that the title to the pistol was in the government at the time the same was pledged makes the offense complete under the statute, and to show that the value of the pistol had been charged to the soldier by the government could not in any wise affect the guilt or innocence of the defendant.

In the case of Lobosco v. United States, 183 Fed. 742, 106 C. C. A. 476, the Circuit Court of Appeals for the Second Circuit, in discussing a cause somewhat analogous to this, said:

"It seems entirely clear from these sections that, in supplying the recruit with an equipment suitable and necessary for the discharge of his military duties, the government has been very careful to retain title to the same. It would seem to be public property, whether it remains in depot or is put in the possession of the individual soldier. The circumstance that, when his trust expires, he is allowed to retain such articles of clothing as he has then in use, does not change the character of his holding while he is in the service of the government."

Also, in the case of Ontai v. United States, 188 Fed. 310, 110 C. C. A. 288, where the defendant was charged with purchasing a shirt from a soldier, the Circuit Court of Appeals for the Ninth Circuit said:

"Error is assigned to the refusal of the court to instruct the jury to acquit the plaintiff in error on the ground that the property which he purchased of the soldier had been allowed to the latter under a clothing allowance, whereby it became his individual private property, held by him subject only to his contract with the United States not to dispose of the same, but with a tenure which permitted another to purchase the same without incurring any penalty for violation of the statute, and it is contended that the indictment having charged the purchase of public property of the United States, and the proof having shown that the purchase was an article of clothing which had been allowed to a soldier, the variance between the indictment and proof was fatal. The plaintiff in error cites United States v. Michael (D. C.) 153 Fed. 609, a case in which the court, in construing section 5438 of the Revised Statutes (U. S. Comp. St. 1901, p. 3674), held that a civilian did not commit a penal offense in purchasing from a soldier clothing issued to the latter during the term of his enlistment, and that clothing when issued to an enlisted soldier under the rules of the War Department was no longer public property, but was the soldier's private property. That decision, however, in our opinion is not sustained by reason or by authority. The contrary was held in United States v. Hart (D. C.) 146 Fed. 202; United States v. Koplik (C. C.) 155 Fed. 919; United States v. Smith (C. C.) 156 Fed. 859. It is true that one of the promises held out to the soldier about to enlist is the payment to him of a certain sum of money, and the allowance to him of certain specified clothing. But the clothing which he receives is held by a different tenure from the money. The latter is the soldier's to spend at his will. The clothing is part of his equipment for services which he is to render to the United States. He gets no property right in it other than the right to wear it. It is as much a portion of his equipment as is his gun or his ammunition. It remains public property of the United States. Section 1242 of the Revised Statutes (U. S. Comp. St. 1901, p. 876) declares that the clothing furnished by the United States to any soldier shall not be sold, bartered, or exchanged, pledged, loaned, or given away. Section 3748 (U. S. Comp. St. 1901, p. 2527) provides for the seizure of such public property which has been sold or bartered, pledged, loaned, or given away. The decisions above cited were all rendered prior to the enactment of the present statute as it is expressed in section 35 of the Penal Code. By that section the intention of Congress is made clear beyond question to declare all property secured by a soldier under his clothing allowance to be public property of the United States. That statute specifies 'any' arms, equip-

ment, ammunition, clothing, etc., 'or other public property,' and then follow the words: 'Whether furnished to the soldier, sailor, officer or person under a clothing allowance or otherwise'—thus expressing the will of Congress that a soldier shall acquire no right in any * * * property, and that one who, knowing him to be a soldier, shall purchase the same, shall incur the penalty denounced by the act."

From what we have already said we do not deem it necessary to discuss the third assignment of error.

It is insisted by the fourth assignment that the court below erred in charging the jury that under the statute in question the same presumption existed that existed by law in the case of stolen goods in the possession of a party, to wit, that one recently found in the possession of stolen goods was presumptively the receiver of stolen goods with knowledge of the fact that they were stolen. The reference by the court below to a case where one is charged with being the receiver of stolen property was obviously made for the purpose of illustrating the meaning of the statute which we have just quoted. The fact that the defendant had the pistol in his possession and that it was government property certainly cast upon him the burden of showing that he purchased it from one who had title to the same.

We have carefully considered the fifth assignment of error and are of opinion that the same is without merit.

The sixth assignment of error is in the nature of an argument which could have, with propriety, been made by counsel for defendant in addressing the jury, except that portion of it which requested the court to charge that in order to find the defendant guilty the jury should be satisfied beyond a reasonable doubt. The court fully explained this rule to the jury, and therefore its action in refusing to grant this request was eminently proper.

The eighth assignment of error is untenable, and requires no discussion at our hands.

For the reasons stated, the judgment of the lower court is affirmed.

JASPER & E. RY. CO. et al. v. WALKER, Collector of Internal Revenue.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1917.)

No. 2820.

INTERNAL REVENUE ⊂=9—EXCISE ON CORPORATIONS—"DOING BUSINESS."

A railroad corporation, which had leased all its property to another, which operated and maintained it, paying a fixed rental to the lessor, is not carrying on or doing business, within Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112 (Comp. St. 1913, §§ 6300–6307), imposing an excise tax on corporations carrying on or doing business during the preceding year, though such corporation maintained its corporate existence, and has an office, where it receives the rental and distributes it among its stockholders, and though, as required by the lease, it has during the year made certain improvements on the property, paid for by the sale of old material or by certificates of indebtedness of the lessee, since the expression "doing business" in that statute is one in common use, which has the same meaning applied to a corporation as to a natural person, and does not

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

include one who has retired from business and is merely maintaining property leased by him to another.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13–28; Dec. Dig. ⊂⊃9.

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

In Error to the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

Four separate actions by the Jasper & Eastern Railway Company and others against A. S. Walker, Collector of Internal Revenue, which were consolidated for trial. Judgment for defendant, and plaintiffs bring error. Reversed and remanded, with direction to enter judgment for each plaintiff.

J. W. Terry and A. H. Culwell, both of Galveston, Tex., for plaintiffs in error.

J. L. Camp, U. S. Atty., of San Antonio, Tex. (Hugh R. Robertson, Asst. U. S. Atty., of San Antonio, Tex., on the brief), for defendant in error.

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

WALKER, Circuit Judge. These four cases were consolidated and tried together by the court, a jury being waived, on an agreed statement of facts, and resulted in a judgment in favor of the defendant in error, who is the collector of internal revenue for the district of Texas. The plaintiff in each of the suits is a Texas railroad corporation, and each of the suits was for the recovery of a tax for the year 1912, paid under protest by the plaintiff under the Corporation Tax Act of 1909. The sole claim made in the several suits was that the tax had been illegally assessed, because the plaintiff, in the year 1912, was not "engaged in business," within the meaning of the act. The District Court ruled against these claims, holding that the plaintiff in each of the cases was "engaged in business" during the year for which the tax was assessed.

The facts disclosed may be summarized as follows: Each of the plaintiffs is the owner of a railroad in Texas, and its appurtenances and equipment, including rolling stock, which, prior to 1912, under authority conferred by a Texas statute, it leased to another corporation, the Gulf, Colorado & Santa Fé Railway Company, for a period of years extending beyond 1912. The lessee agreed to maintain and operate at its own expense during the term of the lease the leased railroad lines and the appurtenances thereto, and to pay as rentals all interest on bonds or other obligations of the lessor, all taxes, all rentals and other sums which the lessor shall become liable to pay during the term of the lease, all necessary expenses incurred by the lessor for the purpose of maintaining and perpetuating its organization, and annually a sum equal to 6 per cent. on the par value of the capital stock of the lessor, issued when the lease was made or thereafter issued with the written consent of the lessee. The lease contained the following provisions:

"Any portion of the demised premises appurtenant to the said line of railway, now held, or which may be acquired, for any purpose incidental to the operation thereof, such as premises acquired or held for the purpose of stations, depots, shops, or other buildings, or for obtaining gravel, fuel, or other materials, for use or sale, which, in the judgment of the lessee, its successors or assigns shall be no longer requisite for use for the purposes for which the same shall have been acquired or used, and likewise any part of the track, sidings, or roadway which shall have been thrown out of use by reason of straightening or alteration of the line of road, and any rails, ties, or other materials constituting a part or parts of the said line of railway for which other materials of at least equal value shall have been substituted, may be sold or disposed of by the lessee, its successors or assigns, as may be authorized by law; but the proceeds of any such sale shall be applied to the betterment or improvement or repayment of expenses incurred in the betterment or improvement of the remainder of the demised premises, or the payent or reimbursement of payments for said substituted materials, or in the acquisition of other property, which forthwith shall be transferred to the lessor, its successors and assigns, in exchange for the property sold, and shall become subject to the operation of this lease. * * *

"In the event that at any time during the continuance of said term it shall become necessary or desirable for the accommodation or development of the business of the said demised railroads and premises to construct or acquire any branch or extension thereof, or to make any addition thereto or any improvement or betterment thereof or change therein, or to purchase any rolling stock for use in connection therewith, the lessor covenants that the lessee shall have full power and authority at his own expense to construct or acquire such branch or extension, or make such addition, improvement, betterment, or change, or to purchase such rolling stock, and that, in case the lessee shall so request in writing, it (the lessor) will construct or acquire such branch or extension, or make such addition, improvement, betterment, or change, or purchase such rolling stock: Provided, that the cost thereof shall be paid or furnished by the lessee, and for all moneys expended, paid, or furnished by the lessee for the construction or acquisition of any such branch or extension, or for making any such addition, improvement, betterment, or change, or for the purchase of any such rolling stock, the lessor shall execute and deliver to the lessee its bonds or obligations of such form and tenor as shall be approved by the lessee for the repayment of all such moneys, with interest at the rate of 5 per cent. per annum, payable semiannually, and upon the request of the lessee shall execute, to secure such bonds or obligations, a mortgage or deed of trust, in such form as the lessee may approve and as shall be authorized by law, covering all the railroads, property, and franchises then owned or thereafter to be acquired by the lessor, including any and all such branches, extensions, additions, improvements, and rolling stock; and all branches, extensions, additions, improvements, and rolling stock so constructed or purchased shall become part of the premises demised hereunder, and the lessee during the continuance of the term hereunder shall pay, satisfy, or discharge the interest on the bonds or obligations issued by the lessor as aforesaid in respect thereof: And provided, further, that the cost of the construction or acquisition of any such branch or extension, to the extent of one thousand dollars per mile, may be repaid to the lessee by the lessor by the issuance and delivery to the lessee of a like amount at par of the capital stock of the lessor."

Since the execution of the lease, and pursuant to its terms, the properties mentioned in the lease have been in possession of the lessee, which has operated the railroads therein described under the terms of the lease. The lessor has continuously maintained its corporate organization since the date of the execution of the lease, keeps an office, and maintains an office force, and retains the corporate powers conferred upon it by its charter; and during the year ending December 31, 1912, and during each year that the lease has been in effect, collected rentals from the lessee, invested the same for the

benefit of its stockholders, and distributed among them profits accruing from such investments. During the year 1912 each of the plaintiffs made specified improvements and betterments to its railroad. Two of them paid for such betterments or improvements out of the moneys derived by them from sales of specified rolling stock and equipment made by them to the lessee; and in payment of the betterments and improvements made by two of the lessors the lessee issued to them, respectively, its obligations in writing, called "certificates of indebtedness," made in favor of the lessor and bearing interest at the rate of 6 per cent. per annum. Except as above stated, neither of the plaintiffs engaged in any activities during the year 1912.

It is settled by controlling decisions that what each of the plaintiffs did in 1912 in the way of maintaining its corporate organization, and of receiving rentals and other income and making distribution thereof among its stockholders, did not constitute the "carrying on or doing business" by it in such wise as to make it subject to the tax imposed by the act of 1909. Act August 5, 1909, c. 6, § 38 (U. S. Compiled Statutes 1913, § 6300); Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; McCoach v. Minehill Railway Co., 228 U. S. 295, 33 Sup. Ct. 419, 57 L. Ed. 842. A difference between the facts of the case last cited and those in the pending cases is that, in the former, not only the operation of the leased railroad property was exclusively by the lessee, but it also did all that was done in the way of maintaining or improving that property, while in the latter the operation of the leased property was exclusively by the lessee, but the lessors, pursuant to terms of the leases, made improvements and betterments to their respective leased properties. Is the difference such a one as to make the rulings cited inapplicable?

The charter of each of the plaintiffs conferred upon its incorporators and their successors the usual powers of corporate existence, of acquiring and maintaining property necessary or appropriate for the business authorized to be engaged in, and of transacting and carrying on specified business. It is the exercise by the corporation of the last-named power that subjects it to liability to pay the tax in question. If it lawfully foregoes the exercise of that power, its exercise of other powers does not subject it to the tax. Zonne v. Minneapolis Syndicate, 220 U. S. 187, 31 Sup. Ct. 361, 55 L. Ed. 428; Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312. An effect of the lease was a total authorized cessation of the exercise by the lessor of the power of using its railway properties acquired or to be acquired during the term of the lease in the conduct of the only business for use in which those properties were acquired or are adapted. The acquisition, maintaining, and leasing of property or properties may be parts of a business which the corporate owner engages in. On the other hand, the acquisition and maintenance of property may be only means of enabling the owner to carry on a business for use in which the property is intended, and the leasing of the property may effect a transfer to the lessee of the conduct of that business, leaving the owner no longer engaged in or carrying on business.

Where the law permits, a corporation, like a natural person, may own, maintain, and be the lessor of property, after it has turned over to another the exclusive use of that property and the carrying on of the only business for use in which its property was acquired and is adapted. In the one case, what is done amounts to "the carrying on or doing business," within the meaning of the statute. In the other case, the activities of the owner are limited to those of the proprietorship of property which another exclusively uses in carrying on business. In a sense it is true that all that a business corporation may do is business, as it was created and exists for exclusively business purposes. But that it may be exempt from the tax in question, without being altogether dormant or inert, is shown by rulings above cited. It may act as a proprietor of property without engaging in a business contemplated by its charter. We think this happens when, as a result of an authorized lease, it forgoes for the space of a tax year the transaction of the business for use in which all its property was acquired, and the lessee corporation, by an exclusive use of that property in carrying on that business within that year, subjects itself to liability for the excise tax imposed upon such an exercise of corporate power. Unless a corporation is "engaged in business," it is not embraced in the description found in the statute. The quoted expression is one in common use. It has the same meaning, whether applied to a corporation or to a natural person. It is not apt or appropriate to describe one who has retired from business in which he had engaged and confines his activities to maintaining property let to another and used exclusively by the lessee in carrying on that business.

Each of the plaintiffs in the pending cases, in maintaining its railroad property at the instance of its lessee and as required by the lease, in a condition suitable for use in the railroad business, in which it does not engage, did not, any more than did the Minehill Company, as disclosed in the case above cited, extend its activities beyond those of a corporate proprietor not engaged in or carrying on or doing business within the meaning of the statute. It may as truly be said in these cases, as was similarly said in the opinion in the case of McCoach v. Minehill Railway Co., supra, that the lessee alone in 1912 was "doing business" as a railroad company upon the lines covered by the lease, and was taxable because of it. "The Corporation Tax Law does not contemplate double taxation in respect of the same business." The result of exacting the payment of the tax by the plaintiffs in error would be to hold them to liability, not because they were engaged in or carrying on business, but because of their ownership and maintenance of leased property used in carrying on business only by another corporation, which thereby subjected itself to liability for the tax.

The conclusion is that, as regards the disputed question of liability, the facts in these cases are not materially different from those of the case last mentioned. This conclusion finds support in rulings made in the following cases also: Lewellyn v. Pittsburgh B. & L. E. R. Co., 222 Fed. 177, 137 C. C. A. 617; New York Central & H. R. R. Co. v. Gill, 219 Fed. 184, 134 C. C. A. 558; Anderson v. Morris & E. R. Co., 216 Fed. 83, 132 C. C. A. 327; Forty-Two Broadway Co. v. Anderson (D. C.) 209 Fed. 991; Anderson v. Forty-Two Broadway Co., 213 Fed.

777, 130 C. C. A. 338. It follows that the judgment under review must be reversed. As the cases were submitted on agreed facts, there is no obstacle in the way of this court directing final judgment.

The judgment of the District Court is reversed, and the cases are remanded to that court, with direction to enter judgment in favor of each of the lessor plaintiffs for the amount of the tax paid by it, with interest; the costs to be taxed against the defendant in error.

SOUTHERN RY. CO. v. MEAHER et al.

(Circuit Court of Appeals, Fifth Circuit. January 2, 1917.)

No. 2988.

1. JUDGMENT ⊜235—JOINT PLAINTIFFS—RECOVERY BY PART.
In a joint action by three plaintiffs to recover for the conversion of earth removed from a tract of land by a railroad company, there can be no recovery by any of the plaintiffs, where one of them is not shown to have had any interest in the land, since all must be competent to sue.
[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 414, 429; Dec. Dig. ⊜235.]

2. TENANCY IN COMMON ⊜39—RIGHT OF ACTION—INJURY TO PROPERTY—CONSENT OF ONE COTENANT.
In a suit by cotenants to recover for the conversion of earth removed by a railroad company from the land, there can be no recovery by any of the plaintiffs, if one of them consented to the removal of the earth.
[Ed. Note.—For other cases, see Tenancy in Common, Cent. Dig. § 119; Dec. Dig. ⊜39.]

3. TRESPASS ⊜50—MEASURE OF DAMAGES—REMOVAL OF EARTH.
The measure of damages for trespass by railroad company in removing earth from its right of way on plaintiffs' land, where it acted on an honest belief that it had a right to remove the earth, is the value of the earth at the time and place of its severance from the realty, not enhanced by the expense of excavating it, or of hauling it to the place where it was used.
[Ed Note.—For other cases, see Trespass, Cent. Dig. §§ 134, 136; Dec. Dig. ⊜50.]

In Error to the District Court of the United States for the Southern District of Alabama; Henry D. Clayton, Judge.

Action by Augustine Meaher and others against the Southern Railway Company. Judgment for plaintiffs, and defendant brings error. Reversed and remanded, with directions to grant a new trial.

The record shows that this suit was originally instituted against the Southern Railway Company by Augustine Meaher and Henry Hall Clarke, individually, and Henry Hall and Norborne R. Clarke, as executors and trustees under the will of G. Clifton Clarke, deceased. The complaint contained two counts, each claiming $25,000 damages. The first count claimed for the conversion of 50,000 cubic yards of clay, and the second for a like amount of earth.

The plaintiffs introduced two deeds in evidence, covering the land through which defendant's right of way ran. These deeds ran to George C. Clarke and Augustine Meaher. They showed that Mr. Clarke died in July, 1909, that Mr. Meaher had looked after this land since the death of Mr. Clarke, and that he and the estate of G. Clifton Clarke, as joint owners, were in the possession of these lands in 1914 and 1915. They further showed that the defend-

ant in 1914 and 1915 had dug a large amount of dirt or clay from the side of a cut several miles north of Mobile, through which the defendant's track and right of way ran through plaintiff's lands, and transported it and used it in filling in trestles on defendant's line north of plaintiff's lands, and in filling in the freight yards and freight depot of defendant in the city of Mobile, and in filling in a part of the freight yards of the Mobile & Ohio in the city of Mobile, and in filling in and making a connecting or spur track between the defendant's road and that of the A. T. & N. Railroad, and introduced evidence to show the value of this dirt in Mobile and at the several places where it was dumped.

The defendant, Southern Railway Company, introduced evidence which showed that its predecessor in title, the Mobile & Alabama Grand Trunk Railroad Company, was chartered by an act of the Legislature of Alabama in February, 1866 (Laws 1865–66, p. 405) and thereby authorized to build a railroad from the city of Mobile north through the state of Alabama, with a right of way 100 feet wide; that in 1871 said railroad condemned a right of way 100 feet in width through the "Johnston Tract," the property of plaintiffs now in question; that immediately it constructed its road through this tract; that the title, franchises, and properties of the Mobile & Alabama Grand Trunk Railroad, by a straight chain of conveyances, court proceedings, and legislative acts, became vested in the defendant, the Southern Railway Company; that none of the dirt was taken from anywhere except from their 100-foot right of way; that the dirt so taken was hauled by it and used as shown by the plaintiffs' evidence, a great deal being used for railroad pursposes on the Mobile & Alabama Grand Trunk Railroad; that one of the plaintiffs, Mr. Meaher, had consented to the taking of at least some of this dirt, and that this digging was in progress, more or less continuously, for about 14 months, and no protest or notice to stop was ever made or given by Mr. Meaher, although he had many times during that time been both at the place where the dirt was being dug and at the places where the dirt was being dumped; that it had acted in good faith in taking and using this dirt; and that this dirt had little or no market value, either where it was used or where it was excavated.

At the conclusion of the trial the jury brought in a verdict for the plaintiffs for $2,600.10, and judgment was rendered thereon by the court, to reverse which this writ of error is prosecuted; the plaintiff in error assigning 27 errors relating to admission and rejection of evidence, and charges to the jury given and refused.

D. P. Bestor, Jr., of Mobile, Ala., for plaintiff in error.

Gregory L. Smith, of Mobile, Ala., for defendants in error.

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

PARDEE, Circuit Judge (after stating the facts as above). The assignments of error, all insisted upon in this case, cover the propositions:

[1] First. That the court erred in refusing to give the general affirmative charge requested by the defendant. This is based on the proposition that the suit was brought by the three persons joining, to wit, Augustine Meaher and Henry Hall Clarke, individually, and Henry Hall and Norborne R. Clarke, as executors and trustees under the will of G. Clifton Clarke, deceased, and that under the proof in the case Henry Hall Clarke, individually, had no interest in the subject-matter of the suit, and the law is thoroughly settled in both the state and federal courts and in all character of cases that all plaintiffs to an action must be competent to sue or the action cannot be maintained, and that if one of several joint plaintiffs is not entitled to recover then none can.

This proposition seems to be well founded. We do not find under the proof that Henry Hall Clarke had any individual ownership in the property claimed to have been damaged, and the law claimed to apply seems well settled. Prestwood v. McGowin, 128 Ala. 267, 29 South. 386, 86 Am. St. Rep. 136.

[2] Second. That the court erred in refusing to charge the jury that if they believed from the evidence that Augustine Meaher, one of the parties plaintiff, gave the defendant permission or authority to dig and remove any of the clay or earth in question, then they cannot award the plaintiffs any damages for the digging and removal of clay or earth covered by such permission or authority, on the ground that, where several who are cotenants sue to recover damages to their estate, the plea that sets up that the damages were by the consent or direction of one of the plaintiffs presents good defense to the action. The plaintiff who consented to the action could not recover, and all persons suing for the same action must be entitled to recover, or none can.

There was evidence sufficient to go to the jury that Meaher, one of the cotenants suing, consented to the removal of the earth sued for, and the law is plain. Lowery v. Rowland et al., 104 Ala. 420, 16 South. 88. As on a reversal a new trial may be had, in which the evidence may be different in relation to both foregoing propositions, we take up the main and controlling question in the case, which is as to the proper rule of damages on the theory that the plaintiffs below are entitled to recover. Said plaintiffs sued for the conversion of certain *clay* and *earth* taken by the defendants from the Montgomery & Alabama Grand Trunk Railroad right of way, contending that it became, as soon as severed, merchantable property belonging to them as owners of the fee, for which they are entitled to recover, as for any merchantable commodity, like coal, timber, gravel, or building sand, its full value at any place to which it is finally removed or used.

On the other hand, it is contended that the clay and earth actually excavated and afterwards removed from the right of way had no marketable value as a commodity, and got none except from excavating and hauling for a special purpose, and then only was valued at the cost of excavating and hauling, and that the true rule of recovery was the damage to the realty by removing the same, or, at most, the value of the clay and earth at the place and time it was excavated. The defendants below also contended, to the same effect, that if this clay and earth was wrongfully taken from the plaintiffs' property through mistake, or with the honest belief that it was actually within its legal rights in so doing, then the measure of damages was the value of the earth so taken as it rested in its original place before the digging; and there was evidence tending to show that in taking the said clay and earth the defendant acted honestly in the belief that it was fully within its rights.

As to the character and value of the excavated earth removed by the defendant:

"Engineer Nicol testified that: 'The land up there in which this cut is made is the ordinary pine land in the Mobile plateau. It is the ordinary material found throughout Mobile county on the elevated division.' Engineer Buckley

testified: 'I call the soil there sandy clay; the country looks open land to me; it has been cut over.' Engineer Towle testified: 'The country up there where this cut was made is piney woods.' As we calculate it, the area dug over by the defendant aggregated 3.7 acres."

"Mr. Cochrane said: 'The Southern brought it there and dumped it on the track, and we paid for the service, whatever that was. In that arrangement or contract nothing was paid specifically for the dirt. I had an agreement to pay so much for the steam shovel, locomotive, cars, and train crew, and that was the basis on which I paid them, by the day. In that agreement there was no amount of money to be paid for each cubic yard of dirt; it was for the service, transportation, and equipment, payment for the laborers, workmen, engineer, etc.'

"The witness Sims said: 'The stuff that was brought down here was clay; we call it pipe clay; strip of pipe clay in it. I do not know anything it was good for except filling, and (if?) you cannot get anything better; it will answer for filling when you can cover it up with better material. It has to be put down, and has to be covered with something else, because the rain affects it; it gets mushy and sloppy; we call it churning; it is sticky. You have to confine it and shelter it with some other material. I have never noticed during my connection with the road any kind of this material brought in by train to Mobile by dealers in road material, gravel, and sand. There is nobody to my knowledge engaged in getting out this kind of material up there and sending it to Mobile for sale. I have never seen any brought to Mobile. I cannot say what it is worth there immediately after it is dug out of the soil. I have never heard of any value being placed on that kind of material.'

"The witness Hancock said: 'There was no market for dirt in Mobile. I mean, there was no market for it, such as there is for sand and gravel and such as that.'

"The witness Ennis said: 'There wasn't any market value at that time in Mobile for stuff of that character.'

"The witness Radcliff said: 'The dirt is always worth something. You would have to buy it or own it. There is no general market on any of this dirt. It is all figured on contracts; when a man wants it, he wants it bad; it depends on the contract. If they don't want it, you can't get rid of it at all. We never mine any of it, unless we have a contract. You can't bring it down here and wait for a market.' "

During the trial the defendant offered evidence to show the value of the lands in the immediate neighborhood of the excavations complained of, and on objections of immateriality and irrelevance the same was excluded by the court and exception duly taken. The record shows that the court charged the jury orally, to which some exceptions, not material to mention here, were noted, whereupon the plaintiff requested in writing the following charge:

"The plaintiff in this case makes no claim for the earth used upon that part of the defendant's track that was part of the road of the Mobile & Alabama Grand Trunk Railroad; and the court charges you that the defendant did not have the right to take any earth from plaintiff's lands and place it upon the property of the A., T. & N. R. R. Co., or upon the property of the Mobile & Ohio Railroad Company, or upon any portion of the track of the Southern Railway which was no part of the roadbed of the Mobile & Alabama Grand Trunk Railroad Company; and if the jury find for the plaintiff for the dirt that was taken by defendant and so used, they should estimate plaintiff's damages at the reasonable value of the earth delivered at the point where it was used or placed by the defendant."

And the court gave said charge and read the same to the jury in connection with the court's general charge, to all of which the defendant then and there duly excepted, and thereupon the defendant requested the court to give the following charge:

"The court charges the jury that if they believe from the evidence that the defendant, through its employés, willfully or intentionally trespassed on the property of the plaintiffs and took therefrom the earth in question, then the measure of the plaintiffs' damage is the enhanced value of the earth so taken when and where it was finally converted to the use of the defendant; but if you should find from the evidence that the defendant took and converted the earth from plaintiffs' property through inadvertence or mistake, or in the honest belief that it was acting within its legal rights, then the measure of damage is the value of the earth so taken as it was in the ground before it was disturbed by the defendant."

The court refused to give said charge, and the defendant then and there duly excepted.

The defendant further requested the court to give the following written charge:

"The court charges the jury that the measure of plaintiff's damages in this case is the difference in the market value of the lands trespassed on immediately before the commission of the injuries and the market value of the lands immediately thereafter"

—which the court refused to give the jury, and to such refusal the defendant duly excepted. Whereupon the defendant requested the court to give the following written charge:

"The court charges the jury that if they believe the evidence they can award to the plaintiff as damages in this case only the value of the clay or earth immediately after its severance from the ground"

—which was refused and the defendant duly excepted.

[3] It thus appears that, while excluding evidence of the value of the land theoretically trespassed upon and the surface of which was actually excavated, the jury was practically instructed to find damages based on the value of the earth at any point to which it was subsequently hauled and disposed of; and this tends to explain a verdict condemning the defendant to pay over $2,600 for removing from the surface of some 3.7 acres of land worth to the plaintiffs after the earth was removed by reason of its condemnation for a railroad right of way as much as before, because as to them the land was out of commerce, and their title remote and contingent, charged with a servitude practically perpetual. Since the Woodenware Case, 106 U. S. 432, 1 Sup. Ct. 398, 27 L. Ed. 230, the rule has been in the United States courts that the honest or mistaken trespasser, severing timber, coal, ore, etc., from the land of another, is liable for the value of the product severed at the time and place of severance, and it was error to refuse the charge requested by the defendant below in that respect.

Further than this, assuming, but not deciding, that the defendant below, by reason of his title and occupancy and possession, had no right to take clay and earth from the right of way of the Mobile & Alabama Grand Trunk Railway to use on defendant's other lines, although connected by tracks and in a sense forming a part of the same system, we are of opinion that under all the circumstances shown by the evidence in this case the true measure of damages is the value of the earth and clay at the time and place of severance, not to be

enhanced by expense of excavating and hauling to other places for disposition and use.

The judgment of the District Court is reversed, and the case is remanded, with instructions to set aside the verdict and award a new trial.

In re EVANS et al.

COLUMBIA NAT. BANK v. COMMONWEALTH TRUST CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1917.)

No. 2164.

1. PLEDGES ⟸19—CLAIMS—SECURITY—APPLICATION.
Where two joint makers of a note pledged their individual property for the payment of the note and "all other liabilities of the undersigned" to the holder of the note, the holder cannot, after the bankruptcy of the makers, apply the security to the payment of a note jointly signed by those two makers and one other, any more than it could to one signed by one of the makers alone.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58–63; Dec. Dig. ⟸19.]

2. PARTNERSHIP ⟸217(3)—NOTE—EVIDENCE.
Evidence that the signers of a joint note, who were two of the three members of a partnership, directed the money to be placed to the credit of the partnership, does not show that the note was a partnership obligation.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. § 425; Dec. Dig. ⟸217(3).]

3. PLEDGES ⟸19—CLAIMS—SECURITY—APPLICATION.
Where a bank held two secured notes of a bankrupt partnership and an unsecured joint note of the three members, it could not apply the excess of the partnership security to the payment of the individual note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 58–63; Dec. Dig. ⟸19.]

4. PLEDGES ⟸1—CONTRACT—EVIDENCE.
A statement by two makers of a secured note, who were two of the three makers of an unsecured note, that the bank need not press them, as it had plenty of security, did not make a new contract, pledging the security for the payment of the unsecured note.

[Ed. Note.—For other cases, see Pledges, Cent. Dig. §§ 1, 4, 5; Dec. Dig. ⟸1.]

Appeal from the District Court of the United States for the Western District of Pennsylvania; W. H. Seward Thomson, Judge.

In the matter of John Kuhn Evans and others, individually and as partners, bankrupts. As against the Commonwealth Trust Company, trustee in bankruptcy, the Columbia National Bank appeals from an order of the District Court dismissing appellant's claim against the estate. Order affirmed.

For opinion below, see 235 Fed. 635.

Gifford K. Wright and McKee, Mitchell & Alter, all of Pittsburgh, Pa., for appellant.

Charles Alvin Jones and Sterrett & Acheson, all of Pittsburgh, Pa., for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

WOOLLEY, Circuit Judge. The opinion accompanying the order from which this appeal was taken ([D. C.] 235 Fed. 635) so correctly states the law that nothing more than an affirmance by this court would be necessary, were it not that the authority upon which the decision was made, being a case decided by this court, is on appeal attacked or distinguished. The facts are fully stated and the law thoroughly considered in the opinion. We will therefore repeat only what is necessary to a consideration of the phase of the question raised on appeal.

John K. Evans, James Evans and Alan S. Evans, individually and as partners, were adjudged bankrupts. The appellant bank held four of their notes given in different capacities. Two were admittedly partnership notes, being signed by the firm name of Evans Bros. These were paid by the proceeds of the sale of a portion of their accompanying collateral, leaving as an excess certain securities and funds now claimed by the appellant and held by the trustee awaiting this decision. The third note was for $15,000. It was the joint note (not the joint and several note) of James Evans and Alan S. Evans, made, so far as shown upon its face, in their individual and not in their partnership capacity, with accompanying collateral separately owned but jointly pledged "for the payment of this and *all other liabilities of the undersigned* to the holder hereof, now or hereafter due." The fourth note was a joint unsecured note for $4,500 made by James Evans, Alan S. Evans, and John K. Evans. Upon default in payment of the $15,000 note, the appellant bank realized upon its collateral approximately $17,000, applied the proceeds first to the full payment of the $4,500 note and the balance in part payment of the $15,000 note, proved a claim against the bankrupts' estate for the residue, and made a claim for the excess remaining from the sale of the collateral of the two Evans Bros. notes. The referee dismissed the appellant's claim to this excess, and entered an order disallowing its claim for the alleged unpaid residue on the $15,000 note and directed it to pay the trustee of James Evans and Alan S. Evans, individually, a sum approximating $3,000, which would have been the balance if nothing had been paid upon the three-party $4,500 note and if the proceeds had been applied in full to the two-party $15,000 note.

[1] The order was affirmed on authority of Torrance v. Third National Bank of Pittsburgh, 210 Fed. 806, 127 C. C. A. 356. In that case this court held, with respect to a note that was *both* joint and several, that because of the joint liability of the makers, the collateral jointly pledged for the payment of that and "other liabilities of the undersigned" was available only upon their other *joint* liabilities and

was not available in settlement of their several liabilities. Aside from the question of the individual or partnership character of these obligations, presently to be considered, the matters alleged to distinguish the Torrance Case from this case are, that in the former, the collateral which was jointly pledged was jointly owned by the makers, while in this case the collateral jointly pledged was severally owned by them, and that while in the former case the collateral so jointly pledged was held not available for their several obligations, here the collateral jointly pledged is available for another joint obligation of the same two makers, though joined with them therein is a third and new maker. We are not impressed that this difference of fact makes a difference in the law.

When the joint makers pledged their individual property for the payment of their joint obligation, the pledge became joint as between the owners and the bank, and did not affect or alter the joint character of the obligation, nor did it affect or alter the rule of the Torrance Case that the pledge was available only for other obligations of the same parties in the same joint character. In the Torrance Case the makers were Saulsbury and Graham, the words of the pledge in their note being precisely the same as those in the note of the two Evanses. The court said:

"It seems to us that the words 'of this or any other liabilities of the undersigned' clearly indicate that the other liabilities referred to are of the same character as the joint liability in the (note in suit). Moreover, the natural inference from the words 'liabilities of the undersigned' would be that the jointly owned securities were pledged only for the joint liability of the two makers. So that the clause is as if written 'any other liability or liabilities of Graham and Saulsbury.'"

As the liability of one maker, singly made, is different from the liability of two makers, jointly made, as held in the Torrance Case, so in this case, pari ratione, the liability of three joint makers is different from that of two joint makers. The liability of the two joint makers in this case is similar to that of the two joint makers in the Torrance Case, which, when similarly paraphrased, is "any other liability or liabilities of James Evans and Alan S. Evans." A liability of James Evans, Alan S. Evans, and John K. Evans is, therefore, not another liability of James Evans and Alan S. Evans in the sense of the Torrance decision. In other words, the joint obligation of three is no more the joint obligation of two than is the single obligation of one the joint obligation of two. We are therefore of opinion that the appellant bank acted upon a misconception of the law, not only in applying proceeds of the collateral of the $15,000 two-party note, first to the $4,500 three-party note, but in applying any of those proceeds to that note. We do not find the two cases distinguished by the difference in facts, and are of opinion that the principle of the Torrance Case rules this case and was properly invoked by the referee in his finding and by the District Court in its order.

The appellant bank claims the right to proceed against the partnership and appropriate the proceeds of the various collaterals upon the theory, first, that the $15,000 two-party note was in fact a partnership note, and second, that by an independent contract between

the bank and the makers of the two-party note, its collateral was pledged as security for payment of the three-party note.

[2, 3] Upon the first contention it was shown that the money obtained upon the loan was placed by the bank, upon the direction of the borrowers, to the credit of the partnership. But this is not evidence that the loan was made to the partnership. The note takes its character from the transaction between the two makers and the bank. This was a personal transaction of two persons individually, upon security of their individual property. The subsequent diversion and use of the money is not at all inconsistent with the loan being made to them personally, and the money thus borrowed being by them loaned to the partnership. Even if the $15,000 note were a partnership note, we are at a loss to see how it aids the appellant, for if a partnership note, the application to it of the proceeds of its own collateral wholly discharges it, making unnecessary a contribution from the excess collateral of other partnership notes and making impossible the application of the residue to the non-partnership $4,500 note. We are in accord with the finding of the District Court that it was not a partnership note.

[4] This brings us to the final contention, namely, that in a conversation between one or both of the makers of the two-party note and officers of the bank, the bank was told that it need not press them as it had ample security, thus making a new contract whereby the makers of the two-party note pledged the collateral of that note for the payment of the unsecured three-party note. We agree with the District Court that this vague and uncertain conversation did not raise a contract, and that in relying upon it, the bank relied upon a mistaken assumption of legal rights.

The order of the District Court is affirmed.

ILLINOIS SURETY CO. v. STANDARD UNDERGROUND CABLE CO.

(Circuit Court of Appeals, Third Circuit. January 5, 1917.)

No. 2178.

1. EVIDENCE ⟸595—POSITIVE TESTIMONY AND GENERAL INFERENCES.
Direct and positive testimony, the good faith of which is undisputed, may not be overcome by inferences of the most general character, unsupported by a single detail.
[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 2444, 2445; Dec. Dig. ⟸595.]

2. PRINCIPAL AND SURETY ⟸97—RELEASE—CHANGES IN CONTRACT.
Changes in the principal's contract, made before and with reference to which its surety's obligation was assumed, do not release the surety.
[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 146–168; Dec. Dig. ⟸97.]

3. APPEAL AND ERROR ⟸999(1)—REVIEW—FINDINGS OF FACT.
Any dispute as to material changes prejudicial to the surety having been made in the principal's contract after the surety became bound is settled by the verdict on definite proper instructions.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 3912–3915, 3917–3921; Dec. Dig. ⟸999(1).]

In Error to the District Court of the United States for the Western District of Pennsylvania; Charles P. Orr, Judge.

Action by the Standard Underground Cable Company against the Illinois Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Walter Lyon and A. V. D. Watterson, both of Pittsburgh, Pa., for plaintiff in error.

William Watson Smith, James I. Marsh, and Gordon & Smith, all of Pittsburgh, Pa., for defendant in error.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

McPHERSON, Circuit Judge. In this action the Cable Company, a Pennsylvania corporation, recovered a judgment against the Surety Company, a corporation of Illinois, on a bond of suretyship. The facts are as follows:

On June 12, 1911, David Dick & Sons, Limited, a Canadian corporation, agreed in writing to erect a building for the Cable Company in the city of Hamilton, Ontario. All the labor was to be done by the Dick Company, and all the material furnished, except the structural steel; this the Cable Company itself was to obtain from some steel maker, and deliver on the ground. The building was to be finished by October 15 under penalty for delay. The price was $69,250, and 80 per cent. in value of the work and of the material delivered was to be paid monthly on the architect's estimate, and the balance was payable not long after completion of the job. The agreement also provided in effect that the Cable Company should not be held liable to any contractor for the delay of a prior contractor, but, in case such delay should keep the subsequent contractor out of possession, the architect should allow him additional time to complete his own contract. The Cable Company was to supply the steel complete by August 7. In compliance with this obligation the Cable Company contracted with the Hamilton Bridge Works for the manufacture of the steel, but deliveries were delayed beyond the contract time. About 90 per cent. of it, however, was on the ground by October 12, and all except 35 pounds by November 10, and the architect in charge testified that, even if all of it had been available by August 7, the Dick Company would not have been ready to erect it, and would not have suffered more than a week's postponement. The manager of the Dick Company denied this, and testified that if the steel had been delivered in due time the building could have been erected by October 15. According to the Cable Company's evidence, the default in delivery was due, at least in part, to the Dick Company's success in urging the Hamilton Company to make and deliver first the steel needed for a job at Welland, on which also the Dick Company was the contractor.

As just stated, only part of the steel had been delivered by August 7—about one-fifth, in fact—and the bond in suit was given in that condition of affairs, the Dick Company and both parties to this suit either having actual knowledge thereof or being chargeable with knowledge. The instrument is dated August 11, and—after reciting that "the

above bounden David Dick & Sons, Limited, have entered, or is about to enter, into a contract" with the Cable Company for the erection of the building in Hamilton—contains the usual conditions. The Dick Company continued the work until the latter part of November, when financial difficulties compelled it to retire. Notice to this effect was given to the Cable Company, and the Dick Company was dismissed as contractor on December 4. As soon as the Cable Company received notice of the contractor's embarrassment, it communicated with the Surety Company and asked two or three times for advice or suggestion, saying that if the Surety Company took no action the Cable Company would complete the building and would look to the bond for redress. The Surety Company paid no attention to these communications, whereupon the Cable Company accepted the lowest bids it could obtain. For reasons not now important, the completion of the work was delayed until June, 1912.

While the Dick Company was still going on with the contract, it received four certificates from the architect, dated August 1, September 1, October 2, and November 1, respectively, and upon these was paid $54,842. The architect testified without contradiction that this amount represented 80 per cent. in value of the work done and of the materials on the premises. There was no dispute that (after the contract price had been properly reduced by several items) the amount thus paid was about $100 less than 80 per cent. of the reduced price. The Cable Company sought to recover several items of loss, aggregating more than $30,000, but the verdict is evidently confined to the sum paid out in excess of the full contract price.

The Surety Company's chief defenses were: (1) Overpayment to the Dick Company; and (2) the delay in delivering the steel. The court charged that there was no evidence of overpayment, as the architect's estimates were not attacked, and as the Cable Company had accepted them as correct, but submitted nevertheless the question whether the payments had in fact done the surety harm. The court also charged that under the contract the delay in delivery would entitle the Dick Company to an extension of time, but that the Surety Company would not be discharged merely by such delay. The verdict was for $15,000, with interest, and the judgment is for $18,507.50.

[1] Two or three questions of minor importance are raised by the Surety Company, but as they are not much insisted on we shall consider only the defenses already referred to. With regard to the contractor's overpayment, we find nothing in the record to contradict the architect's estimate. Indeed, nothing is suggested except the argument that, as it cost a large sum to finish the building, the architect must have put much too high an estimate on the value of the work already done and the material already furnished. But we discover no facts to support the argument, and we cannot agree that direct and positive testimony whose good faith is undisputed may be displaced by inferences of the most general character unsupported by a single detail.

[2, 3] The other defense is also without merit under the particular facts of this case. It is true that one provision of the writing makes

time the essence of the contract, but this is so qualified by other provisions that extensions of time were evidently foreseen as possible and were taken into account. We may pass without comment the question how far the liability of a surety for hire would be affected by giving the contractor an extension of time; in our opinion this question is not now presented, for the surety here did not become bound until after the time limit had been disregarded by the parties themselves, and therefore after the provision just referred to had practically ceased to exist. In other words, there was no change of the contract after the bond was given; the change had already taken place, and the surety's obligation was assumed with reference to the situation as the parties had made it for themselves. But, from any point of view, the essential matters for decision were whether there had been any material changes in the contract after the surety company became bound, and (if such changes had been made) whether the surety had been prejudiced thereby. On these matters the jury received definite instructions, and the verdict has settled in favor of the plaintiff whatever dispute may have existed concerning the facts.

We find no reversible error, and direct the judgment to be affirmed.

CORN EXCHANGE OF BUFFALO et al. v. PATTERSON.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 14.

1. MONOPOLIES ⊂=28—CIVIL LIABILITY—RIGHT OF ACTION.

At common law, an action could be maintained on an agreement in restraint of trade by one whom it was maliciously intended to injure, though such an agreement would not be enforced; but, to maintain the action, plaintiff must prove, not only the agreement, but that such agreement was maliciously made to injure him.

[Ed. Note.—For other cases, see Monopolies, Cent. Dig. § 18; Dec. Dig. ⊂=28.]

2. CONSPIRACY ⊂=19—CIVIL LIABILITY—EVIDENCE—MALICIOUS INTENT.

The action by the grain committee of a corn exchange in notifying members that plaintiff had failed to pay for corn purchased from one of the members, even if the decision of the committee that he was liable for the corn was incorrect, did not alone establish a malicious conspiracy to injure plaintiff; especially where it was shown that only two members of the exchange had refused to deal with plaintiff, and they had based their refusal on knowledge of their officers, or information from the dealer having the claim against plaintiff.

[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. §§ 25, 26; Dec. Dig. ⊂=19.]

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

Action by Richard S. Patterson against the Corn Exchange of Buffalo and others. Judgment for the plaintiff against some of the defendants, and those defendants bring error. Reversed.

See, also, 197 Fed. 686.

Kenefick, Cooke, Mitchell & Bass, of Buffalo, N. Y., for plaintiffs in error.

Rush Trescott and Edmund G. Butler, both of Wilkes-Barre, Pa., and Harris S. Williams, of Buffalo, N. Y., for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The plaintiff brought this action to recover $50,000 actual and $100,000 punitive damages against the Corn Exchange of Buffalo and 55 other persons, mostly associate members of the Exchange. The cause of action alleged was a conspiracy at common law, to wit, that on or about August 1, 1907, the defendants had maliciously combined to injure and destroy the plaintiff's business and his good name and reputation by passing a resolution in the Exchange prohibiting members from dealing with him, and in furtherance thereof on or about October 7th, did post, blacklist, and boycott him on the Exchange and refused to sell him grain for the purpose of compelling him to pay an unjust demand of Burns Bros., a member of said Exchange.

It appears that April 26, 1907, the plaintiff, doing business at Wilkes-Barre, Pa., ordered of Burns Bros. of Buffalo, and they agreed to ship to him, three cars of No. 3 yellow corn, "official weight and inspection certificate final." Three cars certified to be No. 3 yellow corn were so shipped from Buffalo; but, on arrival at Wilkes-Barre nine days later, the grain in one of the cars was found to be in bad condition, and we assume was not then of the grade of No. 3 yellow corn.

July 27th, the plaintiff having refused to pay for this car, Burns Bros. made a complaint against him to the Corn Exchange.

August 15th, the grain committee having previously notified the plaintiff that they would take up the case on that day, when he would be given an opportunity to be heard, having been informed that Burns Bros. had brought suit against him, determined to proceed no further and referred the matter to the board of directors.

September 26th, the board of directors recommitted the subject to the grain committee "for such decision as to them would seem just and proper under the rules of the Corn Exchange."

October 2d, without holding that the grain in question was No. 3 yellow corn on arrival at Wilkes-Barre, the committee decided that the Buffalo certificate of inspection was final and all that Burns Bros. had agreed to give. They stated, moreover, that it was evidence confirmatory of the correctness of the certificate that this was the only car out of thirteen graded at the same time out of the same elevator, cargo, and bin, about which any complaint had been made. The committee made an award in favor of Burns Bros. against the plaintiff of $200.52 with $20 expenses, the fact of which award was circularized by the secretary of the exchange to the members.

The committee did not recommend to the board under rule 3, § 1, that transactions with the plaintiff by members should be prohibited until he had settled the claim, nor did the board ever pass such a resolution. The rule reads:

"Sec. 1. Any corporation, joint-stock company, firm or individual, not a member of the Corn Exchange of Buffalo, who shall be accused of any pro-

ceeding inconsistent with just and equitable principles of trade, or a violation of any commercial usage established by the Corn Exchange shall, on complaint, be summoned before the grain committee and given an opportunity to be heard. Should the above committee be unable to induce a settlement, if a proper case and the circumstances seem to warrant, it shall report to the board of directors, recommending that the transaction of business with such defendant by any member of the Corn Exchange, be prohibited until a settlement be made; and any member of the Corn Exchange who shall represent or transact business with, for or on behalf of said defendant, after notice of such prohibition shall have been posted on the bulletin five days, shall be guilty of willful violation of these rules and subject to the penalties of rule 4, § 2."

The court correctly held that this rule was lawful, but submitted to the jury the question whether it had been perverted to an unlawful use by the grain committee and by such of the defendants as acted upon the notice of the award for the purpose of compelling the plaintiff to pay it.

The complaint was dismissed as to all the defendants except ten, and against them the jury rendered a verdict of $2,000, to the judgment entered upon which this writ of error was taken.

[1] Decisions in cases arising under statutes are not applicable. Although at common law courts would not enforce an agreement in restraint of trade or against public policy, an action could be maintained upon it by one whom it was maliciously intended to injure. Mogul v. MacGregor, L. H. 21, Q. B. 552, L. R. (1892) App. Cas. 25. See, also, our decision in National Fireproofing Co. v. Mason Builders' Ass'n, 169 Fed. 259, 94 C. C. A. 535, 26 L. R. A. (N. S.) 148.

[2] In order to recover, the plaintiff had to prove first an agreement between the defendants or between some of them, not to sell to the plaintiff, and, second, that such agreement was made maliciously for the purpose of injuring him. We discover no evidence whatever of a conspiracy between any of the defendants, much less of a malicious conspiracy to injure the plaintiff. The Corn Exchange, defendant, took no part except as it might be held liable for the action of the grain committee. The action of that committee was right, in view of the facts laid before it as well as of the facts as developed at the trial. However, if their decision was wrong in law or in fact, or in both, there was no evidence that it was the result of a corrupt or malicious conspiracy. On the other hand, there was proof that several of the defendants filled every order that the plaintiff gave them and only two were shown to have refused to deal with him, that is, Husted Milling Company, one of whose officers had been on the grain committee that made the award, and Whitney & Gibson, who acted upon information given them by one of the Burns Bros. that the plaintiff was not a reliable person. There was no direct evidence of any combination between these defendants and anybody else nor any evidence from which such a conspiracy could be inferred. Their action was obviously independent and individual. A number of other questions have been discussed by counsel which we need not consider, because we think a verdict should have been directed for the defendants.

The judgment is reversed.

GEORGE BROWN & CO. v. O'CONNOR

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 85

1. MASTER AND SERVANT ⟸289(28)—INJURIES TO SERVANT—CONTRIBUTORY NEGLIGENCE—SAFER METHOD.

A derrickman, who used a plank scaffolding placed at one end of a building for the purpose of removing the windows, but shown by the proof to have been used whenever convenient, in oiling a shaft of the derrick, is not guilty of contributory negligence as a matter of law in using such plank, though it would have been safer to have oiled the shaft while lying upon the derrick.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1120; Dec. Dig. ⟸289(28).]

2. MASTER AND SERVANT ⟸278(9)—INJURIES TO SERVANT—NEGLIGENCE OF MASTER—DEFECTIVE SCAFFOLDING.

While the fact that a bracket supporting a plank on which employés were expected to stand gave way under plaintiff is not conclusive proof of negligence, such fact, together with proof that it was in a defective condition which could have been discovered by reasonable care and that it was wet by steam from the whistle five times a day, was sufficient to support a verdict finding the master negligent, especially where he failed to preserve the bracket so that the jury might see its condition.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 958; Dec. Dig. ⟸278(9).]

3. MASTER AND SERVANT ⟸286(17)—INJURIES TO SERVANT—DISMISSAL OF ACTION—FALSE TESTIMONY.

In an action for injuries to a servant, erroneous testimony, whether mistaken or false, that the opposite end of a plank on which plaintiff was standing when the bracket under it gave way struck him on the head, does not require a dismissal of the complaint; there being sufficient other evidence to support a finding of the master's negligence.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1024; Dec. Dig. ⟸286(17).]

4. WITNESSES ⟸254—REFRESHING RECOLLECTION—OBJECTION.

The use by plaintiff of an affidavit previously verified by his witness to refresh his recollection, so as to qualify and add to his testimony, was not subject to objection that he was impeaching his own witness, though it may have been objectionable because the affidavit was not contemporaneous with the event.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 868–873; Dec. Dig. ⟸254.]

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

Action by Joseph O'Connor against George Brown & Co. Judgment for the plaintiff, and defendant brings error. Affirmed.

Dilworth & Wurts, of New York City, for plaintiff in error.

David Oggins, of Long Island City, N. Y., for defendant in error.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an action by a servant to recover damages against his master under article 14 of the Labor Law of New

York (Consol. Laws, c. 31), regulating employers' liability, on the ground of defects in the condition of his ways, works, machinery, or plant, which arose from or had not been discovered or remedied owing to the employer's negligence.

The defendant operated a stone yard at Long Island City on which stood a rough frame shed running north and south. At the north end were three planks or scaffolds running in succession east and west at different heights from the floor. These planks were supported on triangular wooden brackets nailed into the perpendicular joists at the north end of the building. They were primarily intended for the use of persons taking out the windows at the beginning of summer and replacing them as winter came on.

The plaintiff was derrickman in charge of a derrick consisting of two steel girders which ran across the building east and west and were connected by diagonal braces. There were wheels at each end of these girders running on rails north and south. Machinery and a crane were carried on the structure.

September 22, 1913, it became necessary for plaintiff to oil a shaft parallel to and beneath the north girder. He could have done so by lying down on his stomach on the girder with one arm around it and reaching under it with his oil can, a method which he had found to be uncomfortable and which he thought to be dangerous. Instead of doing this, he ran the derrick up to the north end of the building, stood on the middle plank, which was some 25 feet above the floor and a convenient distance below the shaft to be oiled. The bracket at the west end of the plank where plaintiff was standing pulled out from the joist, causing him to fall to the floor.

[1] The defendant objects that the plaintiff had no right to use this plank at all, and also that he was guilty of contributory negligence in not oiling the shaft by lying on his stomach; that being a safer way. The proof justified the jury in finding that the use of the scaffold in question was not confined to persons working about the windows, but that the plaintiff and other employés used it whenever they found it convenient to do so. We also think it cannot be said that plaintiff was guilty of contributory negligence as matter of law in oiling the shaft while standing on this plank, even if lying on the girder would have been safer. These questions were fairly submitted to the jury, and they have passed upon them favorably to the plaintiff.

[2] The real question is whether there was evidence that the defendant was guilty of negligence. That the bracket broke and the plank fell is not in itself conclusive proof of negligence, but, taken together with other circumstances, it may prove negligence. A platform on which it is intended that people shall stand should be able to support them, and, when it proves insufficient for this use, a duty of explanation at least lies upon the defendant. It would have been a very proper and very natural precaution for the defendant to preserve this bracket so that the jury might see the character of the wood and of the nails. This was not done. The testimony on these points was conflicting, but there was enough, if believed, to show that the bracket was in a defective condition which could have been discovered and

remedied by reasonable care in inspection. Among other things, it was shown that a steam whistle which was blown five times a day was immediately under it. The effect of a continuous process of wetting and drying might well have weakened and rotted the wood or rusted the nails.

[3] The plaintiff testified that when the bracket gave way he held onto the shaft with one arm, but was knocked off by the plank striking him on the head. In view of the length of the plank, 17 feet, and the distance from the ground, 25 feet, and the plaintiff's position near the west end of the plank, it is difficult to credit this statement. The defendant contends that it makes his story so incredible that the court should have dismissed the complaint. We do not think so. That he was mistaken or even testified falsely on this point would not justify the dismissal of the complaint. His whole account was before the jury, and they could have found from it, together with the testimony of other witnesses, that the defendant was negligent, without adopting his statement that the east end of the falling plank struck him on the head.

[4] The plaintiff used an affidavit previously verified by his witness Zuillo to refresh his recollection, so as to qualify and add to his testimony at the trial. Defendant objected on the ground that the plaintiff was impeaching his own witness, which objection Judge Chatfield properly overruled. If the objection had been to the use of the affidavit to refresh the recollection of the witness because not contemporaneous—that is, not made at or near the time of the accident—the ruling might have been different, or, if not, an exception would have raised a different question for our consideration. Putnam v. United States, 162 U. S. 687, 16 Sup. Ct. 923, 40 L. Ed. 1118; Peters v. United States, 94 Fed. 127, 140, 36 C. C. A. 105.

We think the other assignments of error without merit, and the judgment is affirmed.

STRONG v. HOLMES.

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

No. 2648

1. SHIPPING ⟸209(1)—LIMITATION OF LIABILITY—"MAY BE SUED IN THAT BEHALF"—DISTRICT OF SUIT.

In admiralty rule 57 (29 Sup. Ct. xlvi), providing that a petition for limitation of liability shall be filed in the District Court of the district in which the ship may be libeled to answer for the liability against which limitation is sought, or if the ship "be not libeled then in the District Court for any district in which the said owner or owners may be sued in that behalf," the term "may be sued in that behalf" refers to suits already instituted against the owner to enforce his liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646, 649; Dec. Dig. ⟸209(1).]

2. SHIPPING ⟸209(1)—LIMITATION OF LIABILITY—"IN BEHALF OF"—JURISDICTION OF COURT.

An action in a District Court against a shipowner, based on a judgment recovered against him in a state court in another jurisdiction for loss of

cargo, is one "in behalf of" such loss, within the fair meaning of such rule, and such District Court has jurisdiction to entertain a petition by the shipowner for limitation of liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 646, 649; Dec. Dig. ⊂⊃209(1).

For other definitions, see Words and Phrases, First and Second Series, In Behalf of.]

3. SHIPPING ⊂⊃209(2)—LIMITATION OF LIABILITY—RIGHT TO LIMITATION.
That there is but one claim against a ship or owner does not defeat the owner's right to a limitation of liability.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. § 647; Dec. Dig. ⊂⊃209(2).

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

Petition in admiralty by H. C. Strong, as owner of the steamship Alki, for limitation of liability. From a decree dismissing the petition for want of jurisdiction, petitioner appeals. Reversed.

Bronson, Robinson & Jones, of Seattle, Wash., and Shackleford & Bayless, of Juneau, Alaska, for appellant.

Chauncy L. Baxter and J. Will Jones, both of Seattle, Wash., and V. A. Paine, of Juneau, Alaska, for appellee.

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

RUDKIN, District Judge. This is an appeal from a decree dismissing, for want of jurisdiction, a libel or petition to limit liability under the act of March 3, 1851, entitled "an act to limit the liability of shipowners and for other purposes" (R. S. §§ 4283–4289 [Comp. St. 1913, §§ 8021–8027]).

[1] Admiralty rule 57, as amended and promulgated April 22, 1889 (130 U. S. 705, 29 Sup. Ct. xlvi), provides as follows:

"The said libel or petition shall be filed and the said proceedings had in any District Court of the United States in which said ship or vessel may be libeled to answer to any such embezzlement, loss, destruction, damage or injury, or, if the ship or vessel be not libeled, then in the District Court for any district in which the said owner or owners may be sued in that behalf. When the said ship or vessel has not been libeled to answer the matters aforesaid, and suit has not been commenced against the said owner or owners, or has been commenced in a district other than that in which the said ship or vessel may be, the said proceedings may be had in the District Court of the district in which the ship or vessel may be, and where it may be subject to the control of such court for the purposes of the case as hereinbefore provided. If the ship have already been libeled and sold, the proceeds shall represent the same for the purposes of these rules."

Under this rule, where the ship has not been libeled to answer for the embezzlement, loss, destruction, damage, or injury, as is the case here, the libel or petition to limit liability shall be filed in the District Court for any district in which the owner or owners may be sued in that behalf. The term "may be sued in that behalf" refers to suits already instituted. In re The Luckenback (D. C.) 26 Fed. 870.

[2] The facts upon which the jurisdiction depends in this case are as follows: Certain piles of lumber on the steamship Alki toppled

over on a voyage from the city of Seattle to Juneau, Alaska, on the 31st day of March, 1912. A personal action was thereafter brought in the superior court of King county, state of Washington, against the appellant, as owner, to recover damages for the loss and injury occasioned thereby. A judgment was recovered in that action in the sum of $21,250. Thereafter a suit was instituted on the King county judgment against the appellant in the court below, and in that suit a second judgment was recovered, upon which the appellee is now threatening to issue an execution. It will thus be seen that the jurisdiction of the court below depended upon the question whether the suit on the King county judgment in the Alaska court was a suit in behalf of the loss or injury resulting from the toppling over of the lumber, within the meaning of rule 57. We think that it was.

"In these provisions of the statute we have sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of which to our maritime commerce can hardly be estimated. Nevertheless, the practical value of the law will largely depend on the manner in which it is administered. If the courts having the execution of it administer it in a spirit of fairness, with the view of giving to shipowners the full benefit of the immunities intended to be secured by it, the encouragement it will afford to commercial operations (as before stated) will be of the last importance. But if it is administered with a tight and grudging hand, construing every clause most unfavorably against the shipowner, and allowing as little as possible to operate in his favor, the law will hardly be worth the trouble of its enactment. Its value and efficiency will also be greatly diminished, if not entirely destroyed, by allowing its administration to be hampered and interfered with by various and conflicting jurisdictions." Providence & N. Y. S. S. Co. v. Hill Mfg. Co., 109 U. S. 578, 588, 3 Sup. Ct. 379, 385 (27 L. Ed. 1038).

While the rule of liberal construction may not apply to jurisdictional questions, yet it should not be entirely lost sight of in determining the question now before us and in construing the rules adopted by the Supreme Court. Technically speaking, of course, the suit instituted in the District of Alaska was upon a judgment. But if we go behind the mere form, and look at the substance of things, the real and only purpose of that suit was to enforce the personal liability of the owner for the loss or damages in question, and the effect upon the shipowner will be the same, whether the appellee enforces the Alaska judgment or the King county judgment. Under the rule in question personal actions may be brought in many different jurisdictions, as the number of such actions need only be limited by the number of claimants and the number of jurisdictions in which process may be served. The District Court of any jurisdiction in which the owner or owners may be sued has jurisdiction of the limitation proceedings, and the court below was one of such jurisdictions. Other objections are urged against the petition; but these were not passed upon by the court below and call for but slight consideration here. It is suggested that the libel or petition was not filed in time; but we think otherwise. The Benefactor, 103 U. S. 239, 26 L. Ed. 351.

[3] It is also urged that there is only one claimant, and that the value of the vessel is greatly in excess of his claim; but the fact that there is but one claim is immaterial. White v. Island Transportation Co., 233 U. S. 346, 34 Sup. Ct. 589, 58 L. Ed. 993. And the claim

that the value of the ship greatly exceeds the amount of the claim is not supported by the record.

The decree of the court below is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

TOWE v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 11, 1916.)

No. 1457.

1. CRIMINAL LAW ⟸935(1), 1156(2)—NEW TRIAL—DISCRETION OF TRIAL COURT.

The granting or refusing of a new trial on the ground of the insufficiency of the evidence rests in the discretion of the trial court, which cannot be reviewed on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 2297, 3068; Dec. Dig. ⟸935(1), 1156(2).]

2. CRIMINAL LAW ⟸968(8)—ARREST OF JUDGMENT—SCOPE.

A motion in arrest of judgment lies only for material errors on the face of the record; so an assignment of error complaining of the overruling of a motion in arrest on the ground that the judgment was without evidence to support it cannot be upheld, where the evidence was conflicting.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 2437; Dec. Dig. ⟸968(8).]

3. CRIMINAL LAW ⟸1159(3)—APPEAL—CONVICTIONS.

A conviction based on conflicting evidence will not be disturbed on writ of error.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3076; Dec. Dig. ⟸1159(3).]

In Error to the District Court of the United States for the Western District of Virginia, at Abingdon; Henry Clay McDowell, Judge.

Robert Towe was convicted of removing and concealing spirits on which the tax had not been paid, in violation of Rev. St. § 3296 (Comp. St. 1913, § 6038), and he brings error. Affirmed.

L. P. Summers, of Abingdon, Va., for plaintiff in error.

R. E. Byrd, U. S. Atty., of Richmond, Va., and Joseph H. Chitwood, Asst. U. S. Atty., of Roanoke, Va.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

PRITCHARD, Circuit Judge. The plaintiff in error will hereinafter be referred to as defendant, and the defendant in error as plaintiff; such being the respective positions occupied by the parties in the court below. This case comes here on writ of error from the District Court of the United States for the Western District of Virginia.

The defendant was convicted on a charge of violating section 3296 of the Revised Statutes (Comp. St. 1913, § 6038), which relates to removing and concealing spirits on which the tax had not paid. The indictment contains two counts. The first count charges that the defendant did, on the 9th day of November, 1914, in Carroll county,

Va., unlawfully and feloniously remove, aid and abet in the removal of certain distilled spirits, to wit, ten gallons, on which the tax imposed by law had not been paid, from the distillery to a place other than the distillery warehouse provided by law. The second count charges that the defendant, at the same time and place, did conceal, aid and abet in the concealment of certain distilled spirits, to wit, ten gallons, which had theretofore been removed from a certain distillery, to the grand jurors unknown, to a place other than the distillery warehouse provided by law.

The jury returned a verdict of guilty, and counsel for defendant moved the court to set aside the verdict upon the ground that the same was contrary to the evidence and against the evidence. This motion was overruled, and the defendant was sentenced to two years in the penitentiary. There was no objection to the instructions given to the jury, nor was there objection to the admissibility of any evidence offered; the only exception being to the judgment of the court in overruling defendant's motion to set aside the verdict and grant him a new trial.

[1] The defendant bases his contention upon three assignments of error, the first being that:

"The court erred in refusing to set aside the verdict and grant a new trial, because same was without evidence to support it."

It is well settled that the granting or refusing of a new trial is within the discretion of the court, and that the refusal to grant such motion is not subject to review upon a writ of error. Newcomb v. Woods, 97 U. S. 518, 24 L. Ed. 1085; Indianapolis Railway Company v. Horst, 93 U. S. 291, 23 L. Ed. 898; Pocahontas Distilling Co. v. United States, 218 Fed. 782, 134 C. C. A. 566; Prichard v. Budd et al., 76 Fed. 710, 22 C. C. A. 504.

[2, 3] The second assignment of error is as follows:

"The court erred in refusing to arrest the judgment, for the reasons set forth in the bill of exceptions, as the same is against the evidence and without evidence."

An examination of the record discloses the fact that neither the bill of exceptions nor the judgment of the court show that any motion was made in arrest of judgment. A motion in arrest of judgment lies only for material error apparent on the face of the record. Even if the motion had been made at the proper time and in due form, nothing appears on the face of the record to support the same. While there is a conflict of evidence, nevertheless the evidence offered by the government was sufficient in our opinion to warrant the conviction of the defendant, and, the jury having determined the same, this court, in following the well-defined rule in such cases, will not disturb the verdict.

The third assignment of error is in the following language:

"The court erred in giving judgment against the defendant because of the errors previously made, and for other reasons to be assigned at bar."

In view of what we have said, this assignment is wholly without merit.

For the reasons stated, the judgment of the court below is affirmed.

FIRST NAT. BANK OF JACKSON, MISS., v. McNEEL, Internal Revenue Collector.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1917.)

No. 2857.

INTERNAL REVENUE ⊂⊃9—CORPORATION TAX—IMPOSITION.

Code Miss. 1906, § 4273 declares that the president, cashier, or other officer having like duties of each bank, whether state or national, shall deliver to the assessor a written statement of the number and amount of shares of its capital stock paid in, and the value of such shares at par, and as increased by any surplus which shall be the basis of taxation of such shares to the holder or owner, but if they are of less value than par, they shall be valued accordingly. The statute makes no provision for recovery from the several shareholders of their proportional part of the amount so paid for them. *Held*, that notwithstanding such omission, the tax paid under such act cannot be deducted from a national bank's net income under Corporation Tax Act Aug. 5, 1909, c. 6, § 38, 36 Stat. 112–117 (Comp. St. 1913, §§ 6300–6307), as taxes imposed, for the tax is imposed on the shareholders.

[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 13-28; Dec. Dig. ⊂⊃9.]

Error to the District Court of the United States for the Northern District of Alabama; Wm. I. Grubb, Judge.

Action by the First National Bank of Jackson, Miss., against John D. McNeel, Collector of Internal Revenue. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Edw. Mayes, of Jackson, Miss. (Percy, Benners & Burr, of Birmingham, Ala., on the brief), for plaintiff in error.

Robt. N. Bell, U. S. Atty., of Birmingham, Ala., for defendant in error.

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

PER CURIAM. The claim asserted by the plaintiff in error, the First National Bank of Jackson, Miss., is that in the ascertainment of its net income in the year 1909 for the purpose of determining the amount of the tax payable by it under the Corporation Tax Act of 1909 (36 Stat. L. 112–117) there should have been a deduction from the gross amount of its income during that year of the amount of the tax assessed, and paid by it, during that year, pursuant to the provisions of section 4273 of the Code of Mississippi of 1906, which is as follows:

"*Banks; How Taxed* (Laws 1890, page 6).—The president, cashier, or other officer having like duties, of each bank or banking association in this state, whether existing by the laws of this state or of the United States, shall deliver to the assessor of taxes of the county in which it is located, a written statement, on or before the first day of May in each year, under oath, of the number and amount of all the shares of its capital stock paid in, or if it be not a corporation or joint-stock company, then the amount of its capital, and of the sum of all undivided profits or surplus or accumulation of any sort constituting part of the assets of the bank and not including its real estate;

and the value of such shares estimated at par and increased by the proportion of the par value of all the shares of the stock to the said surplus fund or accumulation, or of the amount of its capital so increased, shall be the basis of the taxation of such shares to the holder or of the capital to the owner thereof; but if the shares of such bank or association are of less value than par, they shall be valued accordingly."

In construing the statute just set out the Supreme Court of Mississippi, in the case of Bank v. Oxford, 70 Miss. 504, 514, 12 South. 203, 204, said:

"If a bank has added to its capital stock any sum, by whatever name, which augments the value of its stock, and puts that in nontaxable securities, that does not entitle it to any deduction in taxation, but the capital stock, at its increased value by reason of such accumulations, is the basis of taxation, the purpose of the law being to impose on holders of bank stock taxes according to value as on other forms of property. The owner of bank stock is not required to give it in to the assessor. Another mode of reaching it is provided, and that is through the bank, whose officers are required to report it, and the bank is to pay it. In other words, the shareholder is to be taxed, and pay through the bank."

The statute, as so construed, imposes the tax, not on the bank or its capital, but upon the shareholders; the bank being required to pay for them. The absence of express provision in the statute giving the bank the right to recover from its several shareholders their proportional parts of the amount so paid for them does not show that there is no such right of recovery, or that the intention was for the tax to fall ultimately upon the bank and not upon its shareholders. Home Savings Bank v. Des Moines, 205 U. S. 503, 518, 27 Sup. Ct. 571, 51 L. Ed. 901. That the tax fell upon the shareholders and not upon the bank is sufficiently shown by the language of the statute, giving it the meaning which the Supreme Court of Mississippi has found that it expresses. The conclusion is that the payment in question was not for "taxes imposed" within the meaning of those words as used in the provision of the Corporation Tax Act as to the deductions allowable in ascertaining the corporation's net income, as the tax in question was imposed, not on the corporation, but upon its shareholders. Eliot National Bank v. Gill, 218 Fed. 600, 134 C. C. A. 358; Northern Trust Co. v. McCoach (D. C.) 215 Fed. 991; National Bank of Commerce in St. Louis v. Allen (D. C.) 211 Fed. 743.

The judgment is affirmed.

DELAWARE, L. & W. R. CO. v. CENTRAL R. CO. OF NEW JERSEY et al.

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

No. 33.

COLLISION ⊂=95(7)—STEAM VESSELS CROSSING—MUTUAL FAULTS—FAILURE TO KEEP PROPER LOOKOUTS.

A collision on the Hudson river in the daytime between a ferryboat passing up and a car float alongside a tug coming down on slightly crossing courses *held* due to faults on the part of both vessels; the ferryboat being in fault for not observing the starboard hand crossing rule, and

both for failing to keep proper lookouts, it being admitted that they did not discover each other until they were within 300 to 400 feet, and it appearing that with an efficient lookout they should have done so much sooner, although for a part of the time as they approached there was another vessel intervening.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 200–202; Dec. Dig. ⇐95(7).]

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

Suit in admiralty for collision by the Delaware, Lackawanna & Western Railroad Company, owner of the ferryboat Ithaca, against the Central Railroad Company of New Jersey, owner of the ferryboat Goshen, and the Erie Railroad Company, owner of the tug Roselle. Decree for respondents, and libelant appeals. Modified.

A. J. McMahon, of New York City, for appellant.

James J. Macklin, of New York City, for appellee Central R. Co. of New Jersey.

Herbert Green, of New York City, for appellee Erie R. Co.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. March 17, 1914, about 5 p. m., on a clear day, in the middle of the North River occupied by the usual traffic, the ferryboat Goshen, belonging to the Erie Railroad Company, while going up, passed between the ferryboat Ithaca, belonging to the Delaware, Lackawanna & Western Railroad Company, also going up, and a car float in tow of the tug Roselle, belonging to the Central Railroad Company of New Jersey, coming down. The starboard corner of the float struck the starboard side of the Ithaca, doing damage to the boat and causing the death of three passengers and personal injuries to nine others. It is admitted that those on the Goshen did not discover the Roselle and her tow until they were within 600 feet, and that the Roselle and the Ithaca did not discover each other until they were within 300 to 400 feet. A more inexcusable collision or a more deficient lookout has not often been presented to this court.

The libelant charges both the Goshen and the Roselle with fault for not exchanging signals. But if these vessels were in a situation with reference to each other which called for signals under the rules, such signals were for their own guidance respectively, and not for that of other vessels, such as the Ithaca, and as they passed clear the violation of the rule was harmless. Therefore we think the District Judge properly exonerated the Goshen and the Roselle as to this charge.

Out of the very conflicting testimony the District Judge adopted the story of the Roselle, viz., that the Goshen and the Ithaca were approaching on courses slightly crossing the Roselle's, and were therefore, under the starboard hand rule, bound to keep out of the way, while the Roselle was bound to hold her course and speed. We will follow him in this also, and agree that the Ithaca was properly held in fault, which, indeed, is not denied. But he exonerated the Roselle on the ground that the Ithaca was blanketed by the Goshen, and that

when the Goshen starboarded to cross her bow for New Jersey, the Ithaca ported so as to head toward New York, but upon discovering the Roselle and her tow suddenly starboarded to New Jersey, and so threw her starboard side into contact with the starboard corner of the float. Under these circumstances the District Judge thought the Roselle was not at fault because she held her course and speed, which is what the rule required her to do.

We cannot believe that, in the very short time and space which all the witnesses agree existed between the time the vessels discovered and collided with each other, the Ithaca made any such swing, or that, if she were on a clearing course to New York, she would have deliberately changed it to a course toward New Jersey, which made collision inevitable. However, whether that be so or not, we think the Roselle was also at fault for not seeing the Ithaca in time to take steps which might have prevented the collision by warning the Ithaca or otherwise. When the approaching vessels started from their slips they were a nautical mile or more apart. It is most unlikely that the Goshen, whose slip was 1,500 feet north of the Ithaca's slip, could have completely blanketed her from the Roselle on the whole course. Certainly the Ithaca's smokestack and four flag poles were plainly visible to those on the Roselle, and it is difficult to see how they could have watched the Goshen without also seeing them. At all events, a navigator may not blindfold his eyes, and then say, after collision, that although he did not see her at all, the fault under the rules was with the other vessel. The fundamental rule of the admiralty is that a vigilant lookout must be kept on all vessels, so that collision may be prevented even with those which are violating the rules. This is emphasized by article 29 of the Inland Regulations (U. S. Comp. St. 1913, § 7903), applicable to this collision, which provides:

"No Vessel under Any Circumstances to Neglect Proper Precautions.

"Art. 29. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

Who can say that this negligence on the part of the Roselle did not contribute to the collision? There is no obligation in navigation that this court is more disposed to enforce than the duty of keeping a proper lookout.

The decree is therefore modified, by directing the court below to enter the usual decree against the Delaware, Lackawanna & Western Railroad Company and the Central Railroad Company of New Jersey for half damages, with interest and costs.

ALLEN v. SWEENEY et al.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1916.)

No. 2917.

BANKRUPTCY ⊂=447—PETITION TO REVISE—MOOT QUESTION.

A petition to revise an order of the District Court, affirming an order of the referee in bankruptcy which set the bankrupt's petition for discharge for hearing at a future date, will be dismissed, where that date has passed, and there is no showing whether the case was heard on that date, or continued to a later date.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 930; Dec. Dig. ⊂=447.]

Petition to Superintend and Revise from the District Court of the United States for the Western District of Texas; Thomas S. Maxey, Judge.

In the matter of bankruptcy proceedings against Augustus Chapman Allen. On petition by the bankrupt against J. J. Sweeney and others to revise an order of the District Court, affirming an order of the referee which set for hearing at a future date the bankrupt's petition for discharge. Petition dismissed.

H. H. Cooper, of Houston, Tex., for petitioner.

W. H. Gill, of Houston, Tex., and John Neethe and F. A. Williams, both of Galveston, Tex., for respondents.

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

PER CURIAM. On the 30th day of August, 1913, the petitioner was adjudged a bankrupt, and on the 1st day of August, 1914, he filed an application and petition in proper form for a discharge, to be discharged from all debts provable against his estate under the Bankruptcy Act. On the 7th day of August, the clerk, under the rules, set down the application to be heard before the referee on the 28th day of September, 1914; and on that day, opposition having been filed upon application of objectors, the referee did postpone the hearing of said application to the 4th day of January, 1915.

On January 4, 1915, by agreement of parties, the hearing was postponed; but the petitioner procured an order setting the case for hearing upon the 9th day of August, 1915. On said day the matter was called before the referee, and, upon objections and pleadings filed, the referee made an order overruling the exceptions of the bankrupt for discharge until after the trial of a certain suit pending in the district court of Harris county, Tex. Thereafter said referee in bankruptcy set down the petition and application for a discharge for hearing on the 28th day of January, 1916, at which time the petitioner and objecting creditors appeared, and thereupon, upon motion of the objectors, a further postponement was granted, and an order was entered resetting the application for hearing on June 5, 1916.

This last order was carried before the District Court for review, and, after hearing the argument of all parties, the court ordered that

the order of the referee be in all things affirmed. The petition in this court to superintend and review this last order was filed April 24, 1916; in due course it came on for hearing at our November term at Ft. Worth, commencing the first Monday of November, 1916.

It will be noticed that the order of the referee, which the District Court affirmed, reset the application for hearing on June 5, 1916. That date is now long past. There is nothing in the record to show whether the case was heard upon that date, as it well may have been, or thereafter continued to some other day, also now in the past; therefore a decision upon the correctness of the order of the District Court of February 28, 1916, sustaining or vacating it, would effect nothing for either party.

The petition for revision is dismissed.

INTERNATIONAL CURTIS MARINE TURBINE CO. et al. v. WILLIAM CRAMP & SONS SHIP & ENGINE BLDG. CO.

(Circuit Court of Appeals, Third Circuit. January 10, 1917.)

No. 2126

COURTS ⊂=525—CIRCUIT COURT OF APPEALS—AWAITING DECISION OF SUPREME COURT.

The question sought to be reviewed being involved in a case pending before the Supreme Court, its action will be awaited; except that to avoid delay the accounting, sought and denied, will be ordered.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊂=525.]

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

Suit by the International Curtis Marine Turbine Company and another against the William Cramp & Sons Ship & Engine Building Company. Sur petition for writ of certiorari or mandamus to review order (232 Fed. 166) denying defendant's motion to exclude evidence. Case retained awaiting decision of Supreme Court.

C. Bradford Fraley, of Philadelphia, Pa., and Fish, Richardson, Herrick & Neave and William G. McKnight, all of Boston, Mass., for appellants.

A. M. Beitler, of Philadelphia, Pa., and Edwards, Sager & Wooster, of New York City, for appellee.

Before BUFFINGTON and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. This application for a mandamus or other appropriate process in effect asks us to reverse the ruling of the court below, which is reported in International Curtis Marine Turbine Co. v. Cramp & Sons (D. C.) 232 Fed. 166, and to direct the master to proceed on an accounting for contracts Nos. 47, 48, 49, and 50, made by the defendant with the United States government. The question passed upon by the court below in that decision is, as we view it, involved in a case in the Second circuit. Marconi Co. v. Simon, 231 Fed. 1021, 145 C. C. A. 656. This latter case is now under review by

the Supreme Court of the United States on certiorari at No. 485 of October term, 1916. As a decision therein will settle the case pending before us, it seems proper for this court to await the action of the Supreme Court. In view, however, of the fact that the press of business of that court may prevent an early hearing and decision of the case pending before it, we will, without passing on the merits of the case now pending before us, for the interim, direct the court below to enter an order directing the master to proceed to an accounting upon contracts Nos. 47, 48, 49, and 50, keeping the proofs and proceedings thereunder separate from those under contracts Nos. 30 and 31. By following this course, the delay and loss of time which would result in the case in this circuit, if the view of the Second circuit is sustained, will be avoided; and, in case the view held by the court below is sustained, the present order will only have involved costs, for which the plaintiff will, of course, be liable.

The case will therefore be retained in this court for the time being to await the decision of the Supreme Court; but pending such time the court below will enter an order directing the master to proceed in the accounting upon contracts Nos. 47, 48, 49, and 50, as above indicated.

OVERSTREET v. NORFOLK & W. RY. CO.

(Circuit Court of Appeals, Fourth Circuit. December 21, 1916.)

No. 1475.

1. MASTER AND SERVANT ⊜286(12)—INJURIES TO SERVANT—EVIDENCE—LIABILITY OF MASTER.

In an action under Employers' Liability Act April 22, 1908, c. 149, 35 Stat. 65 (Comp. St. 1913, §§ 8657–8665) for the death of a railroad hostler, alleged to have been caused by a defect in the coupler of a locomotive, evidence of the plaintiff *held* sufficient to warrant submission to the jury, so that it was error to direct a verdict for defendant.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1019; Dec. Dig. ⊜286(12).]

2. APPEAL AND ERROR ⊜970(2)—REVIEW—DISCRETION OF COURT.

The admission or exclusion of testimony on objection that it is too remote is largely within the discretion of the trial court, and its exclusion does not require reversal, though the appellate court is of the opinion it should have been admitted.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3850; Dec. Dig. ⊜970(2).]

In Error to the District Court of the United States for the Western District of Virginia, at Roanoke; Henry Clay McDowell, Judge.

Action by Lola M. Overstreet, administratrix of R. S. Overstreet, deceased, against the Norfolk & Western Railway Company. Judgment for defendant on directed verdict, and plaintiff brings error. Reversed and remanded, with instruction to grant a new trial.

Abram P. Staples and A. B. Hunt, both of Roanoke, Va., for plaintiff in error.

Roy B. Smith and Waller R. Staples, both of Roanoke, Va. (F. Markoe Rivinus and Theodore W. Reath, both of Philadelphia, Pa., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

KNAPP, Circuit Judge. On October 19, 1915, R. S. Overstreet, a hostler in the employ of defendant in error, was caught between the couplers of two locomotives, which he was presumably attempting to couple together, and so badly hurt that he died a few hours afterwards. There was no eyewitness of the accident, and how or why it happened can only be inferred from the surrounding circumstances. His administratrix brought suit under the Employers' Liability Act, alleging that the coupler on one of the locomotives, or some part of it, was out of order, and that this was the proximate cause of Overstreet's death. The trial court directed a verdict for defendant, and the case comes here on writ of error.

[1] We are of opinion, after painstaking study of the testimony, that enough was shown on behalf of the plaintiff to warrant submission to the jury, and it was therefore error to direct a verdict for the defendant. C., B. & Q. Ry. Co. v. United States, 220 U. S. 559, 571, 31 Sup. Ct. 612, 55 L. Ed. 582; C., R. I. & P. Ry. Co. v. Brown, 229 U. S. 317, 321, 33 Sup. Ct. 840, 57 L. Ed. 1204; Myers v. Pittsburgh Coal Co., 233 U. S. 184, 34 Sup. Ct. 559, 58 L. Ed. 906; San Antonio & Aransas Pass Ry. Co. v. Wagner, 241 U. S. 476, 484, 36 Sup. Ct. 626, 60 L. Ed. 1110; and Atlantic City R. Co. v. Parker, 37 Sup. Ct. 69, decided by the Supreme Court December 4, 1916. As the case presented seems exceedingly close, we purposely refrain from stating the reasons for our conclusion, in order that neither party may be prejudiced, in the event of another trial, by any comments we might make upon the evidence here of record.

[2] As to the rejected proof offered by the plaintiff, it is perhaps sufficient to remark that in a case like this the admission or exclusion of testimony, upon the objection that it is too remote, is largely within the discretion of the trial judge, and that we would not feel called upon to reverse the judgment herein on account of the ruling in question. At the same time, as the case now appears, we think that the testimony offered was competent, and should have been admitted. Texas & Pacific R. Co. v. Rosborough, 235 U. S. 429, 35 Sup. Ct. 117, 59 L. Ed. 299.

The judgment will be reversed, and the case remanded, with instructions to grant a new trial.

Reversed.

MAXWELL v. JURNEY.

In re JURNEY.

(Circuit Court of Appeals, Fifth Circuit. December 18, 1916.)

No. 2995.

1. HUSBAND AND WIFE ⇐125—WIFE'S SEPARATE ESTATE—RENT FROM "SEPARATE PROPERTY."

Under Vernon's Sayles' Ann. Civ. St. Tex. 1914, art. 4621, providing that all property of the wife, both real and personal, owned by her before marriage, and that acquired by gift, devise, or descent, and the increase of

all lands thus acquired, shall constitute her separate property, and article 4622, providing that all property acquired by either the husband or wife during marriage, except that which is the separate property of either one, shall be community property, subject to the husband's control, but that the rents from the wife's real estate shall be under her control alone, subject to article 4621, the rents from the wife's real estate or her separate property are her "separate property," not community property.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. §§ 453–458; Dec. Dig. ⊂⊃125.

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

2. HUSBAND AND WIFE ⊂⊃36—CONTRACTS—RENT OF PROPERTY—LIEN.

Since the rents are separate property under those provisions, the wife can make a valid rental contract of her separate property with her husband for the rental, under which she is entitled to a landlord's lien.

[Ed. Note.—For other cases, see Husband and Wife, Cent. Dig. § 218; Dec. Dig. ⊂⊃36.]

Appeal from the District Court of the United States for the Western District of Texas; Wm. B. Sheppard, Judge.

In the matter of Richard Jurney, bankrupt. On petition of Mrs. I. N. Jurney against John Maxwell, trustee in bankruptcy, to review an order of the referee denying petitioner's claim to a lien. The order of the referee was reversed, and the trustee appeals. Decree of the District Court, reversing the order, affirmed.

The opinion of Sheppard, District Judge, was as follows:

The question here presented on the record is whether or not a wife, contracting with her husband regarding her separate property, is entitled to a landlord's lien for the rent of a certain part of her separate property let to the husband under a rental contract. The solution of this would depend primarily upon whether or not the rents derived from the wife's separate real estate would, under the statute of 1913, be a part of the wife's separate estate, or a part of the community estate of the spouses.

[1] Undoubtedly the wife in Texas can make a valid contract with her husband regarding her separate estate. Article 4621 of the act provides what shall constitute the separate property of the wife. It shall be "all property of the wife, both real and personal, owned or claimed by her before marriage, and that acquired afterwards by gift, devise or descent, as also the increase of all lands thus acquired. * * *" It is contended that this does not include the rents issuing from the wife's separate real estate, but that such rents form part of the community property of the spouses. Article 4622 provides that "all property acquired by either the husband or wife during marriage, except that which is the *separate property* of either one or the other, shall be deemed the common property of the husband and wife, and during coverture may be disposed of by the husband only. * * *"

Had the Legislature stopped here, it might well be contended that the rents issuing from the wife's separate real estate become a part of the community estate. But such a contention seems to the court to be untenable in the light of the provision contained in the same article (4622), viz.: That "the rents from the wife's real estate * * * shall be under the control, management and disposition of the wife alone, subject to the provisions of article 4621." For, if the Legislature gave the wife the "control, management and disposition" of the rents of her separate real estate, subject to the provisions of the section creating her separate property, it should become a part thereof.

[2] I am constrained to the view that the "rents from the wife's real estate" under the statute of 1913 is a part of her "separate property." The wife, being able to make a valid contract with her husband regarding her

separate property, is entitled to all the privileges and benefits which such a contract may confer, and is therefore under a rental contract entitled to a landlord's lien.

An order reversing the referee will be accordingly entered.

M. C. H. Park, of Waco, Tex., for appellant.

Marshall Surratt, of Waco, Tex., for appellee.

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

PER CURIAM. On consideration of the transcript and oral arguments and briefs, we have concluded that this case was correctly ruled and decided in the lower court.

The decree appealed from is affirmed.

ROLLMAN MFG. CO. v. UNIVERSAL HARDWARE WORKS.

(Circuit Court of Appeals, Third Circuit. December 14, 1916.)

No. 2107.

1. PATENTS ⟸321—ORDER OF COURT—RESTRAINING MISUSE OF DECREE.

A court of equity has power by an order to restrain the complainant in an infringement suit from making unfair use of information obtained from defendant's books, produced by order of the court on an accounting by sending circulars to defendant's customers in effect misrepresenting the scope of the decree and endeavoring by veiled threats of suit to divert their business from defendant to itself.

[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 588, 589; Dec. Dig. ⟸321.]

2. EQUITY ⟸66—PRINCIPLES.

The maxim that he who seeks equity must do equity is a duty which makes one who gets into a court of equity continue to do equity while he is litigating.

[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 188–190; Dec. Dig. ⟸66.]

Appeal from the District Court of the United States for the Eastern District of Pennsylvania; J. Whitaker Thompson, Judge.

Suit in equity by the Rollman Manufacturing Company against the Universal Hardware Works. From an order, complainant appeals. Affirmed.

Archibald Cox, of New York City, for appellant.

William R. Davis, of New York City, for appellee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below the Rollman Manufacturing Company filed a bill against the Universal Hardware Works, charging infringement of a patent. On final hearing, the court below, in an opinion reported at 229 Fed. 579, held certain claims of plaintiff's patent infringed by one of the several cherry seeders made by defendant, and entered a decree for accounting. During such ac-

counting an order was made on defendant to produce its books, and by the access thus had, plaintiff obtained the names of the defendant's customers who had bought infringing machines, as well as of those who, it is alleged by defendant, had bought noninfringing ones. Later the attention of the court was called to a letter sent by plaintiff to all defendant's customers, which defendant alleged was unfair, misleading, and oppressive, in that, while purporting to give information to such customers as to the decree of the court, it did not do so fairly, in that, instead of stating the court had decreed infringement of but one of defendant's cherry seeders, it led the customers to believe that all of defendant's machines had been enjoined. Thereupon defendant applied to the court below for relief, which, on hearing, found:

"That the terms of the circular letters sent out bear the inference that the interlocutory decree declared infringement against any or all cherry seeders manufactured by the defendant, and that the plaintiff was entitled under that decree to recover from the defendant's customers profits made on sales of any or all cherry seeders purchased from it."

It further found:

"The letters contain no false representation of the scope of the decree, but undoubtedly suppressed information as to its effect and limits. In that respect the plaintiff must be held to have made an improper and unlawful use of the decree, which prima facie would entitle the defendant to maintain a suit to protect it from injury to its trade."

Holding it had power to grant relief in the premises, the court entered an order forbidding the plaintiff—

"during the pendency of this suit from making representations to the defendant's customers as to the interlocutory decree and the orders of this court, without stating the limits and effect of the decree and orders, and without definitely informing the defendant's customers of the character of infringement adjudged."

On entry of such order this appeal was taken.

Assuming for present purposes this was a final decree in equity, from which an appeal lies, we are clear the court, not only had the power to make the order, but that it properly exercised such power in doing so. The proceeding was in equity and was pending. The drastic power of the court had been exercised to compel defendant to disclose the names of all its customers as an aid to the court in decreeing a final accounting for the infringing seeders sold to certain customers. This disclosure of customers was ordered at the plaintiff's instance. Having been produced for plaintiff's benefit, it goes without saying plaintiff was under peculiar obligations not to use information, so accorded it by the court's power, in a way to wrong defendant. But this, the court below found, and we concur in that finding, is just what the plaintiff did.

This disingenuous letter subtly left to be inferred by the defendant's customers as facts and conclusions that which the writer carefully abstained from so stating. There is no question the effect such a letter left on the ordinary business man's mind. Its opening sentence, "We extend to you the olive branch, provided you in return," etc., in effect, and in connection with other parts of the letter, left the impression that

plaintiff had a claim for infringement against the customer, which plaintiff was willing to compromise. And its clever antecedent recital of a patent litigation, without saying just what it was and what it had decided—that "we are now proceeding with the accounting, and so far have found that shipments of cherry seeders were made to you on dates stated on the enclosed card"; that "in order that we may complete our claims against the infringing manufacturer, kindly send us original invoices of all shipments of cherry seeders made to you"—was such a groundwork as to lodge, by the statement following: "You understand, of course, that according to the decision of the court sustaining our patent we have a right to recover from you any profits you may have made on infringing cherry seeders"—the impression in the mind of every customer of defendant that plaintiff had a claim of infringement against him, which it was willing to compromise and adjust. And the lodgment in the mind of the customer that he was liable to a claim of infringement was made the basis of a proposed settlement, whereby defendant's customer was to be acquired by the plaintiff as its customer, viz.:

"If you send us the invoices of all cherry seeders shipped to you, * * * we will agree to release you from any liability to us for infringement, provided you will hereafter buy and sell our cherry seeders to the exclusion of any infringing cherry seeders that may be made by the New Standard Hardware Works, Mt. Joy, Pa., their successors and assigns."

[2] Under the facts disclosed, and others to which reference might be made, we think the conduct of this plaintiff litigant was such as to call for the exercise of that broad power of control which a court of equity has, namely, to see that he who seeks equity must do equity; for that maxim not only means that the obligation to do equity is a duty which enables one to get into a court of equity, but makes him continue to do equity while he is litigating.

Without discussing the authority of the court below to make the order it did—a power which is here challenged—we may say that an examination of the authorities which are collected in Asbestos Co. v. Johns-Manville Co. (C. C.) 189 Fed. 611, afford no ground for denying to a court of equity the power absolutely essential to its existence, namely, to prevent its decrees from being made the means of working injustice. When the plaintiff sought the relief of a court of equity, it bound itself to follow equity, and the decree below kept it from departing from that course.

Affirming as we do the decree of the court below, this appeal will be dismissed, at appellant's cost, but with the suggestion to both litigants in this needlessly acrimonious litigation, to which acrimony both have contributed, that before either of them do any further circularizing of the decree of this court, or the court below, they should do so under the supervision of that court in which they are litigants with certain equitable obligations.

In re WODZICKI.

(District Court, S. D. New York. December 20, 1916.)

BANKRUPTCY ⇐200(4)—EXECUTION AGAINST SALARY—COLLECTIONS BEFORE BANKRUPTCY.

Where under execution against salary of bankrupt, under Code Civ. Proc. N. Y. § 1391, there was, each of the 6 months preceding petition in bankruptcy, deducted and withheld 10 per cent. of bankrupt's salary for account of the execution creditor, not only is the creditor entitled to the part collected prior to the 4-month period, but neither the bankrupt, nor any one else, no trustee in bankruptcy having been appointed, has any claim, as against such creditor, to the amount collected and withheld during such 4 months.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306-316; Dec. Dig. ⇐200(4).]

In Bankruptcy. In the matter of Casimer C. Wodzicki, bankrupt, on motion to amend an order. Motion granted.

J. George Metz, of New York City, for the motion.
Burger & Burger, of New York City, opposed.

MAYER, District Judge. This is the reargument of a motion for an order to amend an order heretofore made, restraining the petitioner, Zahn, from taking further proceedings to collect his judgment so as to limit the operation thereof to moneys deducted by the city paymaster subsequent to the filing of the petition in bankruptcy herein.

In August, 1911, Zahn recovered a judgment against the bankrupt, a city employé, for $534,09. In due course Zahn obtained an order, permitting a garnishee execution to issue against the salary of the bankrupt in accordance with the provisions of section 1391 of the New York Code. By arrangement made between the petitioner, the sheriff of the county of New York and the city paymaster, it was agreed that the city paymaster withhold the 10 per cent., directed to be withheld by the order of garnishee execution, until such time as requested by the sheriff. Under this arrangement Zahn received the proceeds of these collections approximately each 6 months.

On November 4, 1916, the bankrupt filed his petition for a voluntary adjudication, and adjudication was had on the same day. It is conceded, and the records on file show, that a trustee in bankruptcy was not appointed. At the time of the filing of the petition in bankruptcy, certain moneys had been deducted from the bankrupt's salary and withheld as agreed, the total approximating $115.

On November 8, 1916, and thus subsequent to the filing of the petition and the adjudication, an ex parte order was made by the district court, restraining Zahn and his attorney from taking further proceedings toward the collection of the judgment, except in bankruptcy, for a period of 12 months from the date of the adjudication, or until the determination of the bankrupt's application for a discharge, and further restraining the city paymaster from paying over any money to Zahn, but directing him to withhold from the salary of the bankrupt all sums deducted and to retain the same until the further order of the

court. The money in the hands of the city paymaster represented the deductions and withholdings for a period of upwards of 6 months prior to the filing of the petition in bankruptcy.

As to so much of said money as was deducted and withheld prior to the 4-month period (i. e., prior to July 4, 1916) there can be no question. Zahn is clearly entitled to this money, and the injunction must be modified in that regard.

The more difficult question relates to the money which was collected and withheld during the 4-month period (i. e., from July 4, 1916, to November 4, 1916). Judge Hough, in Matter of Robert T. Beck, 238 Fed. 653, dated November 10, 1915 (unreported), in a case where there was a trustee in bankruptcy, instructed the trustee to demand from the city paymaster the amount retained during the 4-month period, and cited Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, as an authority by analogy. He said, however:

"Clearly no one but the trustee in bankruptcy can claim anything as against Bauer, the judgment creditor. * * *"

Judge Learned Hand in In re Sims (D. C.) 176 Fed. 645, 23 Am. Bankr. Rep. 899, held that where, prior to adjudication, judgment creditors of a bankrupt had secured, under section 1391 of the New York Code, the right to reach 10 per cent. of his salary, they are entitled to collect salary then falling due, and that a stay of proceedings would be vacated to that extent, but continued as to salary earned after adjudication, and this would be covered by the bankrupt's discharge. He called attention to the fact that the levy was more than 4 months old when the petition was filed, and that under the New York Code the execution operated as "a continuing levy" until the judgment was paid. Section 1391 provides, in part, that the appropriate state court—

"must grant an order directing that an execution issue against the wages * * * salary * * * of said judgment debtor, and on presentation of such execution by the officer to whom delivered for collection to the person or persons from whom such wages * * * salary * * * are due and owing, or may thereafter become due and owing to the judgment debtor, said execution shall become a lien and a continuing levy upon the wages * * * salary * * * due or to become due to said judgment debtor to the amount specified therein which shall not exceed ten per centum thereof, and said levy shall be a continuing levy until said execution and the expenses thereof are fully satisfied and paid. * * *"

The question is a close one. The theory of Judge Learned Hand's opinion seems to be that by virtue of the specific provisions of the New York statute (section 1391 supra) the levy continues, and a new levy therefore becomes unnecessary, and that the intent of the statute was that the levy, throughout its continuance, was as of its original date. There is support for this construction from the further provision of the statute that, where more than one execution has been issued pursuant to section 1391, the execution shall be satisfied in the order of priority, and that only one execution shall be satisfied at one time, the purpose obviously being that the earner of the wages or salary should not be deprived of more than 10 per cent. of his wages or salary, as the case might be, at any one time, with the result that the first execution must be satisfied before the satisfaction of another execution can be begun.

In the circumstances, the bankrupt has no claim against the garnisheed amount collected and withheld during the 4-month period. No other person has any claim, because no other person has any title, there being, as heretofore stated, no trustee.

The Beck Case went no further than to deal with the situation as presented by its own facts and, as Judge Hough pointed out, and to repeat, "clearly no one but the trustee in bankruptcy can claim anything as against * * * a judgment creditor."

If the injunction which is sought to be modified were permitted to stand, the result would be that the bankrupt would ultimately obtain money collected for account of the judgment creditor during 4 months when the execution and levy under section 1391 of the New York Code were valid and outstanding, and the judgment creditor would be deprived of the fruits of his diligence, all to the benefit of the debtor—a result which I think was not contemplated by the bankruptcy statute in a case where the facts are as here presented.

The motion, therefore, will be granted, and an order, modifying the injunction as asked for, may be presented on two days' notice.

In re CHASS.

(District Court, W. D. Pennsylvania. September, 1916.)

BANKRUPTCY ⊂⊃414(1)—DISCHARGE—FAILURE TO KEEP BOOKS OF ACCOUNT—INTENT.

Mere proof of failure of bankrupt to keep books of account, where they were necessary and proper, raises the presumption, requiring rebuttal, that it was with intent to conceal his financial condition; for which, under the statute (Act July 1, 1898, c. 541, 30 Stat. 544), discharge is to be refused.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 720; Dec. Dig. ⊂⊃414(1).]

In Bankruptcy. In the matter of the bankruptcy of one Chass. On exceptions to report of referee. Exceptions sustained, and discharge refused.

Ben Paul Brasley, of Pittsburgh, Pa., for bankrupt.

Alpern & Seder, of Pittsburgh, Pa., for trustee.

ORR, District Judge. This matter comes before the court upon exceptions to a report of the referee recommending a discharge of the bankrupt. The creditors' objection to the discharge is that the bankrupt, with intent to conceal his financial condition, failed to keep books of account or records from which such condition might be ascertained. The referee recommended that the discharge be granted.

The bankrupt began business on June 1, 1913, and was adjudicated a bankrupt prior to March 11, 1915. He was engaged in the business of selling "Ladies and Gents' Furnishings." He began business with about $4,500 as capital. According to his testimony, for the balance of the year 1913 he broke "about even." In the year 1914, he lost from $9,000 to $10,000. The stock on hand at the time the petition in bankruptcy was filed he estimated at $8,500.

The foregoing is taken from the testimony of the bankrupt. He further testified that he kept no books of account, but admitted that he had a memorandum book in which he kept a memorandum of wages due employés and of some borrowed money. The capital with which he started business in 1913 was derived by him from the sale of a cigar business, in which business he had kept books of account. Of the books kept in the cigar business, he delivered one containing a memorandum of accounts receivable, arising from the conduct of the cigar business, to his trustee upon demand by the latter. The trustee never received from the bankrupt any papers or invoices or bills or files. The bankrupt's explanation of his losses is most unsatisfactory. It is necessarily uncertain and inexact because of his failure to keep books. The present is a marked example of the difficulty a bankrupt may encounter by his failure to keep books.

Looking at the testimony in every light most favorable to the bankrupt, this court is unable to agree with the learned referee in his conclusions. The necessity of keeping books in a mercantile business, such as that in which the bankrupt was engaged, must be apparent to every one of intelligence. It must have been apparent to him because he had kept books in the business in which he had previously been engaged. The Bankruptcy Law (Act July 1, 1898, c. 541, 30 Stat. 544) itself contemplates that books should be kept by those who might benefit by its provision where such books were necessary factors in the conducting of business. Had it not been so, the failure to keep books would not have been expressed as a reason for refusing a discharge when coupled with an intent to conceal the merchant's financial condition. It is apparent, too, that the "intent" denounced by the present law is not intensified by the word "fraudulent" as it was in the act as originally passed. The reason for the omission of the word "fraudulent" in the amendment to the act cannot be deemed as purposeless. The effect is to relieve the objecting creditors from the proof of fraudulent acts which disclose "fraudulent intent." As the act stands to-day, it is but necessary for the creditor to prove the failure of the bankrupt to keep books of account where such books of account were necessary and proper. And when satisfactory evidence of such fact is produced, the law determines the intent to have existed because the bankrupt must be presumed to have intended to conceal his financial condition if such were the natural and probable consequences of his failure to keep books. Even in the criminal courts, where intent must be proven by the government, it is in many cases announced as a doctrine of the law that every man is presumed to have intended the natural and probable consequence of his act.

There is nothing in the testimony before the referee which must be held to be sufficient to rebut such presumption in the case at bar.

This case is not unlike that of McKibbin, Driscoll & Dorsey v. Haskell (8th Cir.) 28 Am. Bankr. Rep. 588, 198 Fed. 639, 117 C. C. A. 343. See, also, In re Koelle (D. C. Pa.) 22 Am. Bankr. Rep. 515, 171 Fed. 257.

The decision of the referee must be reversed, the exceptions to his report must be sustained, and the discharge of the bankrupt must be refused.

UNITED STATES v. McCUTCHEN et al.

(District Court, S. D. California, N. D. July 29, 1916.)

No. A-12.

1. MINES AND MINERALS ⟸29(1)—OIL CLAIMS—RIGHT ACQUIRED BY LOCATION.

Under the laws of the United States, one who locates an oil mining claim on public land, though he erects appropriate monuments and posts and records his location notices, if he makes no discovery of mineral, acquires no rights as against the government or any private individual, except the right to proceed with diligence to effect discovery of oil, and even though in actual possession, in the absence of discovery, and in the absence of diligent prosecution of work leading to discovery, as against the government, at least, he is subject to the possibility of a withdrawal of the privilege offered him and a consequent termination of his rights.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 66; Dec. Dig. ⟸29(1).]

2. MINES AND MINERALS ⟸29(1)—OIL CLAIMS—RIGHTS ACQUIRED BY LOCATION.

If in such case the locator leaves his claim without intending to abandon it, he may return at any time prior to the withdrawal of the land from entry by the government, or its entry by another, and proceed to prosecute with diligence his search for mineral, and while so engaged will be protected, both from the government and from private persons, and if his work is successful, and results in discovery, his right will vest by relation as of the time of his location.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 66; Dec. Dig. ⟸29(1).]

3. MINES AND MINERALS ⟸17(1)—OIL CLAIMS—"DISCOVERY."

Under Act Feb. 11, 1897, c. 216, 29 Stat. 526 (Comp. St. 1913, § 4635), which provides that "any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims," assuming a valid location, a subsequent discovery by the locator, which will vest him with rights in the property, must be such as establishes its character as within the act, and entitles him to a patent on compliance with the other requirements of the statutes.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28; Dec. Dig. ⟸17(1).

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

4. MINES AND MINERALS ⟸17(1)—OIL CLAIMS—"DISCOVERY."

The finding of gas in drilling a well on an oil claim in too small quantity to be of any commercial value, or to give reasonable evidence of the value of the land for oil, and which was not at the time given any consideration as an inducement of further expenditures for development, *held* not a "discovery," which gave the locator any vested rights in the property as against the United States.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 24, 27, 28; Dec. Dig. ⟸17(1).]

5. MINES AND MINERALS ⟸29(4)—OIL CLAIMS—RECOVERY BY UNITED STATES—DAMAGES.

On an account for damages in a suit in equity by the United States for the recovery of oil land, defendants, who sunk and operated wells on the land in good faith, under advice of reputable counsel, and where the

question of their rights under the law was in great doubt, will not be treated as willful trespassers.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 69, 70; Dec. Dig. ⊂⇒29(4).]

In Equity. Suit by the United States against G. W. McCutchen and others. Decree for complainant.

See, also, 234 Fed. 702.

This controversy centers about the right of the government of the United States, in furtherance of its declared conservation policy and because of its withdrawal orders heretofore issued, to assert its paramount proprietary interest in, and title to, a certain quarter section of very valuable oil land in the California oil fields. See U. S. v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 641. The proceeding in one form or another has been pending for some time before the courts and the Land Department, and the principal facts necessary to a proper understanding of the issues to be determined have been stated in reported decisions heretofore rendered with considerable detail. In the proceeding before the Land Department, which was an application on the part of the Pacific Midway Oil Company, one of the operating defendants herein, for a mineral patent, the Commissioner of the General Land Office made a very full statement of the facts. 44 Land Dec. 420. Thereafter, in an application for a receiver, before Judge Dooling, of the Northern District of California, then sitting in this court under special assignment, a further statement was made. 217 Fed. 650. Subsequently a renewed application for receivership was entertained in this court, whereupon I made such additional statement of the facts as seemed to be necessary, and made an order appointing a receiver of the properties in question. 234 Fed. 702. For purposes of clarity merely, in connection with the conclusions announced herein, the controlling facts may be summarized as follows:

In January, 1900, the ground in question being then open, unoccupied, unappropriated public land of the United States, was located by certain defendants herein, named G. W. McCutchen, R. L. McCutchen, J. B. McCutchen, W. C. McCutchen, C. W. Johnson, Mrs. Lena McCutchen, Mrs. M. A. Johnson, and Mrs. M. P. McCutchen. For purposes of brevity, the various McCutchens will be referred to hereafter by their initials. G. W., R. L., J. B., and W. C. were brothers, and composed what will be hereafter referred to as "McCutchen Bros.," an informal association or partnership. Mrs. Lena McCutchen is the wife of R. L., Mrs. M. P. McCutchen is the wife of J. B., Mrs. M. A. Johnson is the sister of the McCutchen men, and C. W. Johnson is her husband. The location above referred to, which was named the Lone Star, consisted merely of the entry upon the ground of the persons named, the erection of appropriate monuments, together with the posting and subsequent filing of a notice of location as of mineral ground. No "discovery" was made. It may not be amiss to suggest at this time that it appears from a careful consideration of all the testimony, giving due weight to every circumstance presented, that the Lone Star location was made by the members of the McCutchen family, as above set forth, for the benefit of the entire McCutchen family, including, not only the eight locators, but probably some others not mentioned therein, and that at all times thereafter the members of the McCutchen family considered and understood, howsoever they may appear to have acted, that they, collectively, were entitled to enjoy the ownership of the Lone Star claim. In passing, it may also be suggested that the Johnsons, because of personal considerations unnecessary to specify here, were somewhat dependent upon the McCutchen brothers for maintenance and support.

In December, 1900, the locators of the Lone Star conveyed the same to R. L., with the intent and purpose in so doing that, because of the individual ownership, it might be the more easily handled and managed, but with no intention at all of investing R. L. with the sole title and beneficial interest in and to the property. Under a mistaken conception as to the requirements of, as well as the privileges conferred by, the mining law, so-called assessment work was done upon the claim for one or more years. In 1907, because of a

failure to do this assessment work the previous year, for the purpose of reinvesting the members of the McCutchen family with the title to the property, but under the misconception again as to a prohibition of the law forbidding locators, after failure to do assessment work, from relocating their own claims, the property was relocated under the name of the Cormorant claim by certain members of the Freear family, who were relatives of the McCutchens, and through whom it was expected that the title would be reinvested in the McCutchens. Late in 1908 the McCutchens began the erection of an oil rig upon the property. Some work was done that year also by an individual named Howe, who was doing so-called assessment work upon the property under a location of the property made the preceding year by one Francis, who entered and made the same sort of a location, apparently, as was made by the McCutchens in 1900, but who also, like them, had effected no discovery of mineral therein.

In 1909 one Smith, who was looking for available oil properties to exploit, entered into negotiations with G. W. McCutchen, representing the McCutchen interests, whereby, finally it was agreed that a corporation be organized by Smith and his associates, who should enter upon the land in question and drill the same for oil at least to a depth of 2,000 feet, if production were not had previously. In drafting the formal contract embodying this agreement, it was discovered that the so-called Freear location, under which the parties were then formally operating, did not contain a correct description of the land actually located, whereupon G. W. offered to, and did, go out and have the land relocated by eight acquaintances, who admittedly consented to the use of their names merely in order that G. W. McCutchen, or the McCutchen family, might secure the advantages consequent upon a valid relocation of the quarter section in controversy. This location was known as the Hawk location, and is the one which was made the basis for the application for a patent in the Land Department.

The corporation formed under the Smith contract was known as the Obispo Oil Company, one of the defendants herein, and it entered upon the property in question and, making use of the McCutchen rig thereon, proceeded to drill for oil. Two holes were sunk, each approximately 500 feet deep, but no oil was discovered in either one. On August 5, 1909, the Obispo Company being without financial resources, and apparently lacking the then means, or not harboring the disposition to secure additional financial resources, secured from the McCutchen brothers a consent to a 90-day cessation of their labors upon the property. Thereupon, apparently pursuant to a demand from the McCutchens in the cessation agreement to the effect that "some one [be] left in charge of and to protect the property," though all work ceased and all employés were discharged, a caretaker was left in possession of the property, whereupon the representatives of the Obispo Company started out to secure more funds, or to interest some one else in the performance of its contract. It was successful in the latter behalf, in that, in the spring of 1910 the Pacific Midway Oil Company, a defendant herein, entered into an agreement with the Obispo Company to complete the McCutchen contract. This it proceeded to do, and a new well was drilled, and oil actually encountered and produced by it on June 6, 1910. Thereafter, on June 27, 1910, the Mud Hen location was made upon the land; the locators being all members of the McCutchen family, G. W. and the Johnsons, however, not appearing therein.

The government by its bill of complaint alleges that it is entitled to the land; that none of the defendants have any valid claim or right thereto, or any part thereof, or to extract any minerals therefrom. It alleges that "the land now is, and at all times has been, oil and gas bearing land, containing rich deposits of petroleum, or mineral oil and gas, in commercially paying quantities, and at all times is and has been chiefly valuable for the petroleum or mineral oil deposited therein, and has never contained any minerals other than petroleum or mineral oil and gas." It asserts that without right, and in violation of its proprietary rights in the premises, divers of the defendants have entered upon the land, and have been and now are extracting the minerals therefrom, and committing waste therein. It alleges the making of the withdrawal order by President Taft on September 27, 1909, wherein this land,

together with other lands mentioned, was withdrawn from all forms of entry and exploration for minerals. It is alleged that the defendants have entered upon and are operating the property solely under the Hawk location, hereinabove referred to, and that such Hawk location was void because the locators thereof were obviously acting as mere dummies for others, and in this behalf it is alleged that the said Hawk location was made for the sole use and benefit of G. W. McCutchen, to enable him to secure a greater area of mineral ground than was allowable to him under the laws of the United States in a single location. It is further alleged that no petroleum or other mineral was produced in said land prior to June 6, 1910, on which date oil and gas were produced by the Pacific Midway Oil Company. It is also alleged that, at the date of the Taft withdrawal in 1909, none of the defendants or any other persons were on the land engaged in diligent prosecution of work leading to a discovery of oil. Whereupon, because of these facts, it is asked by the government that the defendants be required to set up whatever asserted rights they may have, that all such rights may be declared void, and that an appropriate judgment as for an accounting as for the extraction of oil may be granted, etc.

The answers of the defendants admit the mineral character of the land, deny the asserted want of diligence, allege the exercise of reasonable diligence at the time of the Taft withdrawal, and deny that the operations on the land were conducted under the Hawk location, but allege that at all times the operators thereon were conducting their mining operations and drilling under and with a view to the protection of the rights of the McCutchens under the Lone Star location. In amendments to the answers, filed just before the trial, it is also specifically alleged that a discovery of mineral, to wit, gas, was had on the land by the Obispo Company in May, 1909.

James C. McReynolds, Atty. Gen., E. J. Justice and A. I. McCormick, Sp. Asst. Attys. Gen., and Albert Schoonover, U. S. Atty., of Los Angeles, Cal., for the United States.

Beasly & Fry, of San Jose, Cal., for defendant Bean-Spray Pump Co.

Samuel Shortridge, of San Francisco, Cal., for defendants Spreckles Oil Co. and J. D. Spreckles.

A. L. Weil, of San Francisco, Cal., for defendants General Petroleum Co. and David S. Bachman.

J. W. Wiley, of Bakersfield, Cal., for defendants G. W. McCutchen et al.

R. T. Harding, of San Francisco, Cal., for defendants Pacific Mid. Oil Co., Pacific States Refiners' Co., and American Oriental Co.

M. S. Platz, of Bakersfield, Cal., for defendants Francis.

Curtis H. Lindley, of San Francisco, Cal., for defendant Obispo Oil Co.

George W. Lane, of San Francisco, Cal., for defendant Independent Oil Producers Co.

Andrews, Toland & Andrews, of Los Angeles, Cal., for defendants Union Oil Co., Maricopa Star Oil Co., Producers' Transp. Co., and Maricopa Oil Co.

Geo. E. Whitaker and Rowan Irwin, of Bakersfield, Cal., for defendant Coons.

Oscar Lawler, of Los Angeles, Cal., for defendant Midway Fields Oil Co.

BLEDSOE, District Judge (after stating the facts as above). [1, 2] Preliminarily, I feel constrained to suggest that I see no reason

to depart at all from either the reasons adopted or the conclusions reached heretofore in the hearing herein on the question of the appointment of a receiver. 234 Fed. 702. A consideration of the facts in the case, as they have been presented in detail on the trial, serves but to confirm the conclusions, announced in that opinion, that defendants were not diligently engaged in the prosecution of work leading to a "discovery" on September 27, 1909, the date of the Taft withdrawal.

Under the laws of the United States, as the same have been enacted from time to time and as they have been construed by the courts, I think it may be safely asserted that one who enters upon the public domain and "locates" land as for its mineral content, as oil land, though he may erect appropriate monuments, and post and properly file location notices, *if he makes no "discovery" of mineral,* acquires no rights of any nature against the government or any private individual, save the right to proceed with diligence to effect an actual discovery of mineral, gas, or oil. He may remain out of possession of the land, and, sitting supinely down, do nothing, awaiting developments of himself or of others on adjoining or in regional parcels, with no risk other than that of being dispossessed by the government or by some other locator. If, however, luck and chance are with him, he may return at some considerable period thereafter—at any time, in fact, prior to actual withdrawal by the government or entry by another—and proceed to prosecute with diligence his search for mineral. If he so returns, during the time he may be in possession actually engaged in the diligent prosecution of work leading to a discovery, he will be protected from inroads upon his rights, asserted either by the government or by private parties, and when he does, if ever, actually effect a discovery of mineral, his vested right to the possession and enjoyment of the property and of its mineral contents may, with no impropriety, I think, in so far as may be necessary to secure protection to his rights, be said to relate back to the time of his original location, and will continue in the future for such time as he may comply with all valid laws and mining regulations. He is then for the first time in the position of one who, having made a discovery of mineral upon vacant, unappropriated public land, has perfected a "location" thereof in the strict sense of that term, and is thereafter subject to all the obligations and possessed of all the privileges of one in possession of a valid and subsisting mining claim. In other words, possession and enjoyment of mining ground in the United States depend upon location and discovery of valuable minerals therein.

With respect to oil land, at least, arising out of the necessities of the case, discovery may, if not must, follow location. Upon discovery, however, whenever attained, in the absence of intervening rights of a superior nature, the same rights and results flow as if discovery had preceded location, and, pending discovery, the locator, after location, possesses all of the substantial rights consequent upon a discovery itself, as long as he continuously engages himself with diligence in seeking for oil upon the claim. But in the absence of a discovery, and in the absence of diligent prosecution of work leading to a discovery, even though in actual possession of the property, as against the government, at least, he is subject at any time to the possibility of a withdrawal of

the privileges offered to him and consequent termination of his rights. His status is in the nature of a tenancy at sufferance. Mining Co. v. Tunnel Co., 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; Cosmos Exploration Co. v. Gray Eagle Oil Co., 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147; Hirshfeld v. Chrisman, 40 L. D. 112; Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63; Chrisman v. Miller, 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770; Borgwardt v. McKittrick Oil Co., 164 Cal. 650, 130 Pac. 417; Smith v. Union Oil Co., 166 Cal. 217, 135 Pac. 966; Tuolumne Consolidated Mining Co. v. Maier, 134 Cal. 583, 66 Pac. 863; Olive Land & Development Co. v. Olmstead (C. C.) 103 Fed. 568; New England Oil Co. v. Congdon, 152 Cal. 211, 92 Pac. 180; U. S. v. Midwest Oil Co., 236 U. S. 459, 35 Sup. Ct. 309, 59 L. Ed. 641; In re Lowell, 40 Land Dec. 303; U. S. v. McCutchen (D. C.) 234 Fed. 702.

Reasoning from these premises, *in the absence of an entry, location, and discovery, or the diligent doing of work looking to a discovery, by adverse interests,* and in the absence of any evidence of an intention to abandon the original location, what may have happened, as shown by the evidence herein, as to the doing or not doing of assessment work, the making of adverse locations, or the making or attempted making of relocations, all become of no consequence. If the Lone Star location of 1900 was originally valid, and not void because in fraud of the government's general mineral land policy, and if in May, 1909, a valid discovery of mineral was made upon the land by the Lone Star locators, or their agents or assignees, then, no intervening location rendered valid by prosecution of diligent work or discovery having been made, the discovery in May, 1909, would confer upon the Lone Star locators, or their assignees, the vested status of true "locators" of mineral land. If they possessed that status in May, 1909, and thereafter conformed to and complied with the law, no act by the government short of proceedings in eminent domain could serve to deprive them of such right of property. They could not, in the very nature of things, be subjected to the provisions of any subsequent withdrawal order, of whatever source or authority.

A determination of the basic and controlling features of this case, then, depends upon an answer to the two questions: Was the Lone Star location valid, and devoid of fraudulent intent? If so, did its beneficiaries actually through the efforts of themselves or their agents, effect a "discovery" of oil or gas thereon prior to September 27, 1909?

With respect to the first question, I can come to no conclusion other than that it should receive an affirmative answer. As indicated hereinabove, the Lone Star location was probably made for the purpose of benefiting, not only the eight members of the McCutchen family named therein as locators, but also others who were more or less dependent upon the McCutchen brothers. The management and control of the Lone Star claim, assuming that, in the absence of a discovery, the word "claim" could be applied to the inchoate right possessed, was vested either in R. L. or G. W., or in the informal association known as the McCutchen Bros., and composed of the four active members of the family.

It was also managed and controlled, apparently, for all of the McCutchen family. The arrangements had to effectuate this, together with the ultimate purpose in view, seem to have been of a commendable nature and tendency. With respect to the property, some members of the McCutchen family were doing work; some were not. Some were assuming responsibilities; some were not. All, however, apparently, were sharing, and were expecting to share to a greater or lesser extent, in the proceeds from the property. It may be that there was the fraudulent intent that an individual, or, what is more colorable, that the "McCutchen Bros.," should be the sole and real beneficiary of the Lone Star location; but there is no proof that this was the fact, and no circumstances adduced from which the court could rationally, and in the exercise of the reasonable discretion confided to it, deduce the inference that such fraudulent intent in fact existed. The facts adduced are all consistent with honesty of purpose as well as with fraudulent design. In the absence of controlling proof of a contrary intent, the court is in duty bound to assume that the parties have been actuated, therefore, by honesty of purpose rather than by fraudulent intent.

The only elements which may be said to squint at fraud are the meagerness of the payments out of the proceeds from the oil developments to the Johnsons, and the relocation of the Mud Hen claim without the Johnsons being located therein. As to the first, however, it does appear that the Johnsons did share to a substantial extent in the proceeds from the sale and development of the property. If the location was originally valid, and made with no fraudulent intent to evade the mining laws, forbidding one employing the convenient device of making use of dummies in acquiring title to more mineral land than the laws would give him in one location, the property might thereafter have been divided up as the parties saw fit, and it might well have been the case that those who submitted to the larger labors and larger responsibilities were, by common consent, to enjoy the larger reward. The fact, also, that the Johnsons have not as yet received all of their share of the returns which may be coming to them, is not in itself conclusive of fraud. It may be, for reasons which were explained, and which, being of a private nature, are unnecessary to reiterate here, that it was the part of wisdom to withhold from the Johnsons a portion of the proceeds otherwise properly payable to them. In the absence of persuasive evidence to the contrary, and indulging in the presumption of good faith and of innocence of wrongdoing, I cannot but conclude that the situation is as claimed by those who are most familiar with its details.

The failure to include the Johnsons in the Mud Hen location at first appealed to me as a very suspicious circumstance; but it is made clear that this location was insisted upon by an attorney for one of the operating companies after the discovery of oil on the 6th of June, 1910, and to perfect, as he advised, what might be otherwise an invalid location. In the doing of this the McCutchens merely followed his advice and obeyed his directions. No fraudulent purpose can therefore be imputed to them because of this. The Hawk location, made in 1909, and upon which application for patent was based, obviously was open to suspicion of the severest sort, and it is no wonder that, under the rights

sought to be founded upon it, governmental agents concluded that a fraud was about to be perpetrated upon the government; but, as seen, however colorable the transaction, standing by itself, there was no fraudulent intent, even as to this location.

In substance, the parties directly interested, the McCutchens, were at all times relying upon and proceeding from an entirely valid and bona fide transaction and muniment of title, to wit, the Lone Star location of 1900. Their rights, therefore, and the rights of those deriving title from them, will have to be measured under the assumption that at all times within the domain of this controversy they had made and were relying upon a bona fide location of the mining ground in dispute.

The other fundamental question involved in the case, confessedly, is of much greater difficulty of answer. In arriving at the conclusion to which I have, after most careful and painstaking deliberation, been driven, I have been duly and sensibly impressed with the exceeding importance of this litigation to the various defendants involved herein. I have not underestimated the magnitude of their expenditures in the development of the quarter section in controversy, amounting approximately to $1,000,000, nor the value of the property itself, which has been estimated at more than $10,000,000, nor have I at any time been disposed, for any cause, to overlook the fundamental and basic rights inuring to them, in common with all citizens, that no change in, or modification of, any governmental policy, could through any species of judicial legerdemain, or administrative fiat, or otherwise, suffice to deprive them of any rights of property. Under our scheme of government, and as a condition precedent to its perpetuation, the property of the citizen must be as sacred from confiscation by the government as it is from appropriation by another. I have not permitted my individual approval of commendable conservation policies, therefore, to lead me to lose sight of the fundamental fact in this controversy that private rights of a vested nature are not susceptible to judicial destruction herein. Neither have I overlooked the fact that this proceeding has pendency in a court of equity. In so far as *equitable considerations,* proceeding from the conscience of the chancellor, and operating upon the conscience of the parties, have to do with this case, the court purposes to do only that which is equity, and which is in line with the court's most profound conceptions of high moral dealings.

The question in the case, reduced to its lowest terms, is: Had the defendants done anything, pursuant to the requirements of the law, whereby they had served to divest the government of its proprietary title to the land in question (i. e., served to clothe themselves with a *vested* right therein) previous to the withdrawal order of September 27, 1909? If they had, they are entitled as of right to go their way and continue to exploit and operate the property as for their own individual and private benefit. If they had not, because of the withdrawal order, framed in furtherance of the conservation policy of the government, they are not entitled, as a matter of law, to continue to operate the property, and extract from it, for their own behoof, that which the government, from considerations of necessity, has determined to conserve. This question is essentially one of pure law, in

the consideration of which the court cannot be restrained by sympathy nor moved by principles of purely equitable cognizance. As to what shall be done otherwise concerning the respective demands and defenses of the litigants herein, if their consideration becomes necessary, is a matter for equitable consideration and for equitable adjustment. Then and therein the conscience of the chancellor will feel in duty bound to assert its high prerogative.

If the defendants had divested the government of the title to this property at the time of the withdrawal order (i. e., if they had acquired some vested rights therein), it must have been in virtue of some contractual relation. No conveyance has ever passed from the government, and consequently any rights inuring to the defendants must have arisen otherwise. There must have been something offered by the government, and something done by the defendants amounting to an acceptance of that offer. If the offer made by the government was accepted before being withdrawn, it cannot now, and could not at any time subsequent to such acceptance, be withdrawn. It thereby became a binding, enforceable obligation. If, however, it was withdrawn prior to acceptance, it stands precisely, on this phase of the case, as I see it, as if no offer had ever been made, and the parties are to be judged accordingly.

[3] Whatever may have been done with respect to mineral lands generally, lode or placer, the attitude of the government, with respect to its oil lands, was defined, as it was circumscribed, by its announced policy, as indicated by the adoption of the act of Congress of February 11, 1897. 29 Stat. 526. Therein it was enacted:

"That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims."

It seems clear to me that Congress thereby intentionally limited the right of entry upon, and location of, oil lands to such lands as were "chiefly valuable therefor"—i. e., lands chiefly valuable for oil. Obviously, the government, as sovereign proprietor, could say what lands, if any, might be entered and located as for petroleum. It could, if it saw fit, deny the right to enter upon any such lands, and for the same reason could limit the lands upon which entry might lawfully be made. In this view of the situation, as to any lands not within the category specified in the statute, there was no invitation or authorization given to enter them, and in consequence no right could be obtained, as against the government, by so doing. In this connection, although attention will be directed to it more in detail hereafter, the difference in language between the act of February 11, 1897, and section 2319 of the Revised Statutes (Comp. St. 1913, § 4614), ought not to be overlooked. It seems to be not without significance. The act of 1897 gives the right to enter on "lands" which are "chiefly valuable" for oil. Section 2319 of the Revised Statutes, which has to do with the general right of the citizen to exploit the public mineral lands, recites that "all valuable mineral *deposits*" are declared open to exploration and purchase, and the lands in which they are found to occupation and

purchase," etc. (Italics mine.) In other words, as I sense the difference between the two statutes, as to lodes and placers the right is given to explore and purchase "valuable mineral deposits" and "the lands in which they are found"; but with respect to petroleum the right is given only to enter and obtain patent to lands which not only contain petroleum, but which are "chiefly valuable therefor." In a word, in one case the value of the "deposits" is the criterion, and in the other it is the value of the land. I believe this should not be lost sight of in defining what will suffice for a "discovery" under the oil statute.

It is hornbook law, of course, that the successful location or appropriation of mineral lands of any sort, to be valid, must be accompanied by a "discovery." This discovery, in its broad and comprehensive sense, is the doing or the accomplishing of that thing, with respect to the land sought to be appropriated, which serves to impress upon it the quality of being land which is open to appropriation or exploration, in the manner and pursuant to the law, sought to be made use of. And it may be said that, with becoming propriety, both judicial and departmental rulings have evinced a disposition to be liberal toward locators in the matter of the requirement as to what will suffice to constitute such a "discovery" as to segregate the land sought to be selected from the public domain, and invest it with the attribute of mineral land, and subject to private ownership or exploitation. What discovery, then, will suffice to meet the requirements under the act of 1897? Though under that act entry and patent were to be obtained pursuant to the placer mineral laws, yet it must be remembered that upon location and "discovery," followed or accompanied by the expenditure of $500, and upon application, patent from the government was to follow. R. S. § 2325 (Comp. St. 1913, § 4622). In this behalf I can see no escape from the conclusion that, as against the government, if the defendants had made such a location of, and "discovery" upon, the land in question, as to invest them with a right of property therein, they had made such location and "discovery" as to entitle them, as a matter of law and of right, to a patent. Conversely, if they had made no such "discovery" as to entitle them to a patent as against the government, they had made no such "discovery" as to vest them with rights in and to the property. McLemore v. Express Oil Co., 158 Cal. 559, 563, 112 Pac. 59; 139 Am. St. Rep. 147. (This question is wholly unrelated, of course, to that of continuing diligence heretofore referred to.)

[4] Defendants rely upon a "discovery of gas" in Obispo wells Nos. 1 and 2 in the spring and summer of 1909. Viewed in the most favorable light, I cannot but regard this asserted discovery as being of such an unsubstantial and negligible character, and as considered by the defendants at all times, until after this suit was brought, as of such unimportance, that I cannot bring myself to believe that it suffices to attach to the land in question the character of being "chiefly valuable" as for petroleum, or even gas, or that it should be considered as the equivalent of a "discovery" under the placer mining law. In this connection I feel it not inappropriate to suggest that, owing to the gravity

and importance of the questions herein presented, I have, with almost laborious effort, read and studied, not only all of the various decisions which the industry of learned and assiduous counsel has provided for me, but also others, not found, or at least not cited, by them, which seemingly have had to do with the question of the rationale of the rule respecting the sufficiency of a mineral discovery. In addition, I have given careful, and what I conceive to be painstaking, consideration to the testimony of the witnesses who have given evidence herein upon this subject, the transcript of which has been available to me. In order that this decision may not grow to interminable lengths, I shall content myself merely with a reference to some very brief statements of what I conceive to be the essentials, both with respect to the facts as developed, and the law as applicable.

Briefly, it may be said that in each of the two wells above referred to, when at a depth of 450 feet, and thereafter, some sort of vapor was observed coming from the wells. The contention indulged in by the government that defendants have failed to prove either that any gas actually did come from the wells, or that, assuming that it came, it was petroleum gas, are laid out of consideration. Under the evidence, no conclusion is possible, other than that some petroleum gas was produced from each of these two wells. As to the quantity of gas produced, I am forced to the conclusion, from a careful consideration of all the evidence, that it was extremely negligible. Respecting its volume (quantity), Judge Lindley, one of counsel for the defendants, says in his brief that:

"It was never accurately determined. There was at the time no particular attention paid to it for the purpose of determining its volume."

One witness states that it appeared like heat waves rising from the horizon on a hot day. Another smelt it, and several offered testimony that on at least one occasion it was lighted and flared up to a height of a couple of feet. Another witness at first stated that he observed it coming up through the water in the well in the form of bubbles, but later withdrew that statement. Obviously, however, if it came up at all, it must have come in some such fashion. Another witness, the man in charge of the Obispo operations during the time in question, but whose evidence as a whole, especially as demonstrated by his disposition to evade direct answers to material questions, does not impress me with its verity, testified that sufficient gas came out of each of the wells to furnish a 40-horse power boiler with fuel. There was other evidence that subsequently, in 1910 and 1911, when one of these wells was being continuously operated for its water content, and it became necessary to "pull out the tubing," in the process of doing so the gas would be noticed. There is a dearth of testimony, however, as to a constant, or substantially constant, emission of gas from the time of its original encounter down to the time of the trial, and, on the contrary, there is testimony offered by government witnesses, who had made careful examination of the wells in 1910 and 1911, and even as late as 1915, to the effect that at those times they failed to notice any gas in or about either of the wells.

In addition, there is another bit of evidence, not inconsequential in its nature, as weighing upon the apparent unimportance of the discovery claimed, that during the time subsequent to the cessation of work by the Obispo Company, and while the Pacific Midway Company was engaged in sinking its wells, a driller on the Midway Northern well, situated about a quarter of a mile away from the Obispo wells, though he was about the wells frequently and examined them, not only stated that he saw no gas coming from the wells at that time, but says further that he "never heard of gas at that time being in that well." A mining engineer named Jackson, who went on the ground as the representative of the Pacific Midway, at the time it took over the Obispo contract in 1910, gave evidence in the hearing before the Land Department that, for the purpose of making an investigation for his company, he not only sounded both of the Obispo wells, but also endeavored to continue the drilling in well No. 2, using all means available to him for that purpose, but in a detailed statement of conditions as he found them he nowhere makes even a casual mention of gas. True, he was not asked at that time, specifically, with reference to gas in the wells; but it appeals to me as a very strong and persuasive circumstance with respect to the inconsequential nature of this gas find that the engineer of a company which was then purposing to exploit the property should have made no mention at all, and therefore probably made no observation, of such a circumstance as it is now claimed sufficed to demonstrate that the property was oil land and "chiefly valuable therefor," and was of such a character as to justify a reasonably prudent man in making expenditures of money and time in its further exploration or exploitation. If there had been anything in the situation last above adverted to, I am constrained to feel that the engineer would have noticed it, and, if he had noticed it, he would have made some reference to it.

In this connection, also, a statement of Judge Lindley, made at the inception of the trial herein, and when application was made for leave to amend the answers, so as to allege a discovery of gas on the property prior to the withdrawal order, is not without force. He said that the original answers in this case "admit that there was no discovery either of oil or gas until after the withdrawal order in 1909." This is evidentiary only to the point that even as late as the filing of the original answers in this case, and with respect to the knowledge then possessed by those who were charged with the responsibility of defending the case, either as individuals or as officers of corporations, there was either no knowledge, or at least no attention paid to the fact, that gas had been encountered in the wells of the Obispo Company, previous to the withdrawal order, in such quantity, or under such circumstances, as to constitute a "discovery."

Another circumstance that is not without its effect upon me in this connection is that the leg of one of the wells nearest to the property in question, being that of the Midway Northern No. 1, and, as heretofore stated, located about a quarter of a mile away from the Obispo wells, was introduced in evidence. It was copied in the record, apparently, upon the precise blanks made use of by the drillers during

the course of their operations. It shows that the well was sunk to a depth of 1,920 feet, at which time oil was encountered; but, though the blank for record shows each day a place whereat to indicate the depth where "got gas," there is no entry on the report, at any depth, as to a discovery of gas. This is suggestive of the fact, either that no gas was in truth discovered previous to the discovery of oil, or, what is more probable, that it was considered of such little moment or importance as that no mention need be made of it. Assuming the latter to be the true situation, it affords something of a practical demonstration that drillers then working in this territory, presumably both practical and reasonable men, considered a finding of an apparently inconsequential volume of gas at a depth of 1,000 feet above the oil sand as being unimportant in nature, and probably not such a discovery of mineral, as *in itself* would justify a prudent man in going deeper and making greater expenditures of time and money. It is thus seen that no more than what might be termed mere casual attention was paid to the gas encountered in the Obispo wells, and that no rights were predicated upon it, or sought to be predicated upon it, until after a determination by this court that defendants were in default with respect to the proprietary rights of the government under the withdrawal order, because of their nonconformity to the rule requiring diligence of them in their search for mineral.

That the alleged discovery of gas was not pleaded in the case sooner is, in my judgment, a matter of no consequence in itself. If there was a valid "discovery," as the same is defined under the law, and that "discovery" had actually been relied upon as such, the mere fact that it was not presented earlier in this action as a defense to the claims of the government would, of course, be of no moment. That it never, however, was relied upon in any sense as constituting a "discovery," or as an inducement or justification for any of the defendants to make or continue to make expenditures upon the property in search of oil, is amply demonstrated by the evidence. The witness Burns, who was sent upon the property in August, 1909, with instructions to take such steps respecting future operations as seemed best, asserts that he reported to the stockholders, in session on September 15, 1909, with respect to the discovery of gas and his encouraging conclusions as a result thereof. But neither the stockholders nor the corporation, apparently, took any step because of such representation, or even determined because of it, to continue their operations upon the property. It nowhere appears from the evidence, in so far as I can ascertain, that the question of the discovery of gas was ever presented to, or in any wise considered by, any of those who had to do with operations upon this quarter section. None of the defendants seem to have been induced to expend their money because of, or in reliance upon, the alleged discovery of gas in the two abandoned Obispo wells. It may be said, then, that none of the defendants paid any attention at all to the gas encountered in 1909, either as an inducement to further progress, or as justification or cause for the expenditure of money upon their part, or as the basis of a valid "discovery."

To my mind the encountering of gas in a well under the circum-

stances detailed herein, and not giving it any consideration as a "discovery," possesses the same legal effect, and presents the same question, as if the gas had been in the well, and had been emitted therefrom, but the operators or owners had not seen it at all. If it were in the well, and actually produced, but not seen, no different situation would arise than if it were contained in the ground, but not penetrated at all by the well. All of which leads to the logical conclusion that if one locates—that is, marks out and "notices"—land which at the time actually contains oil or gas hidden within its depths, a subsequent demonstration of that fact thereafter, by anybody, would give such locator a valid location of the land as oil land. If one could locate land, and in boring for oil encounter gas, and give it no consideration at all as constituting a "discovery," he could, it seems to me, just as rationally and as logically go through the other performance mentioned; that is, not meet it at all, but claim it as a "discovery" when it suited his convenience or purpose so to do, merely because it was in the ground. This, I am constrained to hold, cannot be done, and that a locator may not rely upon the mere presence of mineral in the soil as a basis for a title to, or valid claim of, mineral land, unless, not only having encountered it, he has also, in good faith, when called upon to act, either based a "discovery" thereon, or been induced to expend his money because of its revealed presence.

The testimony of experts and practical oil men that the gas encountered by defendants was sufficient to justify them in further expenditures in search of petroleum becomes an immaterial factor, since it appears with indubitable clearness that the defendants were in no wise induced by anything they saw or found, in connection with the gas, to rely upon it, either as justification, cause, or excuse. On the contrary, in spite of their knowledge of it, as appears from the testimony of the witness Burns, the Obispo people, when they were called upon to act, refrained from proceeding with the due diligence which the law required, but seek now to take advantage of it as a mere afterthought, solely because it was there. Their disregard of it at all times when called upon to act, and their failure to rely upon it, in good faith, as an inducement to further progress upon their part, deprive them now of the right to set it up as a "discovery," as an acceptance of the government's offer, or as a sufficient justification for what they did. They, as well as their codefendants, did nothing because of it. Obviously, so far as the proofs show, they all would have done precisely what they did do if they had never encountered it, and consequently, in my judgment, they should not now be held to have acquired rights from a circumstance of such slight consequence, in the first place, and so utterly negligible in so far as influence upon their conduct is concerned, in the second.

The well-known litigation between Miller and Chrisman ultimately found its way into the Supreme Court of the United States. 197 U. S. 313, 25 Sup. Ct. 468, 49 L. Ed. 770. That tribunal, in affirming the judgment of the courts of California, had occasion to express itself with reference to what constitutes a sufficient discovery under the act of 1897. If I mistake not, it is the only case in which the

highest tribunal in the land has announced its conclusion with respect to this particular matter. Preliminarily, it should be observed that the "discovery" therein relied upon was in fact *a discovery of mineral,* to wit, petroleum. That only a small amount, such as would run from a spring, float over the water, and drip down over a "rock about two feet high," was the quantity discovered, is true; but the fact to which I desire to draw particular attention is that *oil itself was actually discovered.* This, I think, serves to give added point also to the conclusions of the Supreme Court. After adverting to the language of the act of 1897, providing that lands "chiefly valuable" for oil could be located, the court says of the above-mentioned Barrieau discovery:

"It does not establish a discovery. It only suggests a possibility of mineral of sufficient amount and value to justify further exploration."

And this it must be remembered is with respect to a discovery involving the finding of petroleum itself. The court thereafter quotes from previous decisions with respect to the requirements, in so far as the value of the mineral found is concerned, to justify the appellation "discovery," and after quoting the rule announced in Castle v. Womble, 19 Land Dec. 455, 457, proceeds to say:

"Some cases have held that a mere willingness on the part of the locator to further expend his labor and means was a fair criterion. In respect to this Lindley on Mines (1st Ed.) p. 336, says: 'But it would seem that the question should not be left to the arbitrary will of the locator. Willingness, unless evidenced by actual exploitation, would be a mere mental state, which could not be satisfactorily proved. The facts which are within the observation of the discoverer, *and which induce him to locate,* should be such as would justify a man of ordinary prudence, not necessarily a skilled miner, in the expenditure of his time and money, in the development of the property.'" (Italics mine.)

In this the Supreme Court apparently lends countenance to the claim, advanced by the defendants herein, that the mere willingness on the part of the locator to make additional expenditures is not the test whereby the sufficiency of a "discovery" is to be determined. But it must be understood that the question there was, not whether his willingness should be one of the factors which enters into a consideration of the case, but whether his willingness alone, which might have been based, of course, upon overenthusiastic hopes and entirely unreasonable ideas, could suffice to impress the land with the quality necessary to validate an asserted right of appropriation. The court, however, quoting from Judge Lindley himself, does show, as I read the language, that the facts upon which the locator may successfully predicate a valid discovery must be such as, being within his observation, "induced him to locate." In other words, though it is obviously true, as contended by defendants, that willingness alone is not the test of justification, it must be equally true that there can be no justification in the absence of a willingness to rely, and an actual reliance, upon the observed conditions. The court then, adverting to the liberality of the rule as between adverse claimants to mineral land, with respect to what will constitute a "discovery," and after

conceding that that was the case then before the court, proceeds to hold that:

"Even in such a case * * * there must be such a discovery of mineral as gives reasonable evidence of the fact * * * if it be claimed as placer ground, *that it is valuable for such mining.*" (Italics mine.)

Adopting the conclusion thus announced, there is nothing in the case at bar tending to show that the quantity of gas actually encountered had at the time of its discovery, or at any period up to the time of this trial, any appreciable commercial value, or that its presence in the land, in the quantity in which it was found, served to impress upon the land any value at all. In the absence of such showing, in the face of this decision, I do not see how defendants' contentions can be accepted.

In Cook v. Johnson, 3 Alaska, 506, 534, et seq., the district court, in considering the sufficiency of a discovery under the placer law, calls attention to this holding of the Supreme Court in Miller v. Chrisman, and indulges in the observation, which is very persuasive with me, that the court used the language employed there as indicative of an intention to lay down a somewhat different rule with respect to the sufficiency of a discovery under the petroleum act, as differentiated from one under the general mining law. That difference, suggests the court, rests primarily upon the language of the act, that oil land may only be appropriated when it is "chiefly valuable" for its oil content. In the same case, at pages 528, 536 and 538, the court deals with the necessity of a reliance, in good faith, by the locator, upon the minerals actually observed by him, in order that a valid discovery may thereby be effectuated. On page 538, the court says:

"But to what extent is his [the locator's] bona fides to be considered in determining the sufficiency of his discovery and the matter of justification? *An examination of the books makes it evident that the bona fides of the locator is vital to the validity of his claim.* (Italics mine.) Thus, in the case just cited ([Book v. Justice Min. Co. (C. C.)] 58 Fed. 125), stress is laid on the fact that the discovery in good faith induced the prospector to locate and expend large sums for the purpose of properly working or developing the ground and complying with the provisions of the law."

After citing some other cases in point, the court continues:

"So that, after all is said and done, the attitude of the discoverer himself toward the sufficiency of his discovery is a potent factor in the determination of the question as to justification. Obviously these requirements are made to prevent locations based upon fictitious discoveries and attempts by means of fraud to obtain title to public domain for purposes of speculation. Do the acts of defendants' predecessor square with the question of good faith?"

On page 536 the court also calls attention to the fact, which is of moment herein, that, though subsequent developments had demonstrated that the claim in question was immensely rich, yet, *as this fact was obviously unknown to the locator at the time he made his alleged discovery,* it is held that he must be bound by what he knew at the time of his claimed location and "which induced him to locate." This answers the contention, raised by defendants, that because the government alleges the land in question to be valuable for its oil and gas con-

tent, that thereby the rights of defendants with respect to the sufficiency of its asserted "discovery" are affirmatively determined.

With the reasoning as well as the conclusion of the court in Cook v. Johnson I concur, and though they concerned a placer location, per se, I cannot conceive why they are not applicable in all their intensity and force to an oil location. Although the rule of diligence followed in oil locations apparently does not obtain in the Alaskan placers, it nevertheless is the fact in Cook v. Johnson that the asserted "discovery" upon which reliance was had, and the good faith of which the court held must be indubitably determined, occurred many months after the original location had been made.

The Land Department, in the Butte Oil Company's Case, 40 Land Dec. 602, after referring to some of the cases mentioned hereafter, held that no discovery had been made upon either of two claims involved. The facts were, briefly, that upon one claim in question the locator had drilled a well to a depth of 1,400 feet, but had struck no oil. A small flow of natural gas, however, was developed, insufficient for commercial purposes, and without value. One witness testified that by conserving the flow and using small pipes the gas might be sufficient for a range used by a resident in the near vicinity. Upon the other claim, there was a seepage of oil beneath a large rock upon the surface of a spring of water, which had stained some of the surrounding rocks. It could be skimmed off the surface and collected in a bottle, and one sample so collected upon analysis was proved to be petroleum. There is a striking similarity, in all of the substantial features of the situation, between the discovery upon the claim first mentioned and the discovery in the case at bar. There is also striking similarity between the discovery on the second claim and the Barrieau discovery, considered by the Supreme Court. With respect to both of these discoveries, however, the Department, upon consideration, held (page 606) that:

"The slight flow of gas and the small seepage of oil were indications that there possibly is a reservoir of oil lying at an unknown depth and situated at some unknown distance from the land, and cannot be regarded as a discovery of oil as a basis of a placer mining location under the act of February 11, 1897."

In Olive Land & Development Company v. Olmstead (C. C.) 103 Fed. 568, Judge Ross, of this circuit, held that the presence of physical features upon a location, to wit, the geological formation, the presence of an anticline and of bituminous sand which gave out a distinct odor of petroleum, and all of which, it was asserted, "would lead any experienced petroleum expert, or any practical geologist familiar with petroleum-bearing lands in California, to pronounce the same oil or petroleum territory and chiefly valuable therefor," and which would also "justify any prudent petroleum miner in locating the same as petroleum land, and in spending his time and money in developing the same for its petroleum product," did not suffice to validate an attempted location.

In Southwestern Oil Company v. A. & P. Railroad Company, 39 Land Dec. 35, the Land Department held, as phrased in the syllabus:

"The disclosure of a stratum of bituminous sandstone or shale from which a small quantity of oil seeps, not sufficient to impress the land with any value for mining purposes, does not constitute a sufficient discovery to support a valid mining location."

In Book v. Justice (C. C.) 58 Fed. 106, 125, Judge Hawley, of this circuit, in a decision which has become a classic in the literature of mining law, calls attention to the element of good faith, and the reliance upon the discovery claimed by the locator, as an inducement for him to expend his money.

Though it was apparently unnecessary to a decision of the case, yet it was held by the Supreme Court of Oklahoma, in Bay v. Oklahoma Southern Gas Company, 13 Okl. 425, 73 Pac. 936, 940, that in the absence of a discovery of some body or vein of oil, from which oil can be brought to the surface, the production of 1½ gallons of oil 43 feet below the surface was not a sufficient "discovery" under the law to validate a location.

In New England Oil Company v. Congdon, 152 Cal. 211, 92 Pac. 180, the evidence showed the discovery of " 'some oil sand stained with oil and a ridge of fossil,' and that oil had been discovered in neighboring locations, the nearest well being some two miles distant. The geological formation indicated the probable existence of oil-bearing strata in the claim." This evidence was held insufficient to validate a location or constitute a discovery. Undoubtedly the witnesses in this case, who have testified that a reasonably prudent man would have been justified in going ahead because of the discovery of gas herein, would also have testified that such a man would have been similarly justified under the conditions shown in the Congdon Case. The circumstances there developed, showing "the probable existence of oil-bearing strata in the claim," together with the finding of oil sand actually "stained with oil," would seem to put that case somewhat upon a parity with the case at bar; yet therein discovery was held to be insufficient. The cases of McLemore v. Express Oil Co., 158 Cal. 559, 112 Pac. 59, 139 Am. St. Rep. 147, and Miller v. Chrisman, 140 Cal. 440, 73 Pac. 1083, 74 Pac. 444, 98 Am. St. Rep. 63, also lend support to the views hereinabove announced.

Defendants claim that Borgwardt v. McKittrick, 164 Cal. 650, 130 Pac. 417, support their views that a sufficient discovery was had herein. Without taking the time to enter into a detailed discussion of that case, it suffices, however, to say that the lower court there *found* that in sinking a well upon the claim, at 775 feet below the surface, 25 feet of rich oil sands were discovered, capable of producing, so it was claimed, 40 barrels of oil per day. Of course, if such oil sands were discovered, and they were capable of producing 40 barrels of oil per day, and the lower court so found, and concluded that such constituted a "discovery," the Supreme Court could hardly do otherwise, as a matter of law, than to affirm its conclusions.

I have carefully examined cases cited having reference to Alaskan placers and to copper sulphides, but it must suffice to say that, in my judgment, they do not detract from the conclusions reached herein. With respect to this feature of the case, then, my judgment is that the

encountering by the defendants in the two abandoned Obispo wells of the small quantity of gas actually discovered, both because of its inconsequential nature and extent, and also because of the fact that it was at no time, until in the midst of this litigation, relied upon in any wise or sense by any of the defendants as a "discovery" validating their claim, cannot now, as a matter of law, authorize the court to enter a decree that such encountering sufficed to segregate the quarter section in question from the unappropriated public domain of the United States prior to the withdrawal order of September 27, 1909.

What has been determined hereinabove is merely that the government, as the proprietary owner of the property in question, had the right on September 27, 1909, to withdraw it from location, entry, exploration, and exploitation by its citizens; that it had the right to withdraw the unaccepted offer theretofore made with respect to the lands, and assert its own right as sovereign proprietor to the lands and their mineral content. This holding carries with it as a necessary corollary the right on the part of the government to a decree of this court that the defendants have no right in or to the property, and therefore no right further to exploit it to their own use or benefit. This takes care of the res itself and of its future use and disposition. It is the fact, however, in addition, as referred to heretofore, that upwards of $1,000,000 have been expended upon the land in the effort to produce oil therefrom; that many hundreds of thousands of barrels of oil have been taken from the land by the operating companies, and bought and thereafter sold by the purchasing companies.

[5] With respect to the damages which may have been sustained by the government because of the extraction and conversion by the operating companies of the oil and gas taken from the land, it will be both necessary and proper that the case shall go to a master for an inquiry and report by him as to the damage, if any, suffered, and the amounts thereof. In defining the scope of the inquiry to be undertaken by the master, I feel constrained to follow the decision of Judge Bean, sitting in this court in similar cases, and in which a similar judgment was directed to be entered. U. S. v. Midway Northern Oil Co. (D. C.) 232 Fed. 619.

There can be no valid claim, in my judgment, that the defendants herein were in any sense willful trespassers. Assuredly there is nothing in the facts developed to warrant that conclusion, and I know of no rule of law which could or should appeal to this court in equity which would have the effect of so adjudging them. True it is, as I have been constrained to hold, that without warrant they entered upon the lands of the United States and extracted the mineral content therefrom. True it was, however, also, that they did this in what I conceive to be good faith, and acting under the advice of counsel. There can be no doubt that bad advice emanating from reputable counsel will not suffice to confer any rights where otherwise none would exist. But there can be no doubt either that, in a court of equity at least, the imputation of being willful trespassers will not be indulged in as against those who are shown to have acted in good faith in reliance upon advice of reputable counsel.

At the time the transactions complained of were had in this case, the validity of the withdrawal order of September, 1909, had not only not been upheld, but, on the contrary, had been determined by courts of great respectability to be without force or effect. The President of the United States, himself a great lawyer, had indicated *his* doubt as to his power to make the order, and there is small wonder, therefore, that counsel, eminent in their profession, should, after mature deliberation, have been led to advise clients that the order, being beyond the scope of executive function, might be disregarded. That it has since been determined, beyond the shadow of a doubt, to the satisfaction of all except those who will not see, that it is and was at all times valid and efficacious, does not detract from the proposition that men who in good faith, even though erroneously, labored under the misconception of its invalidity, are not to be punished now for anything more than the actual wrong they may have wrought. In addition, as suggested by Judge Bean in the opinion referred to, plaintiff, having seen fit to come into a court of equity to right its wrongs, must not expect that court to award other than equitable relief—must content itself with compensatory damages and not expect to receive those of an exemplary character.

In line with these views, thus briefly announced, a decree will be prepared substantially in the form indicated by Judge Bean in the Midway Northern Case. I have examined carefully his conclusions with respect to the damages to be allowed, and the relief, if any, to be accorded to the defendants by way of offset as for improvements erected upon the land.

The defendants, having indulged in what they did without warrant of law, and as trespassers, should not, of course, be permitted to take to themselves any profit because of their own wrongdoings. As to whether or not they are to be allowed the value of such improvements as they have placed upon the land, which may have a tendency actually to increase its value, not because of the discoveries they made, but because of the actual addition to the substance of the estate, has not been presented to or considered by the court, and will not be determined definitely at this time. As in the case of the Midway Northern, the decree will provide for a reference of all matters affecting the question of damages suffered by the government, and in addition, in order that the court may have the facts before it when it comes to render its judgment upon that feature of the case, the master will also make report upon the reasonable cost and expense of drilling the several wells sunk upon the property previous to the entry of the receiver thereon, and any other permanent and valuable improvements placed upon the property and affixed thereto.

But one other matter requires consideration. Counsel for the purchasing companies have made the point that, based upon the holding in U. S. v. Bitter Root, 200 U. S. 451, 26 Sup. Ct. 318, 50 L. Ed. 550, as against the purchasing companies, they having had nothing to do with any trespass upon the lands involved, and their sole offending having consisted in the purchase and sale of the oil produced therefrom, paying the market price therefor from time to time, they

are liable, if liable at all, only as for a conversion of the oil, and that this court has no jurisdiction, sitting as a court of equity, to award a judgment in damages as for a conversion.

In litigation of a similar nature decided by Judge Bean and hereinabove referred to, it was held by Judge Bean, on the authority of the Bitter Root Case, and on the grounds stated hereinabove, that the marketing companies were entitled to a dismissal, and an appropriate order was directed to be entered. The point has not been argued by counsel for government in this case, in so far as I can discover, either in the briefs or transcript of the oral argument; but, without intending to express any opinion definitely upon the subject in advance of argument upon this particular feature of the controversy, I merely content myself with saying that I am in doubt as to the correctness of Judge Bean's holding. This case is clearly differentiated from that of the Bitter Root controversy, there being there no attempt made to follow the res involved, and here the effort of the government being centered primarily about a recovery of the property, a quieting of its title thereto, and a recovery of damages for the trespasses committed as an incidental feature thereof. I am not so sure that, under the circumstances, it is not proper for this court now, sitting as a court of equity, to adjudicate with respect to the liability, if any, of the marketing companies, and this for the reason that so to do would be to avoid a multiplicity of suits—a distinct ground of equity jurisdiction. However that may be, the question will be considered to be held in abeyance until the coming in of the master's report.

The marketing companies have set up and argued with much force and clearness that they are absolved from liability here because of the fact that they were purchasers of the oil taken from this land in good faith, without notice, and for value. The government denies this contention, and asserts a right to recover of the marketing companies the full value of all oil purchased and paid for by them. As has been indicated heretofore, this is a court of equity, and complainant, having deliberately entered into this forum to secure a judicial recognition of its rights, must conform to the rules of righteousness under which the decrees of a court of this character are moulded.

Without going into the minutiæ of the law with respect to the rights of the parties in this behalf, it will suffice to state that, irrespective of what else the government may have done after the making of the withdrawal order, it is indubitably true that it sat by and permitted wells to be sunk upon this property, and permitted the oil to be produced, and permitted it to be sold, without saying a word or raising a hand in opposition until at least October, 1913, when charges affecting the validity of the rights of the locators upon this land were filed in the Land Office. It must have known, as every one else knew, that upon the wells being sunk it was necessary that the oil should be taken therefrom, in order that irreparable damage to the oil sands might not result. Having been so taken and produced, it was necessary, of course, that it should be sold. It was impossible, in the very nature of things, that it should have been impounded or retained pending a determination of some controversy which might at some time arise with respect to the title. The marketing companies

were in the field, and had assumed properly a part of the burden resting upon the community to take and dispose of all oil as it was being produced from time to time. They purchased this oil at its full market price, in the utmost of good faith, I am constrained to believe, and after such due and legitimate inquiry into the state of the title of the vendors as it was possible for them to make in the exercise of due and reasonable diligence. True it was that they knew of the withdrawal order; but true it was, also, that they knew that the withdrawal order covered thousands of acres of land that had already passed to patent, or as to which vested rights had accrued, and with respect to which it was obvious that the government had no withdrawal rights. In the face of the things as they saw them, and in the face of a want of diligence on the part of the government to prevent the extraction of oil from land which it considered as its own, they are not, in this court of equity, to be charged with having done that which will make them liable as for a conversion of the oil. After the filing of the charges in the Land Department the situation changed, and they were then put upon notice, and in my judgment acted thereafter in the purchase of oil in disregard of what they ought to have understood were the plain and substantial rights of the government.

If, as seems to be suggested by the argument of counsel for the government, this great government of ours, with its multitudinous ramifications, was too big and had too much to do to be concerned with the question as to whether or not oil was being produced upon this little quarter section of land after the promulgation of the withdrawal order, by the same token it must now be held by this court to be too big to ask for compensation as for the deprivation of that portion of its estate which it sat by and permitted, without the exercise of any diligence upon its part at all, to be dissipated and to pass into the hands of its citizens, who in good faith paid full value therefor.

The master will make a report upon all oil produced from this property and purchased by the purchasing companies, together with the dates of such purchases, and upon the coming in of that report, upon the facts as herein adduced, the court will endeavor to do that which will appeal to its conscience, as well as satisfy the law as between these contending litigants.

Counsel for the government will prepare and present to the court the appropriate decree.

In re ROSENTHAL.

In re GEORGIA RAILROAD BANK.

(District Court, S. D. Georgia. November 1, 1916.)

1. BANKRUPTCY ⟸184(2)—PROPERTY ACQUIRED BY TRUSTEE—TRANSFERS—NECESSITY OF RECORDING—CHOSE IN ACTION.

Under the laws of South Carolina, which govern the necessity for recording an assignment of a bond for title to land in that state, though executed in another state by an assignor who subsequently became bankrupt, a chose in action, or an assignment thereof, need not be recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⟸184(2).]

2. BANKRUPTCY ⟸184(2)—PROPERTY ACQUIRED BY TRUSTEE—TRANSFERS—NECESSITY OF RECORDING—ASSIGNMENT OF BOND FOR TITLE—"CHOSE IN ACTION."

Under the laws of South Carolina, a bond for title is not a mere "chose in action," but conveys a substantial interest in the land, and Civ. Code 1912, § 3542, requiring all conveyances of lands and all mortgages or instruments in the nature of a mortgage of any property to be recorded, in order to be valid against subsequent creditors, requires an assignment of a bond for title, given by one who subsequently became a bankrupt to secure a debt, to be recorded.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 276; Dec. Dig. ⟸184(2).

For other definitions, see Words and Phrases, First and Second Series, Chose in Action.]

3. BANKRUPTCY ⟸184(1)—PROPERTY ACQUIRED BY TRUSTEE—TRANSFERS—SUFFICIENCY OF RECORD.

Under Civ. Code S. C. 1912, § 1352, providing that, before any instrument can be recorded, the execution shall be proved by the affidavit of the subscribing witness, the recording of such assignment for title, without it having been proved in the manner required, is a nullity.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 275; Dec. Dig. ⟸184(1).]

4. BANKRUPTCY ⟸353—DISTRIBUTION OF ASSETS—PROPERTY AFFECTED BY VOID LIEN.

Under Civ. Code S. C. 1912, § 2535, providing that instruments required thereby to be recorded shall be valid, so as to affect the rights of subsequent creditors or purchasers, only when recorded within 10 days from the time of such delivery or execution, and Bankr. Act July 1, 1898, c. 541, § 47, 30 Stat. 557, as amended by Act June 25, 1910, c. 412, § 8, 36 Stat. 840 (Comp. St. 1913, § 9631), vesting the trustee with the rights of lien creditors, the proceeds of property affected by a lien, which was not recorded so as to give it a preference, must be distributed among the creditors of the bankrupt without distinction.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 541–544; Dec. Dig. ⟸353.]

In Bankruptcy. In the matter of A. Rosenthal, bankrupt. On petition to review an order of the referee allowing the claim of the Georgia Railroad Bank as a secured claim. Order reversed and set aside.

Cumming & Hull and C. H. & R. S. Cohen, all of Augusta, Ga., for Georgia Railroad Bank.

P. C. O'Gorman and Abram Levy, both of Augusta, Ga., for L. Koppel.

S. H. Myers, of Augusta, Ga., for bankrupt.

LAMBDIN, District Judge. The matter before me is a petition to review an order of the referee allowing the claim of the Georgia Railroad Bank as a secured claim and holding that the lien claimed by it on certain real estate in the state of South Carolina is valid. A. Rosenthal, the bankrupt, who lived in Augusta, Ga., but who owned an abattoir plant located across the Savannah river in South Carolina, filed his petition in bankruptcy on the 30th day of July, 1913. In schedule A (2), he listed the Georgia Railroad Bank as a secured creditor, describing the securities, as follows:

"Mortgage on real estate and plant in North Augusta, S. C. [being the property involved in this matter], and equity in real estate and plant, Thirteenth and Market streets, Augusta, Ga.; value of securities $20,000, and amount of debts $14,950."

In schedule B (1), he listed the property in Augusta, Ga., and also "North Augusta, abattoir plant" (being the property involved in this matter), naming as incumbrances thereon "Mortgage to Georgia Railroad Bank and Jacob Phinizy," referring to schedule A (2), "estimated value, $10,000."

The evidence shows that on the 3d day of July, 1911, Mrs. Mattie B. Mealing executed to said Rosenthal a bond for title in which she obligated herself in the penal sum of $4,000 to convey to A. Rosenthal a tract of three acres of land in Schultz township, Aiken county, S. C. (describing same), on condition that Rosenthal should pay her the sum of $2,000 on certain dates specified in the bond for title. This bond for title was properly witnessed and duly probated, and was recorded in the proper registry office in South Carolina, as required by the laws of that state. On the 10th day of May, 1912, Rosenthal transferred and assigned to the National Bank of Augusta "all his right, title, and interest in, to, and under" said bond for title; said transfer being made, as stated therein, for the purpose of securing the repayment to said bank of a then existing indebtedness, as well as for the purpose of securing any future indebtedness due by him to said bank. Said transfer was not probated as required by the laws of South Carolina. Subsequently, on the 25th day of July, 1912, the National Bank of Augusta, in consideration of the payment by the Georgia Railroad Bank of the indebtedness due to the National Bank by said Rosenthal (the said Rosenthal joining therein in consideration of the payment of said indebtedness), and to better secure the Georgia Railroad Bank in the repayment of the sum so advanced for his benefit, and also for the purpose of securing any and all other indebtedness he might at any time owe the said Georgia Railroad Bank, transferred and assigned to said Georgia Railroad Bank "all the right, title, and interest of said the National Bank of Augusta and of said A. Rosenthal in and to" said bond for title. Both of said transfers were attached to the original bond, and the first transfer, although not probated, was recorded in the proper registry office in South Carolina along with the bond for title; but the last transfer was not recorded. Rosenthal went into possession of the three acres of land in question located in South Carolina, and made extensive improvements thereon, and erected an abattoir on same, such improvements costing about $15,000, and the ma-

chinery about $5,000 in addition. On July 30, 1913, he went into bankruptcy, and in due course his trustee applied for leave to sell the above-named real estate, and the same was sold and purchased by one Lesser at the price of $6,000. The bank at the proper time filed its proof of indebtedness against the bankrupt, claiming that on account of the above-mentioned transfers it held said real estate as security for its indebtedness against Rosenthal. L. Koppel, a creditor, objected to the claim upon various grounds, and after a hearing the referee overruled the objections, and filed an opinion and an order, in which he held that the bank's lien on said real estate was good. The petition for review challenges the correctness of this order.

It appears from the evidence that, when the last note which Rosenthal owed Mrs. Mealing for the property fell due, the bankrupt applied to Dr. Mealing, the husband of the obligor in the bond, asking for the renewal of this note, which was refused. Subsequently Rosenthal paid this last note, and Dr. Mealing testified that at the time he called up Mr. Phinizy, the president of the Georgia Railroad Bank, by telephone, and asked him if he should make the deed to Rosenthal, and that Mr. Phinizy's reply was that he might do as Rosenthal wished; that he (Phinizy) had nothing to do with it. Mrs. Mealing then received the balance of the purchase money, and made the deed to the property to Rosenthal, and delivered same to him on March 4, 1913, and he in turn on the same day delivered the deed to one Martin, assistant cashier of the bank. This deed was never recorded, but remained in the custody of the bank. Mr. Phinizy testified that he had no recollection of any telephone conversation with Dr. Mealing, and that he had not knowingly waived any of the rights of the bank in the bond for title, and that he had not consented to the making of the deed from Mrs. Mealing to Rosenthal, and did not know that such a deed had been made until some months later, when Rosenthal went into bankruptcy. The referee in his opinion concludes that both Mr. Phinizy and Dr. Mealing were honest in their testimony, and that it was quite possible that Dr. Mealing had his telephone conversation with some other person, as there are several Messrs. Phinizy in Augusta. The referee found, therefore, that the deed from Mrs. Mealing to Rosenthal was made without the consent of the bank, and that the execution of the deed did not deprive the bank of the security which it already held in the transfers of the bond for title. I am inclined to think that the referee was correct in holding that the rights of the bank growing out of the transfers which it held to the bond for title in question were not waived by the execution of this deed. In other words, the bank still held to its former security. However, the knowledge of the assistant cashier of the execution and delivery of the deed to Rosenthal should be imputed to the bank. The court will discuss the question growing out of the delivery of the deed further on in this opinion.

The referee in his opinion correctly stated as follows:

"The transfer of the bond for title operated to vest in the bank all the equity that Rosenthal had in the land. It was always in contemplation that the equity should be enlarged from time to time by the successive payments of the purchase money. Whatever additional interest Rosenthal acquired

with these payments became automatically subject to the rights of the bank, and, when he got from Mrs. Mealing full title, that also was subject to the bank's claim."

[1] 1. There is only one question in this case, as the court sees it, and that is whether, under the laws of South Carolina, the transfer of the bond for title in question, made originally by the bankrupt to the National Bank of Augusta, and the subsequent transfer to the Georgia Railroad Bank, were required to be recorded or not. As the land involved in this case is located in South Carolina, the transaction is, of course, governed by the laws of that state. It is contended by the Georgia Railroad Bank that the bond for title in question from Mrs. Mealing to Rosenthal was a mere chose in action, and that neither this bond, nor the transfer of same, was required to be recorded by the laws of South Carolina. The Supreme Court of South Carolina, in the case of Bank v. Greenville, 97 S. C. 291, 81 S. E. 634, holds that a chose in action in South Carolina is not required to be recorded, and therefore an assignment thereof would not have to be recorded. Judge Smith, of the Eastern District of South Carolina in Re Floyd & Hayes (D. C.) 225 Fed. 262, followed this decision, and the Circuit Court of Appeals of the Fourth Circuit, in 232 Fed. 119, 146 C. C. A. 311, affirmed the opinion of Judge Smith; the case appearing in the Circuit Court of Appeals under the style of Ward v. American Agricultural Chemical Company.

[2] If, therefore, the bond for title from Mrs. Mealing to the bankrupt was a mere chose in action, neither this bond, nor the transfer of same as security for debt, would, under the decisions cited, which are controlling, be required to be recorded under the laws of South Carolina.

A bond for title is a somewhat anomalous instrument. In one sense of the word, it is a mere chose in action, as it is an obligation to make title, and if the obligor fails to comply with his bond, the obligee may bring suit thereon, as upon any other bond or chose in action. Yet, under the decisions of the courts, the effect of the execution of a bond for title to the purchaser of real estate is really to give to the purchaser an interest in such real estate proportionate to the amount paid, and when the purchaser under such bond pays the entire amount of the purchase money, he then owns the entire interest in the land and has a good equitable title thereto. In this case, as stated above, the bankrupt, after purchasing the land, went into possession of same, and put some $20,000 worth of improvements and machinery upon same before he completed his payments. It is clear, therefore, that he had a very substantial interest in the land. In effect, he was the virtual owner of the property, and the vendor only held his notes as security for the balance of the purchase money. As stated in Tiffany on Real Property, page 264, § 110:

"Such a contract in equity converts the land into money, and the money into land, so that thereafter the vendor's interest is personalty, and the vendee's interest is realty."

And as stated by the Supreme Court of South Carolina in the case of Lipscomb et al. v. Goode, 57 S. C. 182, 35 S. E. 493:

"The vendor, under a bond for title to convey land upon the payment of the purchase price, becomes the mortgagee, and the vendee becomes the mortgagor."

The effect, therefore, of the execution of this bond for title upon the payment of part of the purchase price thereon, and the possession and improvement of the property by the bankrupt, was to give him a real and substantial interest in the land, and such interest as he could sell or mortgage. The Supreme Court of South Carolina, in the case of Lipscomb et al. v. Goode, supra, held that the obligor in the bond under such circumstances could execute a second mortgage on the land; the claim of the vendor being in the nature of a first mortgage. The rule is also laid down in 27 Cyc. p. 981, as follows:

"Where a contract for the purchase of real estate, or a bond for title, is assigned to a third person as security for a debt, and with an agreement to reassign on payment of the debt, it constitutes in equity a mortgage on the assignor's equitable title to the land in question; but here, as in other cases, the question whether the transaction creates an equitable mortgage depends upon the intention of the parties in that behalf, and this is to be determined by a consideration of the circumstances attending it."

The Supreme Court of South Carolina lays down the same rule in the following language:

"Where one gets possession of land under a contract of purchase with bond for titles, or, perhaps, even under a mere contract of purchase without the bond, in terms, for titles, he may have such an equitable interest therein as would be the subject of mortgage; and if it appeared that such was the intention of the parties here, that is, that Murphy intended to mortgage his equitable interest in the land to the plaintiff, and give him a specific lien thereon, it might possibly be enforced." Gilkerson v. Connor, 24 S. C. 321; Peay v. Seigler, 48 S. C. 496, 26 S. E. 885, 59 Am. St. Rep. 731.

No particular form is necessary in South Carolina for a mortgage as between the parties. It is only necessary to have it recorded so as to affect third persons. Bryce v. Massey, 35 S. C. 127, 14 S. E. 768; Arthur v. Screven, 39 S. C. 77, 17 S. E. 640.

Under these authorities, the bankrupt was the equitable owner of a substantial interest in the real estate and premises, and when he paid up the balance of the purchase money on March 4, 1913, he became the equitable owner of the entire interest in the premises, and when the deed was made to him, his equitable interest was merged into a perfect legal title. His intention was to borrow the money from the bank, and the bank's intention was to lend him the money, on the faith, originally, of his equitable ownership of an interest in the land, which equitable ownership gradually ripened into a complete equitable interest, and then into a complete legal title. The bankrupt testified that he carried the deed to the bank with the intention that the bank should hold it as security for the debt he owed it. "It was my [the bankrupt's] intention and also the bank's. * * * I knew the bank was entitled to the land when I paid the balance of the purchase money. The bank had required me to bring the deed to it."

The statute of South Carolina, omitting the immaterial portions, governing the recording of instruments in that state, as set out in the Civil Code of that state, is in the following language:

"Sec. 3542.—*What Instruments are to be Recorded—When, Where, and Effect.*—All deeds of conveyance of lands, tenements or hereditaments, either in fee simple or for life; all deeds of trust or instruments in writing, conveying either real or personal estate, and creating a trust or trusts in regard to such property, or charging or incumbering the same; all mortgages or instruments in writing in the nature of a mortgage of any property, real or personal; * * * and, generally, all instruments in writing now required by law to be recorded in the office of register of mesne conveyances, or clerk of court in those counties where the office of register of mesne conveyances has been abolished, or in the office of the secretary of state, delivered or executed on and after the first day of May in the year of our Lord, one thousand nine hundred and nine, shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple contract creditors) or purchasers for valuable consideration without notice, only when recorded within ten days from the time of such delivery or execution in the office of the register of mesne conveyance or clerk of court of the county where the property affected thereby is situated, in the case of real estate: * * * Provided, nevertheless, that the recording and record of the above mentioned deeds or instruments of writing subsequent to the expiration of said ten days shall, from the date of such record, operate as notice to all who may subsequently thereto become creditors or purchasers."

We are clear in our mind that this statute required the original bond for title from Mrs. Mealing to the bankrupt to be recorded; but, however this may be, it certainly required the transfer of the bond to the bank as security for Rosenthal's indebtedness to be recorded. Certainly these transfers had the effect of "charging or incumbering" the land or Rosenthal's interest in same, and these transfers were also "mortgages or instruments in writing in the nature of a mortgage," on said property or Rosenthal's interest in same within the meaning of the South Carolina statute; such interest under the circumstances, being real estate.

[3] The first transfer, to the National Bank of Augusta, was actually recorded, but improperly so; the last transfer, to the Georgia Railroad Bank, was not recorded. Section 1352 of the South Carolina Code provides that:

"Before any deed or other instrument in writing can be recorded in this state, the execution thereof shall be first proved by the affidavit of a subscribing witness to said instrument, taken before some officer within this state competent to administer an oath. If the affidavit be taken without the limits of this state, it may be before a commissioner," etc.

The first transfer, which was recorded, was not probated in accordance with the provisions of the South Carolina Code, and therefore its record was a nullity. Watts v. Whetstone, 79 S. C. 357, 60 S. E. 703; Woolfolk v. Graniteville Mills, 22 S. C. 332.

From the foregoing authorities, the court has therefore reached the conclusion that the transfers of the bond for title in question should, under the laws of the state of South Carolina, have been recorded, and that the record of the first transfer was a nullity, and the last transfer was not recorded, and, even if recorded, the record was likewise a nullity, because not properly probated, as required by the statute.

[4] 2. The next question is as to the effect of the transfers not being properly recorded. Section 3542 of the South Carolina Code, quoted above, provides that such instruments—

"shall be valid, so as to affect from the time of such delivery or execution the rights of subsequent creditors (whether lien creditors or simple creditors)

or purchasers for valuable consideration without notice, *only* when recorded within ten days from the time of such delivery or execution," etc.

Before the passage of the amendment of 1910 to the Bankruptcy Act, which vested trustees with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, it was held by the federal courts having jurisdiction in South Carolina that the failure to record such instruments was to render same invalid as against all subsequent creditors, and that the fund arising from the mortgaged property should be distributed among such subsequent creditors, to the exclusion of both antecedent creditors and the mortgagee. In re Cannon (D. C.) 121 Fed. 582; Simmons v. Greer (C. C. A. 4th Cir.) 174 Fed. 654, 98 C. C. A. 408, affirming the same case in the District Court, reported in 164 Fed. 300.

Both of these cases arose, however, before the passage of the abovementioned amendment of 1910, vesting the trustee with the rights of a lien creditor. Since that amendment the Circuit Court of Appeals of the Fourth Circuit, which embraces South Carolina, in passing upon a similar question in the case of Townsend v. Ashepoo Fertilizer Co., 212 Fed. 97, 128 C. C. A. 613, held that a mortgage not recorded in South Carolina was invalid against a trustee in bankruptcy; the concluding sentence in the opinion being as follows:

"It follows that the proceeds of the property herein involved must be distributed among all of the creditors of the bankrupt without distinction."

Judge Johnson, of the Western District of South Carolina, has recently held to the same effect. In re M. L. B. Sturkey Co. (D. C.) 224 Fed. 251.

The question of whether a seal was attached to the transfers, or not, is immaterial under a recent statute of South Carolina embodied in section 2535 of the Civil Code of that state, which provides as follows:

"Sec. 2535.—*What Considered Sealed Instruments.*—Whenever it shall appear from the attestation clause or from the other parts of any instrument in writing that it was the intention of the party or parties thereto that said instrument should be a sealed instrument, then said instrument shall be construed to be, and shall have the effect of, a sealed instrument, although no seal be actually attached."

Giving due effect to the recording statutes of South Carolina and to the purposes of same, the foregoing conclusions are in accordance with the equities of the case. It appears that the bankrupt went into possession of the real estate in question under the bond for title in question, and placed something like $20,000 worth of improvements on it, and operated a business on same, and then in effect mortgaged the property to the bank as security for an indebtedness. This transfer or mortgage, however, was not recorded, so as to place the world upon notice of the incumbrance. Under the universal construction, therefore, of the statutes governing the recording of instruments, both in the United States courts and the federal courts, the failure to record the transfers was fatal to the lien of the bank. The court is of the opinion, as above stated, that even before the bankrupt had paid up all of the purchase money he had a substantial interest in the land,

and that the transfer of this interest at such a time as security for a debt should have been recorded. The case, however, became stronger against the bank when the bankrupt paid up the balance of the purchase money and thus became vested with the complete equitable title to the property, and still more so when he obtained legal title to the property, which was sufficient to vest a full, complete, and perfect title in him. As the matter then stood, he had title to the property, and yet there was an incumbrance on same (which the referee correctly held not to have been waived by the bank), and this incumbrance was not recorded.

The court, therefore, holds that the referee erred in not giving the proper construction to the recording statute of the state of South Carolina, and the order of the referee complained of is reversed and set aside.

RYAN v. CAVANAGH et al.

(District Court, S. D. Iowa, C. D. September 1, 1916.)

1. PARTNERSHIP ⟸183(5)—USE OF FIRM PROPERTY—PAYMENT OF INDIVIDUAL DEBTS.

The rule of administration of the property of a partnership in the courts that partnership creditors have a right to the application of the firm assets first to the payment of the firm debts does not supersede the rule of operation of partnership affairs that the partners can, with the consent of all of them, dispose of the firm property, transfer it into individual property, or apply it to the payment of individual debts, even if the firm is insolvent, until the property is in the custody of the court, so that the use of partnership property with the consent of all the partners to pay individual debts is not a fraud in law, nor can the partnership creditors complain thereof.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 330, 331, 333, 334; Dec. Dig. ⟸183(5).]

2. BANKRUPTCY ⟸149—PARTNERSHIP ⟸179—TRUSTEES—RIGHT ACQUIRED—PARTNERSHIP PROPERTY.

Where one partner uses firm property to pay his individual debts without the consent of his partner, the latter can recover the property and his right to do so is one which passes to the firm's trustee in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. ⟸149; Partnership, Cent. Dig. §§ 310, 314; Dec. Dig. ⟸179.]

3. PARTNERSHIP ⟸54—EVIDENCE—SUFFICIENCY.

In a suit by the trustee of a bankrupt bank to recover assets of the bank applied to the payment of a debt of the cashier, evidence *held* to show that the bank was conducted by a partnership composed of the cashier and his brother.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 77, 79; Dec. Dig. ⟸54.]

4. PARTNERSHIP ⟸27, 52.—CONTRACT—IMPLIED CONTRACT.

Partnership relations are founded in contract, but the contract may be implied as well as express, and may be established by circumstantial evidence as well as by direct evidence.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 29, 75, 77, 79; Dec. Dig. ⟸27, 52.]

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5. BANKRUPTCY ⟸303(1)—ACTIONS BY TRUSTEE—BURDEN OF PROOF.
In an action by a trustee in bankruptcy to recover firm assets applied to the payment of the debt of a partner, the burden is on defendants to prove that the payment was made with the consent of the other partner.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⟸303(1).]

6. PARTNERSHIP ⟸217(3)—FIRM ASSETS—APPLICATION—INDIVIDUAL DEBTS—CONSENT—EVIDENCE.
Proof that one member of a banking partnership had permitted another to manage the bank, to become deeply indebted to it, and to dispose of the bank's assets, without proof that the former knew of any previous sale of the bank's notes for other than bank purposes, or that he had knowledge of the application of the notes in controversy to the payment of an individual debt, does not show consent to such application.

[Ed. Note.—For other cases, see Partnership, Cent. Dig. §§ 323, 330; Dec. Dig. ⟸217(3).]

7. BANKRUPTCY ⟸149—RIGHTS OF TRUSTEE—PARTNERSHIP PROPERTY—APPLICATION TO INDIVIDUAL DEBTS.
A trustee in bankruptcy, suing in the right of one partner to recover firm assets from one to whom they had been transferred in payment of the individual debt of another partner, is not limited to a recovery of the amount received by the partner, though the latter had authority to sell the notes for firm purposes and the transaction was in form a sale, but can recover the notes still uncollected and the amount collected on the others, since equity will not consider the form, but will look to the substance.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 229; Dec. Dig. ⟸149.]

At Law. Action by Charles O. Ryan, as trustee in bankruptcy, against John A. Cavanagh, individually and as trustee, and others. On final hearing. Decree ordered for plaintiff.

Kelleher & Price, of Ft. Dodge, Iowa, for complainant.
E. J. Kelly, of Des Moines, Iowa, for respondents.

WADE, District Judge. This action is brought by the plaintiff, trustee in bankruptcy of the Farmers' Bank of Radcliff, Iowa, and John E. Himmel, and Henry D. Himmel, alleged to be partners conducting said bank, having been adjudged bankrupt, and the plaintiff is the trustee in said bankruptcy proceedings. He brings this action to recover certain promissory notes, or the proceeds thereof, which were the property of the Farmers' Bank of Radcliff, and which were transferred by John E. Himmel to the German Savings Bank of Des Moines, Iowa, some time prior to the bankruptcy.

It is claimed by the plaintiff that said notes were transferred by said John E. Himmel, one of the partners, without authority of the partnership or his copartner, in payment of a private debt of the said John E. Himmel. Insolvency of the partnership and partners is also alleged.

[1] There cannot be much dispute about the law in this case. It is clearly and emphatically expressed by Judge Sanborn in Sargent v.

Blake, 160 Fed. 57, 87 C. C. A. 213, 17 L. R. A. (N. S.) 1040, 15 Ann. Cas. 58, from which I quote:

"There are two rules of law which at different times apply to the management and disposition of the property of a partnership: First, partners own, and, with the consent of each, have the right and power to sell and dispose of the partnership property, to transform it into the individual property of one or more of the partners, to apply it or its proceeds to the payment of their individual debts in preference to those of the partnership, and to make such other honest disposition of it as they deem fit; second, in the administration of the property of a partnership in the courts, the creditors of the partnership have the right to the application of the partnership property to the payment of the partnership debts in preference to the individual debts of the respective partners. The first is a rule of operation, the second a rule of administration. The first governs during the operation of the partnership business and the disposition of the partnership property by the partners, the second operates during the administration of the partnership property after it is brought into the custody of a court. The first rule prevails until by some suit or act the interposition of some court is invoked to administer the partnership property, and until that time the second rule is ineffective. Before the partnership property is placed in custodia legis for administration, it is not held in trust for the payment of the partnership creditors in preference to the creditors of the individual partners. The partnership creditors have no lien upon it, and no independent right to its application to the payment of their claims in preference to the claims of the creditors of the individual partners. Each partner, however, has the right to require the partnership property to be applied to the payment of the partnership debts in preference to the debts of the individual partners, to the end that he may not be required to pay the former out of his individual estate. The right of the creditors of the partnership to payment out of the partnership property in preference to the individual creditors is the mere right by subrogation or derivation to enforce this right of one of the partners after the partnership property has been placed in the custody of the law. Until it has been so placed, each partner has plenary power at any time to release or waive this right, and if each partner has done so and at the time the property comes within the jurisdiction of a court no partner has this right, then no creditor of the partnership has it, for a stream cannot rise higher than its source."

After citing authorities holding that partners may not, even with the consent of all the partners, lawfully appropriate partnership property to their individual debts, when they and their partnership are insolvent, Judge Sanborn says:

"The decisions in these and many other cases have been carefully considered, but because insolvency does not deprive persons of their right to dispose of their property for lawful purposes, because the application of partnership property with the consent of all the partners to the payment of the individual debts of the partners in preference to those of the partnership is a lawful purpose so long as no application for the interposition of a court to administer the property is made, and the creditors paid have no reasonable cause to believe that a preference is intended, because until the partnership property is placed in custodia legis the rule of administration does not take effect and the preferential equities of the partnership creditors do not attach to it either by way of trust or lien, and because the Supreme Court, by whose determination this court must be guided, and the weight of modern authority have so determined, we are constrained to hold, and do decide that, when all the partners consent, their application of the partnership property to the payment of an individual debt of a partner within four months of the filing of a petition in bankruptcy, while the partners and the partnership are insolvent, does not evidence any intent on the part of the debtors to hinder, delay, or defraud the creditors of the partnership within the meaning of section 67e of

the bankruptcy law, and it is not void or voidable where the creditor paid has no reasonable cause to believe that a preference was intended by the payment."

Supporting these statements numerous authorities are presented. These principles were reaffirmed by the same court in Crawford v. Sternberg, 220 Fed. 73, 135 C. C. A. 641, and cited with approval in Re Baker & Edwards (D. C.) 224 Fed. 611. It is approved and distinguished in Amundson v. Folsom, 219 Fed. 122, 135 C. C. A. 24.

So we must proceed upon the settled doctrine that the use of partnership property to pay individual debts when the partnership consents does not in law constitute fraud; nor can partnership creditors complain thereof.

[2] We must also proceed upon the settled doctrine that, where partnership assets are used by one partner to pay his individual debt without the consent of his copartners, the nonconsenting partner has the right to recover the property, and in case of bankruptcy, the trustee has the same right. A trustee in bankruptcy becomes vested with all the property rights of the bankrupt, and he is empowered to recover any property which the bankrupt could recover in order that it may be applied to the payment of his debts.

Under the evidence in this case, there is no proof that the transaction between John E. Himmel and John A. Cavanagh was with actual intent to defraud creditors; the intent of John E. Himmel was to meet the embarrassing position in which he was placed by having transferred to the German Savings Bank certain forged paper. The intent and purpose of John A. Cavanagh was to secure payment of the debt or collateral in place of the forged paper, and while the evidence shows that his efforts were vigorous and positive, they must be considered in connection with the provocation which he had.

There is no question but that the notes transferred by John E. Himmel were partnership property if a partnership existed; they were payable to John E. Himmel as cashier, so that Cavanagh and the German Savings Bank had full knowledge of their ownership by the bank. But I must assume that Cavanagh believed that a transfer of the notes under the circumstances would be valid in law; otherwise he would not have accepted them.

In view of the foregoing, this case must turn upon the determination of two questions of fact: First, was the bank conducted by a partnership; and, second, if so, did Henry D. Himmel consent to the transfer of these notes, which belonged to the bank, to pay or settle the private debt of John E. Himmel?

[3, 4] As to the first, there is no question in my mind but that a partnership existed. Partnership relations are founded in contract, but contracts may be implied as well as expressed, and may be established by circumstantial evidence as well as by direct evidence. No one can follow the history of this bank and not be convinced that as between the brothers, Henry and John, there was a recognition of the fact that they were both interested in the bank, and in its profits, and in its losses. There is not a word of evidence which indicates that the bank was an individual affair. John and Henry had represented

themselves for years as officials of the bank, John as cashier, Henry as vice president, and later, president. By their letter heads upon which these titles were carried, there was a declaration to the world by both parties; that they were officers of a joint enterprise. The use of these letter heads so inscribed constituted a solemn declaration by both parties that it was a joint enterprise. Placing upon their acts and conduct the construction which would occur to the ordinary mind, the bank was represented to be either a corporation or a partnership, and it was not a corporation. The specific relations of this joint enterprise may not have been determined, but if the bank had succeeded and made large profits, would any one contend that John E. Himmel could appropriate all these profits, and that any court would sustain the transaction? And in the hour of failure, is there any one that would contend that Henry D. Himmel could avoid liability under all the facts, for the debts of the bank? There are cases in which individuals are held to be partners so far as creditors are concerned, but not partners inter se; but this is not such a case. It must, of course, be conceded that Henry D. Himmel was either a partner or an employé. He had devoted much time to the business of the bank; had transacted some of its important business; had kept some of its important records; but there is not a word of evidence to indicate that he was a mere employé. These facts, together with the sworn testimony of both parties, leave no doubt as to the fact that a partnership existed.

[5] It is earnestly contended that, even if a partnership existed, the evidence established the fact that Henry D. Himmel consented to the transfer of the notes in controversy to settle the private debt of John E. Himmel. I cannot agree that there is proof of his consent. The burden of proof is upon the defendants, and the fact of consent must be established by a preponderance of the evidence; but there is practically no evidence. There is evidence, of course, that Henry had permitted John E. Himmel to manage the bank in his own way, and that he had knowledge of the sale of notes by John; but there is no evidence that I recall showing that, at any previous time, notes belonging to the bank had ever been transferred for any except bank uses; nor is there evidence which establishes that at any time John E. Himmel used the assets of the bank directly to pay his debts. It is true that he used the money of the bank, but it was charged up upon the books as an overdraft.

[6] It is true that Henry permitted the business of the bank to be run in a most reckless way, and permitted John E. Himmel to become deeply involved in debt to the bank, but consent to a transaction of the kind in suit cannot be established by such evidence. There is no element of estoppel based upon a long course of conduct between the parties, nor is it claimed that Cavanagh, or the German Savings Bank, proceeded upon the assumption that John had power to use the notes of the bank for his own individual purposes, based upon any previous transactions, of which Cavanagh or the bank had knowledge.

To establish the consent of a copartner to the use of firm property for individual purposes, it should appear that the copartner had

knowledge of the specific transaction. He may have consented to previous use of bank assets for individual purposes, but except as in certain cases estoppel might arise, which is not present in this case, there should be actual consent to the particular transaction. A partner might consent to the use of a certain amount by his copartner for a specific private purpose. This consent might depend, to a considerable extent, upon the condition of the affairs of the partnership and its ability to take care of its customers and its creditors, and the partner certainly should have the opportunity of considering the amount of the assets to be taken—the purpose to which they were to be applied, and the condition of the partnership business at the time with reference to the payment of partnership liabilities.

This question is not only important in this case, but it is important in all partnership transactions. Opinions of courts are not only for the benefit of counsel, but are intended as a guide to business men in the transaction of their business affairs, and it would be a dangerous doctrine to hold that one partner, without the consent of his copartner, could divert the assets of the firm to the payment of his individual creditors, without at least conferring with his copartners upon the subject; and it would be a dangerous doctrine to permit the transaction to be sustained, simply because, during a long course of dealings, the nonconsenting partner had shown his confidence in his copartner by permitting him to have full charge of the business.

A large part of the business of the world is transacted by partnerships, and men would hesitate to enter a partnership if a copartner could legally deprive the partnership of its assets for private use, without consulting those jointly interested with him in the ownership of the property.

It follows from the foregoing, that the plaintiff is entitled to follow and recover the partnership property, wrongfully diverted.

[7] Counsel contend that there was in fact a sale of these notes, and that John E. Himmel had power to sell the notes, and that the defendants cannot be held liable beyond the amount for which he agreed to sell them. It is true that there was a sale in form, but courts of equity do not consider forms; they consider substance. They do not consider the question as to how the thing was done, but they consider what was done, and the motive and the intent of the parties in doing it. As Judge Hook said in Amundson v. Folsom, supra: "It is too narrow a view to regard each step in the transaction separately and independently." He further says: "It is not always safe to venture a prohibited course on a mosaic of sound, but unrelated, rules of law." What was actually done by John E. Himmel, was to take these notes, and through the transaction with the German Savings Bank, pay his personal debt. Counsel say he had authority to sell the notes of the bank. This is too broad a statement. He had only authority to sell the notes of the bank, for the bank, and in the transaction of the business of the bank.

I cannot concede that, if John E. Himmel took $10,000 worth of notes out of the bank, and sold them to a party who knew that the

sale was for private purposes for $5,000, and retained the money, the other partner would be compelled to resort to an action against him to recover the $5,000. He would have a right to recover the notes, because the whole transaction was without authority. An employé of a bank may have power to sell the notes of the bank, but it would not be contended that if he sold them for his own private use, and the purchaser knew that he was selling them for his own private use, that the bank would be limited to an action against him to recover the money.

"It is too narrow a view to regard each step in the transaction" with the German Savings Bank. The bank by these different steps acquired the notes which were the assets of the bank, which John E. Himmel had no power to deliver to them under the circumstances. These assets in equity still belong to the partnership and to the trustee in bankruptcy now representing the partnership. In so far as they have been collected, the proceeds thereof belong to the trustee.

Now, I am not sure that I have a clear idea of the exact amount which the plaintiff is still entitled to recover. He is entitled to receive the notes still uncollected, and the proceeds of those collected, and I have no doubt that counsel can agree in preparing the decree, upon this amount.

Now, as to the parties liable, under my view of this case, John A. Cavanagh is not personally liable, but he is liable as trustee of the German Savings Bank, to a decree directing him, as such trustee, to turn over any part of the assets that may be in his hands.

I do not remember whether the German Savings Bank has been fully dissolved and out of business; if not, it is liable to the extent of any assets held by it, though, as I understand the record, it has no assets—all its assets having passed either to the Des Moines National Bank, or to John A. Cavanagh, trustee. If any of these assets passed to the Des Moines National Bank, it is liable to the extent of the assets so received, and in this connection it cannot make any difference that the money was applied upon the indebtedness of the Enamel Company; nor do I consider the Enamel Company directly liable to the plaintiff herein. It is a proper party in order that it may be bound by this adjudication, and in order that the debts which they owed to the bank, which were canceled by the application of the proceeds of the notes, may be reinstated, and the court will hold jurisdiction in order to complete all the equities of all the parties herein.

I apprehend there will be no difficulty in the preparation of a decree which will insure a return of these assets, if the conclusions of the court are correct, and to this end the matter of preparation of the decree is submitted to counsel, in the hope that a form may be agreed upon which will protect the rights of all parties. If not, I will hear the parties further upon the terms of the decree.

Any decree entered will reserve proper exceptions.

SABINE HARDWOOD CO. v. WEST LUMBER CO. et al.

(District Court, E. D. Texas. December 11, 1916.)

1. COURTS ⇐509—JURISDICTION—FEDERAL AND STATE COURTS.
   The federal District Court has no appellate jurisdiction over a state District Court, and must respect a decree entered by the latter court within its jurisdiction.
   [Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1364–1371; Dec. Dig. ⇐509.]

2. VENDOR AND PURCHASER ⇐227, 229(6, 7)—ENTRY OF JUDGMENT—MISTAKE—NOTICE.
   The attorney for a party in a suit to determine the title to land, in which a judgment by agreement was rendered, but the entry thereof by mistake misstated the length of one of the boundaries, as a matter of fact as well as by legal presumption, had notice of the mistake, and purchased the land from his client subject to the right of the other party to have a judgment entry corrected.
   [Ed. Note.—For other cases, see Vendor and Purchaser, Cent. Dig. §§ 474, 487; Dec. Dig. ⇐227, 229(6, 7).]

3. JUDGMENT ⇐306—ENTRY—CORRECTION—MISTAKE.
   The entry of a judgment is a ministerial act of the clerk, and cannot affect the judgment as rendered by the court, which is a judicial act, and therefore Rev. St. Tex. 1911, art. 7758, providing that any final judgment rendered in any action for the recovery of real estate should be conclusive as to title or right of possession, and does not prevent the correction of a mutual mistake in the entry of the judgment, whereby the land was described differently than in the judgment as rendered.
   [Ed. Note.—For other cases, see Judgment, Cent. Dig. § 598; Dec. Dig. ⇐306.]

In Equity. Suit for partition by the Sabine Hardwood Company against the West Lumber Company and others. Decree entered, determining a disputed boundary adversely to plaintiff's claim.

W. D. Gordon and Thos. J. Baten, both of Beaumont, Tex., for complainant.

Orgain, Butler & Bolinger, of Beaumont, Tex., and Baker, Botts, Parker & Garwood, of Houston, Tex., for defendants.

RUSSELL, District Judge. This controversy originally arose in the state court, and involved the title to the J. D. Nash survey of land. The plaintiff in that suit was Annie T. Lomax, and one of the defendants was H. P. Weir, through whom the plaintiff in this suit, Sabine Hardwood Company, claims. One of the controversies between the parties to the suit in the state court was the length of the lines of the Nash league, one of the parties contending that the south lines should be 5,000 varas in length, and the other party contending that those lines should be only 4,480 varas in length. To state this matter differently, one of those parties contended that the southwest corner of the Nash was on the east bank of Menard creek, and the defendant H. P. Weir contended that that corner should be 520 varas west of Menard creek. The parties to the state court suit finally agreed upon a judgment by which what was known as the Garvey survey of the Nash

was adopted, and was agreed to be made the judgment of the court. The Garvey survey fixed the southwest corner of the Nash on the east bank of Menard creek, and fixed the length of the south lines at 4,480 varas. H. P. Weir was a party to that suit, and W. D. Gordon was his attorney at the trial, and the agreement I have mentioned was executed by W. D. Gordon, as the attorney for H. P. Weir. The state district court of Polk county adopted the agreement of the parties, and thereupon, on December 4, 1911, rendered a judgment, which, among other things, fixed the southwest corner of the Nash on the east bank of Menard creek and established the length of the south lines at 4,480 varas. W. D. Gordon not only executed the agreement above referred to as the attorney for his client, H. P. Weir, but Mr. Gordon was present at the rendition of the judgment and had knowledge of its terms.

In the entry of the judgment the south lines of the Nash were, by mistake, stated to be 5,000 varas instead of 4,480 varas, as agreed upon and as actually established by the court in the judgment of December 4, 1911. In May, 1912, the defendants affected by the judgment of December 4, 1911, discovered the mistake in the judgment entry, and at once brought a proceeding to correct it. At the time this proceeding to correct the judgment entry was brought the plaintiff here, Sabine Hardwood Company, had not acquired title to the land, and when the defendants brought that suit to correct the judgment entry, they filed a lis pendens, under the Texas statute, and the Sabine Hardwood Company acquired the land with such notice as the lis pendens statute visited upon it.

In the trial of this proceeding to correct the judgment entry the state court rendered a judgment, finding that the judgment rendered by the court, on December 4, 1911, fixed the southwest corner of the Nash on the east bank of Menard creek, and established the length of the south lines at 4,480 varas. The court further found that by a mutual mistake of the parties the length of those lines was misstated to be 5,000 varas, and the court thereupon ordered the judgment entry to be corrected so as to conform to the judgment actually rendered as above stated. H. P. Weir, through whom the Sabine Hardwood Company claims, was a party to that proceeding, and appealed from this last described decree of the state court, and the said decree was affirmed by the Texas court of Civil Appeals. See Weir v. W. T. Carter & Bro., 169 S. W. 1113.

[1] Now, this court is not vested with appellate jurisdiction over the state district court of Polk county. That tribunal was a court of competent jurisdiction to render the decree referred to, and that decree must be respected here. The judgment of the state court established the facts as above set out.

The day after the rendition of the judgment of December 4, 1911, in the state court, W. D. Gordon purchased the interest of his client, H. P. Weir, in the land in controversy, and received from him a conveyance in writing. That instrument, according to its terms, assigned and transferred to W. D. Gordon all the estate and interest which H. P. Weir had in the Nash survey, and then proceeded to recite that,

at some future day, Weir would make such further conveyance as might be necessary. The conveyance to Gordon from Weir makes no attempt to describe the land. I call attention to the fact that this instrument only conveys the interest and estate which Weir had in the land, and that that interest, as fixed by the judgment rendered in the state court, was the interest which Weir had in the land with the south lines of the Nash established as being 4,480 varas long. The conveyance from Weir to Gordon was executed on December 5, 1911, more than five months before the proceeding to correct the judgment entry was filed.

H. P. Weir was made a party to the proceeding to correct the judgment entry, but W. D. Gordon was not made a party. However, he was present at the trial of that proceeding, and conducted the examination of the witnesses and participated in the argument of the case. There is a sharp controversy here as to whether Gordon appeared at that trial as amicus curiæ, or as one of the defendants, and much evidence has been submitted on this issue. I find it unnecessary to decide the question of the capacity in which he appeared, because I am of opinion that another legal principle, which is not at all in dispute, is determinative of his rights.

[2] Gordon was the attorney for Weir in the original suit in the state court, in which the judgment was rendered on December 4, 1911. Gordon, on behalf of Weir and as his attorney, executed the agreement on which that judgment was based. He, both as a matter of fact as well as by legal presumption, had full knowledge that in the judgment entry there was a mistake, in stating the south lines of the Nash at 5,000 varas, and that the judgment actually rendered fixed the length of those lines at 4,480 varas. Therefore, when he took the conveyance of the interest and estate which Weir had in the land, he took it subject to the right of the parties at interest to have that judgment entry corrected so as to conform to the judgment actually rendered. Of course, the Sabine Hardwood Company, bought with notice, because it purchased after the lis pendens notice had been properly filed.

[3] The second proceeding in the state court was not a proceeding to reform a judgment, but to correct a judgment entry. An inspection of the pleadings in that case shows this to be the fact, and the Texas court of Civil Appeals took this view of the case. In the opening statement of the case by Judge Pleasants he says:

"This suit was brought by the appellees against appellants to correct the entry of a judgment by agreement rendered by the district court of Polk county on December 4, 1911, in cause No. 4055 on the docket of said court, styled Annie T. Lomax v. William Carlisle & Co. et al."

The decision which I will make in this case is based upon the distinction which must be drawn between a judgment entry and the judgment rendered. Ordinarily the judgment rendered and the judgment entry correspond, but they do not necessarily correspond, and they may widely differ. Where such differences do exist the judgment actually rendered must prevail over the judgment entry, because the former

is the judicial finding of the court, while the latter is but the ministerial act of the clerk.

Mr. Gordon has called my attention to article 7758 of the Revised Statutes of Texas, having reference to the conclusive effect of judgments in cases of trespass to try title. The language is:

"Any final judgment rendered in any action for the recovery of real estate hereafter commenced shall be conclusive as to the title or right of possession established in such action upon the party against whom it is recovered," etc.

This statute, by its terms, relates to judgments rendered, and certainly cannot be invoked in favor of one who is claiming under a judgment entry made by mutual mistake and incorrect, and who took his title with knowledge that the judgment entry did not express the judgment actually rendered by the court.

I have made a hasty examination of some of the authorities to show that there is a distinction to be observed by the courts between the entry of a judgment and the judgment rendered. I have had occasion to consult "Black on Judgments," and I find the same question discussed in Cyc., and therefore I read one or two excerpts from the 23d Vol. of Cyc. because the same propositions are stated with more terseness and with equal clearness. At page 835, this language is used:

"The rendition of a judgment is the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy as ascertained by the pleadings and verdict. The entry of a judgment is a ministerial act, which consists in spreading it upon the record or writing it at large in a docket or other official book. As between the parties a judgment duly rendered is valid and effective, although not entered; that is, the neglect or failure of the clerk to make a proper entry of the judgment, or his defective or inaccurate entry of it, will not deprive it of the force of a judicial decision. Still a judgment is not complete and perfect for all purposes until it has been duly entered. Thus, until entered, it cannot create a lien upon the land of the debtor such as to affect third parties or support a claim of res judicata or former adjudication. As it is the duty of clerks of courts to enter the judgments of the courts, it will be presumed, in aid of a judgment, that this duty was performed, when the dockets or records have been lost or destroyed, especially after the lapse of a considerable period of time."

Now, on page 866 I find this language:

"An amendment or correction may be allowed at any time, where the judgment as entered does not correspond with the judgment as actually rendered, or with the intention and understanding of the court in regard to its form or terms. The power of amendment may be employed to strike out surplusage or matter improperly included in the judgment, to correct wrong recitals, to change the form of the judgment to make it correspond with the facts of its rendition; and it may be employed to relieve the judgment of ambiguity, or to make it conform to the verdict, where by mistake it has been entered in terms different therefrom. And so the court may amend its record by transferring the proceedings to the proper suit when by mistake they have been filed in a suit to which they do not belong."

I read again from page 874:

"If, in consequence of a clerical error or miscalculation on the part of the clerk of the court, the amount of the recovery in a judgment is stated at a wrong sum, the entry may be amended to conform to the truth. So an amendment may be made where the amount of the judgment is in excess of that claimed by the plaintiff in his pleadings, or greater than the sum found by

the verdict or ordered by the court, or larger than the amount which limits the jurisdiction of the court, or excessive in consequence of the failure to allow proper credits, although not where the excess of the judgment is due to an error of law, as where it is greater than the evidence will support, unless in that case plaintiff remits the excess."

On page 883 I find this language:

"The amendment or correction of a judgment relates back to the original judgment and becomes a part of it and makes the judgment of the same effect as if the defects or mistakes on account of which it was amended had never existed. But it does not make a new judgment or confer any new or additional rights. Where a party applies for and obtains an amendment of the judgment, he thereby waives all erroneous rulings of the court preceding the judgment. An amendment of the judgment will not be allowed to prejudice the rights of third persons, such as subsequent judgment creditors, purchasers, or mortgagees, who have acquired interests of value, unless they have taken with notice, or where the amendment is made at the same term at which the judgment was rendered. The order allowing an amendment should contain a saving of the intervening rights of third persons, but the law will make this reservation whether it is expressed or not."

The question for me to consider is, Was this proceeding an effort to correct an error of law in the original judgment, or was it an effort to correct the judgment entry. The parties in the whole of this litigation have viewed it, and considered it, and acted upon it, as a matter in which it was attempted to correct the judgment entry; and the Court of Civil Appeals, in passing upon the question in the first paragraph of the opinion, declared that the purpose of the suit was not to correct the judgment, but to correct the judgment entry. It is true as a matter of fact that in 95 per cent. of the cases brought in courts of record that the clerk is the man who enters the judgments and is responsible for their entry. But if he makes a mistake in the entry, can it be said that the judicial act of the court can be controlled by the ministerial act and mistake of the clerk? Certainly not! Take the judgment entered in the state court on the 8th day of July, 1913. The charge of the court submitted this case upon special issues, and the jury, after hearing the argument of counsel thereon, retired in charge of the proper officer and thereafter on, to wit, the 8th day of July, 1913, returned into court a verdict upon the special issues as follows:

"Question No. 1. Did or did not the parties in that conference preceding the writing of the decree in the case of Annie T. Lomax v. William Carlisle & Co. et al. verbally agree to adopt the Garvey line as the boundary in the settlement of that suit? Let your answer to this question be that they did or did not."

The jury answered that question by writing their answer at the bottom of the question saying, "They did." There is no pretense but that it was a judgment by agreement. There is not a scintilla of controversy in the testimony but that it was a judgment by agreement. In my view of the law I am bound by that judgment. The jury found that the parties agreed verbally to adopt the Garvey lines as the boundary lines of the Nash league. I say I am bound by it because the jury found it and the court entered a judgment on it which was appealed and affirmed and a writ of error refused. The next issue submitted

to the jury was whether or not the failure of the parties in the preparation of the decree in the case of Annie T. Lomax v. William Carlisle et al. to insert the description of the Nash survey as surveyed by A. B. Garvey was the result of a mutual mistake, and the jury answered that it was a mutual mistake.

The situation was that on December 4, 1911, these parties agreed that the Garvey lines should be descriptive of the Nash league, and upon that the court rendered a judgment that the Garvey lines should be the description of the Nash league, and in the entry of that judgment which the court rendered the parties made a mutual mistake by which the line in question was stated to be 5,000 varas when it should have been 4,480 varas. The court, having held that to be the agreement, proceeded to correct the entry of the judgment. At the time the original decree was rendered on December 4, 1911, Mr. Gordon did not own any of the Nash league, but the proof shows beyond controversy that he was present when the judgment was rendered, participated as the attorney for Weir at that trial, and under every presumption of law and fact must be held to have known that it was rendered for the proper figure, though entered for one different in amount by mutual mistake. Therefore when he took as purchaser he took with notice, and was bound by the judgment as rendered, and must stand by the entry as corrected. There is no question but that plaintiff had notice because it bought from Mr. Gordon after the proceeding was filed. I, therefore, find that I am bound by the judgment as rendered on December 4, 1911, and incorrectly entered on that date and afterwards perfected by a correct entry on July 8, 1913. I direct the entry of the decree in this case according to these views.

CENTRAL CONSUMERS' CO. OF NEW JERSEY v. AUSTIN et al.

(District Court, N. D. Alabama, S. D. December 19, 1916.)

No. 296.

1. INJUNCTION ⟸105(1)—SUBJECTS OF RELIEF—CRIMINAL PROCEEDING.
The general rule that equity cannot enjoin criminal proceedings is subject to exceptions, where a party to a pending suit in equity institutes criminal proceedings to try the right in issue there, or where property rights are involved and equity interferes to protect them and prevent a multiplicity of suits.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 178; Dec. Dig. ⟸105(1).]

2. COURTS ⟸508(7)—ENJOINING CRIMINAL PROCEEDINGS.
Under Rev. St. § 720, prohibiting federal courts from enjoining proceedings in the state court, except in aid of bankruptcy proceedings, and Const. Amend. 11, depriving the federal courts of jurisdiction in cases where a state is a defendant, a federal court of equity cannot enjoin criminal proceedings instituted by officers of the state, unless the officers are acting under a state statute which is invalid because in conflict with the federal Constitution, since, if the statute is valid, it is the state which is acting through its officer, and therefore an injunction will not issue to restrain a prosecution under a valid statute prohibiting the sale of intoxicating liquor for the sale of liquor claimed to be nonintoxicating,

though there may be a multiplicity of such proceedings and they indirectly affect property rights.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 1429; Dec. Dig. ⊂⇒508(7).]

3. COURTS ⊂⇒366(27)—RULES OF DECISION—STATE DECISION—CRIMINAL STATUTES.

The interpretation of the criminal statutes of the state is a matter within the exclusive jurisdiction of the state courts, and the federal courts follow the interpretation of the state court of last resort in such matters.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 957; Dec. Dig. ⊂⇒366(27).]

In Equity. Suit by the Central Consumers' Company of New Jersey against Conrad W. Austin and others. On motion for temporary injunction. Motion denied.

Emmet O'Neal and Forney Johnston, both of Birmingham, Ala., and R. B. Evins, of Greensboro, Ala., for plaintiff.

Hugo L. Black and S. D. Weakley, both of Birmingham, Ala., for defendants.

GRUBB, District Judge. The motion for a temporary injunction presents this question upon the threshold: Will a federal court enjoin criminal proceedings in a state court, instituted to enforce a valid state law, or a state officer from instituting such proceeding in a state court, even where the enforcement of the state law will indirectly affect property rights and in order to prevent a multiplicity of suits?

[1, 2] The general rule is that equity has no jurisdiction to enjoin criminal proceedings. It is concedly subject to exceptions. One is where a party to a suit already pending in equity institutes criminal proceedings to try the right in issue there. Another is where property rights are involved in the criminal proceedings, and a court of equity interferes to protect them and to prevent multiplicity of suits and penalties. These limitations apply to the jurisdiction of courts of equity generally. To the jurisdiction of federal courts of equity to restrain criminal proceedings in a state court of competent jurisdiction another limitation applies. Section 720, Revised Statutes, prohibits federal courts from enjoining proceedings in a state court, except in aid of bankruptcy proceedings, and the eleventh article of amendment to the federal Constitution deprives the federal courts of jurisdiction in cases where a state is a defendant.

As applied to federal courts of equity, the exception to the general rule that equity cannot enjoin criminal proceeding brought or to be brought in state courts is as follows: That where the proceedings are instituted to enforce an unconstitutional state statute, and property rights are involved in its enforcement, or to avoid a multiplicity of suits, or the recurrence of severe penalties, such an injunction will lie. As expressed in the case of Shawnee Mills v. Temple (C. C.) 179 Fed. 517, the rule is:

"A bill in equity, in which the writ of injunction can issue to enjoin the enforcement of a criminal or penal statute, is allowable only when: (1) Such

statute is unconstitutional or otherwise invalid; (2) in the attempt to enforce such invalid statute, rights of property are invaded and trampled on; or (3) the often repeated attempts to enforce such invalid statute creates a multiplicity of actions, which are of themselves oppressive."

The unconstitutionality of the state statute conditions each of the three requisites to jurisdiction. In the case of Wiseman v. Tanner (D. C.) 221 Fed. 694, the exception is thus expressed:

"The general rule that equity will not enjoin criminal proceedings is subject to an exception where property rights will be destroyed by criminal proceedings under an unconstitutional or invalid statute."

In the case of Nolen v. Riechman (D. C.) 225 Fed. 812, 817, the court, referring to the exception, said:

"It must be conceded that this doctrine is an exception to the general rule (In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402); and yet the exception is so firmly established in the federal practice that no useful purpose would be served by pausing to trace its origin. The reason for the exception, where applicable, is the constitutional invalidity of the statute, and, consequently, the absence of lawful power to impose or enforce the particular exactions or restrictions which would result in irreparable loss to the complaining party. Philadelphia Co. v. Stimson, 223 U. S. 605, 621, 32 Sup. Ct. 340, 56 L. Ed. 570. The contention made here that the court is without jurisdiction to consider the statute overlooks the feature of plaintiff's case which challenges the constitutional validity of the statute."

In the case of Evansville Brewing Co. v. Excise Commission (D. C.) 225 Fed. 204, 205, the court said:

"There is an equally well settled exception to the general rule, viz. when the injunction is sought to restrain criminal prosecutions, which would result in the invasion of the rights of property through the enforcement of an unconstitutional law, to the irreparable injury of the plaintiff."

In the case of Lusk v. Dora (D. C.) 224 Fed. 650, the court said:

"The jurisdiction of a court of equity to restrain the enforcement of a municipal ordinance by criminal prosecutions, void because violative of the federal Constitution, because of its unreasonableness, is undoubted."

In the case of Arbuckle v. Blackburn, 113 Fed. 616, 625, 51 C. C. A. 122, 131 (65 L. R. A. 864), the Circuit Court of Appeals for the Sixth Circuit said:

"We are now dealing with an officer of a state proceeding under a valid law of the state, and whose error lies in wrongfully construing the statute so as to include the complainant's product. To entertain the bill in this aspect would be to subvert the administration of the criminal law, and deny the right of trial by jury, by substituting a court of equity to inquire into the commission of offenses where it would have no jurisdiction to punish the parties if found guilty. It would be the extension of equity jurisdiction to cases where prosecutions in state courts by the state officers are sought to be enjoined, with a view to determining whether they shall be allowed to proceed under valid statutes in the courts of law. We think this an enlargement of the jurisdiction opposed to reason and authority. It is claimed, however, that conceding that a court of equity cannot enjoin the prosecution of criminal offenses, as a general thing, the rule is different when property rights are involved; and we are cited to cases holding that equity has jurisdiction to enjoin acts likely to be destructive of property rights, although the acts complained of constitute infractions of the criminal law. This is quite a different proposition from enjoining criminal proceedings alleged to be indi-

rectly destructive of property rights. Many criminal prosecutions may affect the property of the person accused. A property may be greatly injured by the wrongful and unfounded charge that it is used for immoral purposes. Such prosecution may destroy its rental value and prevent its sale, yet a court of equity could not usurp the right of trial which both the state and the accused have in a common-law court before a jury. Every citizen must submit to such accusations, if lawfully made, looking to the vindication of an acquittal and such remedies as the law affords for the recovery of damages. It is often a great hardship to be wrongfully accused of crime, but it is one of the hardships which may result in the execution of the law, against which courts of equity are powerless to relieve."

In the case of Harkrader v. Wadley, 172 U. S. 148, 169, 19 Sup. Ct. 119, 127 (43 L. Ed. 399), the Supreme Court said:

"No case can be found where an injunction against a state officer has been upheld where it was conceded that such officer was proceeding under a valid state statute. In the present case the commonwealth's attorney, in the prosecution of an indictment found under a law admittedly valid, represented the state of Virginia, and the injunctions were therefore in substance * * * against the state. In proceeding by indictment to enforce a criminal statute the state can only act by officers or attorneys, and to enjoin the latter is to enjoin the state. As was said in Re Ayers, 123 U. S. 443, 497 [8 Sup. Ct. 164, 31 L. Ed. 216]: 'How else can the state be forbidden by judicial process to bring actions in its name, except by constraining the conduct of its officers, its attorneys and its agents? And if all such officers, attorneys, and agents are personally subjected to the process of the court, so as to forbid their acting in its behalf, how can it be said that the state itself is not subjected to the jurisdiction of the court as an actual and real defendant?' "

These cases show that, in federal courts of equity, the exception to the want of jurisdiction to enjoin criminal proceedings in state courts has the additional limitation that the criminal proceeding must have been instituted to enforce a state statute or municipal ordinance alleged to be in conflict with the federal Constitution and invalid. The reason for the additional limitation is manifest. If the state officers, sought to be enjoined, are proceeding under a valid statute of the state, they represent the state, and a suit to enjoin them is a suit against the state within the meaning of the Eleventh Amendment to the Constitution. On the other hand, if the proceedings are to enforce an unconstitutional statute or ordinance, the persons seeking to enforce it on behalf of the state are not considered as representing the state, but act as individual wrongdoers, and a suit to enjoin them is therefore held not to be a suit against the state.

This is the distinction between the holding in the cases of Harkrader v. Wadley, 172 U. S. 148, 19 Sup. Ct. 119, 43 L. Ed. 399, and of Arbuckle v. Blackburn, 113 Fed. 616, 51 C. C. A. 122, 65 C. C. A. 864, on the one hand, and 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 cases following it, on the other. In the former the law attempted to be enforced was admittedly a valid one. In the latter the law was assailed as contrary to the Fourteenth Amendment to the federal Constitution. In the case of Harkrader v. Wadley, 172 U. S. 169, 19 Sup. Ct. 127, 43 L. Ed. 399, the Supreme Court said that no case could be found "where an injunction against a state officer has been upheld, where it was conceded that such officer was proceeding under a valid state statute."

This is so because, if the officers sought to be enjoined were enforcing a valid state statute, they would, in so doing, represent the state, and a suit to enjoin them would be a suit against the state. No case has been cited to the court in which a federal court of equity has enjoined state officers from enforcing a valid state statute. The cases of Arbuckle v. Blackburn and Harkrader v. Wadley hold expressly to the contrary, and the other federal cases cited, in expressing the exception to the rule as applicable to the federal courts, limit its application to cases of unconstitutional state statutes or void ordinances. The case of Truax v. Raich, 239 U. S. 33, 36 Sup. Ct. 7, 60 L. Ed. 131, L. R. A. 1916D, 545, was such a case, and the Supreme Court, in stating the rule and exception, said:

"It is also settled that while a court of equity, generally speaking, has 'no jurisdiction over the prosecution, the punishment or the pardon of crimes or misdemeanors' (In re Sawyer, 124 U. S. 200, 210 [8 Sup. Ct. 482, 31 L. Ed. 402]) a distinction obtains, and equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property."

The case of Philadelphia Co. v. Stimson, 223 U. S. 605, 32 Sup. Ct. 340, 56 L. Ed. 570, was a suit to enjoin the Secretary of War from performing acts, under color of an act of Congress, but in excess of the authority conferred by it on him, and was not an attempt to enjoin the enforcement of a state statute or a municipal ordinance by state officers. The inhibition of the Eleventh Amendment and of section 720, Revised Statutes, had therefore no application to the facts of that case.

[3] In this case, for the purposes of this motion, it is conceded that the state law was valid. The complaint is that the state solicitor was wrongfully construing it to apply to a nonalcoholic beverage. The solicitor was the law officer of the state, and in enforcing a valid law of the state represented the state, and a suit to enjoin him from so doing is a suit against the state. This is none the less true because he is charged with having misconstrued the valid statute. Arbuckle v. Blackburn, supra. The interpretation of the criminal statutes of the state are matters within the exclusive jurisdiction of the courts of the state, having criminal jurisdiction, original and appellate; certainly so far as it concerns the jurisdiction of federal equity courts. The federal courts follow the interpretation of the state court of last resort in such matters.

If federal courts of equity could interfere with state courts of competent criminal jurisdiction, in their exercise of such jurisdiction, or prevent the law officers of the state from enforcing its criminal laws, because of anticipated errors of law in the administration of such laws, it is clear that they could equally interfere therewith, or prevent such officers from performing their duties to the state, because of anticipated mistakes in decisions of fact. The contention in this case is that the statute does not cover nonalcoholic beverages, and that ambrosia is indisputably a nonalcoholic beverage, but that the state authorities will construe the law to include it. The state does not concede that ambrosia is a nonalcoholic beverage, and asserts that the law applies to it,

if it is. The prosecution to be instituted under the law may therefore present both questions of law and of fact. If the statute is conceded to be valid, a federal court of equity has no more right to interfere with the enforcement of the state's criminal laws by its law officers through its courts, because of anticipated errors in the construction of the statute by the judge, than it would have to interfere because of anticipated errors in the decision of facts by a jury.

Such a ground of federal equitable interference with the enforcement of the criminal laws of a state would not be contended for. An interference because of either ground would be an invasion of the jurisdiction of a court of competent and concurrent, if not exclusive, jurisdiction. Nor can it be assumed that the state courts will commit error in either respect. The presumption is to the contrary. If the construction given the statute by the law officer of the state is erroneous, it will be presumed that the state courts will not follow it. Indeed, the correctness of the construction depends entirely upon the decision of the state court of last resort.

It is to be presumed that the plaintiff can make good any meritorious defense, either of law or fact, by presenting it in the state court. Mere apprehension that it may be otherwise confers no jurisdiction on the federal courts. If it did, the federal equity courts would draw to themselves full jurisdiction of the enforcement of the criminal laws of the state in all cases, and exercise supervisory jurisdiction over the state courts in criminal matters. No such principle obtains. It is only when state law officers cease to be such, because acting under unconstitutional state enactments, that federal courts have power to restrain their acts, done under color of office, but not by authority of it.

For these reasons, the motion for a temporary injunction, as prayed for, is denied, at the costs of the plaintiff.

In re AUGE.

(District Court, D. Montana. December 29, 1916.)

No. 1468.

1. BANKRUPTCY ⊜400(4)—REVIEW—ORDER OF REFEREE—BURDEN OF PROOF.
On objections to an order of the referee refusing to set aside to the bankrupt part of the property claimed as exempt, the burden to show error is on the bankrupt, and all ambiguities must be resolved against him.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 672, 673; Dec. Dig. ⊜400(4).]

2. PUBLIC LANDS ⊜140—HOMESTEAD—EXEMPTION FROM DEBTS—ENLARGED HOMESTEAD—"LANDS ACQUIRED UNDER THE PROVISIONS OF THIS CHAPTER."
The Enlarged Homestead Acts (Act Feb. 19, 1909, c. 160, 35 Stat. 639 [Comp. St. 1913, §§ 4563–4568]; Act June 6, 1912, c. 153, 37 Stat. 123 [Comp. St. 1913, §§ 4532, 4552]) are but additions to and amendments of the original homestead law, and enlarged homesteads are "lands acquired under the provisions of this chapter," within Rev. St. § 2296 (Comp. St. 1913, § 4551), exempting such lands from liability for debts contracted

prior to the issuing of the patent therefor, though other provisions of that chapter limited homesteads to 160 acres or less.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377–382; Dec. Dig. ⊂⊃140.]

3. BANKRUPTCY ⊂⊃396(5)—EXEMPTIONS—PUBLIC LAND HOMESTEAD.

Lands acquired under the homestead laws, which forbid their sale for prior debts, are not, except in a qualified sense, "exempt" or "exemptions," within Bankr. Act July 1, 1898, c. 541, 30 Stat. 544, which refers to exemptions given by state laws.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. ⊂⊃396(5).]

4. BANKRUPTCY ⊂⊃396(5)—RIGHTS OF TRUSTEE—EXEMPT PROPERTY—PUBLIC LAND HOMESTEAD.

The trustee in bankruptcy acquires no title to property exempt under the state laws, but only a right to control and set it off to the bankrupt, the right to exemption not being dependent on the existence or assertion of any debts, and the creditors, even if their claims are valid against property, being relegated to proper proceedings in the state courts; but the title to public lands homesteads, which are exempt under Rev. St. § 2296, only as to debts contracted prior to the issuance of the patent, passes to the trustee, to be sold by him for the payment of subsequent debts and the costs of the proceedings, or reconveyed to the bankrupt on the payment of the costs and of any debts for which they are liable.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 668; Dec. Dig. ⊂⊃396(5).]

5. PUBLIC LANDS ⊂⊃140—HOMESTEADS—EXEMPTION FOR PRIOR DEBT—FINAL PROOF.

Under Rev. St. § 2296, providing that no lands acquired under the homestead laws shall become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor, debts which cannot be enforced against the land are limited to those contracted before final proof, after which the right to the land is complete, and it may be sold or mortgaged or subjected to taxation on those contracted prior to the issuance of patent, which may be delayed, but which, when issued, relates back to the final proof.

[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 377–382; Dec. Dig. ⊂⊃140.]

In Bankruptcy. In the matter of Eugene T. Auge, bankrupt. Proceeding by bankrupt to review an order of the referee confirming the action of the trustee in setting aside a part only of the property claimed as exempt. Order affirmed.

R. O. Lunke, of Sidney, Mont., for bankrupt.

BOURQUIN, District Judge. [1] Herein the record is ambiguous, but will serve; all ambiguities being necessarily resolved against the bankrupt, on whom is the burden to make his right and the referee's error appear. It seems that the bankrupt, in enjoyment of an "enlarged homestead" of 320 acres of public land, made final proof December 24, 1915, and patent issued March 10, 1916. His petition in bankruptcy was filed herein May 24, 1916, amongst other debts scheduling some of "1915." The state law provides for a homestead exemption of 160 acres, and April 13, 1916, the bankrupt pursuant to said law filed a declaration of homestead for all said 320 acres. In due time the trustee set aside only 160 acres thereof as exempt, and

on exceptions the referee confirmed it. Review is sought. The description of the land so set aside is erroneous, and the trustee will correct it.

[2] The bankrupt's contention that all said land is exempt is based on section 2296, R. S. (Comp. St. 1913, § 4551), which reads:

"No lands acquired under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor."

The chapter referred to is that of the federal original homestead law, providing for entries of 160 acres or less. Later homestead enactments (35 Stat. 639; 37 Stat. 123) permit entries for as much as 320 acres—enlarged homesteads—of public lands of certain quality and subject to somewhat different conditions. These latter are but additions to and amendments of the original law, and upon settled principles all form a whole, to be taken and read together as though the later enactments were part of the original law from the beginning, so far as the protection extended by section 2296 is concerned. Said section provides protection; other sections define the area protected. Changes in the latter affect not the former. Hence enlarged homesteads are "lands acquired under the provisions of this chapter," within section 2296, and are entitled to its protection, even as lesser or ordinary homesteads are.

[3] But it is believed lands so acquired are not "exempt" and "exemptions" within the meaning of those terms in the Bankruptcy Act, save perhaps in a qualified sense. Doubtless, within limitations, is congressional power to create exemptions, though this qualified one alone now evidences it. The Bankruptcy Act seems to recognize exemptions therein referred to as of state laws, and the Supreme Court has said that:

"The rights of a bankrupt to property as exempt are those given him by the state statutes." Smalley v. Laugenour, 196 U. S. 97, 25 Sup. Ct. 216, 49 L. Ed. 400.

[4] Of such exempt property a certain amount of control, but not title, passes to the bankrupt's trustee, only for orderly administration and to set it aside to the bankrupt. See citations, In re Lehfeldt (D. C.) 225 Fed. 681. If there are creditors against whom the exemption fails, it is by reason of state law, and they are left to work out their remedy in the state court. The property is still set aside as exempt by the trustee, since he has not title; and as of the bankrupt's estate it is not administered in the bankruptcy court. Lockwood v. Exchange Bank, 190 U. S. 300, 23 Sup. Ct. 751, 47 L. Ed. 1061.

The exempt status exists regardless of debts, even though there be none, or be barred by limitations, or not asserted, or forgiven. This status, and not the existence or nature of the debts, determines whether or not title passes to the trustee. Although a bankrupt's debts are of such nature that all be entitled to prevail over the exemption, yet by reason of its status the title to the exempt property will not pass to the trustee, and it must be set aside to the bankrupt for the procedure above indicated; for the Bankruptcy Act so orders.

No such status is created by section 2296. It attaches no such exempt quality to federal homestead lands. On the contrary, it creates a brief statutory benefit, dependent on debt and time, nonexistent if no debts prior to patent, extinguished by limitations, or nonclaim, or forgiveness of the debts, dependent on federal law, in bankruptcy proceedings to be worked out therein, and to which end the title to the lands subject thereto passes to the trustee. Involved in it may be benefit to the bankrupt's creditors also, and, conferred by federal law, they are entitled to have it determined in the federal court. They are not to be relegated to a state court to that end, as they would be by treating the lands as exempt property to be set aside to the bankrupt. If federal homestead lands are exempt, and the bankrupt have $1,000 of debts subsequent to patent, and $10 or $1 of debts prior to patent, the lands must be set aside, and the creditors of the $1,000 left to pursue them elsewhere. It cannot be conceded. Whether exempt, or whether title passes to the trustee, depends on status, and not on debts and chronology. If exempt by state law, the bankruptcy court does not inquire if there are debts, but looks to status and sets aside. To determine the protection of section 2296, the bankruptcy court does inquire of debts and time, and not at all of status, and administers the whole in bankruptcy.

[5] Bankruptcy proceedings have the flexibility of other equity proceedings. If no debts subsequent to patent, the lands should not be unnecessarily sold, but "turned over" or reconveyed by the trustee to the bankrupt on payment of lawful charges of administration. So, if debts to which the lands are subject are of small amount, the bankrupt might pay them and lawful charges of administration and avoid sale. Circumstances control. In reference to debts "prior to the issuing of patent," which section 2296 protects against, it is believed they are limited to debts prior to final entry, at which time the entryman has performed every condition precedent to patent—has earned and is entitled to patent. Delay in its issuance is due only to governmental routine and labor, and when issued the patent relates to the time it was earned and due. At such time he is owner of the land, it has passed from governmental dominion; the government but holding the legal title and in trust for him. He can sell or mortgage it, and it is subject to taxation and execution.

Mere land office delay, sometimes continuing for years, even if it could, should not protect debts contracted after final entry and patent due. There is difference of opinion, but the weight of authority and better reason warrant this conclusion. See cases, 5 Comp. Stats. (1916) 5371. In all herein, it is found impossible to agree with In re Cohn (D. C.) 171 Fed. 568.

By reason of the ambiguities in the bankrupt's pleadings, it does not appear none of his debts were contracted after final entry, taken to be of date of final proof, alone set out by him. If none such, or if of small amount (and the entire proceedings before the referee will determine, and not this proceeding alone), the course above indicated may be followed.

The referee's order is confirmed.

CENTRAL RY. SIGNAL CO. et al. v. JACKSON.

(District Court, E. D. Pennsylvania. January 3, 1917.)

PROCESS ⇐120—PRIVILEGES AND EXEMPTIONS—ATTENDANCE AS WITNESS.

Under the rule of the federal courts, a person who has come into a jurisdiction which is foreign to him to attend upon proceedings there being conducted, as by giving his testimony as a witness either in court or by deposition is protected from service of process while so attending, and in going to and returning from the same.

[Ed. Note.—For other cases, see Process, Cent. Dig. § 150; Dec. Dig. ⇐120.]

In Equity. Suit by the Central Railway Signal Company and another against George B. Jackson. Sur rule to strike off return of service of subpœna. Rule made absolute.

Wm. Steell Jackson, of Philadelphia, Pa., for plaintiffs.
Howson & Howson, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The defendant invokes no right of his own. At the most he becomes the beneficiary, through receiving the practical benefits, of a rule of policy followed by the courts when deemed applicable. The rule is that no court will brook unwarranted interference by others with the orderly process of judicial proceedings before it. It recognizes the necessity for the enforcement of a like rule by other courts. It therefore applies the doctrine of comity, at least to the extent that it will not sanction the use of its process to interfere with what another court is seeking to do where, under like circumstances, it would not suffer its own proceedings to be hampered by the interference of others. In short, the principle is to voluntarily accord to others what you would insist upon as your right to receive from others. An important duty of the court in every proceeding before it is to have the facts fully developed. These often can be established only through the testimony of witnesses. Out of this grow two duties and correlative rights:

One is to render aid to another court in securing evidence from the testimony of witnesses, and the right to expect that like aid and assistance will be rendered by another court. Out of this has sprung the practice of issuing letters rogatory and subpœnas to assist in the taking of testimony outside of the jurisdiction of the court in which the evidence is to be offered. This practice is facilitated and enforced sometimes through the adoption of rules by the courts and sometimes by statutes. Another is to protect parties and witnesses by securing to them immunity from the service of process while in attendance upon the court and in going and returning. The policy of thus promoting attendance upon the court is obvious. Out of this has sprung the practice of a resort to even the drastic procedure of contempt process where the interference affects the court, and of setting aside the service of its own process where the interference is with the work of other courts. The general guiding principle is thus clear enough, but because of its generality there can be no very hard and fast rule in its application to the facts of a particular case. The rule is neither a whimsical nor a

purely abstract one. It has a practical purpose and should be given a practical application.

Where nothing more is gained than a formal acknowledgment of a theoretical right, compliance with the rule may not be enforced. If, for instance, a defendant is served within his home jurisdiction, where he is open to service, to set it aside merely because he happened to be encountered by the process server when going to or returning from court would be to make of the rule a mere formality. To take advantage of the presence of a defendant in a foreign jurisdiction, where he had gone simply to facilitate the work of the court, would call for all the protection which the court could give him, or the very policy back of the rule would be defeated.

This brings us to the facts of the present case. The defendant was concerned with a patent application pending before the patent examiner. His testimony was thought to be important, and it was arranged to take it by depositions before a notary public in Philadelphia. The subpœna and bill in the present case were served during the taking of the deposition. Affidavits have been submitted in answer to the present rule for the purpose of showing the domicile of the defendant to have been here and this to be his home jurisdiction. There is no averment, however, of a present residence here, and no denial that he came into this jurisdiction solely to attend at a hearing here and to testify. The weight of precedent seems to incline toward setting aside the service. The following cases in the courts of the United States may be considered typical: Bridges v. Sheldon (C. C.) 7 Fed. 17; Atchison v. Morris (C. C.) 11 Fed. 582; Nichols v. Horton (C. C.) 14 Fed. 327; Wilson v. Wilson (C. C.) 22 Fed. 803; Kauffman v. Kennedy (C. C.) 25 Fed. 785; Holyoke v. Ambden (C. C.) 55 Fed. 593, 21 L. R. A. 319; Hale v. Wharton (C. C.) 73 Fed. 740; Skinner v. Waite, (C. C.) 155 Fed. 828; Kauffman v. Garner (C. C.) 173 Fed. 550; Roschynialski v. Hale (D. C.) 201 Fed. 1017; Stratton v. Hughes (D. C.) 211 Fed. 557. To these may be added the citation of Feister v. Hulick (D. C.) 228 Fed. 821, in this jurisdiction.

From these it may be gathered that witnesses in criminal cases will be given the benefit of the rule, and that the federal courts (contrary to the policy of some of the state courts) extend protection to defendants under arrest in criminal cases. Protection is extended also to nonresident plaintiffs attending the trial of their cases, although the courts of the state in which the service was had would uphold it. A nonresident witness or party defendant, who is in the jurisdiction when served, for the purpose of attending the trial of his case, is immune from the service of process; also a nonresident witness, although he did not in fact testify; also those attending the taking of depositions before a notary public; also those attending before a road commissioner. Service may, however, be made in a state through which the party served is traveling, although going to attend a trial. Service may be had for a cause of action arising out of the act of the party served while within the jurisdiction in which served. The service of process upon a party or witness while in attendance on the court will be deemed a contempt, even although related to the same cause of action as that on trial.

It will be observed that in every case in which the service has been set aside the party served was a nonresident, and his protection necessary to the upholding of the policy of the law, and that the rule has been relaxed where the party served was not strictly, although substantially, within the rule and the policy intended to be enforced. The only respect in which the rule has not been enforced with an eye single to the advancement of its policy is in extending its protection to parties under arrest in criminal cases. There does not seem to be a case in which the rule has been applied in favor of parties served within the jurisdiction in which they resided. It is, of course, possible that this may be due to the fact that the question was not worth raising because service could easily be made which was not open to objection.

Holyoke v. Ambden (D. C.) 55 Fed. 593, 21 L. R. A. 319, is, however, significant of a purpose to restrict the rule. The only reason in sight for not there applying is the rather selfish one indicated, and much can be said in support of the rulings in some of the state courts which have refused to follow the Holyoke Case.

The present rule has been argued in a most openminded and frank spirit. The doctrine of immunity from service is admitted by counsel for plaintiff in all its fullness, and the principle to apply unless the defendant be within the recognized exceptions. Those advanced are three, two of which, at least to some extent, blend into each other. One is that a defendant cannot claim immunity where the proceeding in which he appears is related to that in which he is served in such way that the latter may be deemed appellate with respect to the former. The application of this principle is this. The defendant appeared in a proceeding, the purpose of which was to determine his right to letters patent for an alleged invention. The proceeding in which he was served was instituted for the purpose of charging him with the infringement of letters patent held by the plaintiff for the same invention. The latter, therefore, involves a review of what may be done in the first, and is because of this claimed to be in substance, if not in form, appellate. The principle invoked seems to be recognized by some of the state courts, but not by the federal rulings cited.

The exception to the rule of immunity is limited by the federal courts to liability to service in an action, the cause of which arose while the defendant was in the foreign jurisdiction, and does not include a cause of action which is related to the proceeding which brought the defendant within the jurisdiction. Another exception urged is that the principle of comity will not be extended when the effect of it will be to hamper the exercise of a jurisdiction which the court issuing the process feels it should exercise. Illustrations of this appear in the cases cited. One is afforded by those which rule that the party served cannot claim immunity from process issued to right a wrong which the defendant has done while within the jurisdiction in which served because this would be an injustice to the plaintiff. Another is the ruling that process may be served on one passing through a jurisdiction because this is recognized as the right of the plaintiff. This principle of exception blends into the further one urged that where the court issuing the process has such juris-

diction of the subject-matter as that it is the proper jurisdiction in which to have the case determined, and that this jurisdiction for its exercise lacks only jurisdiction of the person of the defendant through notice to him, the defendant will not be granted immunity because within the jurisdiction in attendance in another case. As applied to the facts of this case the exception may be best presented through the supposititious one of a defendant keeping out of his home jurisdiction for the purpose of avoiding service of process. Further illustrations of this are given in those rulings of some of the state courts that a defendant may be served in scire facias proceedings to revive judgments already entered. Such cases present both stronger and weaker reasons for refusing immunity than the case at bar—stronger, because there held to apply to nonresident defendants; weaker, because there the action could be brought in no other jurisdiction. The suggested principles of exception to the general rule are only remotely, if at all, applicable in the present case, because the process here could properly issue in any jurisdiction in which the defendant could be served.

If the present defendant is amenable to service, it must be on the broad ground that this is his home jurisdiction, and because of this there can be no finding that he was here solely for the purpose of attending before the notary public, and therefore not within the spirit or reason of the rule, and that the policy of the law behind it would not be promoted by extending it to him nor the policy defeated by denying immunity to him. This is fortified by the disposition of the courts not to be overeager in aiding defendants to avoid the service of process to which they ought to submit.

This brings us to the simple inquiry of whether this defendant has brought himself within the protection of the rule, the proper statement of which is this: To promote the unhampered proceedings of the courts, any person who has come into a jurisdiction, which is foreign to him, to attend upon proceedings there being conducted, will be protected from service of process while so attending, and in going to and returning from the same.

The averments of the petition bring the defendant squarely within the protection of the rule as stated. Neither the answer to the petition nor any of the answering affidavits contest the essential feature of the facts, to wit, that the defendant came into the jurisdiction solely to testify.

The rule to set aside the service is made absolute.

TOLEDO & O. C. RY. CO. v. CHESAPEAKE & OHIO COAL & COKE CO.

(District Court, S. D. West Virginia. December 23, 1916.)

CARRIERS ⟸100(1)—CARRIAGE OF GOODS—CAR DEMURRAGE—CONSTRUCTION OF TARIFF RULES AND CHARGES—"SEASONAL TARIFF."

A railroad company issued and filed a local tariff, naming special car demurrage rules and charges on lake coal held by the company for transshipment at a lake port during the shipping season, which was fixed as from August 15th to December 31st. This tariff was to become effective July 12th, and provided that all cars on hand August 15th should be recorded as arriving on that date, and that all cars remaining on December 21st should be recorded as released on that date, and after 10 free days should be subject to local demurrage. *Held*, that such tariff was a "seasonal tariff," operative only during the shipping season, and applying only to shipments made after July 12th each year, and that a new tariff, issued and filed in a subsequent year and effective before July 12th, governed as to shipments for the following shipping season, although such shipments were made before it became effective.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 427–430, 432, 433; Dec. Dig. ⟸100(1).]

At Law. Action by the Toledo & Ohio Central Railway Company against the Chesapeake & Ohio Coal & Coke Company. Judgment for plaintiff.

Brown, Jackson & Knight, of Charleston, W. Va., for plaintiff.

Price, Smith, Spilman & Clay, of Charleston, W. Va., for defendant.

KELLER, District Judge. This is a suit brought for the collection of demurrage charges, alleged to be due by the defendant on coal consigned to defendant at Toledo, Ohio, for transshipment in the lake trade. From an agreed statement of facts it appears that whatever demurrage is chargeable to defendant accrued in the years 1910 and 1911 under plaintiff's tariff I. C. C. No. 1668, issued and filed with the Interstate Commerce Commission July 12, 1909, effective August 15, 1909; plaintiff's tariff I. C. C. No. 1856, issued and filed with the said Commission April 4, 1911, effective May 15, 1911, a copy of which was mailed to defendants' office on April 8, 1911, and received by it April 10, 1911; and plaintiff's tariff I. C. C. No. 1865, issued and filed with said Commission May 2, 1911, effective July 1, 1911. These were all local tariffs, naming car demurrage rules and charges appylying on coal or coke transferred from cars to vessels and reshipped via lake, and No. 1668 was in force during 1910. This tariff treated the lake navigation season as extending from August 15th to December 31st, inclusive, and the demurrage rules were framed accordingly, and it was provided in rule 4 that:

"All cars of lake coal or coke held for transshipment on hand August 15th will be recorded under these rules as arriving on that date."

Under the same rule all cars remaining on hand December 21st were to be recorded as released on that date, and additional free time of 10 days allowed for reconsignment or disposition, after which time the car was to become subject to local demurrage. It will thus be

seen that this tariff provided for a transportation season, beginning on August 15th and ending on December 31st of each year, and there was not given the right in any sense to a shipper to use the cars and yards of plaintiff as storage facilities between seasons, though doubtless this tariff did give the right to start shipments for the lake trade on July 12th of each year.

From I. C. C. No. 1856, it appears that the season of lake navigation was extended, so as to begin on May 15th and end on December 31st of each year, and consequent changes were made providing that cars on hand May 15th should be recorded as arriving on that day. The general provisions as to free days, etc., were in all material respects similar to those contained in I. C. C. No. 1668, but the season was *advanced* three months, and lengthened by that time. I. C. C. No. 1865 appears to be a reissue of I. C. C. No. 1856, issued for the purpose of making a verbal correction of rule 5 by the insertion of the word "lake" before coal, so as to limit in terms the character of coal and coke to which the rule was applicable.

It appears from the agreed statement of facts that in 1911, on or before April 4, 1911, 427 cars of coal had been shipped from defendant's mines for transshipment as lake coal, and that between April 10, 1911 (the date on which defendant was notified of the issue of I. C. C. No. 1856), and May 15, 1911, the date when, by its terms, it took effect, 104 additional cars were shipped by defendant; that of the said 531 cars shipped as aforesaid, 493 arrived at Toledo on or before May 14, 1911; that of said 427 cars, shipped on or before April 14, 1911, 40 were released by dumping into a vessel on May 14, 1911, and were subject to no demurrage, 23 cars were similarly released on June 10, 1911, 218 cars were similarly released on June 13, 1911, 50 cars were similarly released on June 24, 1911, 91 cars were similarly released on June 28, 1911, and the remaining 5 cars were similarly released on July 13, 1911; that of the said 104 cars, shipped after April 10, and on or before May 14, 1911, as aforesaid, 15 were similarly released June 25, 1911, 59 were similarly released June 28, 1911, and the remaining 30 cars were similarly released July 13, 1911.

It is the contention of the defendant that no demurrage charges should have been assessed against said 531 cars, as they were all shipped from mines before the tariff I. C. C. No. 1856 took effect, and defendant contends said shipments were made during the pendency of I. C. C. No. 1668, and were entitled to be treated as arriving August 15, 1911, under the provisions of said last-mentioned tariff, although in fact all had been released, unloaded, and transshipped prior to that date. This is the main contention of defendant; a minor one being that, in cases where notice of arrival of cars at Toledo was not given by plaintiff on the day of such arrival, deduction from accrued demurrage should be made in accordance with the time such notice was actually given.

Taking up the last contention first, it is enough to say that it does not appear that there was any contractual obligation on the part of the plaintiff to give notice of the arrival of cars, although it did so as a matter of courtesy; nor does it appear that the alleged failure

in the comparatively few instances referred to played any part in the accrual of demurrage on such cars. Hite v. Central R. R. of N. J., 171 Fed. 370, 96 C. C. A. 326.

As to the main contention of the defendant, that its shipments in 1911, prior to May 15, 1911, were governed in respect to demurrage charges at Toledo by the schedule or tariff regarding such charges in effect at the date of the shipment from the mines, and that such tariff constituted a contract between the parties as to all cars shipped from the mines while such tariff was in force, or, at the least, as to all cars shipped prior to April 10, 1911, the date when notice of the filing of the new tariff No. 1856 was received by defendant, I do not see how this position can possibly be sustained.

The demurrage tariff I. C. C. No. 1668, issued July 12, 1909, and effective August 15, 1909, was, by its own terms, a seasonal, and not a constant, tariff. This is made manifest by the first two paragraphs preceding the rules and by paragraph (a) of rule 4. The two paragraphs referred to as preceding the rules governing demurrage are as follows:

"The rules and charges named herein are effective each year from August 15th to December 31st, inclusive.

"In the application of these rules the season of navigation shall be considered as extending from August 15th to December 21st, inclusive."

Paragraph (a) of rule 4 provided as follows:

"(a) Lake coal or coke remaining on hand December 21st will be recorded as released on that date, detention being figured in accordance with provisions of rule 1 and first paragraph of rule 2. An additional free time of ten days, including Sundays and legal holidays, will be allowed for each individual car for reconsignment or disposition, after which the car will be subject to local demurrage rules. Agents must collect demurrage charges, or obtain a written guaranty of payment of same, before accepting orders for reconsignment or disposition."

This language abundantly sustains my interpretation of this tariff as a "seasonal" tariff, not in force except in relation to the season of lake transportation defined therein. For example, during what portion of the year 1909 was it in force? Clearly no reliance could be placed on it, in regard to demurrage charges at Toledo, as to cars shipped before the date of its issue (July 12th); and by its very terms cars on hand December 21st must be reconsigned or disposed of within 10 free days thereafter, or they became subject to the ordinary local demurrage charges. This being the case with regard to the year 1909, I hold that the same construction applies to the year 1910, during which season this tariff was operative; that is, that the tariff should be treated as again issued as of July 12, 1910, and effective August 15, 1910, with each and all of the rights and liabilities that existed the season before, remembering the special character of the shipments therein provided for. Under that tariff there was no authority for shipments governed thereby to be made before July 12th at the earliest, and most certainly none for shipments made in April and May and June, and arriving in May and June and July.

For the year 1911, the railway company, seasonably, on April 4, 1911, 2 months and 7 days, at the least, before the former lake coal

demurrage tariff would have become effective for that season, issued and filed with the Interstate Commerce Commission, a new tariff, I. C. C. No. 1856, superseding I. C. C. No. 1668, and providing for a much extended lake season beginning May 15, 1911, and extending to December 31. When this tariff was filed there was no lake coal demurrage tariff in effect, and the requisite 30 days for publication expired long before tariff I. C. C. No. 1668 would have gone into effect for the year 1911, and hence the only legal lake coal demurrage tariffs governing the shipments of defendant for 1911, intended for transshipments by lake, were I. C. C. No. 1856 and I. C. C. No. 1865, which latter evidently was issued for the purpose hereinbefore suggested.

In Horton v. Tonopah & Goldfield R. Co. (D. C.) 225 Fed. 406, it was held that a new demurrage tariff, increasing the demurrage rates, would become effective upon cars already subject to demurrage under the former demurrage tariff, upon the effective date of the increased rate. While I agree in the principle of that decision, I do not regard it as strictly applicable to this case by reason of what has already been said as to the "seasonal" character of these special tariffs.

It follows that in the judgment of the court, upon the facts admitted by the agreed statement, no defense is presented, and judgment may be entered for the entire amount of plaintiff's demand.

Ex parte KUNIJIRO TOGUCHI.

(District Court W. D. Washington, N. D. December 29, 1916.)

No. 3482.

ALIENS ⟸50—IMMIGRATION—PERSON EXCLUDED.

Under Immigration Act Feb. 20, 1907, c. 1134, § 2, 34 Stat. 898 (Comp. St. 1913, § 4244), which excludes from admission into the United States aliens "who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, * * * express or implied, to perform labor in this country of any kind, skilled or unskilled," or who have been assisted by others to come, unless it is affirmatively shown that they do not belong to one of the excluded classes, a Japanese alien who came to this country at the solicitation of an uncle and with money furnished by him for the purpose of entering his employ as a salesman in a store, although no contract for service was made, not being in one of the classes expressly excepted by such section, is not entitled to entry.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 108–110; Dec. Dig. ⟸50.]

Application by Kunijiro Toguchi for writ of habeas corpus. Writ denied.

James Kiefer, of Seattle, Wash., for petitioner.

Clay Allen, U. S. Dist. Atty., and Albert Moodie, Asst. U. S. Dist. Atty., both of Seattle, Wash., for the United States.

NETERER, District Judge. The petitioner is an alien, whose mother resides in Japan, and whose uncle lives in Detroit, Mich., where

he is engaged in conducting a Japanese silk and dry goods and bamboo furniture business. This company has a branch store in Japan, where petitioner was employed, and for the last three years was manager of this branch store. He came to the United States, at the request of his uncle, to take a position in the Detroit store as a salesman, and, as he advances in knowledge and business methods, to substitute for one of the partners, so that they may be relieved from time to time. The uncle sent to petitioner $100 to apply on his expenses, and told him to apply to him for more money on landing, if needed. No salary was agreed upon to be paid to the petitioner. The Board found the petitioner to be 25 years of age, "intelligent, but on the whole made an unfavorable impression because of his evasiveness and crafty expression, * * * that the alien is coming to the United States in violation of the alien contract labor provision of the Immigration Act," and rejected him on that ground, and ordered his deportation to Japan. On appeal, the Secretary of Labor affirmed the finding of the Board and Commissioner.

The petitioner contends that he is not within the prohibitory clause of the Immigration Act. If the petitioner is not within the prohibitory clause of the Immigration Act, the Commissioner of Immigration has no jurisdiction to detain and deport him by erroneously concluding questions of law (Gonzales v. Williams, 192 U. S. 1, 24 Sup. Ct. 177, 48 L. Ed. 317), and such act would bring this case to the same status as denying a fair hearing (Chin Yow v. United States, 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369). But if the alien is within the prohibition of the Immigration Act, and the hearing was fairly conducted, the decision of the Secretary of Labor is binding. Lewis v. Frick, 233 U. S. 291, 34 Sup. Ct. 488, 58 L. Ed. 967. A court has jurisdiction to determine whether the reasons given by the Commissioner, excluding aliens, come within the meaning of the Immigration Act. Gegiow v. Uhl, 239 U. S. 3, 36 Sup. Ct. 2, 60 L. Ed. 114. The fact that petitioner made an unfavorable impression upon the board can therefore be dismissed without further comment. The only question for decision is whether the alien comes within the provisions of the act supra. The portion of the act which it is claimed is violated, provides that "persons * * * who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements * * * express or implied, to perform labor in this country of any kind, skilled or unskilled * * *" (Comp. St. 1913, § 4244), are excluded. The violation of this act, by its express provisions, is made a crime, and, the statute being penal, its provisions must be strictly construed. United States v. Gay (C. C.) 80 Fed. 254. The act under consideration was brought forward from Act Feb. 26, 1885, c. 164, 23 Stat. 333, which act was intended to apply only to cheap, unskilled labor. Trinity Church v. United States, 143 U. S. 457, at page 458, 12 Sup. Ct. 511 (36 L. Ed. 226), in which Mr. Justice Brewer, for the court, said:

"It must be conceded that the act of the corporation is within the letter of this section for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the

general words 'labor' and 'service' both used, but also, as it were, to guard against any narrow interpretation and emphasize the breadth of meaning, to that is added 'of any kind.'"

Specific exemptions are made in the act. The court further said (143 U. S. 464, 12 Sup. Ct. 513, 36 L. Ed. 226):

"It appears, also, from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent."

This act was amended March 3, 1891 (26 Stat. 1084, c. 551), and in United States v. Laws, 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151, the court held that a contract with an alien to come to this country and work upon a sugar plantation in Louisiana as a chemist was not within the act of February 26, 1885, citing the Holy Trinity Church, supra. The court, at page 266 of 163 U. S., at page 1001 of 16 Sup. Ct., 41 L. Ed. 151, said:

"If by the terms of the original act the provisions thereof applied only to unskilled laborers whose presence simply tended to degrade American labor, the meaning of the act as amended by the act of 1891 becomes if possible, still plainer. Now by its very terms it is not intended to apply to any person belonging to any recognized profession. We think a chemist would be included in that class."

On March 3, 1903 (32 Stat. 1213, c. 1012), the act was further amended. The committee on immigration (H. R. No. 982, 57th Congress, First Session) stated:

"The general purpose of this bill is to bring together in one act scattered legislation heretofore enacted in regard to the immigration of aliens into the United States * * * to eliminate any part thereof which has become obsolete as a result of subsequent legislation; to amend such portions thereof as have been found, either as the result of experience in enforcing the law or by judicial decision, to be inadequate to accomplish the purpose intended, and to add such further provisions as seem to be demanded by the consensus of enlightened public opinion, besides such as are rendered necessary because of territorial acquisitions of the United States beyond its continental bounds."

The Senate Report (No. 2119, 57th Congress, First Session) stated:

"The necessity for such re-enactment is due in part to the fact that, as the result of judicial decisions, as well as of administrative experience, the efficiency of such laws to accomplish the evident purpose of their enactment has been shown to be materially lessened since the time of their enactment, and therefore a new expression of legislative will upon the subject of immigration has become desirable."

In this act was included the words "skilled and unskilled labor," and Senator Gallinger moved to strike out the words (Congressional Record, vol. 36, p. 2752), which was agreed to, and the House conferees concurred in the Senate action, the change in the act being that the words "offers," "solicitations," and "promises" were substituted for the word "contract," it being understood that the provisions of the bill should be enlarged to meet the difficulties caused by the decisions of the courts that an enforceable contract must exist in order to come within the provisions of the law. There is no suggestion in the report that it was the intention to enlarge the scope of the bill to include persons other than those to which the court

had held it applicable, except the insertion of the words "learned profession" in the last proviso.

Following the adoption of the act of 1903, the Circuit Court for the Southern District of New York, in Re Ellis, 124 Fed. 637, held that aliens imported under contract who are expert accountants were not members of any recognized learned profession, within the terms of the exemption, and were therefore not entitled to enter.

Contention is made that the intent of Congress was to restrict the prohibition to manual laborers, and not to apply it to those engaged in other employment. It will be noted that the terms "labor" or "service" was included in the act of 1885. The same term has been carried through into the act of 1907. While the Supreme Court, in Holy Trinity Church, supra, held that the intention was simply to apply the term to unskilled manual labor, and while the terms "skilled" and "unskilled" were stricken from the act as passed in 1903, the terms were included in the act of 1907. While there is nothing further in the act to indicate any intent or limitation with relation to these terms, reference to section 4 of the act of Feb. 20, 1907, 34 Stat. 900, I think, is conclusive of the question which is here presented. This section, taken in connection with the entire act, I think, clarifies the purpose and fixes the intent of the Congress without any question. Section 4 provides that:

"It shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or immigration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section 2 of this act." Comp. St. 1913, § 4248.

The first proviso is that:

"Skilled labor may be imported if labor of like kind unemployed cannot be found in this country."

And the second proviso:

"That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants." Comp. St. 1913, § 4244.

By this section all persons are excluded who do not come within the exemption. The provisions are not limited to "labor" or "service," but are limited expressly by the exemptions. The petitioner does not bring himself within the exemptions stated. The fact that no salary is agreed upon is immaterial, as under the engagement the law would imply reasonable compensation. There is nothing to indicate that the petitioner was not accorded a fair trial.

The writ will be discharged, and the petitioner remanded to the custody of the Immigration Commissioner.

THE M. MORAN.

THE COLERAINE.

(District Court, E. D. New York. December 22, 1916.)

COLLISION ⇐96—VESSEL LEAVING SLIP—FAILURE TO SIGNAL.

A tug, after leaving her tow in a slip on the Manhattan side of North River at night, backed out and came into collision with another tug passing down at some distance from the ends of the piers. *Held*, on the evidence, that she was in fault (1) for failing to give the proper slip whistle, or to heed the signal given by the other tug; (2) for violation of the starboard hand rule, which gave the other tug the right of way; (3) for passing out at too great speed; and (4) for not keeping a proper lookout; that the fact that the lookout of the passing tug was inattentive was not a material fault, since it had no effect upon the situation.

[Ed. Note.—For other cases, see Collision, Cent. Dig. §§ 203–205; Dec. Dig. ⇐96.]

In Admiralty. Suit for collision by Thomas Tracy, owner of the tug Coleraine, against the tug M. Moran, the Moran Towing & Transportation Company, claimant, with cross-libel by claimant against the tug Coleraine. Decree for libelant, and cross-libel dismissed.

Foley & Martin, of New York City, for libelant and the Coleraine.

Park & Mattison, of New York City, for claimant and the M. Moran.

CHATFIELD, District Judge. On the night of Saturday, August 29, 1915, the ocean-going tug M. Moran, with the mud scow Delaware in tow, proceeded up the North River to the dock at Ninety-Sixth street. The weather was misty and the night dark, but no question of ability to see signals enters into the case. When near Thirtieth street, the captain of the Moran went off watch and to bed, and the pilot took charge of the boat. About half past 1 Sunday morning, the Moran reached the slip between Ninety-Fifth and Ninety-Sixth streets, and found the ebb tide had begun to run along the shore.

The barge Delaware was for some reason left on the north side of Ninety-Fifth street, and the Moran backed out into the Hudson river. While so doing, she came in collision with the Coleraine, which was proceeding down the Hudson river on her way to Fiftieth street, North River. A revenue cutter was lying further down the river, and another a short distance above Ninety-Sixth street. A tug, the Wheeler, was on its way from Jersey City to 138th street, North River, where it was to obtain a barge to be towed down around the Battery and up the East River to Port Morris, so as to arrive there by 7 a. m.

The captain of the Wheeler testifies that he met the Coleraine above Ninety-Sixth street, just at the time when the Wheeler was outside of the revenue cutter, which was anchored some distance off the ends of the piers. This captain testifies that he exchanged one-whistle signals with the Coleraine, and that the Wheeler and the Coleraine

passed port to port, thus putting the Coleraine outside of the Wheeler at that point.

The Coleraine heard no signals from the Moran, but observed the Moran coming out stern first about midway between Ninety-Fifth and Ninety-Sixth streets, blew her a one-whistle signal, which was not answered, and then blew alarm whistles, which were not answered. The Moran struck the Coleraine amidships on her port side, with such force as to cut a deep gash in the hull of the Coleraine through her guard and rail. The boats drifted apart, the Coleraine then being able to work in so as to be beached upon the rocks near Ninety-First street, where her crew swam ashore. The Moran, according to the witnesses upon the Coleraine, continued backing out into the river until near the middle of the stream, before she began to work in toward shore, and finally brought up near Eightieth street, where she was moored for the night.

It appears from the testimony that the rudder of the Moran was jammed in the collision, so that the steering gear would not work, and that the boat had to be maneuvered by alternating operations of the engines until she was close to shore. The captain of the Moran testifies that he was asleep until they reached Ninety-Sixth street, when he was awakened by the noise at the time of mooring the Delaware, and that his attention was attracted by the deckhand on the Moran, who called to "go ahead." This was followed by a slight bump. He looked out of the window alongside of his bed, upon the starboard side of the Moran, and saw that she was (as he estimates) 15 feet from the side of the Ninety-Fifth Street Pier. The witness was then about opposite the end of the pier, and this was just after he felt the shock of the collision. He dressed, went on deck, and found the Moran headed down the river some 50 or 60 feet off the end of the Ninety-Fifth Street Pier. He was told by the pilot that they had "plugged a Tracy boat" and that the steering gear was damaged. He then ran down to look at the steering gear, later noticed that the Moran was backed out into the river to a point further than the Coleraine, and that she subsequently floated and worked down the river to the point near Eightieth street where she was moored.

The pilot in charge of the Moran testifies that he backed away from the Delaware to the middle of the slip. The Moran works to port when under a stern reversed engine, and the pilot heard or saw nothing of the Coleraine until she suddenly appeared, close to the Moran and coming out from behind the end of the pier at Ninety-Sixth street, under the stern of a large garbage scow, which was moored on the south side of the Ninety-Sixth Street Pier.

The pilot of the Moran testifies that he heard alarm whistles from the Coleraine, but no previous single whistle, and that he did not answer the alarm whistles, as it was too late to avoid collision; that he immediately reversed his engines, so as to send the boat full speed ahead; that the way of the Moran was substantially stopped by the time she came in collision with the Coleraine. He then ran her ahead until he was compelled to stop by the vessels in the slip, but that in the meantime he had inquired of those upon the Coleraine if any one was hurt, and

that, thereafter finding the steering gear jammed, he backed out into the river to a safe distance, and from there floated down the river and worked ashore.

The severity of the injury inflicted on the Coleraine would indicate that the Moran was backing with considerable speed, and that she did not reverse her engines for any length of time before the collision. The captain of the garbage scow, which was moored on the south side of Ninety-Sixth street, testifies that he was awakened by the noise made when the tug Moran brought in the Delaware; that he went on deck and saw the whole occurrence. He testifies that the Moran left the Delaware, and, without blowing any signals whatever, backed straight out of the slip into the Coleraine, and then out into the river and substantially half way across. He thus corroborates the witnesses for the Coleraine.

It does not appear that the lookout upon the Moran was in his place, or that he reported the Coleraine in time, while the lookout upon the Coleraine was seated upon the starboard side of that vessel, smoking a cigarette, and did not observe the Moran as quickly as the pilot, who was in charge of the wheel. The admission of the pilot of the Moran upon the stand, as well as that of the Moran's captain, indicates full appreciation of the Moran's responsibility for carelessness. They impressed the court with the feeling that they were trying to state the events as they happened and at the same time excuse liability therefor.

The facts do not seem to justify the conclusion that the Moran continued out into the river without reversing, or that she was entirely oblivious of having run the Coleraine down, or disregardful when her presence was brought to her attention. It would seem that her engines may have been reversed (started running forward), and that her reason for then backing so far out in the river was because of the injury to her own rudder. But the testimony as to the location of the boats just before the collision, even assuming that the Coleraine had turned in somewhat after passing the revenue cutter, does not indicate that she was so close to the Ninety-Sixth Street Pier as to prevent observation on the part of the Moran. As she was headed for Fiftieth street, and had come around the revenue cutter, she was not violating the rule which forbids navigating under the heads of the piers.

If the captain of the Moran is correct as to the location of his boat when he was awakened by the alarm whistles, it is evident that the accident happened down opposite the Ninety-Fifth Street Pier, rather than up at Ninety-Sixth street, and that the Moran was proceeding out at too great a speed for safety to any boat which might have a right to be close to the mouth of the slip. The testimony would seem to show, also, that the Moran did not blow a slip whistle when leaving the slip, even if one was blown as she left the Delaware. The Coleraine did give navigation signals, which should have been heeded by the Moran.

The whereabouts of the lookout on the Coleraine had no effect upon the situation, but the absence of a proper lookout on the Moran, when coupled with her speed, shows negligence sufficient to fix responsibility. The Nevada, 106 U. S. 154, 1 Sup. Ct. 234, 27 L. Ed. 149. The Moran had the Coleraine on her starboard hand, and, as the collision

must have occurred some distance outside of the piers, the failure of the lookout and the neglect to give whistle signals would further fix liability upon the Moran. The Reliable, 183 Fed. 116, 105 C. C. A. 406; The Columbia, 205 Fed. 898, 124 C. C. A. 230.

The libelant Tracy may have a decree, and the cross-libel will be dismissed.

In re HENRY & S. G. LINDEMAN.

(District Court, S. D. New York. October 9, 1916.)

1. BANKRUPTCY ⟸316(4)—CLAIMS—INDORSEMENT OF NOTES.
Under the law of New York, the obligation of both the indorser and the maker of a note is original, there being no relation of suretyship as in some other jurisdictions, and therefore a creditor can base a claim against a bankrupt on notes of third parties payable to the bankrupt and indorsed by it to the creditor.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 476; Dec. Dig. ⟸316(4).]

2. BANKRUPTCY ⟸316(4)—CLAIMS—INDORSEMENT OF NOTES—PAYMENT.
Where a bankrupt was liable as indorser on a number of notes one of which was paid by the maker after the bankruptcy, each note must be treated by itself, not all together as creating one obligation, and the payment extinguishes the liability of the bankrupt on that note, notwithstanding the rule that the status of a claim is determined as of the date of the filing of the petition.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 476; Dec. Dig. ⟸316(4).]

3. BANKRUPTCY ⟸316(4)—CLAIMS—INDORSEMENT OF NOTES—RENEWAL NOTE.
A claim against a bankrupt indorser of notes is not defeated by the claimant, after the bankruptcy of the indorser, taking from the original maker an unindorsed renewal note, since it is then impossible to secure the indorsement, though taking such a note before the bankruptcy of the indorser would extinguish his liability.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 476; Dec. Dig. ⟸316(4).]

In Bankruptcy. In the matter of the bankruptcy of Henry & S. G. Lindeman, a corporation. On certificate of the referee after an order sustaining objections to a claim of the Gotham National Bank. Order reversed in part, and affirmed in part.

Wilder, Ewen & Patterson, of New York City (Ward V. Tolbert, of New York City, of counsel), for the motion.
Wentworth, Lowenstein & Stern, of New York City, opposed.

MAYER, District Judge. The motion comes up on the certificate of a referee in bankruptcy who has entered an order sustaining the objections of the trustee to the claim of the Gotham National Bank and fixing a day for the taking of testimony for the purpose of fixing the value of certain alleged security, and further directing that, if the value of the security shall appear to be less than the face value of the claim, then the bank shall be allowed to file an amended claim for the

difference between the total amount of the claim and the value of the security.

The facts are as follows: The Gotham National Bank filed its proof of claim in due course for the sum of $8,141.94. The trustee objected to $7,424.80 of said claim, which last-mentioned amount is based on the following promissory notes:

Maker	Date	Amount
A. N. Pickerill	May 20, 1914	$ 110.00
Warren Collins	May 21, 1914	139.00
Milton Piano Co.	May 27, 1914	710.00
W. K. Cayton	July 31, 1914	125.00
Jameson-Allen Piano Co.	Aug. 31, 1914	1,136.80
Crafts Piano Co.	Aug. 7, 1914	1,400.00
S. Z. Marks Co.	Aug. 15, 1914	1,849.00
Crafts Piano Co.	Aug. 15, 1914	1,955.00

—all of which were made to the order of the bankrupt.

The bank conceded:

"That the first note of $110 has been paid. The second note of $139 we took a new note for from Warren Collins. The third note for $710, there was no new note in regard to that. The $125 we accepted a new note from W. K. Cayton. As to the other notes, those were all notes payable to the bankrupt which he discounted. We hold these notes, and they have not been paid."

From the record it does not appear when the bank accepted other notes of the original makers in place of the Collins & Cayton notes without the indorsement or consent of the bankrupt.

[1] First. The five notes upon which as yet no payments have been made, and which, presumably, are still in the possession of the bank:

The holding of the referee was based on the theory that the liability of the maker was collateral security for the payment of the note by the bankrupt who was the indorser. The referee evidently sustained the contention of the attorneys for the trustee that there is a distinction between a case where the bankrupt is the maker and a third party the indorser, and a case where a third party is the maker and the bankrupt is the indorser.

Whatever may be the law in other jurisdictions, the New York law is that the holder of a note may recover from the maker or the indorser, as he pleases, or recover as far as he can from one and recover the remainder from the other. So far as the holder of the notes is concerned, the obligation of the indorser to him is an original obligation, and there is not a contract of suretyship such as may exist in some other jurisdictions.

Judge Blodgett, in Re Pulsifer (D. C.) 14 Fed. 247, cited by counsel for the trustee, says:

"But here the bankrupts are only sureties on these notes. Woolner Bros. are the principal debtors, and the bankrupts only made themselves contingently liable, on their contract as indorsers, to pay in case the makers did not."

It was on the theory that the indorser was a surety that he came to his conclusion. Here, however, the obligation of the maker does not constitute surety in aid of or collateral to the obligation of the bankrupt as indorser and the position taken by the bank was entirely sound, and the order of the referee must in that regard be reversed.

[2] Second. The Pickerill note for $110: The record is silent as to when this note was paid but from the argument and briefs it is apparently conceded to be the fact that this note was paid after the filing of the petition in bankruptcy. The bank insists that the status of a claim is as of the date of the filing of the petition. That statement, broadly speaking, is correct when it is sought to ascertain and determine the rights between the parties where the claim remains unpaid. The bank also presumably proceeds upon the theory that the obligations of the bankrupt constitute an entire obligation even though the bankrupt is liable to the bank as indorser upon eight separate transactions.

It is entirely clear to me that each transaction must be treated by itself, and that, when a note is paid as the Pickerill note has been, that ends the obligation of the bankrupt estate to the holder of the note.

We are not concerned here with the relations (if any) between the bankrupt estate and the maker of the note. So much of the claim, therefore, as relates to this note must be expunged.

[3] Third. The two notes for which renewal notes were taken from the makers without the indorsement of the bankrupt:

Here again the record is silent as to the time of the transaction, but counsel apparently agree that this took place after the filing of the petition. This is illustrative of the principle that, as between the bankrupt estate and the bank, the status of the parties must be fixed as of the date of the filing of the petition; and here again we are not concerned with such duties as may rest upon the bank in its relation with the makers, or hereafter with the bankrupt estate if the bank should collect in full from the makers. The bankruptcy statute was intended at least to deal with these situations from a practical and common sense point of view. It would be, to say the least, embarrassing from a commercial standpoint, to insist that the holder of a note could not take a renewal note from the maker when the bankrupt is no longer in a position to endorse a renewal note. The obligation is still outstanding and the note still remains unpaid, and the claim, therefore, is a real claim for an unpaid obligation, and the situation is not similar in principle to that of the Pickerill note.

The object of proving claims in bankruptcy is to set forth what is owed to the claimant, and, as nothing was owed on the Pickerill note, there was no claim in respect thereof; but the case of the other two notes differs from the usual situation of accepting a renewal note without indorsement, because an independent act, to wit, the petition in bankruptcy with the consequent adjudication, has occurred.

To require the holder of a note in such circumstances to refuse or decline to accept a renewal from the maker, unless the bankrupt indorser again indorse such renewal note, would be to call upon the holder to perform a useless act which would have no effect. The principle of release applicable where an indorser does not indorse a renewal note does not apply after bankruptcy.

If therefore I correctly understand that these renewal notes were given after the petition in bankruptcy, then the order of the referee must be reversed in that regard. Of course, if these renewal notes were given before the bankruptcy, then the indorser was released.

CLARK BROS. COAL MINING CO. v. PENNSYLVANIA R. CO.

(District Court, E. D. Pennsylvania. December 14, 1916.)

No. 2432.

COMMERCE ⊂=97—INTERSTATE COMMERCE LAW—ACTION ON AWARD OF COMMISSION.

A new trial granted in an action on an award of damages by the Interstate Commerce Commission for discrimination in the distribution of coal cars, on the ground that the award of the Commission, which was a part of the evidence submitted to the jury, under a later decision of the Supreme Court was made on an erroneous basis, and that the jury were not fully instructed on the point.

[Ed. Note.—For other cases, see Commerce, Cent. Dig. § 147; Dec. Dig. ⊂=97.]

At Law. Action by the Clark Bros. Coal Mining Company against the Pennsylvania Railroad Company. On motion by defendant for new trial. Motion granted.

A. L. Cole and A. M. Liveright, both of Clearfield, Pa., for plaintiff.

Henry W. Bikle and Francis I. Gowen, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. A necessity to retry this case is to be regretted. Not the least cause of regret is from the standpoint of the public interest in the prompt administration of justice, and in the certainties of the law and the sureness of the application of its principles. If, however, error has crept into the trial which compels a new trial, the sooner it is discovered and corrected the better for all concerned. The one thing which helps to reconcile us to this necessity is the opportunity it will afford to correct inadvertently used expressions in charge, which may have resulted in injustice to the plaintiff in the claim made for what for brevity we will call its right to interest. One feature of the trial which may give the defendant the right to a retrial is this:

The defendant introduced what we will term mathematical evidence to establish with mathematical certainty and precision that the Commission by its award allowed damages on the basis that the plaintiff was entitled in the distribution of cars to a number of cars up to its full physical capacity rating, and was also entitled to have included among the cars available for distribution all private and fuel cars. If the damages awarded were awarded on this basis, it is conceded an error was made, because the number of cars, by the Commission's own rule, was to be determined in another way. This other way was to rate the mines, not according to their physical capacity alone, but their physical capacity plus their commercial output, during a certain preceding period, divided by two, and to limit the number of cars for ratable distribution to what are called unassigned cars, being all cars available for general commercial use after excluding private and fuel

cars, and having thus found the share of each mine, to deliver to any mine its private cars and fuel cars consigned to it, but before delivering to it any unassigned cars to count against its share of such cars the private and fuel cars delivered to it. The result would be that no mine, which had received private or fuel cars, would have the right to receive any unassigned cars, unless its share of the unassigned cars exceeded the number of private and fuel cars delivered to it, and then only for the excess.

The evidence would at least tend to show that the award of damages was made by the Commission on this erroneous basis and would mathematically demonstrate this, unless the agreement of the mathematical results of the working out of this wrong rule of car distribution, with the results reached by the Commission, was a mere coincidence, or a necessary coincidence (as it might be), or the exact agreement in results can be otherwise explained. The trial judge submitted the question of the amount of damages to the jury to be determined under all the evidence. Under all the evidence, the mathematical evidence and the findings of the Commission were both included. If the mathematical evidence, in legal effect, merely tended to prove what was fairly a deduction of fact, this submission was of course proper, and it would have been error to have withdrawn the evidence of the Commission's findings. The trial judge was moreover justified, and indeed required to so submit the evidence of the award along with the other evidence, because this had been determined by the court of this district to be proper, and the trial judge was not only following the only guide which up to that time had been given him, but was controlled by the ruling previously made.

Since the trial, however, the law has been authoritatively pronounced for us in the case of Pennsylvania R. R. v. Jacoby, 242 U. S. 89, 37 Sup. Ct. 49, 61 L. Ed. ——. The mathematical evidence in that case was that the percentage relation which the shipments which the plaintiff might have made (on the basis of which damages were awarded) bore to the physical capacity output of the mine was mathematically expressed by the decimal figures 59.9. This had reference to one period which the action covered. The like expression of this relation with reference to the other period of the action was 59.6. The plaintiff had offered in evidence before the Commission certain distribution sheets. These showed that the mines favored by the railroad company had received in car tonnage during the one period 59.9 and during the other period 59.6 per cent. of their mine ratings, based upon the physical capacity of the mines, and as the plaintiff had received a less percentage, this established that these favored companies had received an undue, overlarge, and discriminatory allotment of cars. As these percentage figures were exactly the same percentage figures expressive of the allotment of cars which should have been made to the plaintiff which are disclosed by the award, we are afforded a mathematical demonstration that the Commission allowed damages to the plaintiff based upon the allotment of cars made to the favored shippers.

The defendant asked (by point 8 of its points of charge) that the correctness of this inference be submitted to the jury, and, if drawn

by them, that they should be instructed that the award was erroneous, and be further instructed that the plaintiff could not recover. The court refused to affirm this point. The refusal was adjudged error, and it was further adjudged that this error was not cured by proper instructions in the general charge.

One of the features of the Jacoby Case was that the finding of the Commission was the only evidence offered by the plaintiff. The instruction asked for, therefore, was the equivalent of binding instructions to the jury *if* (and we underscore the "if") they found the Commission had based its award upon the unfair percentage of capacity tonnage of the favored mines. The defendant had presented the same point, with this "if" conclusion stated as a fact, and asking for binding instructions. The trial judge refused the latter point, and there is in the opinion of the Supreme Court no word of direct criticism of this refusal. It is plainly intimated, and almost directly stated that no other inference than that set out in the point could be drawn; but it is to be observed that the ruling is confined to an affirmance of the eighth point, which left the question to the jury, and not to the point which took it from the jury, although here again a more drastic ruling is suggested as proper by the strengthening phrase that the court was "at least" of the opinion that the eighth point should have been affirmed. Thus has the law been settled to be so that all which remains to us is to apply it to the instant case.

We have here in effect the same evidence and almost in words the same testimony. We have likewise to all intents and purposes the same points, except in being framed to meet the difference in the evidence in the respect that in the present case there was and in the Jacoby Case there was not other evidence than the award. That with which we are now concerned is the answers. We are firm believers in the doctrine that charges ought not to be subjected to the hindsight test of verbal accuracy. If they are, the contrary doctrine will result in spineless charges, made up of abstract statements of the law, or in never entering judgments on verdicts rendered. The charge should, however, be free from errors of substance. If, at the time of this trial, we had been given the aid of the enlightening opinion in the Jacoby Case, the sixth point (one of the points corresponding to the seventh point in the Jacoby Case) would have been answered as it was answered or simply refused. The law of the point was affirmed, but we refused to take the question of fact from the jury. In this there was no error. The seventh point and others (corresponding to the eighth point of the Jacoby Case) we now know should have been affirmed. The answer is to have read into it what was said on the same subject in the general charge. When so read, the answer may be said to be an affirmance of the point. It was at least clearly so intended.

We are now constrained to find, however, that the answer does not give the defendant all to which it was entitled. Whether that which belongs to it is of less value than that which it received is a question which it has the right to decide. We cannot deprive it of any of its rights on the plea that what it received was of greater value than what

it was entitled to have. W., C. & P. R. R. Co. v. Broomall, 18 Wkly. Notes Cas. (Pa.) 44.

As the rule for a new trial must be made absolute, we need not advert to the other reasons assigned.

Rule absolute.

THE LONDON.

(District Court, E. D. Pennsylvania. January 9, 1917.)

No. 45 of 1916.

SEAMEN ⊂=23—RIGHT TO WAGES—STATUTE—CONSTRUCTION—"HALF OF WHAT HAS BEEN EARNED."

Under the provisions of the La Follette Seaman Act March 4, 1915, c. 153, 38 Stat. 1164, that a seaman shall be entitled to receive one-half of what he has earned at the time of demand for wages, notwithstanding an agreement that his wages are not to be paid until the end of the voyage, and that if the master refuses to pay the one-half demanded all then earned may be collected, when construed to effectuate the purposes of the act to give some protection to seamen without depriving the master of all control over them and of all means for enforcing loyalty to the ship, the amounts already paid to the seamen are to be deducted from the half of what has been earned which he is entitled to demand, not from the entire amount earned, since under the latter construction a seaman could, by successive demands, collect the entire amount due.

[Ed. Note.—For other cases, see Seamen, Cent. Dig. §§ 118–122; Dec. Dig. ⊂=23.]

In Admiralty. Libel for wages by Jacob Nelleman and others against the steamship London. On trial hearing upon the libel, answer, and proofs. Libel dismissed.

David E. Finley, Jr., and Joseph Hill Brinton, both of Philadelphia, Pa., for libelant.

Bruce A. Metzger and Howard H. Yocum, both of Philadelphia, Pa., for respondent.

DICKINSON, District Judge. This case comes in effect, although not in form, as a case stated. The purpose is to have a construction put upon certain phrases used in the amendment to the Seamen's Act known as the La Follette Act. The question involved is whether, under that act in determining how much of the wages earned may be demanded as presently payable, the amount of payments made on wages is to be deducted from the amount of wages earned, or from the one-half of the amount earned which is made presently payable. A supposititious case will illustrate in the concrete the different result reached by the adoption of the one method of figuring, or the other. Take the case of a sailor who earns for instance $1 per day, or $30 per month, none of which under the shipping articles is payable until the end of the voyage. He has earned on, say, January 1st, $90. He asks for and is paid $45. On January 6th (five days later) he makes another demand. How much, under the La Follette Act, is payable? Under the respondent's construction, the amount is $2.50;

under the libelant's, it is $25. These widely different results flow from the different method of figuring. The respondent takes the amount earned as $95 and the one-half demandable as $47.50, from which is deducted $45, the amount paid, striking the balance of $2.50. The libelant takes the same amount earned $95, and deducts from it $45, the same amount paid, and strikes a balance of $50 as the balance due and gets the result of $25 as the one-half presently demandable.

The sole question before us is: Which of these two methods is in accord with the act of Congress? All other questions have been eliminated to have this one ruled. There is no question of advancements (as distinguished from payments on account of wages earned) and no question of jurisdiction raised, and there is no dispute over the facts. The claim of one of the libelants may be taken as typical of all. He had earned $60.48 and had been paid $37.53. His claim is that he demanded as his right $11.47, the one-half of $22.95, the balance of what he had earned, and, as payment was refused, the whole, $22.95, has become payable under the provisions of the act of Congress. The respondent answers that the sum demandable was $30.24, the one-half of $60.48, the amount earned, and, as more than this had been paid on the wages earned, the ship's master was justified in refusing to pay more, and that no libel would lie for the balance of wages earned but not yet payable.

If the libelants are right in their construction of the act, a decree should be entered for the balance of the earned wages. If they are not right, the libel should be dismissed. It is, of course, obvious that the practical effect of the construction given to the act of Congress by the libelants is to make all the earned wages demandable. The act gives the right to recover all only when payment of half is refused. It also recognizes the right of the master to retain one-half the earned wages to assure fidelity to the shipping articles and loyalty to the ship's service until the end of the voyage. A construction which is destructive of these main purposes of the act would, by its mere statement, forestall discussion. The earnestness, however, with which the argument in its favor has been pressed and the traditional guardianship relation to sailors, which courts of admiralty assume, as well as the highly commendable purposes of the La Follette Act, move us to a fuller expression of the reasons for the finding now made. The act has a general police and remedial purpose, which makes a strong appeal for a liberal construction in advancement of the ends in view. The law evinces, along with a recognition of the urgent need of a remedy for existing abuses, an appreciation of the practical limitations of the general subject. Without adverting to other features, these two phases of the subject-matter of the legislation were in mind. One was the necessity of protection to seamen, who might be brought on board ship under conditions which made them helpless to protect themselves, and held them for the duration of a long voyage with their claim for future wages already depleted and the payment of whatever might be coming to them tied up for an extended period of time. The helplessness of people thus situated is appealing, and this

act was intended to afford relief. Certainly no one would wish to be a party to the withholding of any relief which has thus become the legal right of seamen. On the other hand, the great value which overseas commerce has to every nation and the necessity for the maintenance of proper discipline aboard ship, and to assure, as well as encourage, loyalty to the ship and to its service for its protection, all demand that some means of control over the ship's crew and some measure of command over their services must be given to the master.

The provisions of this act, or some of them, are necessarily drastic. The one we are now considering compels the master to pay at least half the wages earned long before the time when, by the agreement of the parties, any are payable under pain of a penalty for refusal of being obliged to pay all. The act made what was thought to be the best adjustment of all the difficulties which the situation presents by extending relief to the seamen by giving them one-half of their earnings and leaving to the master one-half of the means of control given by the shipping articles. We think this to be the fair construction of the act. It first gives the seamen the right to demand one-half of the wages earned. What follows is intended to provide them with the means of enforcing the right given. No phraseology used in describing the means should therefore be held to expand the right unless clearly intended and plainly expressed. We find such enlargement not to have been expressed—and most certainly not intended. The effect of the construction asked to be given to these later provisions of the act, as already stated, is to enlarge the demand for wages from half to all. The act does, indeed, give the right to all; but this is only in case the master refuses to pay half. If the seamen were, in the first place, entitled to demand all, why give them the right to demand all only in case of a refusal? This very provision is a denial of the construction sought to be given to the act. The common sense and sense of justice of any one upon whom such a construction of the law was attempted to be forced would be so outraged that there would be provoked a feeling of irritation and resentment which the average vessel owner and master could not suppress, and this would defeat their co-operation in accomplishing through this act the very worthy end which its framers had in view.

The construction we have given to the act is in accord with all the cases to which we have been referred, although the special features upon which emphasis was placed in the other cases are not here present. The Ixion, 237 Fed. 142, ruled in the Northern Division of the Western District of Washington; The Jacob N. Haskell (D. C.) 235 Fed. 914.

The libel is dismissed.

UNITED STATES v. ANDERSON.

(District Court, D. Montana. January 8, 1917.)

No. 82.

1. PUBLIC LANDS ⟸120—PATENTS—CANCELLATION—EVIDENCE.
A patent to public lands, being by a solemn grant over the seal of the United States, and presumptive that the patentee has performed all conditions precedent to its issuance, cannot be annulled for fraud, unless the evidence is unequivocal, clear, and convincing.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

2. PUBLIC LANDS ⟸35(3)—HOMESTEAD LAWS—ABSENCE—"ACTUAL RESIDENCE."
Defendant, who entered land under the Homestead Law (Act May 20, 1862, c. 75, 12 Stat. 392), requiring actual residence, erected a house and established a residence upon the land. He substantially improved and cultivated the land, mainly by paid labor and croppers on shares, but, being a single man, worked for neighbors in the vicinity, though occasionally returning to his homestead entry. For some weeks he lived in the timber not far distant securing fence material, and during the period of residence was several times absent from the state on business. *Held*, that as "actual residence," within the law, means no more than residence, true, substantial, and real, such absences did not prevent defendant from acquiring title; the law not insisting that he should remain upon the homestead entry when idle.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. § 74; Dec. Dig. ⟸35(3).
For other definitions, see Words and Phrases, First and Second Series, Actual Residence.]

3. PUBLIC LANDS ⟸120—PATENT—HOMESTEAD ENTRIES—FALSE STATEMENTS.
In such case, as defendant was entitled to the land despite his temporary absences, the statement in his final proof that he had not been absent from the land, made in response to a question to that effect, did not warrant cancellation of the patent, particularly as defendant testified that the officer taking the proof explained to him that absence meant for a period interrupting continuous residence, and the answers of the other witnesses to the proof showed defendant's temporary absence, so that the land department was not misled.
[Ed. Note.—For other cases, see Public Lands, Cent. Dig. §§ 332–335; Dec. Dig. ⟸120.]

In Equity. Suit by the United States against Carl Anderson. Decree for defendant.

Burton K. Wheeler, U. S. Atty., of Butte, Mont.

L. A. Conser, of Baker, Mont., and W. W. Palmer, of Conway, Iowa, for defendant.

BOURQUIN, District Judge. In this suit to annul a homestead patent, the charge is that defendant procured the patent by fraud, in that for the required period he did not establish and continuously maintain residence upon the land. The answer denies.

[1] The settled law is that, in a court of equity, like any other contract, a patent, a solemn grant over the seal of and by the United States

and presumptive that the patentee performed all conditions precedent to its issuance, cannot be annulled for fraud, unless the evidence is unequivocal, clear, and convincing, in quality and quantity that inspires confidence and produces conviction of the truth of the charge. Upon consideration of plaintiff's evidence, the witnesses, the past differences of the principal ones with defendant, their opportunities or lack of them for knowledge, their testimony both favorable and unfavorable to defendant, the latter largely negative, no more than suspicion and doubt is created, far short of the necessary proof of the charge. That suffices to dismiss the suit. It may be added, however, that, considered in connection with defendant's evidence, serious suspicion and doubt are dispelled. There is practically no irreconcilable conflict between the evidence of the parties.

[2] Briefly, it appears defendant built and furnished a house upon the land and established residence therein. For more than three years thereafter and prior to final proof, he substantially improved and cultivated the land, the latter mainly by paid labor and croppers on shares, having some 125 acres under cultivation at the latter time. Being a single man and without stock or work animals, he worked for neighbors a mile or more away, exchanging work for use of teams, at such times staying mostly at the neighbors, though also on occasions returning to this land. For some weeks he lived in the timber not far distant, securing fence material for the land. He went to Dakota and harvested a crop he planted before establishing residence on his homestead, then returning to this land, thereafter and prior to final proof he made some four visits to Minnesota, of two weeks' to two months' duration, due to his father's death and necessities accruing therefrom. At all times all his personal property in Montana was upon this homestead, and it was his only home. At no time was he absent from the land six months. That on occasion or many occasions passers or croppers on some part of the homestead did not see defendant, did not see evidence of residence, ashes, cans, etc., at the house, under all the circumstances is consistent with defendant's residence there. After final entry, made three years prior to suit, he continued to reside upon, improve, and cultivate the land, as before—competent evidence of his intent before. Of the three years' period of residence required to earn the land, he was undoubtedly absent a considerable, perhaps the greater, part.

But this did not disturb his continuous actual residence upon the homestead. "Actual residence," within the Homestead Law, means no more than residence—true, substantial and real; not fictitious, nominal, or pretended. It does not require continuous presence on the land, but only that it be habitation fixed and maintained with intent to continue it so long as the homestead law requires, in this case, three years. It is consistent with much absence and less presence on the land, turning largely on circumstances and intent and good faith evidenced by acts and conduct. No good policy would be subserved by insisting an entryman in a case like this should "loaf" upon the homestead, and the law does not insist.

[3] In homestead final proofs is a question: Has the entryman "ever been absent from the homstead" ? Defendant at final proof answered, "I have not," and plaintiff's principal argument was that, since he now admits he was absent, he made a false and fraudulent representation in the final proof, and so the patent should be canceled. As the evidence here shows that, despite absences, plaintiff earned the land, had he at final proof admitted absences, he still ought to and would have received the patent; so the false answer was not material, not fraud.

The final proof question is ambiguous. What absence does it import? Surely not mere trips to town, neighbors, etc., though of some few days. Defendant testified herein that, on his necessary inquiry, the officer taking the proof explained to him that "absent" meant for a period interrupting continuous residence; hence his answer. And in that final proof are the answers of two witnesses that plaintiff had been absent, demonstrating, though not material, that by defendant's answer the Land Department was not misled. It is appreciated that, in such cases as this, circumstances render proof of the alleged fraud difficult. But no more so than for an honest patentee to defend the charge. Safety of the latter, stability of titles, and general welfare prohibit relaxation of the rules of proof.

Decree accordingly.

HENNINGSEN PRODUCE CO. v. WHALEY, Internal Revenue Collector.

(District Court, D. Montana. January 8, 1917.)

No. 190.

1. INTERNAL REVENUE ⊂⊃16—ADULTERATION OF BUTTER—REGULATION BY COMMISSIONER OF INTERNAL REVENUE—VALIDITY.

A regulation by the Commissioner of Internal Revenue that butter having 16 per cent. or more of moisture shall be classed as adulterated butter, within Act May 9, 1902, c. 784, § 4, 32 Stat. 194, defining adulterated butter to be any butter in the manufacture or manipulation of which any process or material is used to cause the absorption of abnormal quantities of water, milk, or cream, and imposing taxes on manufacturers of such butter, which regulation did not apply to farmers, is invalid, being in excess of the powers of the Commissioner, imposing taxes where not due, and waiving them when due.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. ⊂⊃16.]

2. INTERNAL REVENUE ⊂⊃16—ADULTERATED BUTTER—MANUFACTURERS—LIABILITY FOR TAXES.

In such case, a manufacturer of butter, intending to take advantage of the regulation, attempted to incorporate into its product as much moisture as possible without exceeding 16 per cent., by working over butter containing a small amount of moisture, so that the moisture would be increased practically up to the maximum prescribed by the regulation, notwithstanding the ordinary amount of moisture in butter is considerably less than 16 per cent. *Held*, that the manufacturer was subject to the tax imposed by the act, being a manufacturer of adulterated butter, because using a process with intent and effect of causing the absorption of abnormal quantities of water, milk, and cream.

[Ed. Note.—For other cases, see Internal Revenue, Dec. Dig. ⊂⊃16.]

At Law. Action by the Henningsen Produce Company, a corporation, against William C. Whaley, as Collector of Internal Revenue of the District of Montana. Judgment for defendant.

John E. Corette, of Butte, Mont., for plaintiff.
Burton K. Wheeler, U. S. Atty., of Butte, Mont., for defendant.

BOURQUIN, District Judge. Plaintiff, assessed as a manufacturer of adulterated butter, seeks recovery of taxes paid, alleging it was not such manufacturer. So far as material here, Act May 9, 1902, § 4 (32 Stat. 194), defines "adulterated butter" to be "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream," and imposes taxes on the manufacturer.

[1] Although the act does not so authorize, the Commissioner of Internal Revenue has issued a "regulation" that "butter having 16 per cent. or more of moisture contains an abnormal quantity and is classed as adulterated butter." And the maker, if not a farmer, to whom the regulation is not applied, though the statute contains no exceptions, is assumed to be a manufacturer of adulterated butter and taxed. From the evidence it appears that revenue agents in the markets secured samples of plaintiff's butter, in many of which was found 16 per cent. and more of moisture. Thereupon, because of and relying on the regulation alone, plaintiff was assessed as a manufacturer of adulterated butter, and paid under protest.

Plaintiff contends the regulation is void, relying on U. S. v. 11,150 Pounds of Butter, 195 Fed. 657, 115 C. C. A. 463, which so decides. Defendant, contra, relies on Creamery Co. v. Lemon, 163 Fed. 145, 89 C. C. A. 595, which holds the regulation valid. It is believed that the conclusion, at least, of the former case is right—that the regulation is void. It is more than a rule of procedure and administration, being legislative in character. It would amend, change, annul, expand, and contract the act. Amongst other things, it ignores means, intent, and effect, the very substance of the act, and counts alone on a condition, however produced, contrary to the act. It imposes taxes where not due, and waives them where due. It creates some offenses, and pardons, even licenses, others. The Commissioner has no such power. Neither the act nor general statutes confer it on him.

[2] But there is more to the case. It also appears, and by plaintiff's evidence, that at the vital time it was manufacturing daily about 2,000 pounds of butter, and was buying and selling other butter; that its methods of churning—preparation of cream, temperatures, churn revolutions, washing, salting, and working, any and all of which affect the amount of moisture in the finished product—were not dictated alone by what, under the circumstances, was ordinary, usual, customary, recognized as good practice, and with an eye single to the quality of the butter; in brief, were not normal, but were modified with intent that the butter would contain 15.9 per cent. moisture and all practicable within the 16 per cent. of the regulation, and to the effect that moisture content varied from less to more than 16 per cent.,

but always more than it would have been from normal methods. Plaintiff frankly admits its aim and instructions were not to exceed 15.9 per cent. moisture and to secure all practicable benefit from the regulation; and therein, at the final stage, when "finished," when, as happened, sampling showed moisture substantially lower than 15.9 per cent., the butter was additionally worked, solely to increase, as it did, its moisture content. It is obvious that plaintiff's instructions were, not only not to exceed 15.9 per cent. moisture, but were also to modify normal methods when necessary, to increase moisture to that amount; and this was done. And so done, in "manufacture or manipulafion" a "process" was "used with intent or effect of causing the absorption of abnormal quantities of water, milk, or cream," resulting in "adulterated butter" within the statute, whether the moisture content was 16 per cent., or more, or less. The determining factor is not any particular percentage of moisture, but the means and intent by which moisture is increased. In one case butter containing 18 per cent. of moisture may not be adulterated; in another case, containing 12 per cent., it may be.

As observed in the first-cited case, butter making eliminates moisture. But the statute must receive a reasonable and practicable construction. And it is believed that any departure from methods appropriate to the circumstances of the particular churning, departure from methods calculated to result in a product of appropriate quality, with intent and effect to increase moisture over what it would have been, but for such departure, has caused "absorption of abnormal quantities of water, milk, or cream," within the statute, whether the increase be due to retention of moisture throughout, or by elimination and reincorporation. Intent *and* effect, not "or," the statute must be read; for intent without effect could not produce adulterated butter. It would seem normal methods of manufacture generally result in about 14 per cent. moisture. The butter plaintiff purchased ranged from 8 to 17.5 per cent., and it appears it worked over at least that containing 16 per cent. and more, to reduce moisture just below the 16 per cent. of the regulation and to what it terms the "legal limit."

From the evidence it appears the regulation is responsible for startling consequences. Manufacturers take advantage of it to deliberately increase moisture, it may be from less than 1 up to 3 per cent. and more, to a point short of the regulation's 16 per cent. It follows a tremendous amount of water is sold at butter prices, doubtless aggregating millions of dollars annually, which would not be, but for the license seen in the regulation—a curious and injurious result from administration of a beneficial law. And although an occasional manufacturer, who oversteps the "legal limit" and is detected, pays a tax, it is probably not cents to the treasury where the people pay dollars for water. The regulation being void, even as its mere violation does not subject the manufacturer to the statute, obedience to it does not protect those who violate the statute.

From what precedes, it appears that plaintiff was a manufacturer of adulterated butter when the taxes involved were levied and paid, and so it is not entitled to recover them.

Judgment accordingly.

In re BECK.

(District Court, S. D. New York. November 10, 1915.)

1. BANKRUPTCY ⊂=205—EFFECT OF—RIGHTS OF TRUSTEE.
After bankkruptcy, the trustee, and not the bankrupt, can claim money retained by the bankrupt's employer under execution issued pursuant to Code Civ. Proc. N. Y. § 1391; execution on the judgment having been returned unsatisfied and the judgment creditor desiring to subject the bankrupt's wages to the payment of his claim.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⊂=205.]

2. BANKRUPTCY ⊂=205—ADJUDICATION—RIGHTS OF TRUSTEE.
The trustee is not, as against the judgment creditor, entitled to funds reserved by the employer at a time more than four months before adjudication.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⊂=205.]

3. BANKRUPTCY ⊂=196—LIEN—RIGHTS OF JUDGMENT CREDITOR.
In such case, as the action was one at law, the judgment creditor had no equitable lien against the moneys retained under execution which could be asserted against the trustee.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 306–316; Dec. Dig. ⊂=196.]

4. BANKRUPTCY ⊂=205—ADJUDICATION—RIGHT OF TRUSTEE.
As there could be no levy on the bankrupt's salary until there was a salary to levy upon, money retained by the employer within the four months period is subject to the claim of the trustee, being treated as property subjected to execution within four months of bankruptcy.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 234, 303; Dec. Dig. ⊂=205.]

5. BANKRUPTCY ⊂=216—DISCHARGE—NECESSITY.
In such case, as a debt is not barred until the bankrupt secures a discharge, the bankrupt's employer should, despite adjudication, continue to retain the required percentage out of his compensation pursuant to execution, the assertion of the claim by the trustee having reduced the amount retained to a sum insufficient to satisfy the creditor's claim, which sum should be delivered to the bankrupt in event of discharge, or to the creditor in event of denial.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 328–333; Dec. Dig. ⊂=216.]

In Bankruptcy. In the matter of the bankruptcy of Robert T. Beck. On motion to vacate or modify an order staying proceedings in the state court affecting the bankruptcy. Order modified.

Allen & Dean, of New York City, for Bauer, a judgment creditor.
Eugene L. Brisach, of New York City, for bankrupt.

HOUGH, Circuit Judge. The only proceeding intended to be affected by this motion is an outstanding execution (or rather the proceeds thereof) issued under section 1391 of the Code of Civil Procedure against the wages of the bankrupt herein, who is now and long has been a policeman of this city.

It appears that on October 6, 1913, a judgment was obtained against Beck in the Municipal Court for the sum of $86.86. On October 21, 1913, an ordinary execution was returned unsatisfied, and thereupon another execution was issued under the section of the Code above alluded to. Ever since that time the city paymaster has retained the proper proportion of Beck's wages, until he has in hand the sum of $101.34.

[1, 2] On February 16, 1915, Beck filed a petition in voluntary bankruptcy, and was at once adjudicated. The question submitted is, To whom does the money now in the hands of the city paymaster belong? Clearly no one but the trustee in bankruptcy can claim anything as against Bauer, the judgment creditor, and that trustee can claim nothing back of the four months period which began October 16, 1914.

[3] The action was at law. There was no equitable lien arising in favor of the judgment creditor, wherefore Bauer's claim is not within the doctrine of Metcalf v. Barker, 187 U. S. 165, 23 Sup. Ct. 67, 47 L. Ed. 122.

The moment any wages or salary became due to Beck, the execution applied to the proper proportion thereof. Whatever was retained by the city paymaster down to October 16, 1914, is clearly applicable to the payment of Bauer's judgment.

[4] What was retained after October 16, 1914, was just so much money practically in the hands of the sheriff under a levy made within the four months period, for there could be no levy upon Beck's salary until there was a salary to levy upon. Therefore the date of levy is coincident with the date of accruing wage. To such a situation Clarke v. Larremore, 188 U. S. 486, 23 Sup. Ct. 363, 47 L. Ed. 555, applies, and the trustee in bankruptcy is entitled to whatever the city paymaster has in his hand and retained from Beck's wages between October 16, 1914, and February 16, 1915.

[5] Beck has not yet obtained a discharge, nor does it appear whether he has applied for one; therefore until he is discharged, or his right to apply for a discharge has expired, the doctrine of In re Van Buren (D. C.) 164 Fed. 883, applies, and the city paymaster must continue to retain enough of Beck's still accruing salary, and retain it for the benefit of Bauer or of Beck as the case may be. That is, if Beck gets a discharge, the debt is wiped out, and if he does not get a discharge, Bauer's judgment may be satisfied out of wages earned after adjudication as well as before the four months period. Of course under no circumstances can the trustee claim anything accruing after adjudication.

The stay order will therefore be lifted to the extent of authorizing the judgment creditor and the sheriff to obtain and pay over whatever was retained by the city paymaster prior to October 16, 1914. The trustee is instructed to demand the amount retained between October 16, 1914, and February 16, 1915. This will leave a deficiency upon Bauer's judgment, and the retention of wages must still continue until it appears whether Beck gets his discharge or not.

Settle order on notice.

EQUITABLE TRUST CO. OF NEW YORK v. BIRMINGHAM, E. & B. R. CO.

(District Court, N. D. Alabama, S. D. January 11, 1917.)

No. 257.

CORPORATIONS ⊂=566(3) — RECEIVERS — CLAIMS AGAINST — PREFERENCES — SURETY.

The surety on a supersedeas bond of an insolvent corporation is not entitled to a preference, as against the bondholders, to the income or corpus of the property in the hands of receivers on the theory that the supersedeas bond by postponing the receivership benefited the bondholders, in the absence of a showing that the bondholders or their trustee procured the execution of the bond by the surety or acquiesced therein, with knowledge that the corporation was insolvent, or that the money realized by the bond could be traced into the possession of the receivers and so shown to have benefited the bondholders.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2284; Dec. Dig. ⊂=566(3).]

In Equity. Suit by the Equitable Trust Company of New York against the Birmingham, Ensley & Bessemer Railroad Company. On intervention by the United States Fidelity & Guaranty Company. Intervention dismissed.

Coleman & Coleman, of Birmingham, Ala., for intervener.

Forney Johnston, of Birmingham, Ala., for complainant and receiver.

GRUBB, District Judge. The intervention presents the right of one, who becomes surety on the supersedeas bond of an insolvent corporation, resulting in the postponement of a seizure of its property under execution, to a preference in the distribution of the income of the receiver of the corporation or in the corpus, if the receiver's income has been diverted.

The right of labor and supply creditors, who furnished labor or material within six months, to such a preference, is well settled in the federal courts.

The intervener claims in analogy to that rule, upon the idea that its act was of benefit to the mortgage bondholders by postponing the receivership. If it were shown that the bondholders or their trustee procured the intervener to execute the bond or acquiesced in its act, with knowledge that the mortgagor was insolvent, and that the intervener therefore looked beyond the credit of the mortgagor to the mortgaged property, the equity claimed might be sustained. Union Trust Co. v. Morrison, 125 U. S. 591, 8 Sup. Ct. 1004, 31 L. Ed. 825; Jones v. Central Trust Co., 73 Fed. 568, 19 C. C. A. 569. Or if the money or property, released by the giving of the bond, could be traced into the possession of the receiver, and so shown to benefit the bondholders, as in the case of Love v. North American Co., 229 Fed. 103, 143 C. C. A. 379. But where no such special facts appear, and the claim depends upon the sole equity that the act of the sure-

ty, unknown to and unauthorized by the bondholders or their trustee, has served to postpone insolvency and a receivership, and to prolong the existence of the mortgagor as a going concern, I do not think the preference should be sustained. It does not lie in the power of the mortgagor and its surety, by an agreement between themselves, to which the bondholders were not parties or consenting, to convert an unpreferred claim against the mortgagor's assets into one prior to that of the mortgagee. The mortgagee might well prefer an earlier receivership to such a preference, depending upon the amount of the claim preferred. The prior lien of the mortgage should not be displaced without the mortgagee's consent or acquiescence by action of the mortgagor and its surety. When, as in this case, the surety bonds were executed while the principal was apparently solvent and was not in default under the mortgage, the natural presumption would be that the surety company looked to the personal credit of the mortgagor for indemnity, and the mortgagee could well indulge in that presumption, if it knew of the transaction. The authorities are in conflict, but this seems to me the better rule. Whiteley v. Central Trust Co., 76 Fed. 74, 22 C. C. A. 67, 34 L. R. A. 303; United States Fidelity & Guaranty Co. v. United States & Mexican Trust Co., 234 Fed. 238, — C. C. A. —.

For these reasons, the intervention will be dismissed at intervener's costs, and it is so ordered.

STARK ELECTRIC R. CO. v. McGINTY CONTRACTING CO.

(Circuit Court of Appeals, Sixth Circuit. January 9, 1917.)

No. 2851.

1. CORPORATIONS ⟸617(5)—DISSOLUTION—PENDING SUITS.
The provisions of Code W. Va. 1906, c. 53, § 59 (Code W. Va. 1913, c. 53, § 59 [sec. 2891]), for the collection and distribution of the assets of a corporation whose franchise is annulled for failure to pay corporate license tax, are not exclusive, and suits either for or on behalf of the corporation, pending at the time of dissolution, are not abated.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. § 2454; Dec. Dig. ⟸617(5).]

2. CORPORATIONS ⟸630(1)—DISSOLUTION—RIGHT TO SUE.
At the time the contract in suit was made, plaintiff was a domestic corporation, organized under the laws of West Virginia, but in the year 1909 its charter rights and franchises were annulled for failure to pay the corporate license tax. Code W. Va. 1906, c. 32, § 136 (Code W. Va. 1913, c. 32, § 136 [sec. 1269]), declares that the actual or attempted exercise of any powers under the charter of such corporation after the Governor's proclamation of delinquency shall be a criminal misdemeanor. Chapter 53, § 59 (Code W. Va. 1913, c. 53, § 59 [sec. 2891]), provides for the collection and distribution of corporate assets. *Held* that as the mode prescribed is not exclusive, the institution of suit on such contract was not prohibited, not amounting to an exercise, or attempt to exercise, any corporate power.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2482, 2483; Dec. Dig. ⟸630(1).]

3. CORPORATIONS ⟸630(5)—DISSOLUTION—ACTIONS—PRESUMPTIONS.
In such case, it will be presumed that a suit by such corporation is for the purpose of collecting a debt for distribution, and the absence of evidence of corporate debts is immaterial, for the stockholders are entitled to corporate assets subject to payment of debts.

[Ed. Note.—For other cases, see Corporations, Dec. Dig. ⟸630(5).]

4. CORPORATIONS ⟸621(1)—DISSOLUTION—RECEIVERS.
In such case, there was no imperative necessity for the appointment of a receiver.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2461–2464, 2469, 2471; Dec. Dig. ⟸621(1).]

5. CORPORATIONS ⟸623—DISSOLUTION—TRUST FUNDS.
In such case, assets collected in suit by corporation constitute a trust fund, and are to be distributed by its directors.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 2472–2474; Dec. Dig. ⟸623.]

6. RAILROADS ⟸25—CONTRACTS—EVIDENCE—SUFFICIENCY.
In a suit against defendant railroad company, evidence *held* to warrant a finding that defendant was the real party in interest to the contract involved; the ostensible party being its mere buffer or dummy.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. § 57; Dec. Dig. ⟸25.]

7. RAILROADS ⟸17—CONTRACTS—LIABILITY.
Where the defendant railroad company in building an extension organized a buffer or dummy corporation, and defendant and its officers

represented that defendant was the real party in interest, defendant is liable on contracts made by its dummy.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 36–38; Dec. Dig. ⊂⊃17.]

8. EVIDENCE ⊂⊃397(1)—PAROL EVIDENCE RULE—ADMISSIBILITY.
Parol representations are not admissible to vary a written contract, purporting to contain the entire agreement, in the absence of fraud or mutual mistake.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. §§ 1756, 1763–1765; Dec. Dig. ⊂⊃397(1).]

9. EVIDENCE ⊂⊃445(7)—PAROL EVIDENCE RULE—ADMISSIBILITY.
Defendant railroad company, desiring to build an extension, contracted with plaintiff. The written contract made no provision as to the supporting of defendant's tracks during excavation, but it was intended, and both parties expected, that the extension should not interfere with the traffic. Defendant refused to remove its tracks out of the way of the excavation, and in making such excavations plaintiff supported the tracks. *Held*, that in such case parol evidence that defendant agreed to pay a greater price for the excavation to induce plaintiff to continue the work was admissible; the contract not purporting to speak on such matter and the agreement being collateral.

[Ed. Note.—For other cases, see Evidence, Cent. Dig. § 2062; Dec. Dig. ⊂⊃445(7).]

10. CONTRACTS ⊂⊃322(5)—CONSTRUCTION—RECEIPT OF PAYMENT.
In such case, plaintiff's acceptance of payment of vouchers for the contract price for the excavations is not conclusive against its right to recover the increased compensation, in view of testimony that such funds were received with an understanding that the balance should be paid when the entire work was done.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1465, 1534, 1535, 1538–1542; Dec. Dig. ⊂⊃322(5).]

11. LIMITATION OF ACTIONS ⊂⊃46(1)—RUNNING OF STATUTE—ACCRUAL OF ACTION.
Where a railroad contractor was to receive any balance due on the contract when the work was done, limitations against his right of action for such sums did not begin to run until the completion of the work.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 240, 251, 253; Dec. Dig. ⊂⊃46(1).]

12. PRINCIPAL AND AGENT ⊂⊃101(1)—AUTHORITY OF AGENT—EFFECT OF.
Where the agreement was within an agent's apparent authority, such agreement cannot be defeated by proof of lack of actual authority.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 255, 330, 346; Dec. Dig. ⊂⊃101(1).]

13. TRIAL ⊂⊃139(1)—PROVINCE OF COURT AND JURY—SUBMISSION OF ISSUES.
Where there is evidence in support of a cause of action, it is properly submitted to the jury.

[Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 332, 333, 338–341; Dec. Dig. ⊂⊃139(1).]

14. CONTRACTS ⊂⊃284(4)—CONSTRUCTION—DUTY OF ENGINEER.
Where a construction contract required the work to be done to the satisfaction of an engineer whose judgment should be conclusive on both parties, and who should be entitled to decide all controversies, the engineer's action is final and conclusive, and binding on the parties in the absence

of fraud, or such gross mistake as to imply bad faith, or failure to exercise an honest judgment.

[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 1326, 1334; Dec. Dig. ⊂⊃284(4).]

15. APPEAL AND ERROR ⊂⊃1068(4)—REVIEW—HARMLESS ERROR.

In an action on a construction contract, which provided that the work should be performed to the satisfaction of the company's engineer, whose judgment should be conclusive on the parties, and who should have power to determine all controversies, the court charged that the action of the engineer was final, conclusive, and binding on the parties, and that his judgment could only be impeached when he has been so grossly mistaken that the mistake would suggest nearly something akin to fraud on his part. After the contractor had quit work, the engineer gave a final quantity sheet based on a completed contract, which stated the quantities of the several classes of labor called for by the written contract, and the first oral contract at the prices provided for therein, together with the amounts for each class of labor and the aggregate thereof. The contract provided that the engineer's certificate should be given only when in the opinion of the engineer the contractor shall have finally completed all the work contemplated. There was testimony tending to show that the engineer in making the statement intended to accept the work done by the contractor subject to such deductions as should be necessary to complete the work in respects stated by the engineer. *Held* that, where there was a verdict for the contractor for the full amount without any deduction, any error resulting from the instruction must be deemed cured by a deduction of the amount stated by the engineer as necessary to complete the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 4228; Dec. Dig. ⊂⊃1068(4); Trial, Cent. Dig. § 558.]

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

Action by the McGinty Contracting Company against the Stark Electric Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed, with modification in case plaintiff enters remittitur; otherwise, reversed, and new trial directed.

H. B. Webber, of Canton, Ohio, for plaintiff in error.

Luther Day, of Cleveland, Ohio, and John T. De Ford, of Minerva, Ohio, for defendant in error.

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

KNAPPEN, Circuit Judge. The defendant in error (hereinafter called plaintiff) sued plaintiff in error (whom we shall call defendant), together with the Interurban Construction Company, for breach of a contract by which plaintiff agreed to do certain grading for the construction of an extension of defendants' line from its terminus at Sebring, Ohio, to Salem, Ohio. At the conclusion of the testimony, taken on a trial by jury, plaintiff was required to elect as to which defendant it would prosecute, and elected to proceed against the railroad company. Plaintiff had verdict and judgment, and defendant's motion for a new trial was overruled. The errors assigned relate to the introduction of testimony, the denial of motions for directed verdict, and for new trial, the refusal of requests to charge and the

charge as given. The suit involves several causes of action, to which specific defenses are made. Two defenses were presented going to the entire right of action, viz.: That plaintiff lacks legal capacity to sue; and that defendant was not a party to the contract sued on.

[1, 2] 1. Plaintiff's capacity to sue: When the contract in suit was made (June 22, 1903), and during the entire period of its performance, plaintiff was a domestic corporation organized under the laws of West Virginia. In the year 1909 its charter rights and franchises were annulled under the statutes of that state for failure to pay the corporate license tax, together with certain penalties and fines. By section 1058 of the then existing Code (Code 1913, c. 32, § 136 [section 1269]), the actual or attempted exercise of "any powers under the charter of any such corporation," after the issuing of the Governor's proclamation of delinquency, was made a criminal misdemeanor. Provision was made by statute for the winding up of affairs of a dissolved corporation by action of the public authorities, as well as on behalf of stockholders representing a given interest, including the appointment of receivers over the corporate assets and affairs; and defendant contends that the effect of these statutes is to forbid the maintenance of this suit. But section 2287 of the Code (Code 1913, c. 53, § 59 [section 2891]) expressly provides for the bringing and continuing or defending of suits—

"in the corporate name, in like manner and with like effect as before such dissolution or expiration; but so far only as shall be necessary or proper for collecting the debts and claims due to the corporation, converting its property and assets into money, prosecuting and protecting its rights, enforcing its liabilities, and paying over and distributing its property or assets, or the proceeds thereof, to those entitled thereto."

These statutory provisions for winding up and distributing the assets are not exclusive. Donnally v. Hearndon, 41 W. Va. 519, 526, 23 S. E. 646. And suits either for or on behalf of the corporation pending at the time of the dissolution are expressly held not abated thereby. Lumber Co. v. Ward, 30 W. Va. 43, 54, 3 S. E. 227; Board of Education v. Berry, 62 W. Va. 433, 442, 59 S. E. 169, 125 Am. St. Rep. 975. Stiles v. Coal Co., 47 W. Va. 838, 847, 35 S. E. 986, is not, in our opinion, an authority to the contrary. In the later case of Lumber Co. v. Coal Co., 66 W. Va. 696, 702, 66 S. E. 1073, 1075 (29 L. R. A. [N. S.] 1101), the court said that "the prosecution and defense of actions, respecting valid contracts, do not constitute doing business within the meaning of the statutes, restricting the right of foreign corporations," and that among the rights not taken away by the revocation of the right to do business was the right to sue upon a valid contract, and also the right to make defense in any action instituted against it. True, the corporation there involved was a foreign one, but the statutory provisions in the respect here involved are the same; and in the still later case of Comstock v. Lumber Co., 69 W. Va. 100, 102, 71 S. E. 255, 256 (which involved a domestic corporation whose charter had been forfeited), it was held that the phrase " 'exercise or attempt to exercise any power' under the charter, must be read as if it said carry on

the business of the corporation," and Lumber Co. v. Coal Co., supra, was cited as holding that the term "doing business" does not extend "to the mere act of suing or defending suits in respect to contracts made or rights acquired, while the corporation had power to do business"; the court saying, further, that "the power to sue and make defense is incident to property and contract rights," and that "its continuance, after the right to do business or exercise the ordinary corporate powers has ceased, is necessary to the preservation of rights lawfully acquired, and which the Legislature cannot be deemed to have intended to destroy or leave unprotected by denying or withholding it." In Lively v. Picton (C. C. A. 6) 218 Fed. 401, 407, 134 C. C. A. 189, we held the statute in question not intended to "interfere with the right to sue an expired or dissolved corporation." It is true that in the cases cited the suit was against the corporation, but we see no reason why the express terms of the statute should not equally extend to suits on its behalf. A somewhat analogous statute of New Jersey has been similarly construed. American Surety Co. v. Great White Spirit Co., 58 N. J. Eq. 526, 530, 43 Atl. 579. The dissolution under the New Jersey statutes has likewise been held not to preclude bankruptcy proceedings against a corporation. White Mountain Paper Co. v. Morse & Co. (C. C. A. 1) 127 Fed. 643, 62 C. C. A. 369; In re Munger Vehicle Tire Co. (C. C. A. 2) 159 Fed. 901, 87 C. C. A. 81.

[3-5] In the absence of proof we think it should be presumed that this suit is being prosecuted for the purpose of collecting a debt due the corporation, for purposes of distribution. The absence of proof of the existence of debts is not material. The corporation being dissolved the stockholders owned its property, subject, of course, to the payment of debts. Stearns Coal & Lumber Co. v. Van Winkle (C. C. A. 6) 221 Fed. 590, 593–596, 137 C. C. A. 314. Distribution for their benefit is equally within the proper purpose of winding up proceedings, and for the mere collection of debts due there was no imperative necessity for a receiver. Stearns Co. v. Van Winkle, supra. The proceeds of collection are, of course, held by the corporation as a trust fund, to be distributed by its directors. We conclude that plaintiff had legal capacity to maintain this suit.

[6] 2. Was defendant properly held a party to the contract in suit? The contract, which was in writing, was in form made by plaintiff with the construction company, which was a corporation and legally distinct from the railroad company. The jury was instructed that plaintiff could recover against the railroad company only upon being convinced that the "construction company, for the convenience of the * * * railroad company, and with the knowledge of everybody interested in the transaction, was masquerading, acting for and put forth substantially as the Stark Electric Railroad Company," and that if so satisfied by clear and convincing evidence, the railroad company could be so held. McGinty, who represented plaintiff in negotiating and making the contract, testified that the offer (which with its acceptance constituted the contract) was, as written by him, addressed to the Stark Electric Railroad Company; that he had never

heard of the construction company; that his preliminary negotiations and agreement were with Morley, who was both president and manager of the railroad company; that Morley suggested having the offer typewritten, and retained McGinty's pen draft for that purpose; that on a later date it was signed without being read by him and in ignorance that the typewritten offer was addressed to, and the acceptance signed by, the construction company; that he first learned that fact about six weeks later, after several weeks' work had been done under the contract; that he then told Morley that he did not wish any contract with the construction company; that his proposition was "with the Stark Electric Railroad Company"; that Morley said they were having a hard time to get right of way from the farmers, and that the construction company was just "a sort of buffer between the * * * railroad company and trouble"; that the construction company was "practically the same thing" as the railroad company, that the latter was behind it, and that "you will get your money, so you need not be alarmed on that score." There was also other testimony tending to show that the interurban company was, so far as concerns the extension in question and for its purposes, used by Morley and the railroad company as a mere instrumentality of the latter, in effect a "dummy" or "buffer"; that Morley and his associates, who constituted a majority stock interest in each company, dominated the operations of both companies; that a few days before the contract sued on was made its corporate stock, of which Morley was a prominent holder, he being one of its officers, was transferred to certain persons without consideration, and who, while only nominally stockholders, were made directors and officers of the construction company; that the latter kept its office with the railroad company, which paid all the office expenses, including the bookkeeper and stenographer used alike by both companies; and that Morley, while having no apparent interest in the construction company, in reality managed its affairs (apparently without salary) in connection with those of the railroad company, sometimes writing letters to plaintiff on railroad company stationery, sometimes on that of the construction company; that the latter, not long after the completion of the work under the contract in question, ceased to hold meetings and do business. The capital stock of the construction company was $5,000 (but $1,000 had been paid in); that of the railroad company, $1,000,000.

The record would, we think, support a finding that the construction company was used with respect to the extension in question, for the purpose (among others) of enabling the controlling stockholders in the railroad company (who were the controlling stockholders in the construction company) to obtain a personal profit to themselves out of the building of the extension by acquiring a large block of railroad company stock, which went, with certain bonds given by the railroad company, to the construction company in connection with this construction. The force of these considerations is not necessarily overcome by the facts that the construction company maintained a legal and independent corporate existence; that the

construction of the railroad from Canton to Sebring had been done through its instrumentality; that it formally made contract with the railroad company for the construction of the extension here involved, and had means to pay all claims made against it under such construction; and that a substantial amount of its stock was held by those not connected with the railroad company.

It is urged that McGinty's testimony referred to was not corroborated, and that it was discredited by his acquiescence in the written contract, by his making the additional contracts hereafter referred to, by subletting parts of the work as under the construction company, by proceedings taken to obtain a subcontractor's lien against that company as well as the railroad company, and in other ways. But these considerations affect merely the weight of the evidence, which, taken together, we think sufficient to sustain a finding, not only that plaintiff believed in good faith that its contract was in reality with the railroad company, but that the construction company for the convenience of the railroad company, and with the knowledge of everybody interested in the transaction, was, with respect to the contract in question, "masquerading, acting for and put forth substantially as" the railroad company.

[7] We think the question of fact stated was properly submitted to the jury, and that, upon such facts being found the railroad company was properly held liable. Pennsylvania R. R. Co. v. Anoka Nat. Bank (C. C. A. 8) 108 Fed. 482, 485, 486, 47 C. C. A. 454; Gay v. Hudson River Co. (C. C. A. 2) 187 Fed. 12, 14, 109 C. C. A. 66; Foard Co. v. Maryland (C. C. A. 4) 219 Fed. 827, 829, 135 C. C. A. 497; McDonald, Shea & Co. v. Railroad, 93 Tenn. 281, 24 S. W. 252. There is nothing opposed to this conclusion in the decision of this court in Kardo Co. v. Adams, 231 Fed. 950, 146 C. C. A. 146.

The remaining criticisms relate to specific items of plaintiff's demands.

[8, 9] 3. The first cause of action embraces a claim for extra work performed in excavating on Weaver Hill, which lies between Canton and Alliance. The contract provided a price of 40 cents per cubic yard therefor. In fact, when the contract was made the railroad tracks were in position at the location where plaintiff's work was to be done, traffic was being maintained thereover, and was continued throughout the excavation work. Testimony was admitted to the effect that when the contract was being negotiated defendant assured plaintiff that it would remove the tracks far enough to be out of the way of the excavation work (which contemplated a deep cut), that such agreement would be embraced in the specifications, and that the contract price was fixed under such inducement. The specifications (which plaintiff claims not to have seen until six weeks after the contract was made) did not contain this provision. There was testimony that defendant did not remove the tracks, and that after the work was entered upon plaintiff refused to proceed further with that portion of it unless the tracks were so removed, or unless defendant would pay an additional price for doing the work with the tracks kept in condition for traffic, that the defendant claimed to be

unable to get right of way for temporary track purposes, and that Morley agreed to pay what the work was thus reasonably worth, and that the work was done under such agreement. Plaintiff claims $1 per cubic yard as a reasonable price. The amount at 40 cents per cubic yard was paid upon vouchers, the difference ($6,816) represents the additional compensation claimed. The defendant criticizes the testimony of the alleged oral agreement as incompetent. It is the well-settled rule that parol representations are not admissible in the absence of fraud or mutual mistake, when the written contract purports to contain the entire agreement. Seitz v. Brewers' Co., 141 U. S. 510, 516, 12 Sup. Ct. 46, 35 L. Ed. 837; Marmet Coal Co. v. Peoples' Coal Co. (C. C. A. 6) 226 Fed. 646, 650, 141 C. C. A. 402, and cases cited.

Plaintiff insists that the assurance in question was the inducing cause of the contract, and was a collateral agreement. It is conceded that if the agreement was of the latter nature, it was admissible, but such nature is denied. The jury was instructed, in effect, that if they found that the contract was made on defendant's assurance that it would remove the tracks, and that defendant subsequently agreed verbally to pay the additional reasonable value of the work occasioned by their maintenance, recovery could be had. It is conceded that the work could not have been done with the tracks in place unless they were blocked up. Plaintiff claims to have kept 30 or 40 men doing such work and transferring the tracks from side to side. It is clear that, by the strict letter of the contract, plaintiff could have done its work without supporting the tracks, thereby suspending operation of the railroad, unless the tracks were removed. Defendant denied any agreement, before the contract was made, to remove the tracks, and denied an agreement to pay additional compensation, claiming that defendant itself actually supported and moved the tracks during the excavation work. It is evident, however, that both parties expected that the excavation should not interfere with traffic, defendant claiming to have secured right of way, for the temporary use of the tracks, before the contract in question was made. On this subject the contract did not purport to speak. We think it was thus competent to show the circumstances surrounding the making of the contract, including the assurance claimed as inducement to its making.

[10] The fact that plaintiff received payment of the vouchers at the original contract price is not conclusive against it, in view of McGinty's testimony tending to show that the money was received with the understanding that the balance should be paid "when the whole job is done."

[11] The defense that the claim under the alleged verbal contract was barred by limitation was made in the charge to turn upon when the payment was to be made. There was testimony that payment was to be made "when the whole job was done," and that "the whole job" was not done until August 2, 1904, which was less than six years before suit was begun. In view of what we have said, we

think defendant was not prejudiced by the admission of the criticized testimony, nor by the charge of the court on the subject.

[12] It is urged that Morley had no authority from the board of directors to make the Weaver Hill modification, and that without such authority the agreement would not bind defendant. There was testimony from which the jury might properly infer that the agreement was within Morley's apparent authority, and in such case liability would not necessarily be defeated by lack of actual authority. Swift & Co. v. Detroit Rock Salt Co. (C. C. A. 6) 233 Fed. 231, 234, 147 C. C. A. 237, and cases cited.

[13] 4. The second cause of action is for certain grading within the limits of Salem (performed under a subsequent verbal contract), for which plaintiff claims $5,128.60. The defense that this item is barred by limitation was submitted to the jury under proper instructions. There was testimony that the item was not completed until August 2, 1904, which was less than six years before suit was begun.

The third cause of action is for excavating for masonry, under a verbal contract, the amount claimed being $853.33. To this claim, the statute of limitations was pleaded. The particular excavation in question seems to have been finished at a date which was in fact more than six years before suit was begun. Plaintiff claims, however, that the right of action accrued August 2, 1904 (the date when the entire work done by plaintiff for defendant was completed), which would be within six years. The controlling question is whether there was evidence substantially tending to show an understanding that the excavation in question was not to be paid for until the entire work done by plaintiff for defendant was completed. We think an implication of such understanding was, in view of all the evidence, at least permissible, and that it was not error to submit such question of fact to the jury.

[14] 5. The written contract in suit provided for payment for the work not at a gross amount, but at certain unit prices for different classes of work, all of which was required to be done under the direction and supervision and to the satisfaction of the construction company's engineer, whose "measurements shall be conclusive on both parties," and who was given power finally and conclusively to decide all controversies between the parties as to "the execution of the work." Provision was made for payments "from time to time on monthly engineer's estimates, in writing, of the amount of work done," and for final payment only upon final estimate by the engineer, "when, in his opinion, the work shall have been fully completed." Defendant contended that the work was not in fact completed according to the contract, and that the construction company was compelled to expend more than $1,800 in completing it. The court charged that the construction company's claim, if any, was out of the case, so far as permitting recovery therefor, and could "only be used as tending to show any defective or uncompleted work, under the contract, that the plaintiff did." Defendant also contended that no final engineer's estimate was given, and that in fact the work was not done to the engineer's satisfaction, and asked an instruction that the engineer's

action with reference to the amount and character of the work done, its conformity to the contract, and the amount to be paid, "was final and conclusive and binding upon the parties to said contract, and in the absence of fraud on the part of said [engineer] or of such gross mistakes on his part as to imply bad faith or for failure to exercise an honest judgment" his decision would be final and conclusive. This instruction was not given in the language asked, the court's charge differing, so far as we think here material, only in that it stated that the engineer's "judgment in this respect can only be impeached when you find that he has been so grossly mistaken that the mistake will suggest nearly something akin to fraud on his part."

The requested instruction as to the engineer's functions correctly embodied the applicable law. Memphis Trust Co. v. Brown-Ketchum Iron Works (C. C. A. 6) 166 Fed. 398, 93 C. C. A. 162; Second National Bank v. Pan-Amer. Bridge Co. (C. C. A. 6) 183 Fed. 391, 105 C. C. A. 611.

[15] We are not required to determine whether this modification of the charge, standing alone, worked error. Indeed, it seems highly improbable that the jury found any actual fraud in the engineer's action. The important question is whether the modification of the requested instruction, together with the charge as given, relating to the expense of finishing uncompleted work, caused prejudicial error. On August 27, 1904, after plaintiff had quit work, the engineer gave plaintiff what is entitled a "Final Quantity Sheet Based on a Completed Contract," which contained quantities of each of the several classes of labor called for by the written contract and the first oral contract, at least, at the prices provided for therein, together with the amounts for each class of labor and the aggregate thereof. (We do not understand defendant to claim that the excavation for masonry under the second oral contract was not fully made.) We think this document in form sufficient to comply with the contract, so far as the technical furnishing of estimates is concerned; and, as defendant has taken the benefit of plaintiff's work, the absence of a more formal document would not be enough to defeat recovery, provided the contract had been substantially performed. We think the testimony would amply sustain a conclusion of substantial performance. The engineer's "final quantity sheet" showed work amounting to more than $62,000, not including the extra price claimed for work on Weaver Hill. McGinty testified that the contract was completed "in every particular." The deficiencies claimed were of a minor character, amounting, at the utmost, to but 3 per cent. of the entire work called for.

We also think the sheet mentioned imported prima facie the engineer's approval, for the specifications provided for its being given only "when, in the opinion of the engineer, the contractor shall have finally completed all the work contemplated under the contract and specifications." There was testimony that the engineer had expressed himself to plaintiff as satisfied with its performance. And while we do not hold that the giving of this sheet was conclusive of the engineer's satisfaction, we think it fairly deducible from his testimony

as a whole that, while he had criticized plaintiff for not progressing with the work rapidly enough (plaintiff likewise criticized defendant for delaying its work by failing to secure right of way promptly), he intended, in making the statement, to accept the work done by plaintiff as a completion of the contract, subject to such deductions as should be necessary to complete it in the respects stated. He testified that when the statement was prepared—

"the work had been completed [afterwards saying "by somebody"], and I supposed somebody would want a basis on which to make the statement, so I proceeded to make it out. That in my opinion was intended by me to be the final estimate; that covers the completed work."

He testified, further, that all the work included in the statement was done by plaintiff, with certain exceptions to which he had previously referred, testifying, in that connection, to deficiencies in yardage, etc., necessary to complete the contract, and that to supply these deficiencies would cost $1,020.60. While we are disposed to think defendant should have been recompensed for the loss incurred in completing plaintiff's contract according to the engineer's judgment, notwithstanding the expense was in form incurred by the interurban company (for, under the theory on which recovery was permitted, defendant in the end bore whatever loss there was in that respect), yet we think defendant not prejudiced by either the instruction or the modification of instruction referred to, provided credit is given for the amount of such loss. We also think that such necessary expense should be limited to the amount stated by the engineer; for, while there was testimony that the amount was greater than the figures given by the engineer as necessary for that purpose, the engineer's figures as to the unit basis of prices are not discredited, defendant's claim, as we understand it, being that the engineer failed to include as necessary work which defendant thought necessary to completion, Morley testifying:

"I agree with [the engineer] in that the work was not completed. I don't agree with [him] as to what he said was the extent in which the work was not completed. I don't think he covered the whole thing in his testimony."

It need scarcely be said that the engineer's conclusions as to what was necessary are equally binding on defendant as on plaintiff. Our conclusion is that whatever prejudicial error may have been committed in respect to the contract under consideration will be cured by deducting from the verdict the sum of $1,020.60, with included interest thereon. It may be that had plaintiff supplied all these deficiencies it would have been entitled to further allowance under the contract. It may also be that the jury deducted the amount stated in whole or in part. But the record is not clear enough in our opinion to justify as basis of a remittitur a deduction of a less amount.

6. We think the defenses of payment and of abandonment (except so far as the latter may be involved in what we have already said) were properly submitted, and under appropriate instructions.

The motion for new trial was addressed to the sound discretion of the court, and we find nothing indicating an abuse of discretion in denying the motion.

We have not discussed all the errors assigned, but we have considered all discussed by counsel, with the result that we find no error of which defendant is, in our judgment, entitled to complain, except in respect to the item discussed under paragraph 5 of this opinion.

If before the mandate goes down plaintiff makes, in the court below, a remittitur of $1,020.60, with interest at 6 per cent. from August 2, 1904, to April 4, 1914, and files with the clerk here a certified copy of such remittitur, the judgment so modified will be affirmed, but with costs to plaintiff in error; lacking such remittitur, the judgment will be reversed and a new trial awarded.

THE KRONPRINZESSIN CECILIE.

(Circuit Court of Appeals, First Circuit. November 17, 1916. On Petitions for Rehearing, January 23, 1917.)

Nos. 1196–1199.

1. SHIPPING ⟸115—AUTHORITY AND DUTIES OF MASTER—NONDELIVERY OF SHIPMENT.

On July 28, 1914, a German steamship sailed from New York for Bremerhaven, Germany, via Plymouth, England, and Cherbourg, France. On the evening of July 31st, when about 1000 miles from Plymouth, it changed its course and returned to an American port. The master had knowledge of such historical facts, conceded to have preceded the outbreak of the European war, as occurred before the sailing of the vessel, and of facts thereafter occurring indicating that his country was on the verge of war with Russia, France, and England, and just before changing his course received a wireless message from the steamship company, the owners of the vessel, stating that war had broken out between the above-mentioned countries and directing him to return to New York. War had not, in fact, been declared at that time. *Held* that, while the master is bound to exercise his discretion for the safety of his ship, passengers, and cargo, the act of the master in turning his vessel back to New York on receipt of the message of the owners cannot be treated as an exercise of the master's discretion, the direction being peremptory, and the statement that war had broken out being false; this being particularly true as the master might, in the ordinary course of events, have discharged cargo consigned to Plymouth and Cherbourg, and have reached a point of comparative safety near his home waters, before war was actually declared between Germany, France, and England.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

2. SHIPPING ⟸115—FAILURE TO DELIVER CARGO—OUTBREAK OF WAR.

The vessel had accepted shipments of specie destined to Plymouth and Cherbourg under contracts exonerating the owner for loss or damage occasioned by arrest and restraint of princes, rulers, or people. The contract of shipment was made at a time when the imminence of war was known to the master and the owners, and the specie might have been delivered at Plymouth and Cherbourg 11 hours before Germany was at war with France and more than 24 hours before Germany was at war with England. *Held* that, as the arrest or restraint to excuse compliance with the contract must be an actual and operative restraint and not a merely expected and contingent restraint, the vessel is liable for nonperformance of the contracts of shipment; the expectation of war not

amounting to an actual state of war whereby, under the law of the flag of the vessel, it would be improper to make delivery at a port where it might be captured or detained.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

3. SHIPPING ⟸115—NONDELIVERY OF SHIPMENT—OUTBREAK OF WAR.

In such case, the act of the owners in abandoning the voyage cannot be justified on the ground that it is the carrier's duty to take reasonable care of the goods intrusted to him, for the precautions were obviously for the sake of the vessel, and not the cargo, and were intended to place the vessel at a point of safety, should hostilities actually be commenced.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 226, 433; Dec. Dig. ⟸115.]

4. SHIPPING ⟸163—PASSENGERS—NOTICE.

Where tickets for passage provided that no claim should be enforceable against the shipowner, or its property, unless notice thereof in writing should be delivered to the shipowner or agent within 5 days after termination of the voyage, or in case of the voyage being abandoned or broken up within 10 days thereafter, passengers on a German vessel, which wrongfully abandoned a voyage on account of the imminence of war between Germany, France, and England, cannot claim damages for breach of contract, where no claim was presented within the 10 days provided.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⟸163.]

Putnam, Circuit Judge, dissenting.

On Petitions for Rehearing.

5. SHIPPING ⟸163—PASSENGERS—VIOLATION OF CONTRACT.

In such case, if the express contracts of passage were displaced by the deviation of the libeled vessel, passengers, not being injured in their person or property, would have no ground of action, aside from the breach of the express contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⟸163.]

6. SHIPPING ⟸163—DEVIATION—INSURERS.

Where a steamship abandoned a prescribed voyage, passengers suffering no injury to person or property could not recover for the deviation on the theory that the steamship company became an insurer; that rule not applying to passengers, save in the absence of the express contract.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 530–532; Dec. Dig. ⟸163.]

Appeals from the District Court of the United States for the District of Massachusetts; Clarence Hale, Judge.

Libel by the Guaranty Trust Company of New York against the steamship Kronprinzessin Cecilie, claimed by the North German Lloyd, together with libels by Charles W. Rantoul, Jr., by Maurice Hanssens, and by the National City Bank of New York against the same vessel. From a decree dismissing the libels (228 Fed. 946), libelants appeal. Reversed as to the libel by the Guaranty Trust Comany of New York and National City Bank of New York, and affirmed as to the libels of Charles W. Rantoul, Jr., and Maurice Hanssens.

J. Parker Kirlin, Charles R. Hickox, and James M. Beck, all of New York City (Kirlin, Woolsey & Hickox and Shearman & Sterling, all of New York City, Blodgett, Jones, Burnham & Bingham, of Boston, Mass., Carl A. Mead and John M. Woolsey, both of New York City and Edward E. Blodgett, of Boston, Mass., on the briefs), for appellants.

Joseph Larocque and Walter C. Noyes, both of New York City (Joseph D. Bedle, of Jersey City, N. J., and Choate, Larocque & Mitchell, of New York City, on the brief), for appellees.

Before PUTNAM, DODGE, and BINGHAM, Circuit Judges.

DODGE, Circuit Judge. The careful and detailed statement of the material facts involved in these cases which is found in the opinion of the District Court (228 Fed. 946) will render direct reference unnecessary to the evidence in the record, except in a few instances. As to the facts there is little or no controversy.

[1] 1. From Bremen, the home port of this German steamship and her ultimate port of destination on the voyage here in question, her owner, a German corporation, sent a wireless message to her master on July 31, 1914, at 2:45 p. m. This message he received on board the ship, at sea, at 10 p. m., on the same day, by the ship's time—11:45 p. m. by Greenwich time. The message consisted of the peremptory order, "Turn back to New York," prefaced by the statement, "War has broken out with England, France, Russia." This statement meant, as is not disputed, and it was understood by the master to mean, that war had actually broken out between Germany and each of the other countries named. Neither at the time it was sent nor at the time it was received was the statement true as to either of said countries. Not only had no war been declared between Germany and any of them, but no actual state of war existed between Germany and any one of them. It was not until midnight on the same day that Germany notified Russia that she would mobilize unless Russia demobilized within 12 hours, and not until 7 p. m. on the next day that war between Germany and Russia was declared; nor did that declaration make it certain that France or England would be involved.

When the master received the above message, his ship had considerably more than half completed her voyage from New York towards Plymouth in England and thence to Cherbourg in France, the ports at which delivery of the specie shipments on board her had been undertaken according to the bills of lading given for them at New York on July 27. She was a little more than 1,000 miles from Plymouth, the nearer of the two. The message was sent and received in a form such as prevented its above meaning from becoming known to any one but the master, and permitted such meaning to be ascertained by him only through the use of means long before carefully prepared, to be availed of in case the emergency indicated should occur, and kept on board the ship under seal for two years, the seal to be broken by the master only in case he received a message of the character given this message in its untranslated form.

The master obeyed the order to turn back instantly, before revealing the substance of the message to any other person on board. Nine minutes after its receipt the ship was headed for New York, instead of for Plymouth, and the voyage undertaken by the bills of lading had been abandoned. Not until after this had been done did the master inform the subordinate officers and the cabin passengers that he had done it.

A master is ordinarily the owner's representative for the purpose of effecting the safe carriage and delivery undertaken by the ship, and as such a stranger to the cargo. But circumstances of unexpected emergency may without doubt occur during a voyage, such as will change his ordinary relations towards ship and cargo, and, because a discretion must needs be exercised in order to avert or minimize extraordinary peril, threatening all the interests concerned, will make him, for the purpose of exercising it, the common representative of all said interests alike. Though a measure adopted by him in the exercise of a discretion so required of him would otherwise be in violation of pending contracts of affreightment, the consent of all concerned will be implied from the fact that in adopting it he has acted as the representative as much of one interest as of any other, and neither will have the right to complain of it as a breach of contract. In the opinion of the District Court the turning back of this ship as above was a discretionary measure taken by the master under circumstances of the kind above referred to, and therefore leaving the owners of these three shipments of specie no right to complain of it as a breach of the contract to deliver their specie at Plymouth or Cherbourg.

The owner of the ship had the burden of proving circumstances actually existing at the time, sufficient to justify such an exercise of discretion on the master's part, present to his mind when he turned back, and also an actual exercise of such discretion by him in view thereof. I have been unable to agree with the finding below that this burden was sustained. As to the circumstances present to the master's mind, it is not contended that he would have turned back, except for the message received from the owner, and, so far as the message conveyed to him an untrue statement of facts, it can have no weight in this connection. Whether or not actually existing circumstances are shown which would have justified abandonment of the voyage is further considered below. But that any actual exercise of discretion by the master has been shown, in the sense necessary for the application of the above principles, I am in any case unable to believe.

The owner's direction to turn the ship back appears from the evidence to have been a specific and unqualified order, leaving the master no choice but to obey. Whether or not, as between him and the owner, disobedience might have been excused by the presence of circumstances then known to the master, but necessarily unknown to the owner, such as made obedience inexpedient, need not be considered, there being no suggestion that there were any such circumstances. If this was the case, no responsibility for results caused by obedience to the order could fall upon the master. By assuming to direct from Bremen, as it did, the course which the ship should take, her owner assumed, for

itself and its ship, all such responsibility, and lost all right to charge the master with any share thereof.

It is said that the owner's message was not a mere order, but informed the master also of facts for his guidance, indicating that the owner still relied upon his discretion, not expecting unreasoning obedience. It is said, further, that the master turned back, not only in compliance with the owner's direction to do so, but in accordance as well with the dictates of his own prudence and sagacity; i. e., in the exercise of his discretion as master under an emergency.

But this requires, in my opinion, a view not justified by the evidence both of the character of the message itself and of the master's action upon it. The statement of facts contained in the message, if true, would have of itself required abandonment of the voyage to Plymouth and Cherbourg; and no independent judgment as to its truth by the master was possible. There can be no doubt that the owner meant him to act upon it as if it were true. Coupled as it was in the message with the unqualified order to turn back, I can see no reason to doubt that the instant obedience given that order by the master was the only course really left open to him, or intended to be left open to him, by the message; there being, as has been stated, no suggestion of any reasons against turning back which the owner could not itself have already considered, and might therefore have demanded an independent judgment on the master's part.

That the above was the view taken at the time by the master himself appears from the terms of the first communication from him to the owner after July 31; i. e., his report in writing to the owner from Bar Harbor, dated August 21, 1916. This was sent 17 days after his arrival there on August 4th, and 2 months before the first of these libels was filed. In it, after stating the latitude and longitude reached upon the voyaye from New York at the time the owner's message of July 31st was received, he said:

"Here we received the order to return, which was immediately carried out."

And thereafter, describing his announcement to the passengers, made as soon as the ship was on her course to the westward, he said:

"I went down and acquainted them with the fact that war had broken out and that I had received orders from the company to return to New York."

Nowhere in this report is any suggestion found that any alternative to compliance with the order was ever present to the master's mind.

In the master's testimony at the trial, given March 31, 1915, which impresses me, as it did the District Court, with its apparent truthfulness, he stated in direct examination that after receipt of the owner's message "there was only one way to do, to go back to the United States"; and in cross-examination, that as the message read, "War had broken out," etc., "there was only this way to take." It is true that he also stated that this seemed to him the best and only course to pursue, aside from the order given in the message, in view of the stock of coal on board, which might not be enough to get him back to New York unless he turned at once. It is true that he declined to

say that the message had relieved him from all further responsibility with respect to the course of the voyage, and did say that it was left in his discretion to do what he chose—"if, for instance, he had not coal enough to return to America." He admitted, however, that, sufficient fuel being on board, as in fact there was, he had to turn back as ordered.

If there is any sense in which the master's act in turning back can be called discretionary with him, the above testimony from him seems to forbid any other conclusion than that such discretion as he may have used was directed and controlled by one only of the interests concerned in a degree altogether too great to permit saying that it was discretion exercised by a common representative of all. Suggestions, or even directions, from owners to their master on a voyage, in an emergency, may not in all cases prevent his determination from being regarded as an exercise of such discretion; but it cannot justly be so regarded when all responsibility for it has been virtually assumed by the owner, as here, and no real scope for choice in the matter left with the master. If, therefore, the abandonment of the contracts undertaken by these bills of lading can be justified at all, it must be justified as the owner's act; and the question is whether or not circumstances are shown which excused nonfulfillment on the owner's part.

[2] 2. The only exception contained in the contracts for delivery of the specie which is relied on for the purpose of exonerating the owner, is the agreement that there shall be no liability for loss or damage occasioned by "arrest and restraint of princes, rulers, or people." The shippers of the specie insist on the literal wording, but the construction contended for by the owner, according to which the clause is to have the same effect as if it read, "arrest *or* restraint," is regarded as more reasonable and as proper.

There having been no actual arrest or restraint of the kind referred to, the owner's act in ordering the ship's return to New York is justifiable, if at all, only by proof that there was at the time ground for apprehending actual arrest or restraint unless she so returned, such as the law of carriage by sea recognizes as the equivalent of actual arrest or restraint. The question is whether or not the requisite proof has been made in this case.

It may be taken for granted that when it has become plainly obvious that continuance of the voyage must necessarily involve arrest or restraint, and can have no other result, such departure from the voyage as is necessary to avoid the danger is not only permissible, but is required of the vessel. She must do what is needful for the purpose of avoiding any actual and presently imminent danger, instead of adhering to a course which can only carry her directly into it. But the evidence here relied on, as will appear, is far from showing the existence of any such situation. What is relied on is, at most, the desirability of keeping the ship out of reach of a future, contingent danger.

The phrase here in question, or some substantial equivalent thereof, has long been familiar in charter parties, bills of lading, and policies of marine insurance. When "arrest and restraint," etc., is a risk assumed by a marine policy, there must be proof, in order to justify aban-

donment to the insurer and maintain thereupon a claim for constructive total loss, that arrest or restraint, etc., was the proximate cause of the abandonment and loss. The peril must operate upon the subject of insurance directly, not circuitously. If there has not in fact been actual arrest or restraint, etc., a loss because of apprehension thereof is not within the policy, unless the apprehension is shown to have been warranted by actual and immediate danger, apparently inevitable and morally certain. This may be regarded as settled by the decisions both in England and the United States, as is hardly disputed on the owner's behalf. Its contention is that a different rule of construction applies in cases arising upon bills of lading, and, in substance, that in such cases apprehension of capture or detention by a hostile power will excuse nondelivery under the exception here relied on, even though no such actual and immediate danger thereof existed, provided that the apprehension was on the whole reasonable.

This exception, like the others wherewith it is usually associated in such documents, is a term introduced into the contract by and for the benefit of the carrier, and therefore to be construed most strongly against the carrier, according to well-settled principles. If another of the exceptions commonly accompanying it, viz., "perils of the seas," means the same, except as regards negligence of master and crew, in a bill of lading as in a marine policy (The G. R. Booth, 171 U. S. 450, 459, 19 Sup. Ct. 9, 43 L. Ed. 234; The Xantho, L. R. 12 App. Cas. 503, 510, 517; Hamilton v. Pandorf, Id. 518, 526), it is not easy to find sufficient ground for assigning to the words in question, when used in a bill of lading, a meaning broader than that to which their recognized construction, when used in policies of insurance, confines them.

Other stipulations found in the same contract may of course enlarge the scope of the carrier's exemption from liability beyond that permitted by these words alone. But nothing of this kind is found in these bills of lading. No charter party is here involved. The ship was a common carrier, and by the terms of the bills of lading the full common carrier's liability for delivery of the specie at the agreed ports had been assumed; qualified only, so far as this case is concerned, by the above exception. There was no stipulation that the agreed ports of delivery should be safe, nor any express reservation of any right to deal with the specie otherwise than as promised by the bills of lading if in the master's judgment they should become unsafe. There were stipulations of this kind in the contracts under consideration in the cases here most relied on by the shipowner, viz.: The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; Nobel's Explosives Co. v. Jenkins, [1896] L. R. 2 Q. B. 326; The Teutonia, L. R. 4 P. C. 171; The Express, L. R. 3 A. & E. 597. No sufficient warrant is found in them for the claim that the recognized construction in insurance cases is inapplicable to the exception relied on in the present case.

That the arrest or restraint which will excuse failure to make the delivery undertaken by a contract of affreightment unqualified, except as in these bills of lading, must be an actual and operative restraint, and that no merely expected and contingent restraint affords sufficient ex-

cuse, has been settled law at least since Atkinson v. Ritchie, 10 East, 530. If, as in that case, an embargo laid by the country of the port where the cargo was to be shipped is relied on, reasonable apprehension that such embargo will be laid does not excuse the carrier, when in fact it was not laid. If, as in Brunner v. Webster, 5 Com. Cas. 167, sanitary regulations forbidding discharge at the port of delivery are relied on, such regulations must have been in force at the probable time of delivery; a justifiable belief that they would be in force, if mistaken, will not be enough to bring the failure to deliver within the exception.

If, as was done in Balfour et al. v. Portland, etc., Co., 167 Fed. 1010, by the District Court in Oregon, the attending and existing circumstances at the time these contracts of affreightment were made be examined in order to determine the meaning presumably intended by both parties to be put upon this exception, no sufficient reason for making it include a merely apprehended danger of capture or detention not present or imminent can be found.

On July 31, 1914, when the owner abandoned the voyage, there was, no doubt, danger that an actual state of war would arise whose existence would make Plymouth and Cherbourg hostile ports as regarded the vessel. But this was not a danger arising after the voyage had begun; there was danger that just such a war would arise when the bills of lading were given, four days before, on July 27th. That this very danger was then present to the minds of both parties to these contracts of affreightment is not and could not be disputed. The ship was capable of being used as a vessel of war by the German government, and liable to be taken and used by it as such if within its actual control; a fact which made her more liable than an ordinary German merchant vessel to arrest or capture by either England or France as soon as the apprehended state of war should exist. This fact also must, we think, be regarded as present to the minds of both parties to the above contracts. Yet the owner of the vessel, with the above situation in view, undertook delivery of the specie at Plymouth and Cherbourg, under contracts which reserved to it no right to abandon or vary the voyage, should those ports become unsafe, but which made it, according to principles long settled and universally understood, insure the delivery as agreed unless "arrest or restraint of princes," etc., should prevent. It appears that the specie might at the time have been shipped on British or French vessels from New York for the above ports, as to which said ports would not have become hostile in event of war, and that it was shipped on this German vessel in order to take advantage of her greater speed. I find nothing in any of these circumstances tending to warrant a construction of the exception under consideration in the shipowner's favor. Whether the danger of war would increase or diminish during the five or six days necessary to get the specie delivered according to the bills of lading, neither party can be said to have known; but the owner deliberately took the risk that the danger might increase, and cannot, therefore, in justice to the shippers, without proof that the only exception relied on operated to prevent delivery in the accepted meaning of its terms, be permitted to aban-

don the attempt to deliver without paying such damages as were thereby sustained.

An actual state of war, arising either before or after the voyage contracted for has begun, whereby ship or cargo are rendered liable to capture and condemnation, may justify abandonment of the voyage in order to avoid such capture, when reasonable grounds for apprehending actual capture are shown. Delivery at a port of destination which such actual state of war has made a hostile port so far as the vessel is concerned, would in such a case be excused. The German Code, in articles 629, 634, a part of the law of the flag for the purposes of this case, has express provisions to this effect. Actual war, indeed, so coming into existence, makes it the ship's duty to her own sovereign not to enter a hostile port. Atkinson v. Ritchie, 10 East, 530, 533, 534; British, etc., Co. v. Sanday, etc., Co., App. Cas. 1916, 650. But no case is found in which, there being no actual state of war, abandonment of a contract like this has been excused under the exception here relied on, because of mere apprehension that actual war might exist before delivery according to the contract could be made.

If, in the case of an actual state of war, arising after the voyage has begun, the ship or cargo might, under some circumstances, be put in immediate actual danger of capture from the moment in which the state of war became existent, so as to make it proper to say that reasonable ground for apprehending immediate war, was, for practical purposes, equally reasonable ground for apprehending immediate actual arrest or restraint by capture, no situation of this kind, sufficient to bring the owner's abandonment of the voyage within the exception relied on, seems to me proved in the present case.

Unless something had happened to delay the ship, such as is not shown to have ever happened on any of her numerous prior voyages to the same ports, the specie to be delivered at Plymouth would probably have been delivered there by 1 a. m. on August 3, 1914, and that for delivery at Cherbourg, by 8 a. m. on the same day. It is to be noticed that the season of the year was that at which delay by weather conditions was least to be expected. The discharging facilities kept ready at both ports had enabled the ship, upon all but one of 13 trips preceding this, as appears from her log, to leave Plymouth within an hour from her arrival; and the same is true as to Cherbourg. Her longest stop at Plymouth had been 78 minutes; at Cherbourg, 66 minutes. Tenders controlled by her owner were regularly found awaiting her arrival, into which passengers, mails, and specie were discharged alongside. She did not go to a dock at either port. Plymouth did not become a hostile port, as regarded the steamship, until August 4th, at 11 p. m., when England declared war with Germany. Cherbourg did not become a hostile port until 6:45 p. m., on August 3d, when Germany declared war with France. It is true that Germany had declared war with Russia at 7:10 p. m., on August 1st, at which time the ship would still have been 30 hours distant from Plymouth; but it can hardly be claimed that a state of war with Russia only exposed the ship to any immediate risk of capture. And after landing the Cherbourg specie as above, 11 hours before any war with France arose, another

23 hours' run at her usual speed between those ports would have brought her to Bremen, her home port, by 7 a. m., on August 4th. The evidence shows no reason for apprehending detention at Cherbourg before 8 a. m., on August 3d, nor until after 6:45 p. m., on that day. Nor is any reason shown for apprehending capture on the way from Plymouth to Cherbourg and thence to Bremen. English men-of-war only could have interfered with the ship, and she would have been at Bremen before any state of war with England existed. German vessels are shown to have used English ports and coast waters unmolested during the whole of August 4th. Germany's refusal to give the requested assurance regarding Belgium, the determining cause of England's participation in the war, did not become a certainty before the last hours of that day.

So far, therefore, from proving actual and immediate danger of war simultaneously involving actual and immediate danger of capture or detention on July 31st, when the ship turned back, the evidence shows that this specie could probably have been delivered as agreed before any actual war began or any immediate danger of capture or detention arose. The carrier's abandonment of the voyage deprived the shippers of the specie of all chance of having it so delivered. Thereby the carrier took the risk that the actual course of events might fail, as it did, to show actual and immediate danger threatening the ship, either at the time or before she could have made delivery.

[3] The carrier's act cannot be justified, as in The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; Nobel's Explosives Co. v. Jenkins, [1896] L. R. 2 Q. B. 326, "apart from the terms of the bill of lading" —on the ground that the master's "duty to take reasonable care of the goods intrusted to him" required it. For that purpose discretionary action by the master would be necessary, which, as above held, is not shown. Nor does the evidence show that regard for the safety of the specie entered into the owner's determination to abandon the voyage. No reason appears for apprehending that capture or detention of the ship would, under the circumstances, have involved loss to the owners of the specie. The ship's value was considerably greater than the value of the specie, or the entire cargo on board. It was far more important to the owner of the ship than to the owners of the specie that she should avoid capture or detention by England, France, or Russia. The evidence shows also that the order to turn this ship back to New York, instead of being a single order given with particular reference to this ship, or her cargo, or her relations thereto, was only one of many other like orders similarly transmitted during the same day to all steamships at sea belonging to the same owner, and then on voyages tending to bring them, if continued, within regions where, in case of actual war between Germany and the other countries named, their capture or detention might become possible. The owner's evident object was, not to avoid actual immediate danger of capture or detention then threatening these ships, but to keep them all as far removed as possible from any and all such regions of possible future danger. This may well have been the course most for the owner's advantage. But, under the contracts here sued on, it cannot justly be

held that the circumstances proved entitled her owner to divert this steamship from the voyage undertaken as above, without incurring any liability to the owners of the specie for their loss thereby caused. We know nothing more at present as to the amount of their loss than that it was substantial. Whatever they may prove their respective losses to have been, I consider the libelants in Nos. 1196 and 1199 entitled to recover against the steamship.

[4] In regard to the cases Nos. 1197 and 1198, wherein the libelants were passengers, no reason is found for disturbing the result below. Not only did the contracts with these libelants permit to the ship a far greater liberty to change or abandon the voyage than was permitted by the bills of lading, but they expressly required written notice of any damage claim, with full particulars, within 10 days after landing from the steamship, and it is admitted that no such notice was ever given. The libelant in 1197 accepted the return of his passage money; the libelant in 1198 accepted instead passage paid for by the claimant in another vessel.

BINGHAM, Circuit Judge. In Nos. 1196 and 1199, I am of the opinion that the decrees of the District Court should be reversed. The facts are substantially the same in the two cases; the only difference being that in the Guaranty Trust Company Case the consignment of gold was to be delivered at Plymouth for transportation by rail to London, while in that of the National City Bank there were two consignments of gold, one to be delivered at Plymouth for transportation to London, and the other at Cherbourg for transportation to Paris.

In the opinion of the District Court the claimant was held to be excused from performing its contracts of carriage upon the ground that the telegram received by the master on the evening of July 31, 1914, from the managing directors of the claimant, saying, "War has broken out with England, France and Russia. Return to New York," stated facts constituting an exigency which authorized him to exercise the discretion vested in the master of a ship by the maritime law, and that, in turning back to America and abandoning the venture, he exercised his discretion and acted within this implied power; that the managing directors of the claimant, when they said in the telegram that war had broken out with England, France and Russia, in substance stated the truth regarding the political situation as it then existed in Europe; and that the claimant could avail itself of the master's exercise of discretion based on that information as a justification for its failure to perform the contracts.

Counsel for the claimant contend (1) that the foregoing ground upon which the decision of the District Court proceeded and upon which the decrees in these cases were based, is right; (2) that if the master did not act in pursuance of his implied authority, but abandoned the venture because the claimant, through its managing directors, ordered him to return to America, nevertheless, in view of the threatened danger of war, the claimant was justified in so ordering the ship back to America; and (3) that the claimant can justify its failure to perform its contracts under the exception contained in the

bills of lading relating to "restraint of princes, rulers or people"; that, although war had not been declared and did not exist, the threatened danger of war was the equivalent of a declaration of war, or of authorized acts of war, and operated directly as a restraint of princes.

It does not seem to me that any of these propositions are right as applied to the facts in these cases.

I. The ship took on board the consignments of gold on the 27th of July, 1914, and set sail at about 1 o'clock on the morning of the following day. At that time England, France, Russia, and Germany were at peace, although there was threatened danger of war. Whether on that day the claimant apprehended that the war clouds were probably clearing, or that in the event of hostilities the ship would make her trip before war broke out, is of little importance. Knowing that these countries were at peace, but that there was threatened danger of war, it made the contracts and took on board the shipments of gold for delivery at Plymouth and Cherbourg. And the evidence discloses that while the master may have had some anxiety after he set sail, and down to the evening of the 31st of July, as to the real condition of the political situation in Europe, he, nevertheless, proceeded at the rate of about 22½ knots an hour, making the usual time, without taking any precaution with reference to the outbreak of war until the night of the 31st of July, at about 10:09 o'clock, ship's time, when he received the telegram above set forth, and immediately turned his ship about for America. Having turned about, he then took such precautions as he thought necessary to avoid detection by painting his smokestacks, dispensing with sidelights, and darkening the portholes and cabin windows. It is evident from this that the immediate change in the course of the ship, resulting in the abandonment of the venture, was due to the receipt of the telegram on the night of July 31st.

That the master, upon receiving the telegram, acted on the idea that he was relieved from exercising his discretion as to the course the ship should take, if he had coal enough to obey the order to return to America, is clearly shown in his answers to the following questions:

"Q. Assuming that you had enough fuel to make the voyage, you had to make the voyage that you were ordered to make, had you not? A. Yes, sir.
"Q. And that was to turn back to America? A. Yes, sir."

And to preclude the necessity of any exercise of discretion by the master, even as to the supply of coal, the managing directors, before they sent the telegram, had the location of the ship and the amount of coal on board computed, and knew that the ship had sufficient coal for the return trip.

The ship arrived in Bar Harbor on August 4th, and, after the master had landed his passengers, discharged the gold, taken on board a supply of coal, and discharged the balance of his cargo, which took until the 21st of August, he on that date made a written report to his company at Bremen, in which he stated in detail what occurred on the trip from the time the ship left New York until it reached Bar Harbor. In this report, among other things, he said:

"On July 28, at 3 a. m., we passed Ambrose Channel Lightship, steamed eastward on the prescribed course, up to July 31, 46° 46′ N, 30° 21′ W. Here

we received the order to return, which was immediately carried out. While the ship was still in the act of turning, I directed that the passengers of the first and second cabin be requested to repair to the smoking room, and when the ship was on the course to westward, I went down and acquainted them with the fact that war had broken out and that I had received orders from my company to return to New York."

This is not the language of one in authority, stating action taken by him in the exercise of his discretion, but of a subordinate, informing his superior that he has received his order, and carried it out. It is a frank statement, free from equivocation, and in no way misleading. It was not formulated to meet a legal position, for these suits had not then been brought, and plainly states the truth—that he had received the order and obeyed it.

When the master had under consideration a matter of importance concerning the voyage as to which he had not received special directions, and requiring the exercise of his discretion, it was his custom to proceed in a deliberate and formal manner by calling his officers in ship's council. This he did on the evening preceding the receipt of the telegram, when he decided to continue on his voyage to Plymouth; and again, on August 3d, when an exchange of signs between the cruiser Essex and the station at Halifax was overheard, and he decided to run for the port of Bar Harbor rather than to New York. In the report to his company he alludes to this, and says:

"As signs from the Essex were not very strong, and she might be watching the port of New York just as well as the port of Boston, I called my officers for ship's council, in which it was decided to run into the port of Bar Harbor."

And again, in his testimony, in speaking of this matter, he said:

"I called my officers together, and said to the chief officer and to the second officer, who were there, 'Gentlemen, we are hearing these wireless signs getting nearer; they may be before New York Harbor; they may be before Boston Harbor; I think it is advisable that we should go out of the way and turn up north, and go to Bar Harbor, which is a path which is not trodden so much by steamers of our size and kind.' "

From these circumstances, and others presented in the case, the reasonable inference is that his course of conduct on the evening of the 31st of July in turning back to America was not due to the exercise of discretion on his part, but was due directly to the order of his superior and in obedience thereto.

II. If, however, it could properly be found that the master acted upon the information contained in the telegram, exercised his discretion and determined to return to America, the claimant cannot avail itself of his decision as a defense to these actions. The information which the managing directors gave was false. War had not broken out, but it was purposely stated that it had to control the exercise of the master's discretion, if he wished to exercise it, and did not at once follow their peremptory order. To permit the claimant to avail itself of the master's decision obtained under such circumstances would be the equivalent of according to one the protection of a judgment which he had procured through fraud. That such was the purpose of the

managing directors in sending the telegram is plainly deducible from the evidence presented by the record. From this it appears that, at the time the message was sent, and at the time it was received, war had not been declared and had not broken out between England, France, Russia, and Germany, or between any two of those nations; that at 2:45 o'clock in the afternoon of July 31st, when the telegram was sent, the managing directors had simply received information that the German emperor was to issue a proclamation declaring a state of war, which would have the effect of putting Germany on a war footing, but would "not amount to a declaration of war against or actual hostilities with any other nation." Their information amounted to nothing more than that a decree of a state of martial law for Germany was about to be issued. It further appears that the managing directors, in the stipulation filed by the claimant in these cases as evidence, stated that this decree was "the immediate reason for the recall of the Cecilie"; that all other political advices and facts which they had, without knowledge that the government was to declare a state of war, would not have caused them to take immediate action in regard to their vessels; that "this decree of a state of war alone can be designated as a decisive fact inducing us to recall the Cecilie"; and that the reason why they stated in their telegram to the master that war had broken out, instead of stating the facts as they existed, was that they deemed "every other information in regard to the political situation, every statement that was not absolutely clear and comprehensive in regard thereto, as inadvisable, and could only lead to misunderstanding and unsafe resolutions," and that the wording of their telegram "occurred purposely in the form that we reported the war as already having broken out, and has nothing to do with the wording of our telegram code."

The conclusion is irresistible that the telegram was primarily an order, and the information it gave as to the political situation was purposely false, and so framed that the master would be compelled to obey the order, whether he wished to exercise his discretion or not.

It is useless to discuss the question whether, if the managing directors had stated in the message the true condition as to the political situation, an exigency would have been presented which would have authorized the master to exercise his discretion, for the true situation was not presented to him, and, if it had been and he had been permitted to exercise his discretion, it is entirely problematical what course of action he would have pursued.

III. As the abandonment of the venture by the ship's return to America was due to the peremptory order contained in the telegram, we will consider the question whether the claimant, apart from the exceptions contained in the contracts, can justify its conduct in ordering the ship to return to America because of the threatened danger of war.

In Atkinson v. Ritchie, 10 East, 530, this question was considered. In that case the action was assumpsit for breach of an agreement in not loading a complete cargo of hemp. Ritchie, the master and owner of the ship Adelphi, chartered her to Atkinson, a London merchant,

agreeing to proceed to St. Petersburg and there load from the factors of Atkinson a complete cargo of clean hemp and 80 tons of iron for ballast, not exceeding what she could reasonably stow, and, being so loaded, to proceed to Woolwich and London and deliver the same on being paid the freight, "restraint of princes and rulers during said voyage always excepted." The ship arrived at Cronstadt, the port of St. Petersburg, on the 16th of September, 1807, where Ritchie proceeded to take on cargo under the charter party, and continued loading with all due diligence until the 25th of that month. He had then taken on board between 70 and 80 tons of iron, a sufficient quantity for ballast. "On the 25th of September there was a general rumor of an embargo being intended to be laid by the Russian government on all British vessels, and there was every appearance that it would take place immediately; but it did not in fact take place then, nor until six weeks afterwards." But on the 25th, the British consul, expecting that the embargo might take place immediately, caused a letter of advice to this effect to be written to Ritchie, in consequence of which he gave instructions to leave off screwing down any more hemp—which was the usual mode of loading—and to fill the ship as fast as possible by hand, and the work continued by hand until 6 o'clock that night, when she was filled, as far as could be done, in that manner. On the evening of the 25th the ship sailed with a cargo of about half what she could have carried, although there was at the time hemp ready to be loaded which would have completed loading her. "Ritchie acted bona fide and as an honest man under the existing circumstances, and there was a *reasonable and well-grounded apprehension for his acting as he did;* and he brought home as complete a cargo as he could under the circumstances." The Adelphi arrived in London, delivered her cargo there to Atkinson, who refused to pay the freight, as a little more than a moiety of the quantity of hemp stipulated for by the charter party was brought. On behalf of the master of the ship it was contended that "an exigency had arisen, and it was a paramount duty of the master, imposed upon him by law, to act for the benefit and safety of the ship, the crew and the cargo, and, still more, for the state to which he belonged, and that the reasonable apprehension of danger created the exigency, and that the master was in duty bound to do the best he could for all concerned, to preserve his ship for the state, as well as for the individuals concerned, to prevent them from falling into the hands of the enemy; and this was evidently a hostile embargo." In delivering the opinion of the court, Lord Ellenborough answered this contention as follows:

"The parties are the merchant freighter on the one hand, and the master on the other; each contracting for himself with the other, as principals. Under such circumstances, any constructive agency on the part of the defendant, in his character of master, for the plaintiff, as the freighter of the goods, is wholly out of the question. Their relative claims upon, and duties in respect of, each other are conclusively fixed and defined by the terms of their own written contract. No exception (of a private nature at least) which is not contained in the contract itself can be engrafted upon it by implication, as an excuse for its nonperformance."

This case clearly shows that the claimant, being one of the principals to the contract of carriage, had no discretionary authority vested in it by which it could justify an abandonment of its contract obligations, in case of the threatened danger of war, even though it honestly believed that the threatened danger presented an exigency, and that it must justify its conduct in abandoning its contracts, if at all, under the exceptions contained therein.

IV. The question remains whether the contracts of shipment as expressed in the bills of lading contain exceptions which would excuse the claimant from the performance of the contracts. The exceptions in the bills of lading upon which counsel for the claimant rely—the two contracts being alike so far as this matter is concerned—are those relating to the "restraint of princes, rulers, or people."

Lord Wrenbury, delivering an opinion in the House of Lords, in the case of British & Foreign Marine Insurance Co., Ltd., v. Samuel Sanday & Co., L. R. [1916] A. C. 650, 671, in discussing the meaning of the words, "restraint of kings, princes, and people," in a policy of insurance, and what would constitute such a restraint, said:

"A declaration of war by the sovereign is a political or executive act, done by virtue of his prerogative, which creates a state of war. A state of war is a lawful state, and is one in which every subject of his majesty becomes an enemy of the nation against which war is declared. The declaration of war amounts to an order to every subject of the crown to conduct himself in such way as he is bound to conduct himself in a state of war. It is an order to every militant subject to fight as he shall be directed, and an order to every civilian subject to cease to trade with the enemy. * * * 'A declaration of war imports a prohibition of commercial intercourse and correspondence with the inhabitants of the enemy's country, and that such intercourse, except with the license of the crown, is illegal."

In that case it was held that the declaration of war between England and Germany on the 4th of August, 1914, rendered trading by an English ship at a German port illegal, and would render the master of the ship with a cargo destined for such port subject to arrest and his ship and cargo subject to confiscation; that the declaration of war by the sovereign, being a political or executive act, operated directly upon the master, ship and cargo and constituted a restraint of kings, princes, and people within the meaning of the policy of insurance, although they were not subjected to actual or physical restraint.

The cases we are considering differ widely from the one passed upon by the House of Lords, for here, at the time the ship turned back for America and abandoned the voyage contracted for, the sovereign powers of Germany, England, and France had not declared war, the voyage was not illegal, and there was no sovereign act in existence which operated or could operate as a restraint within the meaning of the clause, "restraint of princes, rulers, or people," either directly or indirectly. No case has come under my observation where it has been held that there was a restraint of princes within the meaning of the clause in the absence of an act of a sovereign power or state rendering the venture unlawful; or, if the sovereign act was that of a foreign power or state, so that the venture was lawful, unless the circumstances disclosed physical restraint due to that sovereign act of a direct and

operative nature. Where the venture is rendered illegal by a declaration of war, the legal restraint operates directly and immediately upon the master, ship, and cargo, and makes his dealing or attempting to deal with the enemy unlawful. British & Foreign Marine Insurance Company, Ltd., v. Sanday & Company, supra. Whereas, if the venture is lawful (the ship and cargo being that of a neutral power), and the port of destination is blockaded, or the cargo is contraband and destined for a belligerent port, it must appear that restraint of a physical nature was operative to come within the meaning of the clause. Nobles Explosives Co. v. Jenkins, [1896] L. R. 2 Q. B. 326; Rodoconachi et al. v. Elliott, L. R. 9 Common Pleas Cas. 518; The Styria, 186 U. S. 1, 22 Sup. Ct. 731, 46 L. Ed. 1027; Balfour, Gutherie & Co. v. Portland & Asiatic S. S. Co. (D. C.) 167 Fed. 1010. And that if it appears the abandonment of the venture was to avoid encountering a future peril to which the ship or cargo might become subjected, the necessary restraint, within the meaning of the clause, would be wanting. Atkinson v. Ritchie, supra; Mitsui & Co. v. Watts, Watts & Co., 15 Law Times Reports, issued April 15, 1916; Hadkinson v. Robinson, 3 Bos. & P. 388; Kacianoff v. China Traders Insurance Co., [1913] 3 K. B. 407.

Here there was no declaration of war or authorized acts of war involving the nations in question at the time the ship abandoned her contract. The venture was legal, not illegal, and her return to America was not due to any restraint of a sovereign act, legal or physical, but was to avoid a supposed future peril to which she might become subjected.

In Nos. 1197 and 1198, the actions brought by Charles Rantoul, Jr., and Maurice Hanssens, passengers on the steamship Cecilie, to recover for failure to transport them from New York to Cherbourg and Plymouth, respectively, I agree with the conclusions reached in the opinion of the District Court, but not for the reasons there given. The tickets issued to these passengers contained the following provision:

"No claims under this ticket shall be enforceable against the shipowner or its property or the agent or passage broker, unless notice thereof in writing, with full particulars of the claim, be delivered to the shipowner or agent within five days after the passenger shall be landed from the transatlantic ocean steamer at the termination of her voyage, or, in case of the voyage being abandoned or broken up, within ten days thereafter."

And the claimant in its answer sets forth this provision of the contracts and alleges that no such notices were given within either of the periods so specified. As the voyage was abandoned or broken up by the ship's return to America, it became incumbent upon the libelants, in order to recover damages for breach of their contracts, to prove that notices of their claims were given within the time specified in the stipulation above referred to. This they not only failed to do, but admitted that no notices were given.

The libelants seek to avoid the effect of this stipulation on the ground that the ship, by deviating or abandoning its voyage, displaced the contracts and thereafter made the carrier an insurer against all loss and deprived it of the benefit of the conditions contained in the con-

tracts; and, in support of their contention, they refer to certain cases in which the carrier was held liable for loss or damage to goods occurring during or after a deviation had taken place. Morrison v. Shaw, S. & A. Co., Ltd., [1916] 1 K. B. 747; Brunner v. Webster, 5 Commercial Cases, 167. These cases do not seem to me to be in point. There the plaintiff was not suing on the contract of carriage, but upon the common-law obligation of the defendants for loss of or damage to goods occurring after the voyage had been abandoned; while here each libelant is suing upon the contract and must take it with all the stipulations which it contains.

A majority of the court concurring, it is ordered, adjudged, and decreed as follows:

In Nos. 1196 and 1199 the decrees of the District Court are reversed, and the cases are remanded to that court, with directions to enter in each an interlocutory decree for the libelants, and for further proceedings thereon in accordance with law, and the appellants recover their costs of appeal.

In Nos. 1197 and 1198 the decrees of the District Court are affirmed, and the appellee recovers its costs of appeal

PUTNAM, Circuit Judge (dissenting). These proceedings originated in several libels in the District Court, in each of which the decree of the District Court was in favor of the steamship Kronprinzessin Cecilie. Several appeals have been taken, which appear in this court as Nos. 1196, 1197, 1198, and 1199, but they all involve the same main question, and can be conveniently disposed of by a single opinion. The facts herein stated cover all the cases, except as we may otherwise explain.

The learned judge of the District Court said:

"In the first case, the Guaranty Trust Company of New York seeks to recover damages for breach of contract, by the steamship, in failing to carry a consignment of gold from the port of New York to the port of Plymouth, England. The libel alleges that on July 27, 1914, the steamship was lying in the port of New York, bound for Bremerhaven, Germany, by way of Plymouth, England; that on that date the libelant delivered to the steamship in good order and condition ninety-three kegs of gold bullion, of the agreed and declared value of $4,942,936.64, to be carried to Plymouth, England; thence to be forwarded to London; to be there delivered in like good order and condition to the order of the libelant, in consideration of $9,268 prepaid freight; that the steamship delivered to the libelant a bill of lading therefor; that, in violation of her contract, the steamship, when about 900 miles from Plymouth, abandoned her voyage and put back to Bar Harbor, Me., where, on or about August 8, 1914, the libelant accepted redelivery of the 93 kegs of gold from the steamship, under an agreement that such redelivery should not constitute a waiver of libelant's claim for breach of contract. By reason of such failure of the steamship to deliver the gold at Plymouth, the libelant says, it has suffered damage exceeding the sum of $1,104,467.43. The libel was subsequently amended, increasing the amount claimed as damages to $1,793,278.22; and the libelant says that no part of this sum has been paid.

"The answer admits the receipt of the 93 kegs of gold bullion, and alleges that the carriage of the same was undertaken by the claimant, subject to the conditions and exceptions contained in the bill of lading, which is made a part of the answer; subject also to the possibility of the ship being prevented from concluding her voyage and being forced to put back into a port of refuge, in case of outbreak, or threatened outbreak, of the European war. It ad-

mits that the steamship turned back on her course, and says that at the time of turning back she was about 1,070 miles from Plymouth. It alleges that the decision of the master to return to a port in the United States was based upon credible information received by him from the North German Lloyd office at Bremen, by wireless message, that war had broken out, involving Germany and Russia, France, and England, and that this message, considered in conjunction with the information with respect to the European crisis received by him prior to sailing, furnished reasonable ground for him to apprehend that the steamship and cargo would be captured if she continued on her voyage, and required him, in the exercise of sound judgment and discretion, to put back to a port of refuge; that, though war had not actually broken out at the time of the receipt of this wireless message, still the master, in anticipation of an outbreak of hostilities, and the consequent danger of arrest of the members of his crew, the arrest or probable detention and discomfort of his passengers, and the capture of his ship and cargo, was fully justified in adopting the course which he did adopt.

"The answer further alleges that the course followed by the captain was successful; that his return to a port of refuge, and the delivery of the specie to the parties entitled to it, were accomplished without the capture or detention of a single passenger or member of the crew, and without loss or damage to any of the specie, or to any other part of the cargo.

"As a third defense, the answer asserts the exception in the bill of lading against liability for the loss or damage 'occasioned by arrest and restraint of princes, rulers, or people.'

"Certain facts are stipulated: The libelant is a corporation organized under the laws of the state of New York, having its office in New York and a branch office in London. The claimant, North German Lloyd, is a corporation organized under the laws of Bremen, existing under said laws and the laws of the German Empire, and is the owner of the Kronprinzessin Cecilie. The steamship was built in 1907, at a cost of about $4,500,000. On July 27, 1914, the libelant shipped on board the steamer 93 kegs containing gold bars, owned by the shipper, of the value, at the time and place, as set forth in the libel. By the terms of the contract, the gold was to be carried by the steamer from New York to Plymouth, England; thence to be forwarded, at the steamer's expense, but at the owner's risk, to London, unto the Guaranty Trust Company, of New York, or its assigns, subject to the provisions and exceptions of the bill of lading. The steamer was fully manned, outfitted, and equipped, and sailed on the voyage from New York on July 28, 1914, about 1 o'clock in the morning. She continued on the voyage until the night of July 31st, at about 9 minutes past 10 o'clock in the evening, ship's time, when she turned back towards New York. At the time of turning back the steamer was a distance of about 1,070 nautical miles from Plymouth. Just before turning back, about 10 o'clock in the evening a wireless message was received on board of the steamer from the directors of the North German Lloyd at Bremerhaven, in private code. The translation of the message reads as follows: 'War has broken out with England, France, and Russia. Return to New York.' It was signed by the managing directors of the claimant company, after having been informed of the intention of the government to dispatch on that day the notes to Russia and France which are referred to in the German White Paper, and after a general warning by the admiralty to the German merchant marine, and after the directors had received information that a declaration of a state of war had been perfected and would shortly be proclaimed.

"Certain historical facts are agreed upon, as part of the proofs. Those stipulated as having happened before the ship sailed from New York are as follows:

On June 23, 1914, Archduke Francis Ferdinand, of Austria, and his wife, the Duchess of Hohenberg, were assassinated at Sarajevo, the capital of Bosnia; on July 23d, Austria sent an ultimatum to Servia; on July 24th Russia urged that Austria abandon the time limit of her ultimatum 'in order to prevent consequences equally incalculable and fatal to all the powers which might result from the course of action followed by the Austro-Hungarian government'; the Russian government informed the other powers that, if the Austro-Hungarian government should make war on Servia, Russia could not

allow the conflict to be settled between those two countries alone; the French ambassador at St. Petersburg gave the English ambassador at St. Petersburg to understand 'that France would fulfill all the obligations entailed by her alliance with Russia, if necessity arose, besides supporting Russia strongly in all diplomatic negotiations'; on July 25th Austria declined the Russian request for extension of time limit in ultimatum to Servia; Austria advised Servia and the other powers that she considered Servia's reply unsatisfactory; the Austrian minister left Belgrade at 6:30 p. m.; the Servian government moved from Belgrade to Nish the same evening; Germany confined her Alsace-Lorraine garrisons to barracks, and placed the frontier works of Alsace-Lorraine in a complete state of defense; Servia ordered mobilization; Russia began to take military precautions; martial law was proclaimed in Austria.

"On July 26th Austria severed diplomatic relations with Servia, and sent passports to the Servian minister; Austrian mobilization against Servia was decreed; Austria advised Russia that she sought no territory of Servia, and did not intend to impair the sovereignty of that country, but that, aside from that, she was prepared to go to the furthest extremes to obtain satisfaction of her demands; the Servian army began mobilization.

"The history shows that all powers thereupon became promptly involved, including Austria, Russia, Germany, France, and England. Thereupon, on July 30th, the German ambassador at St. Petersburg was directed to make the following declaration to the Russian government: 'Preparatory military measures by Russia will force us to counter measures, which must consist in mobilizing the army. But mobilization means war. As we know the obligations of France towards Russia, this mobilization would be directed against both Russia and France. We cannot assume that Russia desires to unchain such a European war. Since Austria-Hungary will not touch the existence of the Servian kingdom, we are of the opinion that Russia can afford to assume an attitude of waiting. We can all the more support the desire of Russia to protect the integrity of Servia, as Austro-Hungary does not intend to question the latter. It will be easy in the further development of the affair to find a basis for an understanding.'"

We will add that it is true that the Russian secretary at this time—that is, on July 30th—declared that there had been no mobilization; but events came on so rapidly that, while it must be admitted that no flagrant war had broken out involving France, Russia, and England with Germany at the time the wireless message came to the captain of the Cecilie from the North German Lloyd office, yet the mobilization on the part of Russia was in hand, and that mobilization meant flagrant war within the meaning of the message of the North German Lloyd office by wireless, so that for all practical purposes, with reference to this steamer, she was on mid-ocean, and at least a full day's sail from Plymouth, and in the full hazard of that position in mid-ocean, bound for the port of a threatened enemy.

To test this, let us look at the actual position in which the shippers placed her. The war which ensued finally came quickly on, involving all the great powers of Europe, England, France, Germany, Austria, and Russia. The ship in this case was a German ship. She was chartered at New York for a voyage to Bremerhaven, touching first at Plymouth, where she was to deliver the most valuable part of her cargo at what might be a hostile port, and then again at Cherbourg she would deliver more of her gold, which might be another hostile port, and then proceed to her own home port at Bremerhaven. She represented a value of more than $11,000,000, largely of what might be hostile gold, shipped for London and Paris, with a valuable general cargo of $139,-

The Cecilie had aboard 1,892 persons of mixed nationalities; 354 Americans, 667 Germans, 406 Austrians, 151 Russians, and other nationalities of minor amounts, involving nearly all the nationalities of Europe, including some nationalities that would have been hostile, if war had broken out, to any port she might touch, including her port of final destination.

In the event of flagrant hostilities, the master of the ship would have represented the entire enterprise, and would have been quite certain to fall into hostile hands, wherever he might have been, unless in an American port; so that, in case of hostilities, the vessel would have been safe only in America, and by his turning back he accomplished the safety of all concerned. It is true that when he sailed from New York the master was aware of the possibility of the ship being prevented from completing her voyage, and being forced to put back into a port of refuge. He protected himself by using in his bill of lading the usual exemptions from the hostile acts and purposes of princes and nationalities. So far as this ship is concerned, and these bills of lading were concerned, they were not hampered by any peculiar provision of any laws applicable to the ship; but the ship and cargo and passengers were protected to the full extent of the rules of the general international laws that are known to all the nations of the world.

When the ship sailed, and gave her bills of lading, the possibility of war was known; but the amount of freight charged was on the basis of only $9,268 for the gold belonging to the Guaranty Trust Company, and on a like basis for the rest of the gold, and it contemplated imposing no particular hazard on the ship, and the ship, undoubtedly loaded her cargo on the 27th day of July apprehending that the war clouds were probably clearing. The record shows that as late as July 30th those trading with a hope of peace were justified in doing so, and the rates of freight charged for this ship were based on that hope. Instead of that, however, the clouds gathered with remarkable rapidity; so much so that within four days after sailing it became evident that they were about to break, and that for the protection of the entire enterprise the ship must return to a neutral port.

Captain Polack testified that meanwhile, by communicating with vessels by wireless and otherwise, he had received information during the intervening period in regard to the progress of events, and was waiting for further information by wireless, and that, when he turned back, he acted, not only in accordance with his instructions, but also on the idea of his own best judgment, in running no further danger.

It is unnecessary to cite authorities on this topic, because the law is too well settled, and the underlying principles are all too uniformly accepted, in the circumstances of this case, to the effect that it was not only the right, but the duty, for the master of this ship not to delay, and hazard running his vessel into a possible hostile port, but to use justifiable precautions and reasonable grounds for apprehension of capture, and to have due regard to the uncertainties of the ocean, and leave reasonable margin for the state of weather and for accidental detentions; and under the circumstances of this case the decision to turn back was justifiable, whether it came from the master or owners.

It is also plain that the positions of the libelants in these cases would reverse all these propositions, had they been accepted, and would have involved this ship and the entire enterprise in hazards which the master had no right to assume. On the broad ocean, with no pilot but his own foresight and ingenuity, it is the duty of a master under such circumstances, not only to use diligence in escaping actual danger, but to use it in avoiding what is threatened; and, considering the number of people and the value of the ship, and the property which she had aboard, and the complexities of the hostilities by which she was endangered, the exigencies cannot be too strongly described.

This ship lost nothing, and the holders of her bills of lading lost nothing; but in regard to this particular shipment by the Guaranty Trust Company, if this libel is sustained, the company would receive exchange to the amount of $1,793,278.23. This would be all profit, and an addition to the amount of gold shipped which represents no amount paid out by the shippers. The same would apply to the other libelants in proportion to the amounts involved. It would prove a profit for the Guaranty Trust Company and to other shippers proportionately, and a corresponding loss to the ship, without any sum being paid therefor. Looking at the case from this point of view, it is incredible to suppose that, for the mere amount with reference to the Guaranty Trust Company, namely, the $9,268, damages or compensation in this large sum were ever contemplated. It is incredible to suppose that a profit and loss of such an amount was ever contemplated or agreed upon, and it cannot be recovered, of course, unless there were expressed or implied stipulations, agreed to by the parties, that it should be paid.

British & Foreign Insurance Co. v. Sanday & Co. [1916] Appeal Cases, 650, decided January 27, 1916, in our judgment disposes of any question which can be considered as left open in this case, and that is as to the effect of the usual exceptions contained in bills of lading. This case relates to this very war, and concerns what constitutes a deviation within the meaning of that exception. This case concerned two British vessels laden with merchandise for sale in Germany. While on the voyage from the Argentine to Hamburg, at the time of the declaration of war between Great Britain and Germany, the vessels shifted their courses. It was held that the voyages became illegal by force of the declaration of war, and the voyage could not lawfully be completed, and there was no deviation in law. The court was a very full court, and there was no dissent, and there can be no doubt that the position was in accordance with the law universally held. It is enough to quote Lord Loreburn (page 660) as follows:

"It was therefore a loss within the clause which insures these goods at and from losses against restraints by kings, princes, or peoples."

This case covers the only point which had not been precisely covered in the previous decisions, although they led directly up to it, namely, that obedience to an obligation which was a direct result of a condition of law arising out of the existence of war operates as a restraint precisely within these provisions, without any physical act on the part

of the legal authorities. The case at bar would have been precisely within this decision if war between Great Britain and Germany had broken out before the Cecilie reached Plymouth, so that it would have been a violation of the law of Germany for her to enter that port. With that single exception the cases are precisely alike, and it certainly cannot be said that the deviation of the Cecilie, accomplished for the purpose of preventing a pending breach of German law, was not as efficient as it would have been if a deviation had occurred two or three days later. Taking the cases by and large, there cannot be said to be substantially any distinction between them.

We think the following impressions are enough to dispose of all the cases: Of course, the telegrams which passed between the sovereign heads of Germany, Russia, and England are matters of common knowledge with reference to an investigation of this character; and they illustrate very clearly the fact that the question of peace and war was hanging by a single thread, and it was settled overnight, or in less time than overnight. When this ship was loaded at New York, it was known that the world was on the verge of war or on the verge of peace. The voyage involved three different ports, one of which was friendly, and two of which were liable to be hostile; and it also involved the four seas, with the certainty of capture in the case of hostilities. When the ship sailed it was, of course, not known whether war would break out, or when it would break out; but, as she progressed on her voyage of five or six days from New York, towards Plymouth, the master of the ship was in frequent communication, and getting frequent impressions, as to the probability of war or peace in various ways. As he went on his voyage the clouds thickened, and whatever hopes there might have been of peace were disappearing; and, when he was within two or three days of Plymouth, he was within the almost immediate presence of war or peace, with the practical certainty of war. His voyage, moreover, was liable to be delayed by maritime misfortunes. The dangers of navigation, and the possibility of being delayed by those dangers around the British Isles, being so considerable that it was impossible to say, except in absolutely clear weather, as to the time of arrival within one, two, or three days, or within the period which intervened between the time when he turned the ship about and the time of the actual outbreak of hostilities. All the time he was on dangerous ground, with the danger at all times increasing as he proceeded on his voyage; so that, although he sailed with a reasonable probability of peace, instead of war, the probability of war, with enemies all about him, advanced almost to a certainty before he reached the point where he changed his course. In addition to this, the whole transaction must be looked upon together, and the orders which he received not to visit any hostile port, on the 1st of August, the day after he turned his ship, were sufficiently connected with what preceded to justify his continuing his purpose to return to a neutral port, which was still incomplete. This decision should not turn on a narrow rule, as it was still in abeyance. Therefore, from any point of view, the master was justified, on receiving the telegram, on the 1st day of August, in continuing on his return voyage to a neutral port.

Here was a ship whose cargo was, perhaps, neutral; but the ship was herself advancing into the danger zone with nearly 2,000 persons aboard, many of whom might have been liable, on arrival at the first port of discharge, to an indefinite detention if the ship had been accidentally arrested. By the laws of the sea the whole is to be looked upon, ship, cargo, and passengers, as a single venture, and all resting upon the shoulders of one man—the captain. Assuming that, when he left New York, he had the prospect of a clear voyage, under the original probability that, as he advanced upon it, he might find the clouds cleared away, the events worked otherwise. He was, he testified, in constant anxiety as he advanced on account of the information which he received, and he would have been justified, on finding the increased danger, to have returned to a neutral port independently of any advices from the ship's owners.

There was no Moorish cruiser lying across his path, as there was in Driscol v. Bovil, 1 B. & P. 313 (1798), with the danger of slavery following capture, which caused the crew to refuse to sail; but there was danger of a possible, and even probable, detention of all the German passengers aboard, and the captain had as good reason for avoiding danger as there was in the case referred to, in which it was held that there was no deviation which would affect the insurance policy.

The appeal of the National City Bank affords nothing substantially different from the appeal of the Guaranty Trust Company, but it illustrates it forcibly. In the City Bank Case the amount involved was gold shipments; one of them, amounting to $2,104,254.34, to be unladen at Cherbourg for land transportation from there to Paris. This, of course, was for French delivery at a French port. If the regular course of her voyage proved without incident, the libelant estimated that the ship would have reached Plymouth before midnight on the 2d day of August, and Cherbourg early in the morning of the 3d day of August. It is maintained by the libelant that the precise time of arrival was not critical, for it says it is clear, in any event, the Cherbourg shipment would have been landed in France at least 7 hours before Germany declared war, and before France declared war upon Germany, and that, if the libelant's theory had been true, the shipment would have been landed at least 12 hours before then, and that there is, therefore, ample reason that, in either event, the Cherbourg shipment would have been landed, and the ship would have turned back, either to America, or have gone on to Bremen, not less than 6, and probably at least 12, hours before the state of peace was changed into a state of belligerency. Upon this the libelant claims that the court could assume that there would have been no act of hostility; but the question was not what the court would assume, but what hazard the master of the vessel might run. The whole of this hypothesis demonstrates to what extent the libelants were willing to drive the ship into a corner, and what computations they were making, which they were willing to impose upon her, as against the path of actual safety which she adopted.

On Petitions for Rehearing.

BINGHAM, Circuit Judge. The plaintiffs' petitions for rehearing in Nos. 1197 and 1198, the passenger cases, must be denied.

In our opinions of November 17, 1916, it was pointed out that the actions in the passenger cases were brought on the express contracts of carriage stated in the tickets, that these contracts contained certain conditions as to notice with which the plaintiffs had failed to comply, and that, because of this failure, the actions could not be maintained.

In the cases relating to the shipments of gold the actions were also upon express contracts of carriage contained in bills of lading. In these contracts there were certain exceptions within the terms of which the claimant sought to bring itself to excuse its failure to perform the contracts; and the court held, not that the contracts or the exceptions in the contracts were displaced by the deviation of the vessel, but that, by the deviation shown, the claimant broke its contracts and failed to bring itself, by reason of its conduct, within the terms of the exceptions.

[5, 6] The plaintiffs seem to be laboring under the impression that the passenger contracts were displaced by the deviation, that thereupon the claimant became an insurer, and that these actions are based upon implied contracts of insurance due to the relationship of the parties. This is a mistaken notion. To begin with, the actions are brought, as above stated, upon express contracts of carriage, and not upon implied contracts; second, if the express contracts were displaced by the deviation, the plaintiffs would have no ground upon which they could base their actions, for the damages, if any, which they suffered, were due to breaches of the express contracts arising out of a failure to transport the plaintiffs to Plymouth and Cherbourg, and not out of injuries to their persons or property; and, third, if the express contracts were displaced by the deviation, the claimant would not thereafter become liable as insurer for injuries to the persons of its passengers, for a common carrier, in the absence of an express contract to that effect, does not insure the safe carriage of its passengers, and in such case is liable only for negligence, though as respects damage to property after deviation it would be liable as insurer. No claim is here made that the plaintiffs were damaged in their persons after deviation, or that any property which they had with them on the voyage was damaged thereafter. The class of cases relied upon by the plaintiffs, such as Morrison v. Shaw S. & A. Co., Ltd., [1916] 1 K. B. 747, are applicable only where goods are damaged after deviation, in which cases it is held that the deviation displaces the express contracts of carriage, and subjects the defendants to their common-law liability as insurers of the damaged goods.

Petitions denied.

CRANE CO. v. FIDELITY TRUST CO. et al. *

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

No. 2768

1. RECEIVERS ⊂=158(2)—PAYMENT OF CLAIMS—PRIORITY OF UNSECURED DEBTS TO PRE-EXISTING LIENS.

It is the exception and not the rule that prior recorded liens may be displaced by general and unsecured claims, and while circumstances may exist which make it practically necessary to the business of a public service corporation and the preservation of its property that pre-existing debts of certain classes should be paid by its receiver out of the earnings of the receivership, or even out of the corpus of the property, the discretion to make such payments should be exercised with very great care. In general, only claims which were a part of the general current expenses of the ordinary operation of the mortgaged property in the usual course of business of the mortgagor, as distinguished from those for permanent additions or improvements, should be given such preference, and this rule should not be disregarded, except as a matter of business policy, where such preferential payment is necessary to keep the corporation a going concern in the hands of the receiver, or to prevent a loss at least equal to the amount of the payment.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303; Dec. Dig. ⊂=158(2).]

2. RECEIVERS ⊂=158(2)—PAYMENT OF CLAIMS—PRIORITY OF UNSECURED DEBTS TO PRE-EXISTING LIENS—"CONSTRUCTION ITEMS"—"RECONSTRUCTION"—"REPAIRS."

Claims against a public service corporation arising within a limited time before a receivership, which may be given preference over a prior mortgage as for current operating expenses, do not include those for service extensions of a water, gas, or electric light system, which are not to be considered as "repairs," but rather as "construction items," nor for additional equipment or replacement of worn-out equipment, which should be classified as "reconstruction."

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 303; Dec. Dig. ⊂=158(2).

For other definitions, see Words and Phrases, First and Second Series, Reconstruction; Repairs.]

3. RECEIVERS ⊂=159—PAYMENT OF CLAIMS—PRIORITY OF UNSECURED DEBTS TO PRE-EXISTING LIENS—DIVERSION OF INCOME.

The payment of interest to bondholders of a corporation, who are entitled to such payment in priority to claims of supply creditors, is not a diversion of income.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 307, 308; Dec. Dig. ⊂=159.]

Gilbert, Circuit Judge, dissenting.

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

Suit in equity by the Fidelity Trust Company, trustee, against the Washington-Oregon Corporation, Willis D. Hoag, its receiver, and others, in which the Crane Company intervened. From a decree denying it priority, the Crane Company appeals. Affirmed.

See, also, 217 Fed. 588.

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

*Rehearing denied February 13, 1917.

Maurice W. Seitz, of Portland, Or., for appellant.

Randolph W. Childs, of Philadelphia, Pa. (Maurice A. Langhorne, Frederic D. Metzger, and E. M. Hayden, all of Tacoma, Wash., of counsel), for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. The Crane Company, appellant, from time to time between January 1, 1911, and May 31, 1914, sold certain water pipes, fittings, and gas and water equipment to the Washington-Oregon Corporation engaged in the operation of electric railway systems and light and water systems in Washington and Oregon. In May, 1911, the Washington-Oregon Corporation made a mortgage and deed of trust to Fidelity Trust Company, as trustee, to secure a bond issue of Washington-Oregon Corporation for $5,000,000, the bonds to bear 6 per cent. interest, interest maturing on the 1st of April and the 1st of November in each year; the mortgage constituting a lien upon all property of every nature and description then owned by Washington-Oregon Corporation and thereafter acquired by it, and upon the rents, issues, and profits of all of such property. The mortgage was duly recorded. Interest was paid upon the bonds issued under the mortgage up to November 1, 1913, but the defendant corporation defaulted in the interest due on April 1, 1914. Foreclosure proceeding was instituted, a receiver was appointed, and the possession of the property passed to the receiver on July 31, 1914. The Crane Company intervened in the foreclosure proceedings, and asked that its claim for $11,146.67 be declared prior to the mortgage debt, and that the claim be paid out of the proceeds of the mortgage property, or out of the income of the receivership. The receiver and the complainant answered intervener's petition, and the cause was submitted upon a stipulated statement of facts.

In the stipulation it was agreed that on June 1, 1914, a balance was struck between Crane Company and Washington-Oregon Corporation, and that the Oregon-Washington Corporation was found to owe the Crane Company $13,225.25; that to evidence this debt the Washington-Oregon Corporation made six promissory notes, payable at different times, to the order of Crane Company; that one of the notes was thereafter paid on June 7, 1914; that the merchandise which was furnished by the Crane Company and unpaid for consisted of material furnished for public service corporations at different places in Oregon and Washington; that the materials furnished by the Crane Company, and the credits extended, to the Washington-Oregon Corporation, were in reliance on the part of the Crane Company that the same would be paid out of the current earnings of the Washington-Oregon Corporation, and that the current income would be applied to the payment for such materials, and that to that end the Crane Company permitted the account to continue as a running account and to accept payments from time to time as the Washington-Oregon Corporation declared its ability to make such payments; that the interest was paid on outstanding bonds covered by the mortgage sought to be foreclosed for the two years immediately prior to the receivership; that during the period

within which Crane Company's claim accrued, and thereafter, there were actual operating net earnings in excess of the interest of the Washington-Oregon Corporation due and paid by the Washington-Oregon Corporation during said period, on the first consolidated mortgage bonds covered by the foreclosure suit, and in excess of the Crane Company's claim.

The District Court denied all preferences, except for material furnished within six months prior to the appointment of the receiver, and decreed that there was no equity in the claim of intervener for preferential payment over the claims of the mortgage bondholders, save to the extent of $56.03. The Crane Company appeals from the decree.

The claims of the Crane Company may be classified as follows: (1) Service extensions, such as gas equipment for service connections, and water equipment for service connections; (2) main extensions, for water main extensions to different places; (3) betterments, such as hydrant systems, wood gates, and water valves; (4) reconstruction, water mains and pipes to replace certain old mains; (5) repairs, miscellaneous items in the way of water equipment.

[1] In Moore et al. v. Donahoo et al., 217 Fed. 177, 133 C. C. A. 171, this court recently considered the question whether claims for current supplies which are necessary to the maintenance of the property of a public service corporation to keep it in operation should be paid out of the current income in preference to the bonds upon the assumption that the lien of the mortgage attaches only to the residue of the income remaining after the payment of the operating expenses, or should such claims displace the vested lien of the mortgage upon the body of the estate because the claimants by their labor and supplies have rendered necessary assistance in continuing the operation of the property, thus enabling the debtor to discharge its obligations to the public.

The question was regarded as conclusively determined by the Supreme Court in Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717. Inasmuch as the facts of the Gregg Case are stated in the opinion of the court in Moore v. Donahoo, we need not repeat them. But as specially pertinent we quote the following language from Gregg v. Metropolitan Trust Co., supra:

> "There are no special circumstances affecting the claim as a whole, and if it is charged on the corpus it can be only by laying down a general rule that such claims for supplies are entitled to precedence over a lien expressly created by a mortgage recorded before the contracts for supplies were made. An impression that such a general rule was to be deduced from the decisions of this court led to an evidently unwilling application of it in New England R. Co. v. Carnegie Steel Co., 75 Fed. 54, 58 [21 C. C. A. 219], and perhaps in other cases. But we are of opinion, for reasons that need no further statement (Kneeland v. American Loan & Trust Co., 136 U. S. 89, 97 [11 Sup. Ct. 426, 34 L. Ed. 1052]), that the general rule is the other way, and has been recognized as being the other way by this court."

It is well recognized that there may be exceptional cases arise where preferences should be considered and a receiver authorized to pay past debts and charge the same against the corpus of the fund, where fail-

ure to make such payment would result in injury to, or would make it difficult to carry on, the business of the estate. An instance is given in Miltenberger v. Logansport, etc., Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117. But Justice Holmes points out in the Gregg Case:

"The ground of such allowance as was made was not merely that the supplies were necessary for the preservation of the road, but that the payment was necessary to the business of the road—a very different proposition."

The decision in Moore v. Donahoo conformed to the principle recognized in this circuit in the earlier case of Spencer et al. v. Taylor Creek Ditch Co. et. al., 194 Fed. 635, 114 C. C. A. 407, where Judge Morrow, writing for the court, traced the doctrine of Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, through Kneeland v. American Loan & Trust Co., supra, to Gregg v. Metropolitan Trust Co., supra, and held it to be the exception and not the rule that priority of liens can be displaced by general and unsecured claims.

We agree that the six months rule is not inflexible. The reason that six months is frequently taken as the limited time within which preferential claims must accrue is because usually a six months interval passes between the dates when installments of interest upon bonds fall due, and because mortgages often provide that, when an installment of interest is paid, current expenses to that time have either been paid or funds to pay them have been lawfully provided. But the law as laid down by the Supreme Court is that, while circumstances may exist which make it practically necessary to the business of a concern and the preservation of the property that pre-existing debts of certain classes should be paid by the receiver out of the earnings of the receivership, or even out of the corpus of the property, the discretion to make such preferential payments should be exercised with very great care. Westinghouse Air Brake Co. v. Kansas City Southern Ry. Co., 137 Fed. 26, 71 C. C. A. 1; High on Receivers (3d Ed.) § 394a; Street's Federal Equity Practice, § 2750 (1909).

In Illinois Trust & Savings Bank v. Doud et al., 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481 (Court of Appeals for the Eighth Circuit), the court, after a very elaborate review of the decisions of the Supreme Court prior to 1901, used this language with respect to the limitations applicable to the class of claims entitled to equitable preference:

"The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the operation of the mortgaged property, which inured to its benefit, and which was incurred in the ordinary course of its business, within a limited time anterior to the appointment of the receiver, the claim may be preferred. The Supreme Court has refused to apply the principle of the civil and maritime laws of awarding priority to the last creditor who furnished necessary repairs and supplies to a vessel to the distribution of the proceeds of the foreclosure of mortgages of quasi public corporations. Railroad Co. v. Cowdrey, 11 Wall. 459, 474, 482, 20 L. Ed. 199; Thompson v. Railroad Co., 132 U. S. 68, 74, 10 Sup. Ct. 29, 33 L. Ed. 256. If the consideration of a claim is not a part of the current expenses of the ordinary operation of the mortgaged property, but is a part of the expense of constructing a permanent addition or improvement to it, out of the ordinary course of its operation, neither the fact that it tended to conserve and improve the property and increase the security of the mortgagee, nor the fact that it was necessary to keep the mortgagor a going concern, nor the fact

that the mortgagor pledged or mortgaged the current income to secure it, will give the claim a preferential equity over the lien of a prior mortgage."

In Rodger Ballast Car Co. v. Omaha, K. C. & E. R. Co. et al., 154 Fed. 629, 83 C. C. A. 403, the same court carried its examination of decisions down to 1907; and in the recent case of Love et al. v. North American Co. et al., 229 Fed. 103, 143 C. C. A. 379, speaking through Judge Carland, said:

"The class of claims which under the decisions of the Supreme Court may lawfully receive an equitable preference in payment out of the income or out of the corpus of the property of a mortgaged railroad over the bondholders secured by a prior mortgage is limited to claims incurred for the current expenses of the ordinary operation of the mortgaged property in the usual course of the business of the mortgagor. The test of the preferential equity of a claim is its consideration. If its consideration was a current expense of the ordinary operation of the property of the mortgagor incurred in the usual course of its business, for labor, supplies, and like things, necessary for the operation of the railroad, within a limited time, usually not exceeding six months anterior to the appointment of the receiver, the claim may be preferred in payment; otherwise, it may not be."

In thus stating the law the court cites many federal decisions, including Chicago & A. R. Co. v. U. S. & Mex. Trust Co. et al., 225 Fed. 940, 141 C. C. A. 64, and Martin Metal Mfg. Co. v. Same, 225 Fed. 961, 141 C. C. A. 85.

In Chicago & A. R. Co. v. U. S. & Mex. Trust Co. et al., supra, the court held that the claim of preference to payment out of the corpus of the mortgaged property, because it was founded on services rendered which were absolutely necessary to the business of the railway to keep the road a going concern, so that the company's property would be preserved and its public duty discharged, was without ground, because in Gregg v. Metropolitan Trust Co., supra, the Supreme Court had decided that even a claim of such nature accruing within six months prior to the receivership may not be preferred in payment out of the corpus of the mortgaged property to the claims of the bondholders secured thereon in the absence of a diversion of income, found to be lacking. Judge Sanborn carefully considered the decisions of the Supreme Court as bearing upon two particular grounds: First, the diversion of income; and, second, the necessity or business policy of immediate payment—these two grounds being those upon which claims for current expenses for necessities of operation have been paid out of the corpus of the property. But the learned judge points out that Miltenberger v. Logansport, etc., Ry. Co., supra, and Union Trust Co. v. Illinois Midland Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, in both of which cases claims were allowed as necessary for immediate payment, were decided 15 years before the beginning of the series of decisions found in Kneeland v. American Loan & Trust Co., supra, Morgan's Co. v. Texas Central Ry., 137 U. S. 171, 11 Sup. Ct. 61, 34 L. Ed. 625, Thompson v. Valley R. R. Co., supra, Thomas v. Western Car Co., 149 U. S. 95, 13 Sup. Ct. 824, 37 L. Ed. 663, Southern Ry. Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475, and Gregg v. Metropolitan Trust

Co., supra. And Moore v. Donahoo, supra, decided by this court, was cited by the court to sustain the proposition that, if a claim for the current expenses of the necessities of the operation of a railroad is payable in preference to the claims of secured bondholders out of the corpus of the property in any case in the absence of diversion of the income from such expenses, it is only when such preferential payment is necessary to keep the railroad a going concern, or when its preferential payment is necessary to prevent a loss at least equal to the amount of the payment. These cases, we believe, correctly state the general doctrine which must control our decision, and under it materials for extensions and betterments, as included in certain detailed lists incorporated in the record in the present case, must be declared not entitled to preference.

[2] With respect to service extensions, we believe they are not to be considered as repairs, but rather as construction items. Worn-out equipment, when replaced on an extensive scale, ought not to be classified as repairs, but as reconstruction. Additions to equipment are not current operating charges. Lackawanna Iron & Coal Co. v. Farmers' Loan & Trust Co., supra; Central Trust Co. of N. Y. v. Colorado, etc., Co. (D. C.) 200 Fed. 85; Toledo, etc., R. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905; International Trust Co. v. Townsend, etc., Co., 95 Fed. 850, 37 C. C. A. 396; Reyburn v. Consumers' G., F. & L. Co. (C. C.) 29 Fed. 561. In the last case the court disallowed a claim for meters, because meters are not a current necessity, but equipment constituting additions or extensions of the business.

[3] The payment of interest to bondholders entitled to the payment of interest in priority to the claims of creditors claiming is not a diversion. Central Trust Co. v. East Tenn., V. & G. R. Co., 80 Fed. 624, 26 C. C. A. 30.

Without carrying the discussion further, it is enough to say that in the present case the only goods furnished within the six months period were those of the value of $56.03 allowed by the lower court. The Crane Company stands, we think, as a creditor which sold goods to the Washington-Oregon Corporation with the expectation of realizing profits as in ordinary commercial transactions. It extended credit to the corporation, whereas the bondholders lent money to the corporation, looking solely to the security of the mortgage given by the corporation upon all of its then owned and after-acquired property and the income thereof. The Crane Company permitted its claim to run for a long time, part of it for several years; but the bondholders brought proceedings in foreclosure within a month of the time when their right to foreclosure accrued.

The Crane Company, having sold materials which do not fairly constitute operating supplies necessary to the business of the Washington-Oregon Corporation, and having sold them prior to that time preceding the appointment of the receiver within which courts of equity have announced that priority claims would accrue, and having shown no special equity upon which they can rest the right of preference, must fail as against the contract rights of the bondholders secured by the mortgage.

The decree is affirmed.

GILBERT, Circuit Judge (dissenting). There are two grounds on which I think it should be held in this case that the mortgagee, coming into a court of equity seeking equitable relief, and asking for the appointment of a receiver, should be required to do equity, and submit to the preferred payment of claims of the appellant which, within a reasonable time prior to the receivership, furnished goods to keep the mortgaged property a going concern, in the expectation of payment out of the income, but which has not been paid because of the diversion of the income to the payment of interest or betterments. One is the broad principle upon which the equitable right rests. As stated by Chief Justice Waite in Fosdick v. Schall, 99 U. S. 235, 25 L. Ed. 339, the power to displace a mortgage upon the corpus or upon the earnings "rests upon the fact that, in the administration of the affairs of the company, the mortgage creditors have got possession of that which in equity belonged to the whole or a part of the general creditors. Whatever is done, therefore, must be with a view to a restoration by the mortgage creditors of that which they have thus inequitably obtained." An equitable right of so meritorious a nature should not, we think, be barred by an artificial rule of 6 months limitation, or by a lapse of time (within the statute of limitations) other than a delay which must result in prejudice to the mortgagee.

This, as I understand it, is the purport of all the decisions of the Supreme Court of the United States, and in no reported decision of that court is it found that a period of 6 months or any precise period of limitation has been fixed. In Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419, the interveners had furnished supplies to the machinery department of the railway company nearly 3 years before the receiver was appointed, and 16 months before the receivership had received the notes of the railway company for the balance found due. The court held that they were entitled to payment in full. In Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, the court approved the payment of the intervener's claim for a balance, due 11 months before the receivership, for coal furnished for running the railway company's locomotives. In Southern Railway Co. v. Carnegie Steel Co., 176 U. S. 257, 20 Sup. Ct. 347, 44 L. Ed. 458, the decision in Burnham v. Bowen was followed. In Va. & Ala. Coal Co. v. Central R. R. & Banking Co., 170 U. S. 355, 18 Sup. Ct. 657, 42 L. Ed. 1068, the period was 8 months. These decisions establish the principle that every railroad bondholder, in accepting his bonds, impliedly agrees that the current debts of the mortgagor incurred in the ordinary course of the business shall be paid from the income before he shall have any claim thereon.

The case of Gregg v. Metropolitan Trust Co., 197 U. S. 183, 25 Sup. Ct. 415, 49 L. Ed. 717, does not hold to the contrary. In that case it was expressly found that there had been no diversion of income by which the mortgagee had profited or otherwise, and the purport of the decision was that claims for supplies furnished to a railroad company within 6 months before the appointment of a receiver are not entitled, under the general rule, to precedence over a lien expressly created by a mortgage recorded before the contracts for such supplies were made. But in that case the court cited and approved its own decisions which are hereinabove referred to.

Other federal courts have denied the 6 months rule. In Farmers' Loan & Trust Co. v. Kansas City & N. W. R. Co. (C. C.) 53 Fed. 182, Judge Caldwell allowed claims that had accrued 18 months prior to the receivership, and said:

"There is no fixed rule barring preferential debts contracted more than 6 months before the appointment of the receiver. There is no '6 months rule.'"

In that case the court referred to Central Trust Co. v. St. Louis, A. & T. Ry. Co. (C. C.) 41 Fed. 551, in which case an interval of from 2 to 3 years had elapsed between the dates of the mortgages and the receivership, and stated that Mr. Justice Brewer, when the question thereafter arose as to what debts should have priority, said:

"I did not understand from the parties making the application for a receiver that there was any desire or thought of cutting off any just claims accruing during the brief period which has elapsed since their mortgage was given, and, if counsel or party had any such idea, they much mistake my judgment in the premises."

Again, in Northern Pacific R. Co. v. Lamont, 69 Fed. 23, 16 C. C. A. 364, the Circuit Court of Appeals for the Eighth Circuit said:

"A preferential debt is not barred, though contracted more than six months before the appointment of a receiver. As to such debts, there is no arbitrary '6 months rule,' as has been often decided."

In New York Guaranty & Indem. Co. v. Tacoma Railway & M. Co., 83 Fed. 365, 27 C. C. A. 550, this court held that a claim was not barred which accrued 22 months prior to the receivership.

In the present case the appellant's claim has all the elements essential to an equitable preference: (1) The goods that were furnished were of the nature of those for which such a claim is preferred. About 25 per cent. of the appellant's claim is for materials furnished which were used for repairs and replacements of public service systems for furnishing water, gas, and electric light; about 37 per cent. was for goods furnished and used for service connections to customers; and about 42 per cent. was for making extensions and betterments, and for laying new pipes and mains in the place of those which had become old or unfit. (2) The materials furnished were such as were necessary to conserve the property and retain the franchises of a public service corporation. In Union Trust Co. v. Morrison, 125 U. S. 609, 8 Sup. Ct. 1008, 31 L. Ed. 825, the court, in giving preference to such a claim, said: "The ground of the claim is that a portion of the property covered by the mortgage, being in peril of abstraction and loss, was rescued and saved to the mortgage by the act of the petitioner." (3) The evidence shows that the income of the corporation was diverted to the payment of the interest due to the mortgage bondholders. (4) The goods were sold and credit extended by the appellant in reliance upon payment thereafter out of the income of the corporation.

The appellees contend that the appellant's claim is mostly for reconstruction, and that preferences are allowable only for current supplies, and are denied for betterments and new construction or reconstruction, citing Thomas v. Western Car Co., 149 U. S. 95, 13

Sup. Ct. 824, 37 L. Ed. 663, Lackawanna Iron & Coal Co. v. F. L. & T. Co., 176 U. S. 298, 20 Sup. Ct. 363, 44 L. Ed. 475, Toledo R. R. Co. v. Hamilton, 134 U. S. 296, 10 Sup. Ct. 546, 33 L. Ed. 905, and Porter v. Pittsburg & Bessemer Steel Co., 120 U. S. 649, 7 Sup. Ct. 741, 30 L. Ed. 830. In the first of these cases the claim, which the court denied, was a claim for rental due for the use of the railroad cars of another company. The court said that the debt was not one which was made necessary for the business of the railroad company, or the preservation of its property. In Toledo R. R. Co. v. Hamilton, the court held that a railroad mortgage cannot be displaced in favor of a claim arising from building a dock on the railroad property, that the building of such a dock was original construction and not the keeping up as a going concern a railroad already built, that the amount due was no part of the current expenses of operating the road, and that there was as to the claimant no diversion of current earnings. In Porter v. Pittsburg & Bessemer Steel Co., the railroad, at the time when the claims accrued, had not been opened for use. There was no "going concern." There was no diversion of income to pay interest on mortgage bonds, and the claims were not for expenses or repairs which went toward keeping a completed road in operation. They all arose from the original construction of the road. In Lackawanna, etc., Co. v. Farmers' Loan, etc., Co., the claim was for rails furnished to an extent which led the court to say that it amounted to "the construction of a new road"; that the claim was not for materials used, and was not a "current debt made in the ordinary course of business." In that case the court thus summed up the decisions:

"This court has uniformly held that in the distribution of the current earnings of an insolvent railroad company, whose property is being administered by a receiver, mortgage creditors could not be postponed to unsecured creditors, unless the debts due the latter were of the class known as current debts arising in the ordinary course of business and properly chargeable upon current receipts. The decision in each case has been more or less controlled by its special facts."

The cases just referred to are cases of the classes in which claims to preference are disallowed. But among the cases which more closely resemble the case at bar, and which are controlling here, are: Fosdick v. Schall, in which the court defined the allowable claims to be those which were "for necessary operating and managing expenses, proper equipment, and useful improvements"; Union Trust Co. v. Illinois Midland Ry. Co., 117 U. S. 434, 6 Sup. Ct. 809, 29 L. Ed. 963, in which necessary repairs and operating expenses were held to include the expense of rails, ties, turntables and fences; Miltenberger v. Logansport Ry. Co., 106 U. S. 286, 1 Sup. Ct. 140, 27 L. Ed. 117, where it was held that a claim for freight balances was entitled to preference on the theory that a failure to pay such balances might disrupt traffic relations with other carriers and thus cripple the road; and Southern Railway Co. v. Carnegie Steel Co., supra, in which the claim was for steel rails furnished to the railway company, and in which the court held the allowable claims for

preference to be debts of a railway company contracted in the ordinary course of its business.

The appellees deny the application of the doctrine of Fosdick v. Schall to water companies, and they refer to the fact that the material furnished by the appellant was nearly all furnished for water supply. They cite Wood v. Guaranty Trust Co., 128 U. S. 418, 9 Sup. Ct. 131, 32 L. Ed. 472. But that case does not hold that the doctrine is inapplicable to water companies. The court declined to express an opinion on that question, and went no further than to observe that the doctrine of Fosdick v. Schall had never yet been applied to any case except to that of a railroad. Nor does any federal case hold the doctrine inapplicable to water companies. In Reyburn v. Consumers' Gas, Fuel & Light Co. (C. C.) 29 Fed. 561, Judge Blodgett held the doctrine applicable to a gas, fuel and light company, and said that the doctrine of Fosdick v. Schall is "that, for the purpose of keeping works of a public character, within which the works of this company may be properly included, in operation, those who have given the company credit for the supplies necessary to keep the works in operation—current operating supplies—are to have a lien." In Illinois Trust & Savings Bank v. Ottumwa Electric Ry. (C. C.) 89 Fed. 235, the doctrine was held applicable to a company engaged in operating an electric railway system, an electric lighting plant, and a steam-heating plant. The decision in that case was on appeal affirmed in Illinois Trust & Savings Bank v. Doud, 105 Fed. 123, 44 C. C. A. 389, 52 L. R. A. 481.

When the question of the applicability of the doctrine is approached, no distinction in principle is discovered between a railway company and a water company organized to supply a municipality with water. Both are corporations of public utility. Both enjoy the right of eminent domain. Both operate under a public franchise, and the service rendered to the public by a railroad company in the transportation of passengers and freight is of no more vital importance than the service of a water company in furnishing a city with wholesome water, with the attendant advantage of protection against fire and disease. I think it should be held that the doctrine is applicable to the corporation here under consideration.

Another, and I think a conclusive, ground for reversing the decree, is that the corporation here in receivership is a corporation of the state of Washington, in which state the appellant, a foreign corporation, was doing business, and by the laws of which the contracts between the parties were controlled. The Supreme Court of Washington in Bellingham Bay Imp. Co. v. Fairhaven & N. W. Ry. Co., 17 Wash. 371, 49 Pac. 514, held that the right to priority of lien over a mortgage debt in favor of a claim for supplies furnished a railway company is not lost by laches in asserting it, if an action at law to enforce the demand has not been barred by the statute of limitations. After citing Hale v. Frost, 99 U. S. 389, 25 L. Ed. 419, Burnham v. Bowen, 111 U. S. 776, 4 Sup. Ct. 675, 28 L. Ed. 596, and Farmers' L. & T. Co. v. Kansas City & N. W. R. Co. (C. C.) 53 Fed. 182, and quoting from the latter case Judge Caldwell's language,

in which he said, "There is no fixed rule barring preferential debts contracted more than six months before the appointment of the receiver," the court said:

"Upon principle, it would seem but just that a party should, in the absence of special circumstances of controlling importance, be entitled to equitable relief for the full period in which, according to the statute, an action might be maintained at law to enforce the demand. If the lapse of three years is necessary under the statute to bar the debt, there appears to be no sufficient reason, generally speaking, why the equitable right should be barred within a shorter period."

Such has been the established and settled rule of the state of Washington for 20 years. The appellant had the right to rely upon it as the law of the state, and it may be assumed that it did so when it sold the goods and extended the credit, and the trustee and the bondholders were chargeable with notice of it.

Concerning the question of the binding force upon federal courts of the decisions of local state courts, Judge Harlan, in Kuhn v. Fairmont Coal Co., 215 U. S. 349, 30 Sup. Ct. 140, 54 L. Ed. 228, after reviewing the decisions, announced these rules:

"(2) Where, before the rights of the parties accrued, certain rules relating to real estate have been so established by state decisions as to become rules of property and action in the state, those rules are accepted by the federal courts as authoritative declarations of the law of the state. * * * (4) So, when contracts and transactions are entered into and rights have accrued under a particular state of the local decisions, or when there has been no decision by the state court on the particular question involved, then the federal courts properly claim the right to give effect to their own judgment as to what is the law of the state applicable to the case, even where a different view has been expressed by the state court after the rights of parties accrued. But even in such cases, for the sake of comity and to avoid confusion, the federal court should always lean to an agreement with the state court, if the question is balanced with doubt."

It seems clear that the case which is now before us comes within the first of these rules, and that it is one of those cases where a rule established by state decision has become a rule of property. This case does not involve the application of general principles of commercial law, or of contracts. It involves the rights of parties to the proceeds of property located in the state of Washington which is held under a mortgage made in that state.

It is uniformly held that the decisions of state courts as to the rights of parties under mortgages, whether of real or personal property, are binding upon the federal courts, notwithstanding that the state decisions involve no question of the construction of a state statute or Constitution. In Etheridge v. Sperry, 139 U. S. 266, 277, 11 Sup. Ct. 565, 569 (35 L. Ed. 171), it was said:

"We are aware that there is great diversity in the rulings on this question by the courts of the several states; but, whatever may be our individual views as to what the law ought to be in respect thereto, there is so much of a local nature entering into chattel mortgages that this court will accept the settled law of each state as decisive in respect to any case arising therein."

The doctrine of that case was applied by this court in Peterson v. Sabin, 214 Fed. 234, 130 C. C. A. 608, in which, after quoting Etheridge v. Sperry, this court said:

"We are to inquire, therefore, whether the question here presented has been directly or in effect determined by the Supreme Court of Oregon. That court has distinctly held that, where a mortgagee has given the mortgagor unlimited power to dispose of the mortgaged property for his own use, the mortgage is void as to the creditors of the mortgagor, even though there was no actual fraudulent intent on the part of either of the parties to the mortgage."

And this court followed the construction so established by the decision of the state court. In City of Omaha v. Omaha Water Co., 192 Fed. 246, 112 C. C. A. 504, the court said:

"The decisions of the Supreme Court of Nebraska concerning the nature and extent of the estate or rights of mortgagees in mortgaged property are controlling upon us."

In Dugan v. Beckett, 129 Fed. 56, 63 C. C. A. 498, it was held that, in determining whether a chattel mortgage executed by a bankrupt was fraudulent on its face, the federal courts follow the decisions of the courts of last resort of the state in which the controversy arose; the law on the subject being regarded as a rule of property. In Re Buchner (D. C.) 202 Fed. 979, it was held that priority of mortgages executed in Illinois on land located in that state is to be determined in accordance with the decisions of the Illinois Supreme Court. In Re Haywood Wagon Co., 219 Fed. 655, 135 C. C. A. 391, the court said:

"In following the decisions of the local courts upon such a question we are following the rule which the Supreme Court laid down in Etheridge v. Sperry, 139 U. S. 266 [11 Sup. Ct. 565, 35 L. Ed. 171]."

In Haggart v. Wilczinski, 143 Fed. 22, 74 C. C. A. 176, the court said:

"The settled law of the state on the subject of mortgages is regarded as a rule of property."

In Percy Summer Club v. Astle, 163 Fed. 1, 90 C. C. A. 527, a case which involved the construction to be given the language of a deed, the court said:

"Where, however, the decision of the state court, though based upon the common law, is deemed of an application especially local, this decision is given an authority almost as great as would be assigned to it if it construed a state statute"

—citing Burgess v. Seligman, 107 U. S. 20, 33, 2 Sup. Ct. 10, 21 (27 L. Ed. 359), where it was said:

"Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that by the course of their decisions certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb."

In Dooley v. Pease, 180 U. S. 126, 21 Sup. Ct. 329, 45 L. Ed. 457, a case which involved the power of the owner of personal property to sell it and still remain in the possession of it, so as to exempt it from seizure and attachment, the court said:

"It is equally well established that the courts of the United States regard and follow the policy of the state law in cases of this kind."

In Guffey v. Smith, 237 U. S. 101, 35 Sup. Ct. 526, 59 L. Ed. 856, concerning the rights which pass under an oil and gas lease, the court, after citing the decisions from the Supreme Court of the state, said:

"These decisions constitute rules of property, and must be accepted and applied in passing upon the complainants' rights."

In General Electric Co. v. Richardson (D. C.) 228 Fed. 758, the court followed the rule established by the Supreme Court of Pennsylvania that conditional sales are void so far as they affect the rights of bona fide purchasers, and held that, the contract being a Pennsylvania contract, the law of that state was a rule of property to be applied as such in the courts of the United States in any controversy over the right of property, whether the right was invoked in an action at law or in proceedings in equity. And in Gilman v. Lamson Co., 234 Fed. 507, —— C. C. A. ——, it was held that where, at the time of the making of a contract to be performed in the state where made, there is a settled rule of decision of that state as to the damages recoverable for its breach, such rule governs in an action for its breach in the federal court.

NATIONAL SURETY CO. v. LINCOLN COUNTY, MONT.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917. Rehearing Denied February 13, 1917.)

No. 2825.

1. APPEAL AND ERROR ⟸241—REVIEW—MOTION FOR JUDGMENT.
Review of denial of motion for judgment is limited to the specific questions presented on the motion.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1413-1416; Dec. Dig. ⟸241.]

2. APPEAL AND ERROR ⟸671(6)—RECORD—QUESTIONS PRESENTED FOR REVIEW.
A general finding being made on a trial without a jury, review is limited to such rulings in the progress of the trial as are presented by bill of exceptions.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 2872; Dec. Dig. ⟸671(6).]

3. PLEADING ⟸345(1)—MOTION FOR JUDGMENT—CLERICAL ERROR IN BOND.
The complaint in an action on a bond to secure performance of a contract will not be held insufficient, on defendant's motion for judgment, because, as appears by the exhibits, the bond antedates the contract by a year, the complaint showing the contract to be a modification of one a year earlier, and the bond showing that it was given after the making of, and to secure performance of, the modified contract; but the date of the bond will be disregarded as a clerical error in copying the bond for the original contract.
[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 1055, 1057-1059; Dec. Dig. ⟸345(1).]

4. PLEADING ⟸7—PRESUMPTION—VIOLATION OF LAW.
Plaintiff, suing on the bond of the contractor for construction of a bridge over a navigable stream, need not allege and prove that its con-

struction was with the approval of its plans required by Act March 23, 1906, c. 1130, 34 Stat. 84 (Comp. St. 1913, §§ 9961–9968); as it will not be presumed it was an unlawful structure.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. § 11; Dec. Dig. ⊂⊃7.]

5. NAVIGABLE WATERS ⊂⊃1(7)—EVIDENCE OF NAVIGABILITY.

That Congress passed an act authorizing the construction of a bridge in accordance with the act as to bridging navigable streams does not of itself establish navigability of the stream, in an action on the bridge builder's bond.

[Ed. Note.—For other cases, see Navigable Waters, Cent. Dig. §§ 12–15; Dec. Dig. ⊂⊃1(7).]

6. PRINCIPAL AND SURETY ⊂⊃117—DISCHARGE OF SURETY—PREMATURE PAYMENTS.

A contractor's surety, at least a compensated surety, whether a company or individual, to be discharged by payments to the contractor before the stipulated times, must show that it suffered some injury therefrom.

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

7. PRINCIPAL AND SURETY ⊂⊃90—DISCHARGE—APPLICATION OF STATUTE.

Act Mont. March 10, 1909 (Laws 1909, c. 139) § 3, providing how a surety company may be released from liability on a bond, having reference only to official bonds, has no application to the bond of a contractor for construction for a county.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 140; Dec. Dig. ⊂⊃90.]

8. PRINCIPAL AND SURETY ⊂⊃117—DISCHARGE—CONSTRUCTION OF STATUTES.

The second and third subdivisions of Rev. Codes Mont. § 5686, providing that a surety is exonerated, (1) in like manner with a guarantor, (2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security, or (3) to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do, are controlling, notwithstanding section 5673, providing that a guarantor is exonerated, except so far as indemnified by his principal, if by any act of the creditor, without the guarantor's consent, the obligation of the principal is altered in any respect; so that a surety is not released by premature payments to his principal, whereby the surety could not be injured.

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

9. APPEAL AND ERROR ⊂⊃931(4)—PRESUMPTION—FINDINGS.

It must be assumed, on appeal from the general finding for plaintiff suing a contractor's surety, that the court found that deviations from plans and specifications were not at the instance of plaintiff, or that they were such as were permissible under the terms of the contract.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3764; Dec. Dig. ⊂⊃931(4).]

10. PRINCIPAL AND SURETY ⊂⊃159—BUILDING CONTRACT—EVIDENCE TO HOLD SURETY.

Notwithstanding any difference between the bridge described in the bond of a contractor for building a bridge, and that described in the specifications, the surety, sued on the bond because of the fall of the bridge constructed, is properly denied judgment; there being no evidence to show which of the two described bridges was constructed.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 428–435; Dec. Dig. ⊂⊃159.]

11. PRINCIPAL AND SURETY ⟸90—RELEASE—GROUNDS.
Though a contract for constructing a bridge for a county provides that certain work shall be done if ordered by the engineer, yet there being no provision requiring the county to be represented by an engineer, the fact that it had none does not release the contractor's surety.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. § 140; Dec. Dig. ⟸90.]

In Error to the District Court of the United States for the District of Montana; Geo. M. Bourquin, Judge.

Action by the County of Lincoln, Montana, against the National Surety Company. Judgment for plaintiff, and defendant brings error. Affirmed.

For opinion below, see 231 Fed. 468.

Clarence H. Gilbert, of Portland, Or., Gunn, Rasch & Hall, of Helena, Mont., Edmund C. Strode, of Lincoln, Neb., and Coy Burnett, of Portland, Or., for plaintiff in error.

J. B. Poindexter, Atty. Gen., W. H. Poorman, Asst. Atty. Gen., and Sidney M. Logan, of Kalispell, Mont., and James M. Blackford, of Libby, Mont., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error entered into a contract with the Coast Bridge Company, whereby the latter was to construct a bridge across the Kootenai river at Rexford, Mont., a swift mountain stream more than 400 feet wide. The bridge was to be for highway purposes, to be 18 feet in floor width, to consist of two spans each 220 feet long, supported by a central pier. The bridge company agreed to provide all material and labor and to build the bridge in a good, workmanlike, and substantial manner, "so as to make it a perfect bridge, according to the plans and specifications." The bridge company was to furnish the plans and specifications. The bridge was completed and paid for late in the fall of 1912, and early in the spring of 1913 the central pier was undermined so that it overturned and the bridge fell. The loss was total. The defendant in error brought an action against the bridge company and the National Surety Company, the plaintiff in error, to recover the sum of $30,000, the penal sum of the surety company's bond. The case was tried before the court, a jury trial having been waived. The court reached the conclusion that the piles of the center pier were not driven in accordance with the contract, and that because thereof the pier and the bridge fell, and made a general finding for the defendant in error, and entered judgment for $29,345 with interest and costs. No special findings were requested by either party. At the conclusion of the testimony, the plaintiff in error moved for judgment in its favor, not on the ground that there was no evidence sufficient in law to sustain a judgment for the defendant in error, but upon the alleged insufficiency of the complaint to state a cause of action, and upon certain specified

grounds on which it was contended that the plaintiff in error was discharged of liability upon its bond.

[1, 2] On this writ of error we are limited to the consideration of the specific questions which were presented on the motion for a judgment. It is well settled that if a jury trial is waived, and a general finding is made by the court, review in an appellate court is limited to such rulings of the trial court in the progress of the trial as are presented by a bill of exceptions. In Dunsmuir v. Scott, 217 Fed. 200, 133 C. C. A. 194, this court said:

"The question whether or not, at the close of the trial, there is substantial evidence to sustain a finding in favor of one of the parties to the action, is a question of law which arises in the progress of the trial. Where the trial is before a jury, that question is reviewable on exception to a ruling upon a request for a peremptory instruction for a verdict. Where the trial is before the court, it is reviewable upon a motion which presents that issue of law to the court for its determination at or before the end of the trial."

See, also, Mason v. Smith, 191 Fed. 502, 112 C. C. A. 146; National Surety Co. v. United States, 200 Fed. 142, 118 C. C. A. 360; New York Life Ins. Co. v. Dunlevy, 214 Fed. 1, 130 C. C. A. 473; Tiernan v. Chicago Life Ins. Co., 214 Fed. 238, 131 C. C. A. 284.

[3] One ground on which it is contended that the complaint fails to state a cause of action is that the contract therein presented as an exhibit bears date February 5, 1912, whereas the bond which is also presented as an exhibit bears date February 20, 1911, and in the body of the complaint it is alleged that the contract was entered into on December 18, 1911. But the complaint alleges, also, that during the month of February, 1912, the defendant in error and the Coast Bridge Company made certain modifications of the specifications, attached to and made a part of such contract, "a copy of which contract, together with the changed and modified specifications thereunto annexed and made a part of the same, is hereto annexed, marked 'Exhibit A,' and made a part of this complaint." And it alleges that the bond was conditioned upon the bridge company's compliance with all the terms, conditions, and provisions in said contract, and the changed and altered plans and specifications mentioned. The discrepancy between the date which the contract bears and the date of the bond alleged in the complaint was not called to the attention of the court below. The contract of December 18, 1911, and plans and specifications referred to therein, were introduced in evidence without objection. Pursuant to a stipulation of the parties, permission was granted to amend the complaint by alleging that the original contract was made on December 18th, and the agreement modifying the same on February 5, 1912. The plaintiff in error then interposed a general objection to the introduction of any evidence in support of the complaint as amended, upon the ground that the complaint did not state facts sufficient to constitute a cause of action. It appears from the opinion that this objection was for the "purpose of the record," and that no defect in the complaint was pointed out. The court overruled it "as of a class disfavored, in that it tends to defeat justice rather than to promote it," and stated that if the complaint was defective an amendment

would be allowed, and "if necessary the amendment is deemed made to conform to proof." The case went to trial on the understanding of all parties, so far as the record discloses, that the bond sued upon was the bond given for the performance of the contract under which the bridge was constructed; and the bond on its face shows that it was given to secure the performance of that contract. It refers to the contract of December 18, 1911, to the bond which the bridge company had given for the performance thereof, to the fact that the original contract had been changed and altered, and a new contract had been made in accordance with the changed plans and specifications, and to the fact that the county commissioners had ordered that a new bond be given, and then it declares that the Coast Company and its surety undertake that the principal therein shall faithfully and truly observe and comply with all the terms of the contract as altered. The fact that the bond which was then executed bore date December 20, 1911, must be disregarded as a clerical error which resulted from inadvertence in copying the previous bond.

[4, 5] One ground of the motion of the plaintiff in error was that there was neither allegation nor proof that approval of the plans and specifications for the bridge, or permission for its construction, had been obtained from the War Department. In this connection, it is contended, also, that the complaint was insufficient for failure to allege that said permission and approval were had. In the original contract between the defendant in error and the bridge company, it was stipulated that the contract should not take effect until the War Department "has approved the plans and specifications and granted permission for the construction of said bridge." In the contract of February 5, 1912, that stipulation was omitted. An act of Congress was duly passed authorizing the construction of the bridge, the same to be built in accordance with the act of Congress of March 23, 1906 (34 Stat. 84), an act which requires that a bridge over navigable waters, authorized by Congress, shall not be built until the plans have been approved by the Secretary of War and the Chief of Engineers, and provides that any person who shall be guilty of a violation thereof shall be deemed guilty of a misdemeanor and on conviction shall be punished by a fine. The prohibition is against persons constructing or commencing to construct bridges without complying with the requirements of the statute. The act defines "persons," as therein used, to include "municipalities, quasi municipal corporations, corporations, companies, and associations." The complaint contains no allegation that the plans and specifications upon which the bridge was constructed were approved by the War Department, and there is no proof to that effect. No objection was interposed on that account during the progress of the trial, and no mention was made of that omission until the motion was made by the plaintiff in error for a judgment in its favor.

The court below in denying the motion was of the opinion that, since the contract to construct the bridge had been performed, it must be presumed that it was lawfully performed, and that the necessary approval was had, and that the obligation to secure the ap-

proval rested upon the contractor as much, if not more than upon the county, that the surety engaged that its principal would lawfully perform, and that, if the latter unlawfully performed its contract, the surety was not discharged. In so ruling we think the court below committed no error. We think that it should be presumed that, when the bridge company began the construction work, it had determined, as it was its duty to do, that the conditions upon which it could lawfully proceed had been complied with. There is nothing in the record to suggest even remotely that this was not done, and we may assume that if, in fact, it was not done, the plaintiff in error would have availed itself of that defense by pleading it in its answer. Moreover, there is no evidence in the record that the Kootenai river was a navigable stream at the place where the bridge was constructed, or elsewhere. The fact that Congress passed an act authorizing the construction of the bridge does not of itself establish the navigability of the stream.

The plaintiff in error relies upon Texarkana & Ft. S. Ry. Co. v. Parsons, 74 Fed. 408, 20 C. C. A. 481, in which it was held that those who seek to justify the erection or maintenance of a bridge across a navigable river, which obstructs its navigation, upon the ground that Congress authorized its erection and maintenance, must show that it was constructed and is maintained in accordance with the requirements of the act of Congress. In that case it was conceded that the bridge had not been constructed in accordance with the specified requirements of the War Department. Undoubtedly, if the defendant in error here had been sued for damages to a vessel, caused by collision with the pier of the bridge, and the plaintiff had alleged, as did the plaintiff in his complaint in the Texarkana Case, that the bridge was an unlawful structure, the defendant in error would have been required to allege and prove that it was built in accordance with the requirements of the War Department. But that is not the present case. Whether the bridge across the Kootenai was a lawful structure is not a question involved in the action. The question is whether the surety is liable for damages for the loss of a bridge which has been constructed presumably with the surety's knowledge of all the preliminary facts. The act of constructing a bridge without the approval of the War Department is malum prohibitum and not malum in se, and a court would be going far if it indulged the presumption, in the absence of proof, that the bridge in question was unlawfully constructed.

[6-8] We find no error in the refusal of the trial court to render judgment for the plaintiff in error on the ground that it was released and relieved from liability by reason of the premature payments on the contract. The contract provided that 25 per cent. of the contract price should be paid upon completion of the concrete piers, 50 per cent. upon the arrival of the steel for the bridge at the bridge site, and the remainder upon the completion and acceptance of the bridge. It was shown that under a resolution of the county commissioners of July 26, 1912, one-half of the contract price was paid in advance of the arrival of any of the materials, or the performance of any work, and that an additional $12,500 was paid before the central pier was constructed,

and that these payments were made by the issuance and delivery of county warrants. It is not shown that the plaintiff in error was injured, or could have been injured or prejudiced, in any way, by these advanced payments. The case is to be distinguished from those which arise under building contracts for structures upon which liens may be placed. In 32 Cyc. 223, it is said:

"And if a payment by the owner does not impair any security to the benefit of which the surety is entitled, the latter is not discharged."

The plaintiff in error was a compensated surety. As to such sureties, the strictness of the old rule has been relaxed, and it is now held that such a company must show that it suffered some injury by reason of the alteration of the terms of the contract before it can be discharged from its liability. Williams v. Pacific Surety Co., 77 Or. 210, 146 Pac. 147, 149 Pac. 524; Leiter v. Dwyer Plumbing Co., 66 Or. 474, 133 Pac. 1180; Manhattan Co. v. United States F. & G. Co., 77 Wash. 405, 137 Pac. 1003; Atlantic Trust & Deposit Co. v. Laurinberg, 163 Fed. 690, 90 C. C. A. 274; Baglin v. Title Guaranty & Surety Co. (C. C.) 166 Fed. 356, affirmed in 178 Fed. 682, 102 C. C. A. 182; United States Fidelity & Guaranty Co. v. United States, 178 Fed. 692, 102 C. C. A. 192; Pittsburg-Buffalo Co. v. American Fidelity Co., 219 Fed. 818, 135 C. C. A. 488; American Bonding Co. v. United States, 233 Fed. 364, 147 C. C. A. 300; Guaranty Co. v. Pressed Brick Co., 191 U. S. 416, 24 Sup. Ct. 142, 48 L. Ed. 242. And such is the rule in Montana as to all sureties whether compensated or not. Dodd v. Vucovich, 38 Mont. 188, 99 Pac. 296. In that case the court gave effect to section 5686, Revised Codes of Montana, which provided:

"A surety is exonerated: (1) In like manner with a guarantor; (2) to the extent to which he is prejudiced by any act of the creditor which would naturally prove injurious to the remedies of the surety or inconsistent with his rights, or which lessens his security; or (3) to the extent to which he is prejudiced by an omission of the creditor to do anything, when required by the surety, which it is his duty to do."

And the court said:

"In the absence of any showing that the surety was, or, indeed, could have been, injured or prejudiced by these changes, he was not released from liability."

The plaintiff in error contends that the effect of the Montana statutes is to give to surety companies in that state all "the rights and liabilities of private persons," and refers to section 3 of the act of March 10, 1909 (Session Laws of 1909, p. 209), which provides that:

"Such company may be released from its liability on a bond on the same terms and conditions that are by law prescribed for the release of individual sureties."

That section, however, relates only to the manner in which a surety may be relieved from an official bond, a manner which is specified in sections 403, 404, et seq., of the Montana Codes. It has nothing to do with sureties on construction contracts. Nor is the fact that in Montana surety companies are given all the "rights and liabilities" of private persons material to the present controversy. It should be con-

ceded that in Montana, as elsewhere, a private person, if he is a compensated surety, is to be dealt with under the rules which apply to a compensated surety company. But the plaintiff in error relies also upon section 5673, which provides:

"A guarantor is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any wise impaired or suspended."

The contention is that, since under section 5686 a surety is exonerated in like manner with a guarantor, the strict rule of section 5673 is applicable here. We think, however, that the second and third subsections of section 5686 are controlling, and that such is the effect of the decision of the Supreme Court of Montana in the case above cited. It may be added that on the trial the defendant in error offered proof that the surety company had been indemnified by the bridge company. The testimony was excluded by the court, but there was received in evidence a letter of March 14, 1914, from the Assistant General Solicitor of the plaintiff in error to the attorneys for the defendant in error, stating that:

"This company was merely surety on the bond in question, and, of course, must be governed by the instructions and directions of its indemnitors in all matters arising under it."

[9] A ground on which the motion of the plaintiff in error was based was that the plaintiff in error was released and relieved from liability by reason of the change in the location of the central pier and the lowering of the floor of the bridge, which it is contended constituted material departures from the contract. The plaintiff is error in its answer made no defense that there had been variations, or that it was released thereby. The contract provided that should the county at any time order alterations, deviations, additions, or omissions not therein provided for, it should be at liberty to make the same; the expense to be added to or deducted from the amount of the contract price. McClayn, the superintendent of the bridge company, testified that Geary, one of the county commissioners, wanted the location of the bridge moved 16 feet, and that thereupon the center pier of the bridge was placed 16 feet nearer the Rexford side of the river than it was shown on the plan, and that the floor of the bridge was lowered 3 feet. Geary testified that the location of the central pier was changed at the instance of Whitlock, the president of the bridge company; that it was done at Whitlock's suggestion, to avoid the possibility of water cutting out the gravel around one of the piers; and that he (the witness) had nothing to do with the lowering of the floor. It is not shown, and it is inconceivable, that the mere lowering of the floor of the bridge 3 feet was a material alteration of the plans, and there is no evidence that the change of the position of the central pier enhanced the difficulty, peril, or expense of the construction. The only testimony on that subject is that of McClayn, who testified that it placed the pier that was not quite in the center of the river further out in the center, "and the river

swirling around this way would have a bigger sweep at the pier than it would have if it had been left 10 feet further away to the Rexford shore." We must assume, from the general finding of the court in favor of the defendant in error, that the court found, either that these deviations from plans and specifications were not made at the instance of the county, or that they were alterations such as were permissible under the terms of the contract.

[10] Another ground of the motion was that the bond refers to a contract for the construction of a "two-span riveted bridge, together with three concrete piers"; whereas, the bridge which was built was a "two-span pin connected bridge, with one concrete and two tubular piers," "by reason of which the surety company is not liable." The contention seems to be based upon the fact that the bond recites that the contract is for the erection complete of a "two-span riveted bridge together with three concrete piers," while the specifications call for two 220-foot pin connected spans for a superstructure, resting on one stream pier and two shore piers. The specifications were not explained by any witness, and it is not shown that there is any substantial difference, or, indeed, any difference at all between the bridges thus described. If there is a difference, the specifications being more specific, and being a part of the contract, should control. But, in any view, the motion was properly denied, for the reason that there was no evidence to show which of the two described bridges was constructed.

[11] Nor was it ground for releasing the surety that the plaintiff in error appointed no engineer or inspector to supervise the construction of the bridge. The contract twice mentions an engineer. It provides that the approaches to the span shall be of such length as the local engineer may designate. This evidently refers to a highway engineer, and his supervision of the roadways approaching the bridge. Again, it is provided that:

"After excavation is made to the full depth, piles shall be driven inside, if so ordered by the engineer."

This must have referred to an engineer of bridge construction, and it should be considered in connection with the undisputed testimony that the bridge company represented to the county:

"That they were competent bridge engineers, competent construction engineers, and that if pilings were necessary they would so advise us, and, if it were necessary to drive pilings, they would drive them."

But there was no provision requiring that the county be represented by an engineer, and the fact that the county had no such engineer tends in no degree to excuse the bridge company for its failure to carry out its contract.

We find no error in the denial of the motion of plaintiff in error for judgment.

The judgment is affirmed.

GREAT NORTHERN RY. CO. v. WILLARD.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2753.

NEGLIGENCE ⟸134(3) — DANGEROUS PREMISES — INJURY TO TRESPASSING CHILD.

Evidence, in an action for injury to a young boy by the falling of some of the ties in a pile on a railroad right of way, near a highway, while he and another boy were climbing up and down the pile, *held* insufficient to fix any liability on the railroad company, though it was charged with knowledge that the boys of the neighborhood were accustomed to play on them, and that they were attractive for that purpose; such knowledge carrying with it the further knowledge that for weeks and months older boys had climbed and played on the pile without causing any of the ties to fall or inflict injury on any one, the ties being peeled, hewn on both sides, and piled eight high in rows, as close together as possible, there being no evidence that it was necessary or customary to brace ties so piled, and the piles, made by the seller of the ties, being at the appropriate place for their use by the company.

[Ed. Note.—For other cases, see Negligence, Cent. Dig. § 267; Dec. Dig. ⟸134(3).]

In Error to the District Court of the United States for the Northern Division of the Eastern District of Washington; Frank H. Rudkin, Judge.

Action by Leslie Willard, a minor, by Joseph J. Lavin his guardian ad litem, against the Great Northern Railway Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded for new trial.

The minor in whose behalf this action for damages was brought against the plaintiff in error as defendant in the court below was 9 years of age when he received the injury complained of by the falling on him of some ties from a pile of ties alleged in the complaint to have been stacked on the right of way of the plaintiff in error railway company, at the town of Springdale, Stevens county, state of Washington, through which town there was one public street or roadway crossing the railroad track, and near which street the pile of ties in question stood, the complaint alleging that the ties weighed upwards of 300 pounds each, and were piled in about 10 rows of eight ties high in each row; that they were not braced, and that for a number of months prior to the day of the happening of the accident "said pile of ties and said structure was enticing, alluring, and attractive to children of tender years, both boys and girls, and said pile of ties was of such character as to be attractive to children, and of such character as to appeal to childish curiosity and instincts, and for a number of months prior to the date hereinafter referred to, a large number of children, attracted thereby, played in, upon, and about the premises of defendant upon and about said structure, and said pile of ties, all of which was known by defendant, or in the exercise of ordinary care should have been known by defendant"; that on or about the 23d day of February, 1914, the minor in question, not knowing or appreciating the condition of the pile, went upon it, when a large number of the ties fell, throwing him to the ground and inflicting the injuries for which the suit was brought. The defendant company did not deny that the boy was injured by the falling of the ties, but put in issue the other material allegations of the complaint, and here insists upon its contention made in the court below that the case made by the evidence did not justify its submission to the jury, and that the court should have granted its motion made upon the conclusion of all of the

evidence for a directed verdict in its favor; and that is the main question here presented for determination.

Charles S. Albert and Thomas Balmer, both of Spokane, Wash., for plaintiff in error.

Plummer & Lavin, of Spokane, Wash., for defendant in error.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

ROSS, Circuit Judge (after stating the facts as above). The evidence in the case is without any substantial conflict upon any material point. It shows that the ties in question were cut from the farm of one C. W. Magers, and by him sold to the plaintiff in error, he agreeing to haul and pile them at Springdale, which he did with the assistance of his two sons. Magers, who was a witness on behalf of the plaintiff, testified, among other things, that:

"Nobody on behalf of the company directed the manner or where these ties should be piled; nothing more than their bill in the depot; they specified the way they should be piled and the shape of the ties also."

The record shows that when the defendant company offered in evidence the directions posted in the depot (designated in the record as Defendant's Exhibit No. 7), specifying how the ties should be piled, the plaintiff objected to its introduction, which objection was sustained by the court, and which ruling is here assigned as error. That exhibit was a notice reading, in part, as follows:

"TIES

"Will be purchased by this company at its option until further notice as per description, price and specifications given hereon, at all stations on the Spokane and Marcus Divisions of the Great Northern Railway in United States between Troy, Mont., and Dean, Wash., including all main and branch lines in limits described. [Specifications regarding character, sizes, and prices of ties omitted as immaterial.] Note—Following instructions must be followed in piling ties on right of way:

"Permission must be obtained at all stations at which there are agents to pile ties on the company's right of way, and agent will designate place where they are to be piled. Ties must be piled at all stations or sidings between switches on skids at or above grade, convenient for loading.

"They must be piled eight ties or more high with a space of three feet between ranks with the small end of each tie facing the track.

"The first rank to be not less than eight feet from the nearest rail, and no ties shall be to exceed 50 feet from the track. All ties must be piled on the ends so inspector can see whether they are all of an even length.

"No peeling of ties will be allowed on company's right of way.

"These instructions must be strictly followed or you will be required to furnish necessary help to rehandle the ties for their protection, economical handling when loading, or for inspection.

"Cards to show ownership of ties and address of owner will be furnished by the purchasing agent, inspector, or station agent. They must be filled out in ink, as provided for, and attached to each pile.

"Any person or persons violating these terms will be considered trespassers, and will assume all risk and be held liable for all damage caused by their action. All ties put out in accordance with this circular and received by the company will be inspected monthly when practicable, commencing with September, 1913, and payments made within thirty days after the month in which inspection is made."

We think the railway company was entitled to introduce the exhibit in evidence for the purpose of showing that by the terms of the sale the ties in question were not stacked by the company but by the seller, Magers, and to have that fact considered by the jury in connection with the balance of the evidence, in the event the case should be submitted to them. But without at all considering the contents of the exhibit (which, as has been said, was not admitted in evidence) we are of the opinion that the evidence was insufficient to fix any liability upon the defendant company, and therefore that no case was made for the consideration of the jury. It shows that the ties were hauled as cut, that they were hewn on both sides and peeled, and that the cutting and hauling extended from about the 1st of January to the 20th of February, and, in consequence of the season of the year, had more or less snow and ice on them. The ties, which varied in width from 6 to 12 or 14 inches, were piled 8 high and in rows as they came, as close together as possible, but necessarily resulting in there being several inches of space between many of them, owing to the difference in width of the respective ties. There were, according to the evidence, about 80 of them in all, the first hauled being laid in the place of other ties just removed and the balance on skids first laid upon the snow, which was, at the time, about 12 inches deep.

In addition to the street or roadway that has been mentioned, there was a path leading past the pile of ties, along which people passed in going from one side of the railway to the other. There was testimony on the part of the plaintiff that for many weeks it had been the custom of the boys in the town of Springdale to play upon the pile of ties in question, a number of them being much older, and presumably heavier, than the plaintiff, and that until the accident to the latter none of the ties had ever fallen. For example, a brother of the plaintiff, Claire Willard, stated:

> That he was 17 years old (when testifying, the plaintiff then being 11), and had lived in Springdale about 10 years. "I have played on this pile of ties referred to in the testimony," said the witness. "Every once in a while I would be on them. One day I would be on, and then I wouldn't be on for quite awhile. It would be along in the evening. It would not be very long. Sometimes in the afternoon. I have been on the tie pile with them, but I have not noticed how many boys was on there, three or four. I have not noticed any more than that on them at any one time. I was there once in awhile while the ties were piled there. They was piled one on top of the other. Some was close together and others farther. They were apart all the way from that far down, for instance (illustrating) about 8 inches. * * * I paid no particular attention to this particular pile before this, and don't remember particularly with reference to it at all. I played on there once a day, and then for a long time would not play there. When I played up and down on these ties none of them fell with me, and I never knew of them having fallen on anybody."

The witness Clifford Ragsdale, called on behalf of the plaintiff, who also testified that he lived in Springdale, and was 15 years old, said:

> "I played on this pile of ties two or three times a day for an hour for about two months. Sometimes two or three or two to four boys would play there with me. This was before Leslie got hurt. These ties were piled on top of each other. Some were close together, and some had holes in them. These holes would be about 6 inches. * * * I played on these ties before. I

played with Leslie on them before he got hurt, once. I was not around the day Jimmy Stevens was with him (James Stevens being the boy who was with Leslie when he was injured). I would get on top of the ties, crawl up on them, and sit down. I never had any difficulty with them. They never fell down with me. I never paid any particular attention to this particular pile of ties that was there."

The witness Ervin La France, also called as a witness on behalf of the plaintiff, testified that he also lived in Springdale and was 15 years of age. He said:

"I know the pile of ties that has been described. I played there prior to the time Leslie was injured about half an hour for about a month. Two or three boys would be playing there. Wood tag. * * * I didn't play with Leslie. I played with other boys. Some of the piles looked all right to me. I don't remember anything particular about this particular pile, or the way it was piled, or anything of that sort. None of these ties ever fell with me playing there."

The witness Frank Veenhuis, also called on behalf of the plaintiff, testified that he was 13 years of age and lived at Springdale. He said:

"In going to and from school I pass by the pile of ties described, about six times a day, about 5 feet from them on the roadway. I noticed five or six boys playing on the ties before Leslie was hurt. Playing hide and go seek and cross tag. Had continued for two or three months. That occurred almost daily, at night most of the time before the train came in, after school. On Saturdays sometimes, too. I never paid any particular attention to this pile. I don't know how they were piled. * * * I remember playing on this particular pile. I have seen a lot of the boys playing on that pile. This was a couple of weeks we were playing on the pile. We didn't play all of the time on these ties. When we did play on them, the ties did not fall. We did not play on them, we played around them. The other boys got on, but I didn't. The ties did not fall with them."

The witness J. P. Brown, also called on behalf of the plaintiff, testified, among other things, as follows:

"I helped the Magers unload two loads of ties. Whether them was the ties that fell or not, I could not say. We unloaded them right near the street, on the south side of the depot, between the depot and the livery barn on the south side of the railroad track and on the east side of the street. On the east side of the roadway. I should judge about 75 feet from the livery barn, and about the same distance from the railroad track. We placed the ties we unloaded close to the street, right near the street. I think this was in January, 1914. I had nothing to do with the ties, only to help Mr. Magers. They were not my property. He said they were too heavy for him to handle alone, and he asked me to go and help him. I handled these ties. Some of them were pretty heavy. They was tamarack, and there was snow and ice on them, which made them pretty heavy to handle. I should judge they would weigh 300 pounds each. Mr. Magers directed the place where they should be piled. I don't know whether any of the agents of the company were around there. Mr. Magers just drove up there and unloaded the ties where he stopped, and threw some little poles down, probably 3 inches through and we unloaded the ties, and I had nothing more to do. They were piled on top of the snow. I should judge there was a foot of snow under the ties, if not more. There was snow or ice when the ties were piled there. Some of them when they were piled were together, or almost together, and others would lay 3 inches apart. I didn't place any support or brace against them, or anybody else that I seen. I passed there a number of times and noticed the ties, and never noticed them being braced in any way. * * * We put down skids. I guess there was all of a foot of snow on the ground. We un-

loaded the ties on the skids. The skids was put down on top of the snow, and the ties laid on the skids. Some of the ties would not go over 150 and others would weigh 300."

There was other testimony of the same character; the foregoing is the substance of it.

It was further shown by the evidence that at the time of the accident the plaintiff and the boy James Stevens were climbing up and down the pile of ties in question, when some of them fell, inflicting the injury for which the action was brought—whether the ties slipped and fell by reason of the melting of the ice and snow, or from having been, to some extent, displaced by the previous climbing on them of the older boys, or from defective stacking, does not appear, and from the nature of things most likely can never be known. The fact remains, however, that the pile of ties in question appears to have withstood the previous climbing of older and presumably heavier boys from time to time, for weeks and months; that they were essential to the upkeep of the railroad, and were stacked by the seller of them on the company's right of way at the appropriate place for their use, and, conceding that the agents of the appellant company may be properly held to have known that the boys of the neighborhood were accustomed to play upon them, and that they were attractive for that purpose, the knowledge so imputed carries with it the further knowledge on the part of such agents that for weeks and months the older boys had climbed and played upon the pile without causing any of the ties to fall or to inflict any injury upon any one. The law enjoins upon railroad companies the duty of maintaining their roads in a safe condition, which manifestly cannot be done without replacing worn-out and defective ties with new ones, a supply of which must necessarily be provided and kept piled by the companies at convenient places on their rights of way. There was nothing in the evidence tending to show that it was at all necessary to brace ties so piled, or that it had ever been customary to do so.

We are of the opinion that the case made for the plaintiff by the evidence failed to show any liability on the part of the appellant for the injuries received by the plaintiff, that there was no fact or circumstance shown by it from which the jury would have been authorized to draw any inference or conclusion of negligence on the part of the railway company, and therefore that the latter was entitled to a directed verdict in its favor.

We think the cases of Railroad Company v. Stout, 17 Wall. 657, 21 L. Ed. 745, known as the Turntable Case, and Cœur d'Alene Lumber Company v. Thompson, 215 Fed. 8, 131 C. C. A. 316, L. R. A. 1915A, 731, decided by this court, unlike the present one and inapplicable to it. In the former case the catch which locked the turntable when not in use by the railroad company had been broken, and had not been repaired, although the agents of the company knew that boys were accustomed to go and play upon the turntable, a part of which amusement would naturally be the turning of the turntable while they were on or about it, and it was, moreover, in that case proved to have been usual with railroad companies to have upon their

turntables a latch or bolt or some similar instrument. The Supreme Court there said, among other things:

"It was to be expected that the amusement of the boys would have been found in turning this table while they were on it or about it. This could certainly have been prevented by locking the turntable when not in use by the company. It was not shown that this would cause any considerable expense or inconvenience to the defendant. It could probably have been prevented by the repair of the broken latch. This was a heavy catch which, by dropping into a socket, prevented the revolution of the table. There had been one on this table weighing some 8 or 10 pounds, but it had been broken off and had not been replaced. It was proved to have been usual with railroad companies to have upon their turntables a latch or bolt, or some similar instrument. The jury may well have believed that if the defendant had incurred the trifling expense of replacing this latch, and had taken the slight trouble of putting it in its place, these very small boys would not have taken the pains to lift it out, and thus the whole difficulty have been avoided. Thus reasoning, the jury would have reached the conclusion that the defendant had omitted the care and attention it ought to have given, that it was negligent, and that its negligence caused the injury to the plaintiff. The evidence is not strong, and the negligence is slight, but we are not able to say that there is not evidence sufficient to justify the verdict. We are not called upon to weigh, to measure, to balance the evidence, or to ascertain how we should have decided if acting as jurors."

The death of the child involved in Cœur d'Alene Lumber Co. v. Thompson, resulted from drowning in a shallow well, the allegation of the complaint in that regard being:

"That for some time prior to the 1st day of June, 1911, the defendant had owned, operated, and maintained a sawmilling and woodworking plant, located upon its lands in the city of St. Maries, in the state of Idaho; that as part of the plant the defendant had caused to be excavated a certain cistern or well, which was used by it for the storage of water in connection with its milling plant; that some months prior to the 1st day of June, 1911, the defendant caused all of its buildings, machinery, and appliances to be moved from its lands in the city of St. Maries, but carelessly and negligently failed to fill up or cover the cistern or well excavated by it, and carelessly and negligently permitted the cistern or well to remain open up to and including the 1st day of June, 1911; that on that date the cistern or well had become filled with water to a depth of about 10 feet, and had become extremely dangerous to children of tender years and to others who had occasion to go upon the premises, either for business or for pleasure, and the lands, maintained as aforesaid by the defendant, had become and were dangerous premises; that for many months prior to the 1st day of June, 1911, the minor son of the plaintiff, Bernarr Thompson, with numerous other children living in the city of St. Maries, had frequently and habitually gone upon, over, and across the lands and premises of the defendant to the vicinity of the cistern or well for the purpose of play and amusement, all of which was known by the defendant, or could have been known by it in the exercise of reasonable care, and ought to have been, and was, anticipated by it and its agents and servants; that the dangerous condition of the premises of the defendant, and the danger of small children falling into its cistern or well and becoming drowned, and the habitual use of the premises by Bernarr Thompson and other companions and children of tender years was open and notorious up to the time of the death of said Bernarr Thompson, and was well known to the defendant; that on account of the tender years of Bernarr Thompson he did not know or appreciate the dangerous condition of the premises of the defendant; that on the 1st day of June, 1911, Bernarr Thompson, in company with other children, were playing in, about, and upon the premises of the defendant, and close to and in the immediate vicinity of the cistern or well excavated by it, which at that time was filled with water up to and on a level with the ground; that said Bernarr Thompson, while so playing therein and thereabout, accidental-

ly and inadvertently fell into the cistern or well and was drowned; that the negligence and carelessness on the part of the defendant in failing and neglecting to fill up or cover the cistern or well which had been excavated by it was the proximate and sole cause of the death of Bernarr Thompson."

In addition to a denial of the allegations of the complaint, the defendant to that action set up as matter of affirmative defense that it had been, at all of the times mentioned in the complaint, the owner of a certain described piece of land, and—

"that on the 14th day of September, 1907, the defendant entered into a written contract with a certain copartnership doing business under the firm name of Schmidt Bros., to manufacture into timber and lumber for the defendant all of the logs then being on the lands above described and owned by the defendant; that thereupon Schmidt Bros. erected a sawmill on the lands of the defendant, and engaged in manufacturing lumber for the defendant, pursuant to the terms of the contract, up to and including the month of October, 1908; that in the operation of the sawmill by Schmidt Bros., and without the knowledge of the defendant, sawdust accumulated in piles adjacent to the sawmill; that back of the sawmill there was a small ravine, which sloped from a hillside toward the mill site of Schmidt Bros.; that water flowed through the ravine and terminated at the piles of sawdust into a small pool or sink, forming a pond about 25 or 30 feet long and about 12 or 15 feet wide; that the pool or pond was off and out of the way of any public highway; that at all times mentioned in the answer the pool or pond remained open, uninclosed, and uncovered, and that it was caused by Schmidt Bros. leaving upon their mill site piles of sawdust, against which the waters in the ravine flowed, stood, and remained; that, if any well was dug by Schmidt Bros. upon the premises, the defendant had no knowledge thereof. The defendant further alleged in its answer that the plaintiff knew of the existence of the pool or pond of water, and knew that his minor son was in the habit of going upon the premises, and that the carelessness and negligence of the plaintiff in failing to exercise due care, control, and supervision over his minor son, and in omitting to restrain and prevent him from entering upon the premises of the defendant, were the proximate causes of the death of his son."

We held the allegations of the complaint sufficient to constitute a cause of action, and in respect to the affirmative defense set up as follows:

"It appears from the testimony that on the 14th day of September, 1907, the defendant entered into a written agreement with a copartnership doing business under the firm name of Schmidt Bros., wherein and whereby the latter agreed to saw and manufacture into timber and merchantable lumber logs to be furnished to them by the defendant herein, and to be cut from fractional section 27, township 46 north, range 2 W. of Boise meridian, for a stipulated price particularly set forth in the agreement. Schmidt Bros. were to begin the work of manufacturing the timber for the defendant by the 15th day of October, 1907, if it was possible for them to have their mill set up by that time. It was further agreed between the parties that the timber was to be sawed at all times under the direction of the defendant herein, its agent or manager. It further appeared from the testimony that pursuant to this agreement the mill was built by Schmidt Bros., and operations thereon were begun about November 1, 1907; that Schmidt Bros., continued to operate the mill in the performance of their contract with the defendant for about a year, completing their contract at that time, although the mill was not removed from the premises of the defendant until the year 1910. It further appeared from the testimony that, for the purpose of obtaining water for the operation of their mill, Schmidt Bros. dug a well at a point on the defendant's land near the mill, where there was a small spring in a ravine or gulch. The well was about 5 feet deep, and about 4 feet wide and 6 feet long. It was dug in such manner that the spring was right in the bottom thereof, and constituted

the source of supply of water for the well. The sides of the well were curbed with 2-inch planking, which extended up to, but not above, the surface of the ground. When the mill was not being operated and water not being drawn from the well, it filled up and overflowed through a drain extending down the ravine or gulch. In the operation of the mill sawdust was deposited in piles in the vicinity of the well, and at the time of the death of the minor son of the plaintiff the drain or outlet had become clogged with sawdust, causing the waters of the well to back up and accumulate above the top of the well proper, forming a pond or pool about 8 or 10 feet wide and about 18 or 20 feet long. The pool or pond thus formed consisted of a rim of shallow water 6 or 8 inches deep, terminating abruptly in the well which it surrounded. The testimony also tended to show that by reason of the muddy condition of the water, and the sawdust surrounding the pool and floating thereon, the well at the bottom thereof was not visible."

It will be seen that the facts of each of the cases from which the foregoing quotations have been taken were essentially different from the facts appearing in the case now before us, and we are of the opinion that the doctrine applied in those cases is inapplicable here, and should not be so extended as to embrace the facts of this case.

The judgment is reversed, and the cause remanded to the court below for a new trial.

ZENOR v. McFARLIN (two cases).

In re B. A. LOCKWOOD GRAIN CO.

(Circuit Court of Appeals, Eighth Circuit. December 4, 1916.)

Nos. 162, 4565.

1. BANKRUPTCY ⟸345—CLAIMS—PREFERENCES—TRUST FUNDS.

One who delivered grain to a warehouseman, who subsequently became bankrupt after selling the grain, is not entitled to a preference for the value of the grain, unless there is clear proof that the proceeds of the sale went into a specific fund, or into specifically identified property, which came into the hands of the trustee in bankruptcy; it not being sufficient that it went into the general assets of the bankrupt, and thereby increased his estate.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 531, 532, 534, 539, 540; Dec. Dig. ⟸345.]

2. BANKRUPTCY ⟸340—CLAIMS—PREFERENCE—EVIDENCE.

On a claim against a trustee of a bankrupt warehouseman, evidence *held* insufficient to trace any proceeds from the sale of claimant's grain to property or funds which came into the hands of the trustee, and therefore not to entitle the claimant to a preference.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 527; Dec. Dig. ⟸340.]

Petition to Revise Order and Appeal from the District Court of the United States for the Southern District of Iowa; Martin J. Wade, Judge.

In the matter of the B. A. Lockwood Grain Company, bankrupt. The claim of Francis Zenor against M. McFarlin as receiver and trustee in bankruptcy to a preference right to the assets of the bankrupt

was denied by the District Court, and the claimant appeals and petitions for revision. Petition to revise denied, and decree affirmed.

See, also, 225 Fed. 873.

William G. Harvison, of Des Moines, Iowa (Dale & Harvison, of Des Moines, Iowa, and E. H. Addison, of Nevada, Iowa, on the brief), for appellant and petitioner.

Charles Hutchinson and Oscar Strauss, both of Des Moines, Iowa (Clark, Byers & Hutchinson, of Des Moines, Iowa, on the brief), for appellee and respondent.

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

SMITH, Circuit Judge. About August 24, 1914, in a bankruptcy proceeding against the B. A. Lockwood Grain Company, M. McFarlin was appointed receiver of its property, and subsequently, upon the adjudication of bankruptcy about September 2, 1914, he was appointed trustee for the same property. The bankrupt, the B. A. Lockwood Grain Company, prior to its bankruptcy was engaged in dealing in grain at some 15 different cities and towns in Iowa; the principal station being at Ames. It was also conducting the Shannon & Mott Mill at Des Moines. Many years ago it commenced to issue what are called "yellow slips" at all its branches except the Shannon & Mott Mill. Francis Zenor filed in the bankruptcy proceeding a petition as plaintiff and intervener, and many others filed similar petitions in the bankruptcy proceeding, and thereupon all of the parties made a stipulation that the Zenor case should be tried as a test case, and all other claims should be governed by the result in it. From the petition of Zenor it appears that the following certificate, among others, was issued to him:

"B. A. Lockwood Grain Company Grain Storage Certificate.

"Certificate No. 291.

"Ontario, Iowa, 9—16—1913.

"This certifies that we have received from Francis Zenor at Ontario, Iowa, six hundred eighty-three bushels of corn No. 4 mixed, which we agree to purchase at the price our agent is authorized to pay (see exception noted below) for grain of like grade and quality at above-named station the date this ticket is presented for payment, less storage charges as follows: 30 days free; each succeeding 15 days or fraction thereof, one-fourth cent per bushel. Express authority is given by acceptance hereof that said grain may be mingled with grain of other persons and shipped or moved to any other elevator we may select. When agent is authorized to pay above shipping value, and the grain represented by this certificate has been previously shipped away from the station, the owner of this certificate agrees to accept in payment Chicago price for grain of like grades less freight and one cent per bushel. This grain is insured to full value. [Signed] M. Ross, Agent.

"This certificate must be surrendered when grain is paid for."

Certificates of like character were issued by the bankrupt to Mr. Zenor: Certificate No. 294, September 18, 1913, for 650 bushels of corn, No. 3, mixed; certificate No. 295, September 23, 1913, for $766^{60}/_{70}$ bushels of corn, No. 4, mixed; certificate No. 296, September

27, 1913, for $696^{60}/_{70}$ bushels of corn, No. 4, mixed; certificate No. 1961, August 10, 1914, for $1{,}256^{18}/_{32}$ bushels of oats, No. 3W.

The petition in the Zenor case contains the following allegations:

"Par. 8. That thereafter, and prior to September 2, 1914, the date of adjudication of bankruptcy herein, the said Grain Company, in disregard of the duties devolving upon it as expressed in said certificates Nos. 291, 294, 295, 296, and 1961 aforesaid, unlawfully and wrongfully appropriated said grain to its own use, by unlawfully and wrongfully removing said grain from the elevator wherein it was stored and selling the same upon the general market without the knowledge or consent of plaintiff. That upon making such sale of said grain, said Grain Company received the value thereof from the parties to whom sold, and placed the same in the treasury of said Grain Company. That by reason of the premise the apparent assets of said Grain Company were unlawfully and wrongfully increased and enlarged to the extent of said sum of two thousand four hundred and twenty-nine dollars ($2,429.00).

"Par. 9. That upon the delivery of said grain by plaintiff to said Grain Company the same was held by it as the bailee or trustee of plaintiff, and the proceeds of said grain, when so unlawfully and wrongfully received by said Grain Company, as hereinbefore stated, were impressed with a lien or trust thereon to the full amount thereof, in favor of plaintiff, and were in truth and in fact money belonging to plaintiff, then by the said unlawful and wrongful sale of said grain coming unlawfully and wrongfully into the hands of said Grain Company, and were held by it as bailee or trustee for plaintiff.

"Par. 10. That upon the adjudication in bankruptcy said proceeds of said grain, though in form passing by said adjudication to said M. McFarland, as receiver and the trustee in bankruptcy of said Grain Company, were received by said trustee impressed with a lien or trust thereon to the full extent thereof in favor of plaintiff; and said proceeds so received by the trustee in bankruptcy are really held by said trustee in bankruptcy as bailee or trustee for plaintiff, though in form held as trustee for the bankrupt and its general creditors.

"Par. 11. That said grain, at the date of said unlawful and wrongful appropriation thereof, and on August 24, 1914, the date of the filing of the petition in bankruptcy herein, and on September 2, 1914, the date of adjudication herein, was of the value of two thousand four hundred and twenty-nine dollars ($2,429.00)."

The trustee filed an answer which contained the following:

"Third. That even if the said certificates or yellow slips or agreements, oral or in writing, did constitute the bankrupt a bailee for hire or trustee of the property so delivered, yet the bankrupt had, prior to the filing of petition in bankruptcy, sold all of said grain so delivered to it by the various claimants, and had used the proceeds thereof in the payment of its obligations in the conduct of its business, and upon the 24th day of August, 1914, when the petition in bankruptcy against said bankrupt was filed, there was not in the hands of the said bankrupt any of the proceeds of the said sales, and the estate of said bankrupt which came into the hands of this trustee, or of the receiver of the B. A. Lockwood Grain Company was not in any manner increased or enhanced by the proceeds of the sale of said grain, but all of the proceeds of the sale of said grain had been paid out by the bankrupt in the usual course of business before the petition in bankruptcy was filed, viz., August 24, 1914."

[1] Zenor claimed that the certificates in question evidenced a kind of bailment, and that by selling the grain the Grain Company became a trustee ex maleficio of the funds received for it. The case was tried before the referee, who held that the certificates constituted contracts of sale of the grain at a price to be fixed by the designation of the time by Zenor, and dismissed the petition for preference, but allowed the claim of Zenor as a general creditor against the bankrupt estate.

Upon review in the District Court, it, in commenting on the controversy as to whether the certificates constituted contracts of bailment or sale, said:

"I do not think that it is necessary to decide this question under the facts presented to the court. It clearly is not an ordinary case of bailment, nor is it an ordinary sale. Without going into the matter in detail, I feel that it is a conditional sale. * * * But whether sale or a bailment, it is apparent from the evidence that the grain was sold by the company, and even if it were a bailment this sale constituted a conversion, and for this conversion a cause of action arose against the company. * * * The evidence showed that it was sold in the ordinary course of business and that the receipts therefor went into the ordinary business of the company. * * * A claim is made now that for this debt, based upon conversion of this grain, the claimant is entitled to preference. I do not know of any authorities sustaining the proposition; if it affirmatively appeared that the specific money received from property converted remained on hand, so that it could be identified, then the court would be justified in a case of conversion in holding that the claimant would be entitled to such money; but there is no proof here that any of the assets on hand was the direct proceeds of any of the grain sold."

The District Court thereupon affirmed the action of the referee. Being in doubt as to whether his remedy was by appeal to this court or by petition to revise the action of the District Court, Mr. Zenor has pursued both courses.

In Century Savings Bank v. Robert Moody & Son, 209 Fed. 775, 126 C. C. A. 499, we held that these two remedies were mutually exclusive, and consequently either the appeal or the petition to revise should be dismissed; but, in view of the conclusion we have reached, it becomes unnecessary to determine as to which of them this order should be made without a consideration of the merits, nor do we find it necessary to pass upon the question as to whether the certificates constituted contracts of bailment, of sale, or of conditional sale. The earlier authorities held that a claimant such as the plaintiff must identify the property sought to be recovered as the very property he had confided to another. Later some of the states announced that when a trustee appropriated to his own use the property of the trust he thereby swelled his assets, and when he became insolvent his general estate became impressed with the trust for the reimbursement of the beneficiary. The later doctrine has never been approved in its fullness by the federal courts.

In Empire State Surety Co. v. Carroll County, 194 Fed. 593, 114 C. C. A. 435, this court, presided over by Circuit Judges Sanborn, Hook, and Adams, delivered, through Circuit Judge Sanborn, the unanimous opinion of this court on the subject. The opinion in that case is remarkable for its display of erudition, and in it appears the following:

"(1) It is indispensable to the maintenance by a cestui que trust of a claim to preferential payment by a receiver out of the proceeds of the estate of an insolvent that clear proof be made that the trust property or its proceeds went into a specific fund or into a specific identified piece of property which came to the hands of the receiver, and then the claim can be sustained to that fund or property only and only to the extent that the trust property or its proceeds went into it. It is not sufficient to prove that the trust property or its proceeds went into the general assets of the insolvent estate and increased the

amount and the value thereof which came to the hands of the receiver. * * *

"(2) Proof that a trustee mingled trust funds with his own and made payments out of the common fund is a sufficient identification of the remainder of that fund coming to the hands of the receiver, not exceeding the smallest amount the fund contained subsequent to the commingling, * * * as trust property, because the legal presumption is that he regarded the law and neither paid out nor invested in other property the trust fund, but kept it sacred. * * *

"(3) For the same reason the legal presumption is that promissory notes, bonds, and other property coming to the hands of the receiver were not procured by the use of, and are not, trust property. * * *

"(4) Where a trustee has mingled in a common fund the moneys of many separate cestuis que trustent and then made payments out of this common fund, the legal presumption is that the moneys were paid out in the order in which they were paid in, and the cestuis que trustent are equitably entitled to any allowable preference in the inverse order of the times of their respective payments into the fund."

The question was again recently before this court in Macy v. Roedenbeck, 227 Fed. 346, 142 C. C. A. 42, L. R. A. 1916C, 12. In that case this court said:

"Under the earlier rule petitioner would have been required to identify it as the very property which he had confided to another. The modern and more equitable doctrine permits the recovery of a trust fund from one not an innocent purchaser, and into any shape into which it may have been transmuted, *provided he can establish the fact that it is his property, or the proceeds of his property, or that his property has gone into it and remains in a mass from which it cannot be distinguished.*"

Later in the same opinion it is said:

"Only so long as the trust property can be traced and followed into other property into which it has been converted does it remain subject to the trust."

In Spokane County v. First National Bank, 68 Fed. 979, 16 C. C. A. 81, the Circuit Court of Appeals of the Ninth Circuit said, with Mr. Justice McKenna of the Supreme Court of the United States sitting:

"We are unable to assent to the proposition that, because a trust fund has been used by the insolvent in the course of his business, the general creditors of the estate are by that amount benefited, and that therefore equitable considerations require that the owner of the trust fund be paid out of the estate to their postponement or exclusion. If the trust fund has been dissipated in the transaction of the business before insolvency, it will be impossible to demonstrate that the estate has been thereby increased or better prepared to meet the demands of creditors, and even if it is proven that the trust fund has been but recently disbursed, and has been used to pay debts that otherwise would be claims against the estate, there would be manifest inequity in requiring that the money so paid out should be refunded out of the assets, for in so doing the general creditors whose demands remain unpaid are in effect contributing to the payment of the creditors whose demands have been extinguished by the trust fund. Both the settled principles of equity and the weight of authority sustain the view that the plaintiff's right to establish his trust and recover his fund must depend upon his ability to prove that his property is in its original or a substituted form in the hands of the defendant."

See Central Trust Co. v. Chicago, A. & N. Ry. Co. (D. C.) 232 Fed. 936, 943.

The question of when a beneficiary can follow a trust fund is so fully settled in the federal courts generally, and in this court in partic-

ular, that it is not worth while to analyze the various state court decisions that have gone further.

[2] Now, assuming the law to be as repeatedly laid down by this court, what basis is there for giving Zenor a preference? The evidence is quite meager upon some points. For aught that appears all the plants of the company were acquired and paid for before any of these certificates were ever issued, and no preference can then be allowed as against any of the plants. There is no evidence as to how much the Grain Company owed at the time of its failure, much less at any other time. There is nothing even tending to show what the expenses were of conducting this business at the 16 places where it was carried on. When the company was doing business, it bought outright about two-thirds of the grain delivered to it at its various stations, and issued certificates, substantially such as those here in question, upon the balance; but at the time of the failure, as shown by the inventory, it owed $97,498.48 for grain, of which about $60,000 was represented by these storage certificates. The plaintiff Zenor's claim, and the claims of others filed for a preference as heretofore referred to, aggregate nearly $20,300. There is no proof as to when the plaintiff's grain was converted, except that it was all converted before the commencement of the bankruptcy proceeding, August 24, 1914. All the grain delivered by the plaintiff to the Grain Company, except that covered by the certificate No. 1961, was delivered nearly a year before the failure. The record is wholly lacking in any testimony as to what the usual amount of business done by the company in a year was in dollars and cents. Mr Lee Lockwood, an officer of the defunct company, testified:

"Q. Now what was done from time to time with the money which the B. A. Lockwood Grain Company received from the grain you sold and for which you had issued these yellow slip certificates? A. That money always came—practically always came—in the form of drafts and was deposited in the banks. Q. And what resulted with it? A. Checked out in the ordinary course of business."

That is the only testimony on that subject. "In the ordinary course of business" would include operating expenses, payment of the amount due on yellow slips, payment of debts of the Grain Company, and purchase of grain and other merchandise. There is nothing showing the condition of the bank account from day to day, and, as already indicated, no evidence when the plaintiff's grain was sold, except that it was sold promptly. We cannot say from the evidence that the bank account was not frequently all drawn out during the nearly a year that elapsed after the body of this grain was delivered and before the failure, and we cannot, therefore, find that the proceeds of the plaintiff's grain were on hand at the date of the bankruptcy. A more difficult question arises as to the oats deposited under certificate No. 1961. They were deposited but two weeks before the failure. At the time of the failure there was charged to various consignees "grain in transit," $106,169.71. This grain had been shipped in the 30 days next preceding the failure, and probably included the plaintiff's oats; but the record does not show that the company ever had on hand at any

one time all this grain. When a car would be shipped, the Grain Company would draw on the consignee for the estimated value of the grain shipped, sometimes for a little more than its value, but usually slightly less, and deposit the draft in their bank, and take credit for it. Thus the capital invested in the grain in transit was constantly turned over. This would make an average daily shipment of over $3,500, and by the system used, if it were proper to assume that the grain was uniformly shipped, the total capital necessary to carry on this business was a little over $3,500. Mr. Lockwood testified as to this fund as follows:

"Q. What, if anything, was done with the money that you received on this $106,000 of sight drafts practically for grain in transit? A. It was used in the ordinary course of business. The major portion of it was used in the purchase of new property that came into the hands of the receiver. We were buying grain, buying coal, and buying feed, and when I say property, I mean grain, coal, and feed. That money was not used to any extent in the payment of debts, though current expenses were paid from it."

Assuming the truth of this, and it is uncontradicted, how much was spent for grain or other merchandise, and of this sum what was paid on yellow slips or how much for current expenses? We do not know, and, if we guess at that, how much of the grain in which it was invested was in turn shipped and included in the $106,169.71? Again we do not know. There is nothing to show the dates the other claimants left their grain with the Grain Company, and nothing to show when the holders of the $40,000 worth of yellow slips who have not filed claims for a preference deposited their grain. There was finally paid to the receiver or trustee, upon all of the grain in transit, the sum of about $2,000, being the balance after charging the Grain Company with the drafts it had drawn on the consignees. The only possible doubt is as to whether the plaintiff is entitled to a preference as to this $2,000; but in view of the doubt as to whether plaintiff's oats were embraced in these shipments, and the doubt as to which of the holders of certificates of storage, called "yellow slips," had grain embraced in the shipments, we cannot say, in the language of the Empire State Surety Co. v. Carroll County, supra, that there is "clear proof" that any of the plaintiff's property went into said fund of $2,000.

The case of Duel v. Hollins, 241 U. S. 523, 36 Sup. Ct. 615, 60 L. Ed. 1143, does not, in our judgment, conflict with this holding.

It is therefore ordered that the petition to revise be denied and dismissed, and the decree below be affirmed.

TRI-CITY CENTRAL TRADES COUNCIL et al. v. AMERICAN STEEL FOUNDRIES.

(Circuit Court of Appeals, Seventh Circuit. December 6, 1916. Rehearing Denied-January 24, 1917.)

No. 2157.

1. COURTS ⟸328(3)—JURISDICTION—AMOUNT IN CONTROVERSY—INJUNCTION AGAINST STRIKERS.

Where the property which strikers were threatening to destroy far exceeded $3,000 in value, and there was the requisite diversity of citizenship, the federal court had jurisdiction, though less than $3,000 worth of property had been already destroyed.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 890; Dec. Dig. ⟸328(3).]

2. INJUNCTION ⟸101(2)—STRIKERS—PICKETING.

Striking employés have a lawful right to place pickets in the streets leading to their employer's plant, to ascertain who are continuing or seeking employment there, and to persuade, but not to coerce, them not to do so, and the maintenance of such pickets, and attempts to persuade employés to cease working, cannot be enjoined.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. ⟸101(2).]

3. INJUNCTION ⟸101(4)—STRIKES—LAWFUL ACT.

The exercise by employés of their right to combine and strike to obtain better wages, though it interferes with the employer's business, is not an unlawful conspiracy, which entitles the employer to an injunction restraining acts in furtherance thereof which are in themselves lawful.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. ⟸101(4).]

4. INJUNCTION ⟸101(4)—STRIKES—LAWFUL ACT.

The commission of unlawful acts to effectuate that purpose does not taint the purpose itself with unlawfulness, so as to justify an injunction against lawful as well as unlawful acts in furtherance thereof.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 174, 175; Dec. Dig. ⟸101(4).]

5. INJUNCTION ⟸101(2)—STRIKES—INTERMEDDLER—UNION.

A labor union, of which former employés engaged in a strike were members, is not a mere intermeddler, whose interference with other employés may be restrained, when only lawful means are used, since a strike does not fully terminate the relationship between the parties, but creates a relationship, neither that of general employer and employé, nor that of employers and employés seeking work from them as strangers.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 175; Dec. Dig. ⟸101(2).]

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

Suit by American Steel Foundries against the Tri-City General Trades Council and others. From a decree for plaintiff, defendants appeal. Reversed, with directions to modify the decree.

Appellants, herein called defendants, appeal from the final decree entered in favor of appellee, herein called plaintiff, enjoining defendants as follows: "It is further ordered, adjudged, and decreed by the court that the said de-

fendants, the Tri-City Central Trades Council, its officers and agents, and Harry McKenny, Ted Ishmann, Earl Galloway, William Thornberg, C. Thornberg, Tom Churchill, Clay Holmes, Eddie Roach, John Aldridge, Isaac Cook, Benj. F. Lamb, J. P. McDonough, and C. E. Gerlich, and each of them, and all persons combining with, acting in concert with, or under their direction, control or advice, or under the direction, control, or advice of any of them, and all persons whomsoever, be and are hereby perpetually restrained and enjoined from in any way or manner whatsoever, by use of persuasion, threats, or personal injury, intimidation, suggestion of danger, or threats of violence of any kind, from interfering with, hindering, obstructing, or stopping any person engaged in the employ of the American Steel Foundries in connection with its business or its foundry in the city of Granite City, county of Madison, state of Illinois, or elsewhere, and from interfering by persuasion, violence, or threats of violence in any manner with any person desiring to be employed by said American Steel Foundries in its said foundry or plant, and from inducing or attempting to compel or induce by persuasion, threats, intimidation, force, or violence, or putting in fear or suggestion of danger, any of the employés of the American Steel Foundries, or persons seeking employment with it, so as to cause them to refuse to perform any of their duties as employés of the American Steel Foundries, and from preventing any person by persuasion, threats, intimidation, force, or violence, or suggestion of danger or violence, from entering into the employ of the said American Steel Foundries, and from protecting, aiding, or assisting any person or persons in committing any of said acts: and from assembling, loitering, or congregating about or in proximity of the said plant or factory of the American Steel Foundries, for the purpose of doing, or aiding or encouraging others in doing, any of the said unlawful or forbidden acts or things, and from picketing or maintaining at or near the premises of the complainant, or on the streets, leading to the premises of said complainant, any picket or pickets, and from doing any acts or things whatever in furtherance of any conspiracy or combination among them, or any of them, to obstruct or interfere with said American Steel Foundries, its officers, agents, or employés, in the free and unrestrained control and operation of its plant, foundry, and property, and the operation of its business, and also from ordering, directing, aiding, assisting, or in any manner abetting any person committing any or either of the acts aforesaid, and also from entering upon the grounds, foundry, or premises of the American Steel Foundries, without first obtaining its consent, and from injuring or destroying any of the property of the American Steel Foundries."

Plaintiff instituted this suit to prevent alleged threatened injury to its business and threatened destruction of its manufacturing plant, located at Granite City, Ill., claimed to be worth $1,000,000, which it alleges the Tri-City Trades Council, a labor organization, and other defendants, former employés of plaintiff or members of the Council, were injuring and threatening to destroy. It alleges the Tri-City Trades Council attempted to force plaintiff to raise the wage paid its employés, and to accomplish its object called a strike of plaintiff's employés. In the course of the strike picketing was resorted to, and the defendants sought the support of nonstriking and prospective employés. Plaintiff further claimed that its employés were assaulted by defendants and by those engaged in picketing the shops, and that prospective employés had been so intimidated by defendants that they refused to enter plaintiff's employment. The gravamen of the plaintiff's bill is found in the following therefrom: "Your orator further represents that the said defendants have combined and conspired to prevent your orator from employing skilled laborers at its plant, although such skilled laborers and your orator have agreed upon terms of employment that are mutually agreeable and satisfactory; that in carrying out such combination and conspiracy the defendants began picketing said plant of your orator on or about April 23, 1914; that the said defendants, on April 23d and since that time, have caused various numbers of men or pickets, to wit, 5 to 30 men, to be stationed adjacent to the main gate of your orator's said plant, which said pickets from that day until the present time have threatened to assault, mistreat, and injure various of the employés of your orator unless said employés ceased from their work;

that said defendants so combining did on April 29, 1914, cause two of your orator's employés to be assaulted by said pickets," etc.

Defendants denied any and all acts of violence or assaults of any nature. On the other hand, they claimed that strike-breakers attempted to shoot the striking employés, and were urged so to do by representatives of plaintiff. Defendants also denied the existence of any unlawful conspiracy among them, but did admit "that said Tri-City Central Trades Council did place certain ones on certain streets and avenues leading to said plant charged with doing picket duty, but such ones were stationed 100 yards from such mill, and they were instructed to notify all persons who sought to enter the plant that there was a strike on, because of such reduction in wages, and such pickets were instructed to use all honorable means to persuade such ones to not enter such plant, and not to take the places of the laboring men, who had gone on a strike on account of such reduction of wages."

The District Judge, in rendering his opinion, said: "This evidence clearly shows that this union, this trades council, by the testimony of its officers, entered upon the work of preventing this complainant from getting men to run its factory, run its plant, except upon the condition that it pay a certain scale, the November scale. That combination was illegal." Speaking of picketing he said: "However, speaking upon this question, I should say a word about picketing. There is no such thing as peaceful picketing. You might as well talk about peaceful violence. You may as well think of peaceful war as peaceful picketing. Considerable experience in this position, and having these cases frequently before me, has taught me that there is no such thing as peaceful picketing."

Defendants attack the decree on three grounds: (a) The evidence does not justify the issuance of any injunction. (b) The restraining order is too broad, and restrains defendants from doing lawful acts. (c) The court is without jurisdiction, because the amount involved does not exceed $3,000.

F. C. Smith, of Chicago, Ill., for appellants.

William E. Wheeler, of East St. Louis, Ill., and Max Pam, of Chicago, Ill., for appellee.

Before MACK, ALSCHULER, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] Defendants' claim that the court was without jurisdiction is without merit. The necessary diversity of citizenship appears. The amount involved exceeds $3,000. It was not necessary that $3,000 worth of property should be destroyed before the federal court acquired jurisdiction. The alleged threatened damage far exceeded the statutory sum necessary to give the district court jurisdiction.

Defendants contend that the evidence did not justify the court in granting any injunction. We are not able to say that the record presents a situation that did not warrant some action by the court. It is apparent that a situation had developed where fights had occurred and threats had been made, which if carried out would have resulted in the destruction of property. The District Judge heard and saw the witnesses, and we accept his conclusion that such evidence justified the issuance of an injunction to restrain the defendants from the commission of certain unlawful acts.

[2] But the court also enjoined the defendants "from picketing or maintaining any picket or pickets on or about the streets leading to the premises of the plaintiff." And the order continued:

"It is further ordered * * * that the said defendants * * * be and are perpetually restrained and enjoined * * * from doing any acts or things whatever in furtherance of any conspiracy or combination among them, or any of them, to obstruct or interfere with said American Steel Foundries, its officers, agents, or employés, in the free and unrestrained control and operation of its plant, foundry, and property and the operation of its business, and also from ordering, directing, aiding, assisting, or in any manner abetting any person committing any or either of the acts aforesaid."

The obvious effect and purpose of this decree was, among other things, to prevent all picketing by the defendants or others similarly interested, and to prevent these parties from persuading their fellow employés to join them in their effort to secure what the strikers apparently considered the laborers' just demands. In Iron Molders' Union 125 Milwaukee v. Allis-Chalmers Co., 166 Fed. 45, 91 C. C. A. 631, 20 L. R. A. (N. S.) 315, the rule is so well stated that we quote from it the following:

"The right to persuade new men to quit or decline employment is of little worth unless the strikers may ascertain who are the men that their late employer has persuaded or is attempting to persuade to accept employment. Under the name of persuasion, duress may be used; but it is duress, not persuasion, that should be restrained and punished. In the guise of picketing, strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. *Prohibitions of persuasion and picketing, as such, should not be included in the decree.*"

Labatt, in his work on Master and Servant (volume 7, p. 8364), says:

"Attendance in the vicinity of the employer's place of business for the purpose of obtaining information as to those at work there, or of communicating the information that a strike is in progress, to those who may resort for employment, is uniformly regarded as lawful even where the right to maintain pickets for the purpose of persuasion is denied."

The same writer further says:

"The preponderance of opinion is to the effect that attendance, even in numbers, for the purpose of lawfully persuading others not to work, is permissible, so long as it is not carried on in such a manner as to intimidate persons at work, or seeking employment, or to subject them to undue annoyance, or to interfere with the free access to the employer's premises."

Further authorities in support of the rule laid down in the Iron Molders' Union v. Allis-Chalmers Co. Case, supra, are Gray v. Building Trades Council, 91 Minn. 171, 97 N. W. 663, 63 L. R. A. 753, 103 Am. St. Rep. 477, 1 Ann. Cas. 172; Karges Furniture Co. v. A. W. Local Union, 165 Ind. 421, 75 N. E. 877, 2 L. R. A. (N. S.) 788, 6 Ann. Cas. 829; Everett v. Typo. Union, 105 Va. 188, 53 S. E. 273, 5 L. R. A. (N. S.) 792, 8 Ann. Cas. 798; In re Heffron, 179 Mo. App. 639, 162 S. W. 652; Jones v. Maher, 62 Misc. Rep. 388, 116 N. Y. Supp. 180; Jones v. Van Winkle Gin & Mach. Works, 131 Ga. 336, 62 S. E. 236, 17 L. R. A. (N. S.) 848, 127 Am. St. Rep. 235; Pope Motor Car Co. v. Keegan (C. C.) 150 Fed. 148.

But it is contended that the decree in these respects was proper because:

(a) The restraining order does not prohibit picketing per se, but restrains defendants from carrying out an unlawful conspiracy to destroy plaintiff's business; that in order to prevent the defendants from accomplishing the unlawful object of the conspiracy, it was necessary for the court to restrain the defendants from picketing the plaintiff's works, and prohibit them from arguing their cause with plaintiff's employés.

(b) Defendants were not plaintiff's employés, but were mere outsiders, intermeddlers, who were not truly representing the employés, but were trouble makers, fomenting strife and trouble where labor conditions and wages were entirely satisfactory to the employés.

[3] Plaintiff's contention that a court may restrain lawful acts of striking employés, when committed to carry out the purpose of an unlawful conspiracy to destroy the employer's business, is supported by many authorities. Among them are Sailors' Union v. Hammond Lumber Co., 156 Fed. 450, 85 C. C. A. 16; In re Debs, 158 U. S. 564, 15 Sup. Ct. 900, 39 L. Ed. 1092; Barnes v. Typo. Union, 232 Ill. 424, 83 N. E. 940; Karges v. Woodworkers' Union, supra. If the record disclosed the existence of an unlawful conspiracy on the part of the defendants to injure or destroy plaintiff's property the court would be clearly justified in restraining lawful as well as unlawful acts committed in furtherance of such a conspiracy. If the purpose of the undertaking complained of were purely and simply, or even primarily, interference with the plaintiff in the conduct of its business as alleged, no act, however innocent in itself, directed to that end can be said to have a lawful purpose for its doing. Indeed, it may well be said that any act directed to that end is not a lawful act. If, on the other hand, the object of the undertaking is lawful, then the acts calculated to effectuate the object do not necessarily become unlawful merely because they interfere with the plaintiff's conduct of its business.

[4] The right to strike to secure higher wages and improved conditions of labor is too firmly established to necessitate further elucidation. From the record here we can reach no other conclusion than that the object of this strike was to secure for plaintiff's employés the November wage scale of the union. Nothing appears in the record to indicate that this was not in good faith, or to raise the suspicion that the strike was a mere cloak to cover a deliberate purpose to interfere with the plaintiff's conduct of its business, or to injure and destroy its business and property. The purpose being lawful, if unlawful means are used to effectuate it, such means cannot be made to reach back and taint the purpose itself with unlawfulness, and thus render unlawful all the acts in its furtherance. In the pursuit of a lawful purpose to secure a raise in wages, picketing may be employed, as this court has held, to ascertain whom the late employer "has persuaded or attempted to persuade to accept employment," and persuasion may be used to induce them to refuse or quit the employment. As stated further in the Allis-Chalmers Case:

"The right of the one to persuade (but not coerce) the unemployed to accept certain terms is limited and conditioned by the right of the other to dissuade (but not restrain) them from accepting. * * * Molders, having struck, in order to make their strike effective may persuade (but not coerce) other molders not to work for less wages or under worse conditions than those for which they struck, and not to work for their late employer at all, so that he may be forced to take them back into his foundry at their own terms."

Undoubtedly picketing and persuasion would interfere with plaintiff's conduct of its business, in that it would make it more difficult for it to retain old employés and to hire and keep new ones. Indeed, the very act of striking often seriously interferes with that "free and unrestrained control and operation of the employer's business" which the plaintiff here alleges as an object of the conspiracy charged; but the lawfulness or unlawfulness of the strike is not to be tested by such incidental effect of it. And so it is with persuasion and picketing, properly carried on in the interest of a lawful strike. The laborer may be strictly within his rights, although he obstructs "the free and unrestrained control and operation of the employer's business." The right to strike must carry with it by implication the right to interfere with the employer's business to a certain extent. The right to persuade prospective employés by legitimate argument must of necessity interfere with the employer's business. Where labor is essential to the successful conduct of a business, any interference with that labor is an interference with the employer's business. But whether the interference with the business is lawful or unlawful depends upon the facts in each case.

The order in the instant case fails to recognize this difference between the lawful means of interfering with another's business as an incident to the party's own right and unlawful means adopted by the same party. Methods may be considered lawful, even though the employer's business is interfered with, because such methods are incidental to the right of the employé, which right should be and is recognized as equal to the right of the employer.

[5] Plaintiff's further contention that the defendants were not its employés at the time of the strike, and therefore had no right to picket or persuade by argument those about to enter plaintiff's employment, is not well taken. It is true a striker is not technically an employé. The relation of employer and employé is temporarily suspended during a strike. The situation has been described as:

"A relationship between employer and employé that is neither that of a general employer and employé, nor that of employer and employé seeking work from them as strangers."

Neither strike nor lockout fully terminates during the strike the relationship between the parties. Among the defendants in this case there were some former employés. Many of the plaintiff's employés at the time of the strike were members of the defendants' organization, the Tri-City Central Trades Council. These facts disprove the charge that the defendants were merely intermeddling in the affairs of a company in which they had no interest. Under these circumstances, it cannot be said that the labor organization was an inter-

meddler or that its course was contrary to the wishes of its members or the wishes of the plaintiff's employés.

In so far as the decree restrains all picketing and all persuasion and all interference with the plaintiff's free and unrestrained control of its plant and the operation of its business, it transcends the limit of proper restraint, and should be modified, so as to eliminate therefrom any restraint of defendants from doing lawful acts as indicated herein. The order of this court for the modification of the decree in the Allis-Chalmers case will afford sufficient and proper guidance for the modification of the decree herein.

The decree of the District Court is reversed, with direction to modify same, and to enter a decree, in accordance with the views herein expressed.

DAVIS et al. v. HAYDEN et al.

(Circuit Court of Appeals, Fourth Circuit. November 9, 1916.)

No. 1422.

1. APPEAL AND ERROR ⟸71(3)—APPEALABLE ORDERS—ORDER GRANTING PRELIMINARY INJUNCTION.

While a temporary restraining order, granted without a hearing, is not ordinarily appealable, where, after a subsequent hearing on a motion for a preliminary injunction and counter motions to vacate and dismiss, an order is entered refusing to dissolve and in terms continuing the restraining order in force, such order is in effect one granting a preliminary injunction, and is appealable.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 393-398; Dec. Dig. ⟸71(3).]

2. RECEIVERS ⟸6—GROUNDS FOR APPOINTMENT—CONSERVATION OF PROPERTY OF INDIVIDUAL DEBTOR.

A federal court of equity is without jurisdiction to appoint a receiver of the assets of an individual debtor alleged to be solvent, and to enjoin the enforcement of claims against him, at the suit of a mere contract creditor, who has no lien or other security, and who asserts no right to subject any specific property to the payment of his debt.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. § 12; Dec. Dig. ⟸6.]

3. COURTS ⟸371(2)—FEDERAL COURTS—EQUITY JURISDICTION—ENLARGEMENT BY STATE STATUTE.

Jurisdiction to appoint a receiver, contrary to the general principles of equity jurisprudence, cannot be conferred upon a federal court of equity by a state statute authorizing such appointment by courts of the state.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 907, 973; Dec. Dig. ⟸371(2).]

Appeal from the District Court of the United States for the Northern District of West Virginia, at Wheeling; Alston G. Dayton, Judge.

Suit by Jacob S. Hayden against Josiah V. Thompson and others. From an order granting a preliminary injunction and denying a motion to dismiss, Ellen G. Davis and Cornelia B. Bassel, executrices of

the will of John Bassel, deceased, and others, defendants, appeal. Reversed.

R. S. Douglass and George M. Hoffheimer, both of Clarksburg, W. Va. (William H. Taylor and Melvin G. Sperry, both of Clarksburg, W. Va., and Charles McCamic and James Morgan Clarke, both of Wheeling W. Va., on the brief), for appellants.

John J. Coniff, of Wheeling, W. Va., for appellees.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

KNAPP, Circuit Judge. The underlying question in this case is the question of jurisdiction. Briefly stated, the material facts are these:

During a period of years prior to January 19, 1915, when this suit was commenced, the appellee, Josiah V. Thompson, a citizen of Pennsylvania, had become the owner of extensive tracts of coal lands and other properties in that state and the state of West Virginia. His holdings in the former state amounted to over 78,000 acres, and in the latter state to some 26,000 acres. On the date named this bill was filed, the nature and purpose of which will be presently explained. In the meantime, and on various dates between December 3, 1914, and January 19, 1915, certain creditors of Thompson, citizens of West Virginia, had brought suits against him in the circuit court of Harrison county and levied attachments upon all or a large portion of his coal lands in that state, and these suits were pending and undetermined when the bill of complaint herein was filed.

The plaintiff in the bill is the appellee Hayden, and Thompson was the sole defendant. Hayden was the holder of two past-due notes of Thompson, each for $10,000, but his claims had not been reduced to judgment, and he had no lien or other security; he was a simple contract creditor. After setting out the notes, and averring that the amounts thereof were admittedly due, without offsets or deductions of any sort, the bill alleges, among other things not needful to recite, that the total indebtedness of Thompson was approximately $22,000,000, of which about $7,000,000 was unsecured; that the balance of $15,000,000 was secured by mortgage or pledge of substantially all his assets, "which assets are of the fair value of $70,000,000, leaving nothing but equities out of which your orator and other unsecured creditors can be paid," and that such creditors could not collect their claims by execution; that the equities belonging to Thompson were worth approximately $48,000,000, and that if his assets could be conserved and sacrifice prevented they could be sold at even very low prices for a sum largely in excess of the indebtedness to both secured and unsecured creditors; that Thompson was unable to pay the interest already past due upon a part of his obligations, or to provide for the interest soon to become due on other obligations; that suits had been brought against him by certain creditors, and judgments entered on which executions were threatened; that other creditors were threatening to sell the collaterals held by them as security for their claims; and that in consequence there was great danger that early and forced sales under mortgages and

pledges would exhaust the equities of Thompson and leave little or nothing for the payment of plaintiff and other unsecured creditors. Other allegations related to the situation of the properties, the fact that certain tracts were owned by Thompson in common with other parties, the depressed condition of the market for coal lands, and the like. The relief prayed for was the appointment of a receiver and an injunction, in substance restraining creditors, whether secured or unsecured, from taking any proceedings for the collection of their debts.

On the day this bill was filed, at Wheeling, in the Northern district of West Virginia, Thompson was conveniently in that city and at once accepted service of the subpœna. On the same day he filed his answer, admitting the allegations of the bill, averring that his assets were "fairly and conservatively worth more than three times the amount of my indebtedness," and consenting to the appointment of a receiver, and thereupon a receiver was immediately appointed according to the prayer of the bill. Thereafter, on April 15, 1915, the plaintiff filed in open court an "amended and supplemental bill," which reiterated the allegations of the original bill, recited the previous order appointing a receiver and enjoining creditors, alleged that the receiver had qualified and taken possession of all the assets and property of Thompson in West Virginia, and set out a long list of creditors in that state, with the amounts due to them and the securities, if any, held by them respectively, and the proceedings, if any, severally taken by them to enforce their claims. All these creditors were named as defendants, but it appears that no subpœna to answer was ever issued. On the same day a temporary restraining order was entered, to the like effect in substance as the original injunction, which order by its terms was to remain in force "only ten days from this date, within which time plaintiff shall give notice to the parties of a motion for preliminary injunction as required by the seventy-third equity rule."

The motion accordingly made was heard on the 24th of April, and with it the motions of certain defendants, all or most of whom had levied attachments, to dissolve the injunction, vacate the order appointing a receiver, and dismiss the original and amended bills for want of jurisdiction and other reasons. The order made that day, after reciting that the court, "being not now advised what order to enter in the premises, thereof takes time to consider," gave the parties 15 days to file briefs, and continued the temporary restraining order in force "until this motion for a preliminary injunction can be determined." The situation thus brought about remained practically unchanged, so far as the record discloses, until the 29th of October, when a memorandum opinion was filed and an order entered which, in effect, as we hold, denied the motions to dismiss and granted a preliminary injunction. It was provided, however, that the injunction be so far modified as to allow creditors to prosecute their claims to judgment, but not to enforce the judgments by execution sales or otherwise. From that order appeal was taken to this court.

[1] A motion is made here to dismiss the appeal on the ground that

it was prematurely brought; the contention being that the order of October 29th was not an interlocutory order granting a preliminary injunction, but merely a modification and continuance of the temporary restraining order of April 15th, and therefore not appealable. We are unable to sustain this contention. In terms, it is true, the "restraining order" was "continued" until further order of the court; but the substance and intent of what was done must be regarded rather than the form of words employed. As was said in Western Union Tel. Co. v. United States & M. T. Co., 221 Fed. 545, 137 C. C. A. 113:

"Conceding that a restraining order granted without a hearing is not ordinarily appealable, yet a restraining order which is granted, or sustained, or denied, after a hearing of the parties, and which in effect and in everything but name is a temporary injunction, falls within the evident meaning of the statute, and is reviewable by appeal, and the orders in question were of that character."

So in this case. The first injunction was binding, under the Clayton Act (Act Oct. 15, 1914, c. 323, 38 Stat. 730), upon no one but Thompson, because he was the only defendant in the original bill. When the amended bill was filed, making other creditors defendants, an ex parte restraining order was granted for 10 days from its date. Within that time there was a full hearing upon notice of plaintiff's motion for a preliminary injunction and defendants' motions to vacate and dismiss. Desiring further time to consider, the court continued the restraining order until the matter could be more deliberately decided. There surely was no occasion after that to again continue the restraining order for the same purpose, and we are clearly of opinion that the subsequent order of October 29th should not be so construed. On the contrary, it was in intention, and certainly in practical effect, a decision of the pending applications, granting to the plaintiff a preliminary injunction and denying the motions made by defendants. Indeed, in the memorandum filed with the order, it is referred to as an "injunction"; and in the order allowing an appeal it is described as "an interlocutory order or decree continuing an injunction and refusing to dissolve an injunction." In short, it was a final disposition of the motions made by the respective parties, which were heard and submitted, and on which decision was reserved, some six months before, and as such it was plainly appealable. The motion to dismiss must be denied.

[2] On the merits of the controversy it will suffice to outline our conclusions without extended argument. We put aside the contention of appellants that the court below had no jurisdiction to appoint a receiver, because the property of Thompson in West Virginia was already in the custody of the courts of that state by virtue of the attachments which certain creditors had levied. Without questioning the rule of law or comity on which this contention is based, or considering how far it is here decisive, we prefer to rest our decision upon the broader ground that the facts alleged in plaintiff's bills present no case for the cognizance of a federal court of equity. It is to be noted that plaintiff is a mere contract creditor, without lien or security of any kind, and without the claim of right to charge any

specific property with the payment of his debt; that Thompson, though temporarily embarrassed by lack of ready money, is asserted to be abundantly solvent; that the suit was evidently brought in pursuance of a prearranged plan between the plaintiff and Thompson; and that it was the obvious purpose of the suit, not to enforce the plaintiff's own demand, but to enable Thompson, by means of a receivership and injunction, to prevent his creditors from taking any steps to collect their claims. And the case for relief amounts only to this: That certain creditors of Thompson have obtained judgments against him on which executions may issue; that other creditors have levied attachments upon his property; that still others threaten to sell the collaterals held in pledge, as they have the right to do; and that in consequence the assets of Thompson are liable to become so depleted that unsecured creditors will not be paid.

We are clearly of opinion that these facts are insufficient to warrant the action of the court below. In its most favorable aspect the plaintiff's case comes under no recognized head of equity jurisdiction. Indeed, we take it to be an established principle of jurisprudence that a court of equity is without power, in the absence of statutory authority, to appoint a receiver of the assets of an individual debtor, or to enjoin the prosecution of claims against him, at the suit of a mere contract creditor who has no lien or other security, and who asserts no right to subject any specific property to the payment of his debt. Equity may aid in a proper case when legal remedies have been exhausted, but cannot be resorted to in the first instance. The authorities to this effect are numerous and of uniform import. Among the leading cases which illustrate and apply the doctrine are Thompson v. Railroad Companies, 73 U. S. (6 Wall.) 134, 18 L. Ed. 765, Scott v. Neely, 140 U. S. 106, 11 Sup. Ct. 712, 35 L. Ed. 358, Scott v. Armstrong, 146 U. S. 499, 13 Sup. Ct. 148, 36 L. Ed. 1059, Cates v. Allen, 149 U. S. 452, 13 Sup. Ct. 977, 37 L. Ed. 804, and Hollins v. Brierfield C. & I. Co., 150 U. S. 371, 14 Sup. Ct. 127, 37 L. Ed. 1113. In the last-named case the Supreme Court said:

"The plaintiffs were simple contract creditors of the company, their claims had not been reduced to judgment, and they had no express lien by mortgage, trust deed, or otherwise. It is the settled law of this court that such creditors cannot come into a court of equity to obtain the seizure of the property of their debtor, and its application to the satisfaction of their claims; and this, notwithstanding a statute of the state may authorize such a proceeding in the courts of the state."

The only case cited by appellees, and the only one we have been able to find which can be claimed to support their contention, is In re Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403. But this was the case of an insolvent corporation, which, for reasons that have often been pointed out and need not here be repeated, stands upon an entirely different footing from an individual debtor, and especially an individual debtor whose solvency is affirmed by the creditor asking the interposition of a court of equity. In short, we are convinced that the appointment of a receiver and the restraining of creditors in this case, upon the facts al-

leged by both parties to the original bill, are not only without support in principle or precedent, but manifest the attempted exercise of powers which, as repeated decisions declare, are not possessed by a federal court. And this leaves out of view the apparent violation of the act of Congress (Rev. Stat. § 720; Judicial Code [Act March 3, 1911, c. 231] § 265, 36 Stat. 1162 [Comp. St. 1913, § 1242]) which prohibits the granting of an injunction "to stay proceedings in any court of a state," except as authorized by laws relating to proceedings in bankruptcy. And so this court has held in Maxwell v. McDaniels, 184 Fed. 311, 106 C. C. A. 453, a case which, upon the question of jurisdiction, seems not distinguishable from the one at bar. We quote from the opinion as follows:

"The complainant had no right for two reasons to ask that the court should enjoin the prosecution of suits against his debtor in the state courts of West Virginia. If A. is indebted to * * * B. and C., it takes no citation of authority to show that B. cannot ask a court of equity to enjoin C. from suing A., merely because C. by beginning his suit first may get a lien upon A.'s property before B. does. In the second place, if the complainant had any standing in a court of equity to ask that proceedings at law be enjoined, the statutes of the United States expressly prohibit a federal court of equity from granting that relief when the proceedings sought to be enjoined are pending in a state court. * * * A court of equity of the United States has no jurisdiction, at the instance of a simple contract creditor whose claim has not been reduced to judgment, to appoint a receiver for property upon which he asserts no specific lien."

[3] We are asked not to follow Maxwell v. McDaniels, because it is said the court overlooked a statute of West Virginia (Code of 1913, § 4974) which provides as follows:

"A court of equity may in any proper case pending therein, in which the property of a corporation, firm or person is involved, and there is danger of the loss or misappropriation of the same or a material part thereof, appoint a special receiver of such property or of the rents, issues and profits thereof, or both."

Even if it be granted that this statute was not brought to the attention of the court, and therefore not considered, there are two answers to the argument based upon its provisions. The first is that the equitable powers now in question cannot be conferred upon the federal courts by the Legislature of a state, as was distinctly held in Hollins v. Brierfield C. & I. Co. supra, wherein the Supreme Court said:

"The line of demarcation between legal and equitable remedies * * * cannot be obliterated by state legislation."

The other answer is that we are bound to accept the construction of a state statute by the highest court of the enacting state, and the Supreme Court of Appeals of West Virginia has held that the statute referred to does not authorize the appointment of a receiver, in such a case as is here presented, at the suit of a mere contract creditor. Rainey v. Freeport Coal Co., 58 W. Va. 424, 52 S. E. 528; Thompson v. Adams, 60 W. Va. 463, 55 S. E. 668. In the latter case it was said:

"Under our statute * * * a receiver will be appointed where there is danger of loss or misappropriation of the property, or a material part thereof,

of a debtor; but this is only done in a proper pending case. It certainly must be at the instance of some one who has a right to charge the property, and the statute does not mean to extend this remedy to every one who claims to be a common creditor. Equity must have jurisdiction, independent of the appointment of a receiver."

Finally it is argued that jurisdiction was acquired in this case by the consent of Thompson to the appointment of a receiver. But this contention was also made and rejected in Maxwell v. McDaniels; the court saying:

"An individual is not a corporation. The administration of the affairs of an insolvent individual is not a recognized head of equity jurisdiction, as is the administration of the assets of an insolvent corporation. The subject-matter in the former case is not one over which the court has jurisdiction. Mere waiver by the defendant of objections otherwise fatal to the capacity of the plaintiff to invoke the jurisdiction in the case of a corporation removes the only obstacle to the granting of the relief desired. In the case of an individual defendant it leaves untouched the most serious difficulty of all, namely, that the subject-matter is not one within the province of the court."

Without citing further decisions or otherwise prolonging the discussion, we deem it sufficient to repeat our conviction that the appointment of a receiver and the granting of an injunction in this case were wholly without authority, and should be set aside. It follows that the order appealed from must be reversed, and the case remanded, with directions to dissolve the injunction, discharge the receiver, and vacate his appointment, and to dismiss the original and supplemental bills for want of jurisdiction.

Reversed.

ZIMMERN v. BLOUNT.

(Circuit Court of Appeals, Fifth Circuit. January 23, 1917.)

No. 2979.

1. FRAUD ⊂=45—ACTION—COMPLAINT.

A count in a complaint, alleging that defendant's agent, who negotiated the loan for him, falsely and fraudulently represented that the bank stock pledged to secure the loan had a fair market value of $140 a share when the loan was made, and that plaintiff was induced to part with money on such representation and so injured, is sufficient to state a cause of action in deceit, the averment that plaintiff was induced to part with his money by reason of the alleged false representation implying his ignorance of its falsity and his belief in and their reliance on its truth and the allegation that the representation was falsely and fraudulently made, including knowledge by plaintiff's agent of its falsity.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 40; Dec. Dig. ⊂=45.]

2. PRINCIPAL AND AGENT ⊂=156—FALSE REPRESENTATIONS—LIABILITY OF PRINCIPAL.

Defendant is liable for false representations by his agent from which he profited, though the fraud is not personal to him.

[Ed. Note.—For other cases, see Principal and Agent, Cent. Dig. §§ 583-587; Dec. Dig. ⊂=156.]

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3. FRAUD ⊂=11(2)—FALSE REPRESENTATIONS—STATEMENTS OF FACT—VALUE OF STOCK.

The statement of the market value of a stock which has an ascertainable value is a statement of a fact, and not a mere expression of opinion.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 13; Dec. Dig. ⊂=11(2).]

4. FRAUD ⊂=43—COMPLAINT—INJURY—VALUE OF SECURITY.

A complaint for false representations as to the value of stock pledged to secure a loan is sufficient, without showing that the stock was not worth the amount of the loan, since plaintiff was entitled to the additional security afforded by the excess of the value of security over the amount of the loan.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. ⊂=43.]

5. CORPORATIONS ⊂=306—LIABILITY OF DIRECTORS—FICTITIOUS DIVIDEND.

The declaration of an unearned dividend by the directors of a corporation may be a fraud which renders the directors liable to one who purchased stock at an inflated market value created by such dividend.

[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 1457, 1458; Dec. Dig. ⊂=306.]

6. FRAUD ⊂=46—ELEMENTS—REPRESENTATION TO PLAINTIFF.

An averment of a false representation made to plaintiff, not to the public generally, by defendant, by which plaintiff was deceived to his injury, is essential to an action of deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 41; Dec. Dig. ⊂=46.]

7. BANKRUPTCY ⊂=426(1)—DISCHARGE—DEBTS NOT RELEASED—FRAUD.

Though a fraud may be committed in ways other than by false representations and still be actionable, it is only fraud by obtaining property by false pretenses or false representations which prevents the release of a bankrupt from his provable debts under Bankruptcy Act July 1, 1898, c. 541, § 17a (2), 30 Stat. 550, as amended by Act Feb. 5, 1903, c. 487, § 5 (Comp. St. 1913, § 9601).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 793–807; Dec. Dig. ⊂=426(1).]

8. FRAUD ⊂=43—COMPLAINT—FALSE REPRESENTATIONS.

A complaint, alleging that defendant's agent, who negotiated a loan for which bank stock was pledged as security, represented to plaintiff that the bank had never missed a dividend, but in fact the bank directors, of whom defendant was one, had declared an unearned dividend for the purpose of giving a fictitious value to the stock, is sufficient.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. ⊂=43.]

9. FRAUD ⊂=43—COMPLAINT—FICTITIOUS DIVIDEND.

A count, alleging that defendant, as director of a bank, participated in declaring an unearned dividend to enable him to dispose of the stock owned by him at a fictitious value to the public, that plaintiff was deceived thereby, and that defendant obtained plaintiff's money by a loan for which the bank stock was pledged as security, sufficiently stated a cause of action in deceit.

[Ed. Note.—For other cases, see Fraud, Cent. Dig. § 37; Dec. Dig. ⊂=43.]

10. ELECTION OF REMEDIES ⟸3(2)—ACTION ON NOTE AND FOR FRAUD.
The holder of a note, secured by false representations as to the value of security pledged therefor, can proceed on the note and at the same time seek to enforce his cause of action for deceit.
[Ed. Note.—For other cases, see Election of Remedies, Cent. Dig. § 3; Dec. Dig. ⟸3(2).]

11. BANKRUPTCY ⟸426(1)—PLEADING—REPLY.
One suing on a note can reply to a plea of discharge in bankruptcy that the debt sued on is for obtaining money by false pretenses or representations.
[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 792; Dec. Dig. ⟸426(1).]

In Error to the District Court of the United States for the Northern District of Florida; Wm. B. Sheppard, Judge.

Action by Samuel Zimmern against William A. Blount. Judgment for defendant, on demurrer to the amended counts of the complaint and to the replications, and defendant brings error. Reversed and remanded.

The plaintiff in error, plaintiff in the District Court, originally instituted this suit on a promissory note, alleged to have been executed by the defendant in error, who was defendant in the District Court. The defendant filed a plea, relying upon a discharge in bankruptcy theretofore obtained by him. The plaintiff thereupon filed four replications to this plea, to all of which demurrers were sustained. The plaintiff thereupon amended his complaint by adding six additional counts, all of which, except the fifth, relied upon a cause of action in deceit. The plaintiff also filed, as replications to the defendant's said plea, five replications identical with the five amended counts, which relied upon deceit as a cause of action. To these five amended counts and to the five replications, the defendant interposed demurrers, which were sustained by the District Judge, and, the plaintiff declining to plead further, judgment was entered against him, from which writ of error is taken. The alleged deceit consisted in certain alleged false representations as to the value of 50 shares of the capital stock of the First National Bank of Pensacola, which was pledged by defendant to secure said loan evidenced by the note sued upon.

Harry T. Smith, of Mobile, Ala., for plaintiff in error.

Francis B. Carter, of Pensacola, Fla., for defendant in error.

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

GRUBB, District Judge (after stating the facts as above). The questions presented by the demurrers are the sufficiency of amended counts numbered 2, 3, 4, 5, and 7, and replications numbered 1, 2, 3, 4, and 5 to defendant's plea of discharge in bankruptcy. The amended counts and corresponding replications are practically identical in legal effect.

[1] The second count and first replication charge that defendant's agent, who negotiated the loan for him, falsely and fraudulently represented that the bank stock, which was pledged by defendant to secure the loan, had a fair market value of $140 a share, when the loan was made, and that the plaintiff was induced to part with money on such representation, and so injured. Perhaps the averments of the count

and of the corresponding replication might have been more specific. However, we think they set out the elements of a cause of action in deceit, as against the grounds of the demurrer. The averment that plaintiff was induced to part with his money by reason of the alleged false representation implies his ignorance of its falsity and belief in and reliance upon its truth. The allegation that defendant's agent falsely and fraudulently represented the value of the stock includes the idea of knowledge on his part of the falsity. Forsyth v. Vehmeyer, 177 U. S. 177–180, 20 Sup. Ct. 623, 44 L. Ed. 723; Bank of Montreal v. Thayer (C. C.) 7 Fed. 625.

[2] Nor is it necessary that the fraud be personal to the defendant. It is sufficient if committed by his agent and he profit by it. Such a fraud, so committed, will prevent a discharge in bankruptcy from operating to release the bankrupt from a debt obtained by it. Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. 1038, 29 L. Ed. 248; In re Cloutier (D. C.) 228 Fed. 569.

[3] We think the statement of the market value of a stock, which has an ascertainable market value, is a statement of a fact, and not the mere expression of an opinion. Intrinsic value may be the subject of opinion only. Louisville Jeans Co. v. Lischkoff, 109 Ala. 136–141, 19 South. 436; Gordon v. Butler, 105 U. S. 558, 26 L. Ed. 1166.

[4] We think also the averments of the count and replication are sufficient to show that plaintiff suffered injury by reason of the alleged misrepresentation. It is contended that the true market value of the stock is not stated. The allegation that the stock was falsely and fraudulently represented to have a certain market value includes the idea that its true value was, at least, substantially less. It is, however, also contended that, though substantially less than represented, if it was at the time of the loan of a value equal to the amount loaned on it and interest, the plaintiff suffered no injury, and that there is no averment to the contrary in the pleading. This is a mistaken conception. The plaintiff had a right to rely on its value, as represented. Non constat, but he would have been unwilling to lend the money on security, equal to the amount of the loan, though willing to do so on security one and one half times greater in value. Few lenders are satisfied with collateral of no greater market value than the amount loaned. If the value of the stock was just sufficient to secure the amount of the loan, when made, any loss suffered by the bank, between the making of the loan and its maturity, which affected the market value of its stock, would impair the sufficiency of the security, since it was originally only just sufficient. If the value of the stock had been as represented, the plaintiff would have had a margin, against which to offset such future losses. To this protection he was entitled. He was entitled to it by virtue of his right to rely on the truth of the representation. If it was false, he did not receive what he had a right to expect, and thereby suffered legal injury. His right was to receive a value equivalent to what was represented to him to be the true market value of the stock, and he suffered legal injury, if any less value was given him.

The third, fourth, fifth, and seventh amended counts and the second, third, fourth, and fifth replications proceed on a different theory from

that contained in the second amended count and the first replication, though some of the grounds of demurrer apply equally to all the counts and replications. Those already considered in relation to the second amended count and first replication need not be reconsidered. The class of pleadings, now to be considered, is not predicated upon any false representation made by the defendant's agent who negotiated the loan. They are based on the alleged declaration of an unearned and contributed dividend, through the instrumentality of the bank's directors, including defendant, with the purpose of creating a fictitious value for the bank's stock.

[5] A fraud may be committed upon one who, relying upon the assurance of the solvency of the corporation, given by the declaration of an unearned dividend, is induced to purchase its stock, at an exaggerated and inflated market value, for which the directors may be held liable. The creation of a fictitious market value for the stock by such methods by the directors for the purpose of enabling them to dispose of their stock at the inflated value is a fraud upon any such purchaser of the stock. Chesbrough v. Woodworth, 195 Fed. 883, 116 C. C. A. 465; Bank of North America v. Crandall, 87 Mo. 208; King v. Livingston Mfg. Co. (Ala.) 68 South. 898; In re Cloutier (D. C.) 228 Fed. 569.

The third amended count and the second replication charge the defendant with having fraudulently participated in the declaration of an unearned and contributed dividend for the purpose of giving a fictitious market value to his stock to enable him the better to dispose of it; that his agent represented to plaintiff the true market value of the stock, and that plaintiff was induced by the fraud to part with his money. These pleadings do not allege that plaintiff knew of the declaration of the unearned dividend, relied upon it in making the loan, or was deceived by it. The representation made to him by the agent as to the market value of the stock was true. It is not alleged that the implied representation arising from the declaration of the dividend was communicated to him; that he knew of it, relied upon it, or was deceived by it. It is alleged that the public, relying on it, created a fictitious market value for the stock, and that plaintiff was injured by the fraudulent declaration of the dividend, by buying the stock at a market value established for the stock by the fraud. Whether this is a sufficient showing of a cause of action in deceit, in view of the omission of any averment that the plaintiff was deceived by any representation, express or implied, made to him by defendant or his agent, may admit of doubt. The averment is that the representation was made to the public, not to the plaintiff, and that the public was deceived by it, and not the plaintiff, and a fictitious value so given the stock, and that the plaintiff was injured in buying it at the inflated value the public was so induced to put upon it.

[6] There is therefore an absence of averment of a false representation made to plaintiff by defendant, by which plaintiff was deceived to his injury, which is essential to an action of deceit.

[7] A fraud may be committed in ways other than by the making of false representations, and be actionable. In considering the third

count, as an original cause of action, independent of the plea of discharge in bankruptcy, it would be unimportant whether the alleged fraud was committed by the making of false representations or otherwise. However, in considering the second replication to the plea of discharge in bankruptcy, as a sufficient answer to it, it is important to determine not only whether the replication sufficiently charges fraud, but fraud "by obtaining property by false pretenses or false representations," which is the only kind of fraud that prevents the release of bankrupt from his provable debts. Section 17a (2), Bankruptcy Act of 1898 as amended.

[8] The fourth amended count and third replication allege that the defendant's agent, who negotiated the loan, represented to plaintiff that the bank "had never missed a dividend." It also alleges the declaration of the unearned and contributed dividend for the purpose and in the manner set out in the third count. It alleges, as the third count fails to do, that the defendant "did by means thereof deceive the plaintiff and thereby obtain his money." In view of the facts as to the alleged fraudulent declaration of the dividend, the representation that the bank had never missed a dividend may well have been false. It is alleged to have been made to plaintiff. It is further alleged that:

"Defendant knew and participated in the said false and fraudulent declaration of dividends, for the purpose as aforesaid, and did by means thereof deceive the plaintiff, and thereby obtain his money."

We think this sets out a good cause of action "for the obtaining of property by false pretenses or false representations," and is not so indefinite as to time as to encounter defendant's general demurrer that it is vague and uncertain.

[9] The fifth and seventh amended counts and the fourth and fifth replications charge the defendant with having, as a director of the bank, participated in the declaration of an unearned and contributed dividend for the purpose of enabling the defendant to better dispose of stock owned by him and at a fictitious value to the public, that the plaintiff was deceived as to the value of the stock by such means, and that the defendant thereby obtained the plaintiff's money. There is no allegation of any representation made plaintiff by the defendant's agent as in the preceding counts. There is, however, an allegation that the defendant deceived the plaintiff by the false appearance of solvency given the bank by the alleged fraudulent declaration of dividend, and obtained his money thereby. We think these pleadings are sufficient to set out a cause of action in deceit for obtaining property by false representations. They allege, expressly or by necessary implication, the making of the representation, its falsity, defendant's knowledge of its falsity, plaintiff's ignorance of its falsity, his reliance upon its truth, and his resulting injury.

[10] The plaintiff has the right to proceed upon the note and at the same time seek to enforce his alleged cause of action for deceit. They are in no sense inconsistent remedies. Talcott v. Friend, 179 Fed. 676, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649; Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718; 20 Cyc. 87, and note.

[11] The authorities also support the right of the plaintiff to reply,

to a plea of discharge in bankruptcy, that the debt sued on is for obtaining money by false pretenses or representations. Forsyth v. Vehmeyer, 177 U. S. 177, 20 Sup. Ct. 623, 44 L. Ed. 723; Crawford v. Burke, 195 U. S. 176–178, 25 Sup. Ct. 9, 49 L. Ed. 147; Talcott v. Friend, 179 Fed. 678, 103 C. C. A. 80, 43 L. R. A. (N. S.) 649.

For the reasons assigned, the judgment is reversed, and the case remanded, to be further proceeded with in conformity with this opinion.

HIMROD v. FT. PITT MIN. & MILL. CO.

(Circuit Court of Appeals, Eighth Circuit. November 11, 1916. Rehearing Denied January 26, 1917.)

No. 4686.

1. TRIAL ⊂=251(1)—QUESTIONS FOR SUBMISSION TO JURY—ISSUE NOT MADE BY PLEADINGS.
   A trial court is not required to submit to the jury, or to receive evidence upon, issues not made by the pleadings.
   [Ed. Note.—For other cases, see Trial, Cent. Dig. §§ 587, 588, 594; Dec. Dig. ⊂=251(1).]

2. MINES AND MINERALS ⊂=55(6)—RIGHT TO DUMP WASTE—IMPLIED CONDITION OF DEED.
   Defendant acquired by right of way deed the right to use a tunnel in plaintiff's mine and to extend the same into his own claim. In an action to recover damages for his dumping of waste upon the surface of plaintiff's claim, *held*, that the jury were properly instructed that the deed did not by implication give defendant such rights unless he could not, without unreasonable inconvenience and expense, obtain dumping privileges elsewhere in the operation of the tunnel.
   [Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. §§ 156, 163, 164; Dec. Dig. ⊂=55(6).]

3. TRESPASS ⊂=68(1)—DAMAGES—INSTRUCTIONS.
   Taking the whole charge in reference to the subject of damages, the court did not instruct the jury that damages could be awarded for acts of trespass committed six years prior to the accrual of the cause of action.
   [Ed. Note.—For other cases, see Trespass, Cent. Dig. § 151.]

In Error to the District Court of the United States for the District of Colorado; Robert E. Lewis, Judge.

Action at law by the Ft. Pitt Mining & Milling Company against Fred E. Himrod. Judgment for plaintiff, and defendant brings error. Affirmed.

F. L. Collom, of Idaho Springs, Colo., for plaintiff in error.

Caldwell Martin and Charles W. Waterman, both of Denver, Colo., for defendant in error.

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

CARLAND, Circuit Judge. This is an action by the Milling Company, as plaintiff, to recover from Himrod, as defendant, damages for

alleged trespasses upon the Oneida mining claim, Clear Creek county, Colo. The case has been here twice before. 202 Fed. 724, 121 C. C. A. 186; 220 Fed. 80, 135 C. C. A. 648. The plaintiff on the third trial, as it had on the previous trials, recovered a verdict. The defendant has again removed the case here, assigning error.

The errors assigned and argued by counsel for defendant, which we are authorized to consider, relate to the rulings of the trial court with reference to the following subjects: First, the right of the defendant by implication as a reasonable necessity to dump waste rock and débris from the Lamartine tunnel and mines onto the surface of the Oneida claim, in order to fully and properly enjoy the express rights granted by the right of way deed of August 15, 1894; second, the statute of limitations; third, estoppel; fourth, measure of damages.

In the discussion of the alleged errors in reference to the first subject, it is necessary to first consider just what the defendant by his answer claimed was his right under his right of way deed. The only paragraphs which relate to the subject are the second and fifth of the third defense pleaded in the answer. They read as follows:

"(2) That the said Himrod and his co-owner, Amuletta H. Hudson, have continuously worked the said Lamartine mine through the said No. 2 level of the Oneida mine from the said 15th day of August, A. D. 1894, up to the date hereof, dumping the waste rock and material taken from said Oneida lode mining claim, and from the claims lying between the said Oneida claim and the said Lamartine group, upon the surface of the said Oneida lode mining claim."

"(5) That in order to enable the said defendant and his said co-owner, Amuletta H. Hudson, to extend the said Oneida No. 2 level as aforesaid, through the said Oneida lode mining claim, and thence through and into the Lamartine group of claims hereinbefore described, it was necessary that the said defendant and his said co-owner dump the waste rock and other material from said tunnel or adit upon the surface of the said Oneida lode mining claim."

The language contained in paragraph 5 was the narrow ground upon which this court, at the time the case was last here, considered the question of the implied right of defendant under his right of way deed to dump waste rock and other material upon the Oneida claim. The opinion of the court gave illustrations and cited cases showing instances in which the implied right had been upheld; but these general expressions did not decide that the defendant had any other right than that of dumpage, for he had not claimed any other right. The court, in stating the question then under consideration, in the opinion (220 Fed. 82, 135 C. C. A. 650) said:

"At the close of the evidence the court instructed the jury that the plaintiff in error had no right to deposit, upon the surface of the Oneida claim, rock and waste brought from the tunnel or mines beyond the Oneida claim, and the jury returned a verdict against the plaintiff in error. The instructions of the court, denying the plaintiff in error the right of dumpage on the surface of the Oneida claim, are claimed to be erroneous, because the grant of that right was implied in the deed, as it was reasonably essential to carry on his mining operations through the tunnel."

This action was commenced March 28, 1908, and, although there have been three trials, the answer has remained the same in regard to the claim for the right of dumpage. The assignments of error re-

lating to the subject now under discussion complain that the trial court limited the inquiry as to the implied rights of the defendant under the right of way deed to the question of the necessity of the defendant to dump on the surface of the Oneida claim waste rock and other material simply for the purpose of disposing of the waste, whereas the defendant claimed that he not only had the right to have the question of his implied right to deposit waste rock and other material upon the Oneida claim merely as dumpage submitted to the jury, but that he also had the right to have submitted to them and to introduce evidence relating thereto, as to his right to deposit waste rock and other material at a point near the mouth of the tunnel for the storage of fuel and timbers, and for the turning of the delivery teams.

[1] We are of the opinion, after a careful examination of the record, that the assignments of error upon this subject are without merit, because the pleadings did not raise the question of the implied right in the defendant to establish yardage facilities on the Oneida claim, as we have heretofore shown in quoting from defendant's answer. We think that, if defendant claimed the right to deposit the waste rock and other material upon the Oneida claim for any other purpose than dumpage, he should have so pleaded. A trial court is not required to submit to the jury, or to receive evidence upon, issues not made by the pleadings. Nevada Co. v. Farnsworth, 102 Fed. 573, 42 C. C. A. 504; Frizzell v. Omaha St. Ry. Co., 124 Fed. 176, 59 C. C. A. 382; Grady v. St. Louis Transit Co., 169 Fed. 400, 94 C. C. A. 622.

[2] The trial court as to the implied right of the defendant charged the jury as follows:

"Now, the law does not imply that kind of a right in the party who got the contract—in the defendant and his mother—simply because it might be convenient for them to dump on the Oneida. Such a right can only be implied by the law, in considering all the circumstances and the situation in hand, when the right is a necessity to the party who claims it; that is, the situation is such that he could not obtain, without unreasonable labor and expense, any other place or way to dump this material. He is required, not only to show that it would be convenient and beneficial to him to dump it on the Oneida, but, in order to sustain the right as an implication that the law gives to him, he must go further, as I have already said to you, and show that he cannot, at an outlay of an amount that is within reason, obtain dumping privileges elsewhere in the operation of the tunnel. And the law leaves to you to determine, from all the facts surrounding the situation at the time the contract was made, the purpose for which it was made, the condition and situation with which it dealt, to determine whether or not the defendant by necessity was given that right under the contract; and for the purpose of determining that question in this case you may take into consideration the nature of the surface of the ground where the right claimed to deposit rock and waste was situate, its adaptability and value for other uses, the accessibility of other places at convenient reach from the mouth of the tunnel where dumping privileges could be had, and the reasonable cost of acquiring and using such other place. And if you find from the evidence in this case, considering the situation of the premises when the contract was made, the purpose for which it was made, that the defendant could obtain and use at a reasonable expense other places for dumping ground which were easily accessible from the mouth of the tunnel, then the law would not imply any right given by the contract to the defendant to dump on the Oneida claim. The necessity which must exist in order to imply a right in the defendant to dump rock and waste material coming from mining claims other than the Oneida lode mining claim upon the surface of the Oneida lode mining claim

must be more than convenient or beneficial, and it must appear affirmatively by a preponderance of the evidence, before such a right to dump upon the surface of the Oneida lode mining claim can be implied, that the defendant had no other way or place which could be conveniently provided and used without unreasonable labor and expense."

We are of the opinion that the charge fairly stated the rule as enunciated in the opinion of this court, and we do not think the charge is subject to the criticism that it confined the question at issue to the absolute necessity of dumping the waste rock and other material on the Oneida claim. The court said that, if the defendant had no other way or place which could be conveniently provided and used without unreasonable expense, he might deposit the waste rock and other material on the Oneida claim. In the discussion of this question we have assumed that it was properly raised during the trial; but it is very doubtful whether the trial court's attention was at any time called to the fact that counsel for defendant claimed any other right than that of dumpage.

The defendant pleaded section 4627 of Mills' Annotated Statutes of Colorado (1912), which reads as follows:

"*What Actions are Barred in Six Years.*—The following actions shall be commenced within six years next after the cause of action shall accrue, and not afterwards: * * *

"Fifth. All actions for waste and for trespass upon land."

When the case was first here, this court ruled that, if the plaintiff had alleged a single causal wrongful act and subsequent damages as aggravation, the statute of limitations would have run from the date of the causal wrongful act, and if it barred that act it would have barred all subsequent damage; that the present action was one for continuing trespasses, and—

"in such an action the damages from those committed without the time limited by the statute are barred thereby, although the damages from those committed within that time may be recovered."

And again:

"Every such trespass raises a new cause of action * * * and those trespasses regarding which the proof sustains the plea fail, while those concerning which the proof fails to sustain it stand."

It is claimed by the defendant that the trial court charged the jury, in effect, not only that the burden of proof was on the defendant to show that the acts of trespass were committed prior to March 28, 1902, but that the damage was also inflicted prior to that date, and thereby enunciated a rule contrary to the decision of this court as above mentioned. The trial court upon this subject charged the jury as follows:

"As counsel has told you upon both sides, the defendant is entitled to, and you must give him the benefit of, the statute of limitations which he invokes for his protection in this case, and which he has a right to invoke, for which he is not subject to any criticism by you—that is to say, you must exclude from your consideration any damage that might have been inflicted by the defendant which was done prior to March 28, 1902, being six years before the bringing of the suit, and only allow the plaintiff, if you find in favor of the plaintiff, damages for such acts of trespass as are charged in the complaint, and established by the testimony, which took place after March 28, 1902, and

prior to March 28, 1908, the day that the suit was instituted. If you find from the testimony, from a preponderance thereof, that between March 28, 1902, and March 28, 1908, the defendant did dump waste rock and material upon the Oneida claim, that at the time he did so he could have conveniently and at reasonable expense dumped it elsewhere at a point convenient from the mouth of the tunnel, and that dumping that waste rock upon the Oneida claim resulted in damage to the plaintiff, then you must return a verdict in favor of the plaintiff for the amount you find it has been damaged.

"The defendant pleads the six-year statute. He charges that all of this damage was inflicted back of March 28, 1902, and, having so pleaded, the burden is on the defendant to show that the damage was inflicted—the dump was made—that the rock was thrown onto the Oneida claim, and the damage resulting therefrom inflicted, prior to March 28, 1902."

It is claimed that the last paragraph of the above charge is erroneous, under the decision of this court; but we are not at liberty to select isolated portions of a charge for the purpose of assigning error. We must look to the whole charge, for the purpose of ascertaining whether the particular charge complained of was all that there was said upon the subject. In the excerpt from the charge of the court above quoted it is said:

"That is to say, you must exclude from your consideration any *damage* that might have been inflicted by the defendant which was done prior to March 28, 1902, being six years before the bringing of the suit, and only allow the plaintiff, if you find in favor of the plaintiff, *damages for such acts of trespass* as are charged in the complaint, and established by the testimony, which took place after March 28, 1902, and prior to March 28, 1908, the day the suit was instituted."

[3] We are of the opinion that, taking the whole excerpt from the charge together, it was made clear to the jury that damages for acts of trespass committed prior to March 28, 1902, could not be recovered, and that no prejudice could have resulted to the defendant from the charge as given. We see no merit in the assignments of error relating to the statute of limitations.

The assignments of error relating to the question of estoppel have no merit. This was decided by this court when the case was last here, and reference to the opinion then rendered is made for our views. There was no error in the instruction of the court on the measure of damages. The defendant requested the court to charge that:

"The measure of damages for the deposit of such dump is the value of that portion of the surface of said claim covered by said dump."

This request was erroneous, as the dumping of the waste rock and material upon the Oneida claim at any place might damage the whole claim; and, moreover, it was claimed by the plaintiff that the power house, machinery, and blacksmith shop located on the Oneida claim were also damaged.

Complaint is made that the verdict is excessive. This is a subject we cannot consider.

A careful review of the record satisfies us that the judgment below must be affirmed; and it is so ordered.

CYBUR LUMBER CO. v. ERKHART.

(Circuit Court of Appeals, Fifth Circuit. January 19, 1917. Rehearing Denied February 27, 1917.)

No. 3010.

1. MASTER AND SERVANT ⟸189(3)—INJURIES TO SERVANT—"FELLOW SERVANT"—FOREMAN—"VICE PRINCIPAL."

The foreman of a gang engaged in skidding logs out of the woods was a "fellow servant" of one of the members of the gang who was injured, and not a "vice principal" for whose negligence the employer was liable, where he was subject to the orders of a superintendent who was in charge of all the work in that neighborhood, though the latter had not been at the scene of the accident on the day it happened.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 431–435, 445; Dec. Dig. ⟸189(3).

For other definitions, see Words and Phrases, First and Second Series, Fellow Servant; Vice Principal.]

2. MASTER AND SERVANT ⟸107(5)—INJURIES TO SERVANT—SAFE PLACE TO WORK—CONDITIONS SUBSEQUENTLY ARISING.

Where the place originally selected by a foreman to set up a log skidder was safe and the appliances were properly set up, but the place subsequently became unsafe when a small tree was broken off during the operations and the butt was left resting on the stump near a guy wire, the negligence of the foreman in not removing the tree was not within the general rule that the master's duty to make the place of work safe cannot be delegated, but was within the exception to that rule applying where the danger in the place of work arose during the course of the work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 201; Dec. Dig. ⟸107(5).]

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

Action by Corbet Erkhart, by J. H. Erkhart, his next friend, against the Cybur Lumber Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded, with instructions.

This is a writ of error to a judgment of the District Court for the Southern District of Mississippi in a case in which the defendant in error was plaintiff in an action to recover damages for a personal injury sustained by him, while in the employment of the plaintiff in error, which was a lumbering company. The District Judge refused to direct a verdict for the defendant, upon its request, and his refusal is the only error relied upon by the plaintiff in error to reverse the judgment against it.

The facts, which are not in serious controversy, are substantially as follows: Corbet Erkhart, defendant in error, was employed by the plaintiff in error as a "tonger," to assist in the operation of its skidder in pulling logs from the woods adjacent to its skidder. The skidder in question was a "ground skidder," which could be moved from place to place on slides resting on the ground. It was operated by a drum, around which was wound a steel cable, on the end of which cable were tongs, which tongs were taken out in the woods and fastened to the logs to be drawn in to the skidder by the revolutions of the drum. It was the duty of the plaintiff to take the tongs, attached to the end of the cable, from the skidder out into the woods and fasten same to the end of the logs that were to be drawn in. The skidder drew logs in on all sides from a radius of 900 feet by means of this cable attached to the drum on the skidder, which cable ran through a pulley or sheave attached

about 15 or 20 feet in height to a tree. Since the tree was forced to bear the great strain of pulling in the logs through the pulley attached thereto, it was necessary to brace the tree to which the pulley was attached, so that the tree would not be uprooted by the strain. This was done by means of a guy line running from the point on the tree to which the pulley was attached to another tree some 30 or 40 feet away, to which tree the guy line was fastened near the ground. Whenever it became necessary, in the course of the operations, to move the skidder to another scene, it was also necessary to remove the guy line from the tree or object to which it had been attached.

On the date of the accident complained of, a log was being pulled in from the woods by means of the cable and skidder. The log lay to the side, or not directly in front of, the skidder. The plaintiff attached the cable to the log, and it was taken on the "off side" (from the skidder) of a small bay tree, so that, when the cable was pulled by the drum, the little tree, being out of a straight line between the skidder and the log, was broken off about 10 feet high by the cable, the top of the little tree falling on the ground near to and parallel with the guy line of the skidder, but the butt of the little broken tree remained upon the stump, about 10 feet high, where it so remained until the crew prepared to move the skidder a short while afterward.

The testimony of the defendant in error, which is not disputed, was that he was sitting down near the skidder, while witness Batley and witness Gibson were endeavoring to unfasten the guy line of the skidder, which ran along beside, or in the direction of, the little broken tree; that witness Batley had unfastened the guy line at the stump of one tree; and that witness Gibson, up the other tree at the pulley, loosened the guy line there, called out, "Give me some slack," meaning for some one to slacken the guy line so as to facilitate his work up the tree. Plaintiff thereupon got up and walked over to pull on the guy line to give Gibson slack, when the little bay tree, which neither rested on the guy line nor was touched by any one, jumped off the stump, falling on plaintiff's leg, breaking same, and causing the injury complained of.

Gex & Waller, of Bay St. Louis, Miss., and J. C. Henriques, of New Orleans, La., for plaintiff in error.

O. F. Moss, of Lucedale, Miss., and Mize & Mize, of Gulfport, Miss., for defendant in error.

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

GRUBB, District Judge (after stating the facts as above). The plaintiff in the court below relied upon one ground of negligence only, namely, that the defendant was guilty of negligence in that it did not exercise reasonable care to furnish the plaintiff with a safe place in which to work. It was not contended that any part of the plant or appliances used by the defendant were defective. It was not contended that the place where the work was being performed by plaintiff and his fellow workmen was negligently unsafe, when the work was commenced on the morning of the day of the accident. The contention was that it became unsafe after the work was entered upon by reason of a tree having been broken during the progress of the work by one of the logs moved by the skidder, and having been left suspended from the trunk, at the point of the break, and lying parallel to a guy line used in the work, for an unreasonable length of time. The plaintiff and his fellow workmen had been directed by the leader of the gang, Clark, to prepare to move the skidder and to dismantle its rigging for that purpose. After giving this direction, Clark temporarily left the spot and was not present when the plaintiff sustained his injury. After he had

departed, Gibson, a fellow workman of plaintiff, who was up the tree to which the guy lines were fastened, asked the plaintiff, who was seated on the ground at one side, to give the guy line, along, but not upon, which the broken tree lay, slack so as to enable Gibson to unloose the wire from the erect tree up which he was. While the plaintiff was attempting to give slack to the guy wire, as requested by Gibson, the broken tree top fell on him, causing his injury. It may be assumed that the plaintiff was in the discharge of his duties when injured.

[1] It is clear that all of the workmen engaged with the skidder, including Clark, on the day of the accident, were fellow servants of the plaintiff, within the common-law rule of nonliability, which governs the relations of master and servant in Mississippi, except in case of railroad employés. The case of Moss v. Compress Co., 202 Fed. 657, 121 C. C. A. 67, is different from this case, in that in that case the servant, who was held to be a vice principal, was in complete charge of the work of dismantling a compress at a distance from the usual place of business of the defendant, with no one superior to him in the service at the place of work, and with complete control over the means and methods to be employed in the work of demolition. In this case, the evidence shows that the defendant had a superintendent in charge of its operations in the woods, under whom Clark was working and with authority to direct Clark in the means and methods of such operations. The work being done at the time of the accident was part of those operations. It is true that the superintendent was not at the place where the accident happened on the day it happened. It is, however, true that he was in charge of the department of work for the defendant in which the plaintiff was engaged when injured, and that Clark was subordinate to him in that department. It follows that Clark was not in charge of a department of the defendant's service in the sense that would constitute him a vice principal under the federal decisions. We think therefore that the nonliability of a master in Mississippi for the default of a fellow servant precludes a recovery by the plaintiff for the negligence of Clark in this case.

[2] It is contended, however, that the negligence of Clark was in not removing the fallen tree, after its fall and before the accident, and that, a reasonable time having elapsed between these events, Clark's failure constituted negligence in the matter of defendant's nondelegable duty of furnishing the plaintiff a reasonably safe place in which to do his work, and that the fellow-servant rule is no protection to defendant against such a breach of duty. This argument would prevail but for the conceded fact that Clark was guilty of no negligence in the original selection and equipment of the place of work, in the doing of which his acts were binding on the defendant, though he was a mere fellow servant of plaintiff; but, if at all, only in the failure to correct a condition that arose after the work had been entered upon, during its progress, and which was caused by the conduct of the workmen themselves or some of them. It is also true that no vice principal of the defendant was at the place of work, after the condition complained of arose, and saw or should have seen the danger in time to have remedied it before the plaintiff was hurt and negligently failed to do so; nor was there

shown any negligent failure on the part of the defendant to exercise such supervision as was essential to due care. The facts in the record present the ordinary case of an employé, who has been originally furnished with a safe place in which to do his work by his master, injured by a defective condition which arose thereafter and which was created by the fellow servants of the injured employé during the progress of the work and as an incident thereto. It is well settled that an injury due to such a defective condition is caused by the negligence of a fellow servant with respect to a duty that is delegable by the master, and for which the master is not liable. In a case of this kind, the principle that the master is liable when the injury is due to the concurring negligence of himself and that of a fellow servant of the injured person does not obtain, since the negligence in this case was that solely of the fellow servant, and of a kind not legally attributable to the master.

In the case of Dunn v. Great Lakes Dredge & Dock Co., 161 Mich. 551, 126 N. W. 833, the court said:

"A master is under no duty to provide a safe place to work, where the dangers from the place of work arise from the changing conditions in the progress of the work."

In the case of Bennett v. Chrystal Carbonated Lime Co., 146 Mo. App. 565, 124 S. W. 608, the court said:

"Where the place in which a servant works is reasonably safe, and it is the particular work done that renders it unsafe, and the dangers are transitory and inherent in the manner in which the work is done, and the servant performs the work in his own way, the rule requiring a master to furnish a reasonably safe place does not obtain."

In Morgan v. Wabash R. Co., 158 Ill. App. 344, the court said:

The rule that a "master must use reasonable care to furnish a reasonably safe place for his servant to work * * * is * * * subject to * * * one universal exception, * * * that where the master has used reasonable diligence to provide a reasonably safe place for the servant to perform his work, and in the prosecution of that work changes are produced in the conditions of the place where the servant is required to work and these conditions are in the performance of the work for which the servant is employed and only temporary, the rule does not require the master to keep the place reasonably safe at all times under such changed conditions, and the rule has no application where the master does not make or create the conditions, but they are created by the progress of the work and the men engaged in it."

There are many other cases cited in the brief of plaintiff in error to the same effect. We regard the exception too well established to require the citation of further authority.

For the reasons assigned, we think a verdict should have been directed for the defendant upon the evidence in the record, and the judgment is for that reason reversed, and the cause remanded to be proceeded with in conformity with this opinion.

DU PONT v. GARDINER et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 57.

1. INJUNCTION ⟸26(6)—RIGHT TO ISSUANCE—ILLEGAL USE OF PROCESS.
An injunction may be issued to prevent an inequitable use of legal process, and so a court of equity will restrain an action at law, where defendant has a defense in equity which he cannot urge in the action at law; but, if the defense may be urged to the action at law, an injuction is improper.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 35; Dec. Dig. ⟸26(6).]

2. CONTRACTS ⟸94(1)—FRAUD—SEALED INSTRUMENTS.
While at common law the defense of fraud could not be urged against an action on a sealed instrument, the rule was otherwise as to simple contracts.
[Ed. Note.—For other cases, see Contracts, Cent. Dig. §§ 420, 428, 430, 1160; Dec. Dig. ⟸94(1).]

3. EQUITY ⟸153—PLEADINGS—CONSTRUCTION.
While pleadings are not construed in equity with so high a degree of technicality as at law, nevertheless, where allegations are equivocal, they will be construed most strongly against the pleader.
[Ed. Note.—For other cases, see Equity, Cent. Dig. §§ 386–389; Dec. Dig. ⟸153.]

4. INJUNCTION ⟸26(6)—RIGHT TO—DEENSES.
Complainant's bill, seeking to enjoin a suit against him on a contract, alleged that he was induced to sign the contract solely upon representations that were false. No demurrer was interposed, and the answer denied the allegations that the representations which furnished the basis for the contract were false. An injunction was granted, and complainant sought to sustain it on appeal, upon the theory that there is a difference between false and fraudulent representations, and that where representations are merely false, and not fraudulent, relief can be had only in equity. *Held* that, while the bill was ambiguous, yet as the representations, if false, must have been fraudulent, the injunction was improperly granted.
[Ed. Note.—For other cases, see Injunction, Cent. Dig. § 35; Dec. Dig. ⟸26(6).]

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

Bill by T. Coleman Du Pont against George N. Gardiner, upon his death revived against George N. Gardiner, Jr., and others, executors of defendant's last will and testament. From a decree for complainant, defendants appeal. Reversed and remanded, with directions to dismiss bill.

Kellogg & Rose, of New York City (L. Laflin Kellogg and Alfred C. Pette, both of New York City, of counsel), for appellants.

Simpson, Thacher & Bartlett, of New York City (Julius F. Workum and Franklin P. Ferguson, both of New York City, of counsel), for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The plaintiff has obtained an injunction restraining the defendants from prosecuting or taking any further proceedings in an action at law pending in the District Court of the United States for the Southern District of New York, in which they are plaintiffs and he is defendant. This suit was brought originally against George N. Gardiner, the defendants' testator. After the institution of the suit Mr. Gardiner died, and the present defendants were appointed executors under his last will and testament, and both the action at law which has been restrained and the present suit were revived in their names as parties in his place and stead.

The action at law was commenced on May 14, 1913, in the Supreme Court of New York, but was removed into the District Court of the United States for the Southern District of New York on the ground of diversity of citizenship by Mr. Du Pont, defendant therein, who is a citizen of Delaware; Mr. Gardiner being at the time a citizen of New York. The action at law is brought upon a contract alleged to have been made between Gardiner and Du Pont whereby the latter promised to pay to the former, for services rendered and to be rendered in connection with what is referred to as "the Equitable Building deal in the city of New York," $100,000 in cash and $100,000 par value of the common stock of a company incorporated or in process of incorporation for the purchase and carrying out of said deal. It is alleged that the contract is evidenced by a letter reading as follows:

"August 9, 1912.

"Mr. T. Coleman Du Pont, Wilmington, Delaware—Dear Sir: Confirming my conversation with you and recording our understanding in connection with the Equitable Building deal, there is to be paid to Mr. George N. Gardiner a commission, for services rendered and to be rendered, of $100,000 cash and $100,000 par value of the common stock of the company, same to be contingent upon the final closing of the deal now in progress for the purchase of the Equitable site and the erection of a building thereon. The cash commission will be paid out of the first moneys available from the sale of the preferred stock and second mortgage bonds of the company.

"Yours very truly, [Signed] Frank M. Andrews.

"Dear Frank: The above is just as I understand it, and provisions will be made to take care of this as early as possible.

"[Signed] T. C. Du Pont."

Mr. Andrews, it appears, was the architect of the McAlpin Hotel in New York City, and he was endeavoring to promote a project for the acquisition of the site of the former building of the Equitable Life Assurance Society at 120 Broadway in New York City (which building had been burned down in January, 1912), and for the erection of a building thereon. Andrews also desired to become the architect of the new building. Du Pont had been interested with Andrews in the erection of the McAlpin Hotel, and his aid was sought in financing this new project for the erection of a new building for the Equitable. As other persons were necessary in carrying the scheme through, the services of Gardiner were enlisted.

Du Pont now claims that he signed the statement to which his signature is appended above because of the representations made to him by Andrews that Gardiner's services were valuable and that the matter

was "straight" and "all right"; and he asserts that the representations made by Andrews were false. He claims that at the time of signing the statement he knew nothing of what services, if any, had been rendered by Gardiner, and that he relied solely on the representations made by Andrews; the facts being peculiarly and solely within the knowledge of Andrews. He denies that Andrews was his agent, denies that Gardiner rendered any services for him (Du Pont), and in substance and effect denies that Gardiner had, in fact, any contract which entitles him to recover.

According to Mr. Andrews' testimony, Gardiner and Du Pont met at the office of Andrews, at which time matters were talked over and a suggestion was made by Du Pont that perhaps Gardiner would be willing to take his $200,000 in stock, to which the latter replied that he could not afford to take it all in stock, but that he would be willing to take one-half of it in stock, which Du Pont said was acceptable to him. After arranging with Gardiner, Du Pont turned to Andrews and, according to the latter's testimony, said:

"'Frank, if you will embody this conversation and agreement in a letter, and forward it to me, I will put my acceptance on the letter and return it to you;' and turning to Gardiner said: 'Is that sufficient contract for you, Mr. Gardiner, or do you wish a formal contract?' to which Gardiner replied that the letter would be entirely satisfactory to him, and that he wished the matter to be given prompt attention, because he had been worrying Mr. Andrews for some time to have the matter put in final form, and with a clear understanding, to which request Mr. Du Pont answered that he was as anxious to have the matter off his mind as anybody, and that, if the letter were sent, he would attend to it immediately."

[1] At the opening of the case, and before any evidence was taken, the defendants moved to dismiss on the ground that the court as a court of equity had no jurisdiction to restrain the action at law by reason of any alleged fraud, because the contract relied on is not under seal, and a defense based on the fraud alleged could be interposed in the action at law. The court did not take that view of the matter, and the injunction issued. Did the court err?

Ever since the Earl of Oxford's Case, 1 Ch. Rep. 1, the general right of chancery to interfere by injunction for the purpose of preventing an inequitable use of legal process has been recognized in England; neither is it questioned in the United States. There can be no doubt that a court of equity can restrain an action at law in cases in which the defendant has a defense in equity which he cannot interpose in the law court. But the question presented is whether the alleged fraud used to induce Du Pont to enter into the agreement upon which the action at law is brought is purely an equitable defense, of which the party is not entitled to avail himself in the law court. If it is not, and the fraud can be shown in the action at law, the injunction was improvidently issued.

[2] At common law, in an action on a sealed instrument, fraud could not be set up as a defense, except fraud in the actual execution of the instrument. Hartshorn v. Day, 19 How. (U. S.) 222, 15 L. Ed. 605; George v. Tate, 102 U. S. 564, 570, 24 L. Ed. 232; Shampeau v. Connecticut River Lumber Co. (C. C.) 42 Fed. 760; Kosztelnik v. Bethle-

hem Iron Co. (C. C.) 91 Fed. 606. This court has recognized the principle in a number of cases. See Whitcomb v. Shultz, 223 Fed. 268, 275, 138 C. C. A. 510 (1915). And so have the courts of New York. See Jackson v. Hills, 8 Cow. (N. Y.) 290; Dorr v. Munsell, 13 Johns. (N. Y.) 430. In the case of an instrument under seal, it was necessary to resort to equity to cancel the instrument. Taylor v. King, 6 Munf. (Va.) 358, 366, 8 Am. Dec. 746. The principle is that the circumstances show a want of consideration, and in a court of law an instrument under seal could not be avoided on that ground. But in other cases fraud has always been a good defense in an action at law on the contract. Mead v. Bunn, 32 N. Y. 275; Jones v. Emery, 40 N. H. 348; Irving v. Thomas, 18 Mo. 418; Harran v. Klaus, 79 Wis. 383, 48 N. W. 479; Chieves v. Gary, 24 Grat. (Va.) 414. In Such v. Bank of State of New York (C. C.) 127 Fed. 450 (1904) Judge Wallace held that a receipt in full, in the nature of a release, but not under seal, could be avoided at law in a federal court for fraud inducing the settlement pursuant to which it was given, and that the maker was not entitled to resort to equity for its cancellation.

[3, 4] We have discussed the matter upon the theory that the representations alleged to have been false were in fact fraudulent. We are obliged so to regard them. The complainant simply stated in his bill that the representations were false. His allegation is that:

"Said representations were false, and in fact the said George N. Gardiner had not rendered any valuable services in connection with said deal. Said T. Coleman Du Pont was induced to sign said letter solely upon said representations, and would not have signed the same but for the said representations."

In the argument in this court it was contended that a distinction exists between false representations and fraudulent representations, and that where the representations are merely false, and not fraudulent, relief can only be had in equity. A false representation may be either innocent or fraudulent. An allegation in a bill that a representation is false is therefore equivocal. And while pleadings are not construed in equity with so high a degree of technicality as at law, still the rule nevertheless prevails, even in equity, that where allegations are equivocal they will be construed most strongly against the pleader. 16 Cyc. 238. So that, if false representations which are innocent are a good defense in equity, and not in law, and those which are fraudulent are a good defense both at law and in equity, and the complainant simply alleges that the allegations are false, the allegation would seem to be insufficient.

But no demurrer was interposed, and no motion was made to dismiss the bill. An answer was put in which denied the allegation that the representation was false, and the case went to a hearing. Testimony was heard, and the District Judge found that the statement made by Andrews to Du Pont, and which was alleged to have been "a false representation," was fraudulent. The court declares that Andrews' statement was "false, and false in such a way that it must have been fraudulent, although the nature of, or motive for, the fraud remains unknown." The District Judge has issued an injunction staying an ac-

tion at law because of a fraudulent representation, and his action in so doing cannot be sustained. If the representation was false, we have no doubt that it was fraudulent. The representation was of such a nature that it is hardly possible that it should have been made innocently, if false in fact. But, as fraudulent representations have always constituted a perfect defense at law to an action upon a contract not under seal, no necessity existed for the issuance of the injunction.

The attempt, therefore, to restrain the action at law by injunction must fail. No English court is to-day permitted to restrain an action by injunction. The right to do so was taken away by the Judicature Act of 1873, under the provisions of which equitable defenses may be interposed in any action. We have not overlooked the fact that the Congress of the United States in 1915 also passed an act which declares that in all actions at law equitable defenses may be interposed. Act March 3, 1915, c. 90, 38 Stat. 956. That act was, however, not in force when the bill of complaint was filed, which was in May, 1914. The case has been decided, therefore, without reference to it. The result, however, is the same as it would have been, had the statute been applicable.

The decree is reversed, and the injunction vacated, and the case remanded, with directions to dismiss the bill, with costs.

PORTER v. TITUSVILLE FRUIT & FARM LANDS CO.

(Circuit Court of Appeals, Fifth Circuit. January 17, 1917.)

No. 2902.

1. MASTER AND SERVANT ⟸154(1)—WARNING SERVANT—DANGER KNOWN TO SERVANT.

An employer engaged in a dangerous occupation is not obliged to warn an employé, where the latter is aware of the danger accompanying his work.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 308; Dec. Dig. ⟸154(1).]

2. MASTER AND SERVANT ⟸154(1)—WARNING SERVANT—DANGER KNOWN TO SERVANT.

An employer will not be held negligent for failure to warn his employé of dangers accompanying his work, where from the circumstances, a fair-minded person would have concluded that the employé knew of the danger, and misleading conduct or statements of employé may warrant such a conclusion.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 308; Dec. Dig. ⟸154(1).]

3. MASTER AND SERVANT ⟸286(40)—WARNING SERVANT—DANGER KNOWN TO SERVANT.

Where fair-minded persons might draw different conclusions as to an employé's knowledge of dangers incident to his work, or the lack of it, the employer cannot, as a matter of law, be held free of negligence in assuming employé's knowledge of danger and not warning him.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1044; Dec. Dig. ⟸286(40).]

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4. MASTER AND SERVANT ⊂=286(40)—WARNING SERVANT—DANGER KNOWN TO SERVANT—EVIDENCE.

Plaintiff, having once assisted in blasting where charge was exploded by electricity, told employer that he thought he could do blasting with fuse, whereupon the employer did not warn him of danger of caps being exploded by sparks from fuse, and plaintiff was thereby injured. *Held*, that question of defendant's negligence in assuming that plaintiff knew danger, and of not warning him, should have been submitted to jury.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 1044; Dec. Dig. ⊂=286(40).]

5. MASTER AND SERVANT ⊂=154(2)—WARNING SERVANT—DANGER KNOWN TO SERVANT.

Statement by a fellow workman that plaintiff ought not to carry explosive caps when blasting did not necessarily warn plaintiff of danger of explosion from leaving such caps lying around near scene of blasting.

[Ed. Note.—For other cases, see Master and Servant, Cent. Dig. § 309; Dec. Dig. ⊂=154(2).]

In Error to the District Court of the United States for the Southern District of Florida; Rhydon M. Call, Judge.

Action by Raymond L. Porter against the Titusville Fruit & Farm Lands Company. Judgment upon instructed verdict for defendant, and plaintiff brings error. Reversed.

See, also, 219 Fed. 881, 135 C. C. A. 604.

Chas. M. Cooper and Chas. P. Cooper, both of Jacksonville, Fla., for plaintiff in error.

Alston Cockrell and A. W. Cockrell, Jr., both of Jacksonville, Fla., for defendant in error.

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

WALKER, Circuit Judge. As shown by the opinion rendered when this case was here on a former writ of error, the personal injuries complained of by the plaintiff in error were attributed to alleged breaches by the defendant in error of the duty owing by an employer engaged in a dangerous occupation to inform his employé engaged therein of the dangers accompanying work to which the latter is assigned, of which he is not otherwise apprised. Porter v. Titusville Fruit & Farm Lands Co., 219 Fed. 881, 135 C. C. A. 604. The judgment now presented for review followed the granting by the court of a motion, made when the plaintiff rested, for an instructed verdict in favor of the defendant. Evidence introduced by the plaintiff below tended to prove the following state of facts: In January, 1912, when the plaintiff was just past 20 years of age, he was injured as a result of the explosion of dynamite caps which he had placed near by just prior to his lighting a fuse inserted in a cap attached to dynamite used to blow up a stump, the explosion of the caps being caused by a spark or sparks emitted from the burning fuse. At that time the plaintiff had been working for the defendant corporation several months, having been employed as an assistant on a ditching machine, used for digging drainage ditches. For several days before he was

hurt the plaintiff was engaged in making some repairs on that machine, which was not then being operated. He got through with the work on the machine, and also some other work to which he was assigned, the day before he was hurt, and during the evening of that day, in a telephone conversation with Mr. Ellis, an officer or employé of the defendant, who directed employés what work to engage in, he told the latter that he had finished the work on the machine and the other work, and asked what he should do the next day. Ellis asked the plaintiff if there were not some cabbage palms that could be blown up from the ditch so as to prepare ahead. The plaintiff replied that there were, but that the battery that had been used in the blasting work had been taken over to the rock quarry. Ellis then told the plaintiff that there were some fuse and caps at the camp, where the plaintiff was, and that the plaintiff's brother (who was at the camp) would give them to the plaintiff, and asked the plaintiff if he could use them, and the plaintiff said he thought he could. Ellis then told the plaintiff to take one of the men at the camp to help him. The plaintiff had never had any experience in the particular kind of blasting work to which Ellis assigned him. The only experience in blasting work he had had was that during part of one previous day, while he was working for the defendant, he assisted in blasting, when an electric battery was used to explode the cap, the explosion being effected by means of a wire connecting the battery, about 150 feet away, with the cap attached to the dynamite to be exploded. He did not know that caps unconnected with the fuse, but left not far from it, were liable to be exploded by sparks from the burning fuse. He thought that the danger was in the dynamite, and did not understand that the caps contained a dangerous explosive. Ellis did not inquire whether the plaintiff had experience in the kind of work to which he was assigned, and the plaintiff was given no warning or instructions about the danger mentioned or how to avoid it. The next morning the plaintiff took L. R. Houghton, his cousin, who was working for the defendant, to bore the holes for him, and went out to do the blasting as indicated by Ellis. While the two were engaged in the work, and before the plaintiff was hurt, Houghton told the plaintiff that he "hadn't ought" to carry the caps around with him. It was not made to appear that Houghton at that time understood the danger of a cap some distance off being exploded by a spark from the fuse.

[1, 2] The duty of an employer engaged in a dangerous occupation to give warning of dangers accompanying the task to which an employé is assigned is not owed when the latter is aware of and appreciates those dangers. And it may be assumed that the employer is not chargeable with negligence in failing to give warning where any fair-minded person, situated as he was when the direction for doing the work was given, would have concluded that the employé was informed of and appreciated the danger to which he would be exposed, and, further, that misleading conduct or statements of the employé may constitute a sufficient basis for such a conclusion.

[3] But where evidence adduced tends to show that the circum-

stances attending the assignment by the employer to the employé of the dangerous task in which the latter was engaged when he was hurt were such that fair-minded persons, situated as the employer was, might have drawn different conclusions as to the employé's knowledge and appreciation, or lack of knowledge and appreciation, of the dangers incident to the performance of the task, it is not within the province of the court to draw the inference of negligence, or the absence of it, on the part of the employer in making the assignment without giving warning of the danger. Casey-Hedges Co. v. Oliphant, 228 Fed. 636, 143 C. C. A. 158.

[4] Was the undisputed evidence such as to show that any fair-minded person, in the situation of the employer's representative, Ellis, when he directed the plaintiff to do the blasting, must have concluded or assumed that the latter needed no warning, because he already was aware of the danger of the work he undertook to do? A finding that Ellis justifiably so concluded or assumed must have been based upon the evidence of the fact, presumably known to him, of the plaintiff's former participation in blasting work, or upon that to the effect that, when it was suggested to the plaintiff that he undertake the work he was engaged in when he was hurt, he said he thought he could do it. We discover nothing in the evidence to preclude a finding that the danger arising from the proximity to a lighted fuse of dynamite caps other than the one with reference to which the fuse was placed and lighted was one that may not have been disclosed to an inexperienced person engaged in blasting operations as carried on when the plaintiff previously had taken part in such work, as the use of the battery on that occasion dispensed with the necessity of any one being near the fuse when it was lighted, with the result that there was a lack of opportunity to observe that caps near to, but not connected with, the fuse were liable to be exploded by sparks emitted therefrom. And certainly there was no necessary inconsistency between the plaintiff being ignorant of the danger mentioned and his thinking that he could do the work suggested. It is not deemed necessary to say more of the evidence than that we think it was such as not to exclude inferences that the plaintiff was unaware of the dangers to which he exposed himself, and that there was a negligent failure to warn him of the danger and of the necessity of caution in having dynamite caps other than the one to which the fuse was attached far enough away to prevent their being exploded by sparks from the lighted fuse. The evidence as a whole made the question of the defendant's negligence as charged one proper to be submitted to the jury under appropriate instructions.

[5] The evidence as to what Houghton said to the plaintiff about the latter carrying the dynamite caps around with him was not necessarily inconsistent with a conclusion that the plaintiff was not guilty of contributory negligence in having some other caps near by when he lighted the fuse attached to the one to be set off. A finding that that statement was not enough to bring home to the plaintiff an appreciation of the danger and of the necessity of taking the precaution of having caps not intended to be exploded beyond the reach

of sparks from the lighted fuse could not well be regarded as being so arbitrary and in the teeth of undisputed evidence as not to be permissible.

The conclusion is that it was error to take the case from the jury by granting the defendant's motion for a directed verdict.

The judgment is reversed.

LUI HIP CHIN v. PLUMMER, Chinese Immigrant Inspector.

Ex parte LUI HIP CHIN.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2841.

1. ALIENS ⟸23(2)—CHINESE PERSONS—DEPORTATION—MERCHANTS.
That a Chinese person admitted to the United States as a merchant subsequently becomes a laborer is not in itself ground for his deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 77; Dec. Dig. ⟸23(2).]

2. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION.
Where a Chinese person admitted on certificate as a merchant immediately engages in employment as a laborer, that fact has strong retroactive bearing as evidence that he entered with intent to become a laborer.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

3. ALIENS ⟸32(3)—CHINESE PERSONS—DEPORTATION—NOTICE.
Where it is sought to deport a Chinese person who entered as a merchant on the ground that he had later become a laborer, he is entitled, if fraud or misrepresentations in securing his entry are relied on, to be so advised.
[Ed. Note.—For other cases, see Aliens, Dec. Dig. ⟸32(3).]

4. ALIENS ⟸32(8)—CHINESE PERSONS—DEPORTATION—SUSPICION.
Appellant, a Chinese person, who entered the United States as a merchant, was arrested on a charge that he was found in the United States in violation of Chinese Exclusion Act May 6, 1882, c. 126, § 6, 22 Stat. 60, as amended by Act July 5, 1884, c. 220, 23 Stat. 116 (Comp. St. 1913, § 4293), as having secured admission under the section but since having become a laborer. When arrested, he was visiting his brother, and assisting in the latter's restaurant business; but there was no showing that he received compensation, and appellant asserted that it was gratuitous, and that he was investigating business opportunities. *Held* that, while the evidence might raise a suspicion that appellant had entered the country as a merchant intending to become a laborer, such suspicion was not sufficient to warrant his deportation.
[Ed. Note.—For other cases, see Aliens, Cent. Dig. § 84; Dec. Dig. ⟸32(8).]

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

In the matter of the application of Lui Hip Chin, an alien, for a writ of habeas corpus against Lorenzo T. Plummer, Chinese Immigrant Inspector in Charge at Helena, Montana. From a judgment denying

the writ, applicant appeals. Reversed, and applicant ordered discharged.

The appellant, a Chinese merchant of Canton, China, entered the United States on September 30, 1915, at the port of San Francisco. He exhibited to the immigration authorities certain credentials and a draft drawn by a Canton bank on a bank in San Francisco for the sum of $1,000. He was permitted to land as a merchant, and received the usual certificate of identity. He remained at San Francisco about two months, and then went to Mountain Home, Idaho. He had been there about two months, when he was arrested upon proceedings which resulted in an order for his deportation. He thereupon filed in the court below a petition for a writ of habeas corpus, alleging that he had been duly admitted to the United States as a merchant, that the summary hearing which was had before the Chinese immigration inspector was not conducted according to law and the rules and regulations of the Department of Labor of the United States, that the same was unfair and unjust, and that the petitioner had been summarily and arbitrarily deprived of his liberty, that the immigration inspector had grossly abused the discretion vested in him by law and the rules and regulations of the department, and that the evidence at said hearing was incompetent to prove that the petitioner had become a laborer since his arrival in the United States. From the order of the court below denying a writ, the petitioner brings this appeal.

The warrant on which the appellant was arrested charged him with being a Chinese laborer not in the possession of a certificate of residence, and charged that he was found in the United States in violation of section 6 of the Chinese Exclusion Act of July 5, 1884, "having secured admission under said section, but having become a laborer since admission." The warrant for deportation found the appellant to be in the United States in violation of law, following precisely the language of the charge in the warrant for arrest.

P. E. Cavaney, of Boise, Idaho, for appellant.

J. L. McClear, U. S. Atty., and John R. Smead, Asst. U. S. Atty., both of Boise, Idaho, for appellee.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). [1, 2] The evidence that the appellant had performed labor in the United States consisted in testimony that he had, while staying in Mountain Home, worked in the restaurant of his brother, whom he was visiting at that place. He denied that he had received pay for his work, and there was no evidence to the contrary. He admitted that his brother had sent him money to pay his fare to Mountain Home, but he also testified that he had a $500 interest in Fah Wah Company, Dupont street, San Francisco, and that he was in Idaho "investigating business locations." The fact that one who has been admitted into the United States as a merchant subsequently becomes a laborer is not in itself ground for his deportation. In re Yew Bing Hi (D. C.) 128 Fed. 319; United States v. Leo Won Tong (D. C.) 132 Fed. 190; United States v. Foo Duck, 172 Fed. 856, 97 C. C. A. 204; United States v. Hom Lin (D. C.) 214 Fed. 456; Lew Ling Chong v. United States, 222 Fed. 195, 137 C. C. A. 635; United States v. Fong Hong (D. C.) 233 Fed. 168; United States v. Lee You Wing, 211 Fed. 939, 128 C. C. A. 437. But if one who has been admitted on certificate as a merchant immediately on his arrival proceeds to engage in and continues in employment as a laborer, that fact has a strong retroactive bearing as evidence of the intent with which he came. Ong Seen v.

Burnett, 232 Fed. 850, 147 C. C. A. 44; United States v. Yong Yew (D. C.) 83 Fed. 832; Chain Chio Fong v. United States, 133 Fed. 154, 66 C. C. A. 220; Cheung Him Nin v. United States, 133 Fed. 391, 66 C. C. A. 453.

[3, 4] There was no charge that the appellant entered the United States with the intention of becoming a laborer, or that he procured his certificate as a merchant by means of fraud or misrepresentation. If such fraud or misrepresentation was intended to be relied upon as the ground of his deportation, he was entitled to be advised of it. Nor is there anything in the record, aside from the service which he rendered to his brother in Idaho, to suggest that he secured admission to the United States fraudulently, or that he was not a bona fide merchant when he entered, except the casual statement, found in the memorandum decision of the court below, that certain evidence in the case "creates a suspicion, to say the least, that the claim that he intended to engage in the mercantile business was a pretension only." But suspicion is not sufficient to justify deportation on the ground that admission was fraudulently obtained. Ong Chew Lung v. Burnett, 232 Fed. 853, 147 C. C. A. 47. The appellant was possessed of a merchant's certificate duly issued. As the Supreme Court observed in Liu Hop Fong v. United States, 209 U. S. 453, 28 Sup. Ct. 576, 52 L. Ed. 888, the certificate "certainly ought to be entitled to some weight." The court further said:

"While this certificate may be overcome by proper evidence and may not have the effect of a judicial determination, yet being made in conformity to the treaty, and upon it the Chinaman having been duly admitted to a residence in this country, he cannot be deported, as in this case, because of wrongfully entering the United States upon a fraudulent certificate, unless there is some competent evidence to overcome the legal effect of the certificate."

In United States v. Hom Lim (D. C.) 214 Fed. 456, 463, the court, following the decision in the Liu Hop Fong Case, said:

"The decision of his right to enter was presumptively correct, and, unless the United States shows persuasively to the contrary, the mere certificate of admission is sufficient."

In Ex parte Wong Yee Toon (D. C.) 227 Fed. 247, 251, the court said:

"Such a certificate imports at least prima facie verity. It cannot be treated as if it had never existed. Some evidence must be produced to justify the immigrant officials denying to it its usual and appropriate effect."

In Wong Yee Toon v. Stump, 233 Fed. 194, 196, 147 C. C. A. 200, the court said:

"After the certificate is issued, it is our view that the burden is cast upon the government, in case a proceeding is instituted to attack it, to show by testimony which the law recognizes as evidence that it should be annulled before an order for deportation is warranted. * * * It is the privilege of the immigration authorities to prove, if they can, that the certificate is invalid, and that its issue was procured by fraud; but they are not permitted to treat it as a nullity upon mere suspicion and conjecture."

In McDonald v. Siu Tak Sam, 225 Fed. 710, 140 C. C. A. 584, the court said:

"The appellee was regularly admitted on certificate as a Chinese merchant. He had $1,000 on his arrival, and received from China some time later a remittance of an additional $1,000, and at the time of his arrest still had about $1,300 to $1,400. He had continued to seek, and was seeking at the time of his arrest, a place to locate as a merchant. He admitted that he was engaged in ironing some of his own clothing in the laundry of his cousin at Hibbing at the time of his arrest. Accepting the ex parte affidavits of Williams, Mitchell, and Johnson for all that can be claimed for them, they add nothing to his admissions, except that Williams says there was a pile of freshly ironed shirts on the table, where appellee was standing with iron in hand, when he entered the laundry, and that he was dressed as if he were engaged in that sort of work. This evidence falls far short of establishing that appellee was at that time engaged as a laborer, especially so when taken in connection with the other testimony in the case."

In United States v. Yee Quong Yuen, 191 Fed. 28, 111 C. C. A. 500, the court said:

"The worst of his offending was that he worked for his board at a laundry for a few months prior to his arrest, and while he and his father were attempting to find a new business for him. This state of facts, in our opinion, discloses no abandonment of the father's status, or no voluntary adoption of any new status by the son."

A careful consideration of the record, not for the purpose of weighing the evidence, but for the purpose of ascertaining whether the Secretary of Labor had jurisdiction to order the deportation, leads to the conclusion that there is no evidence upon which, as a matter of law, deportation can be based, and that the conclusion that the appellant obtained a merchant's certificate fraudulently rests only upon suspicion and conjecture.

The judgment is reversed, and the cause is remanded, with instructions to discharge the appellant.

TURNER v. WELLS et al.

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917. Rehearing Denied February 13, 1917.)

No. 2798.

1. MINES AND MINERALS ⊂=38(17)—ACTION TO DETERMINE AND ESTABLISH RIGHTS—LOCATION BY GRUBSTAKED PROSPECTOR—EVIDENCE.

Declaration of W., a prospector, grubstaked by plaintiff, and accompanied by B., grubstaked by his mother, that "we discovered and located" claims, is insufficient to show that any of the claims located in the names of B. and his mother were discovered and located by W.; not being inconsistent with his having merely assisted B. in locating them.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 103; Dec. Dig. ⊂=38(17).]

2. MINES AND MINERALS ⊂=99(3)—GRUBSTAKED PROSPECTOR—LOCATION BY PERSON ACCOMPANYING.

That W., a prospector grubstaked by plaintiff, was accompanied by B., grubstaked by his mother, and having an agreement with W. that he should share with W. in any locations made under W.'s grubstake contract, but having no contract with plaintiff, did not prevent B. locating,

free of any right of plaintiff, claims discovered by him, though he was assisted by W. in making the locations.

[Ed. Note.—For other cases, see Mines and Minerals, Cent. Dig. § 224; Dec. Dig. ⇐99(3).]

Ross, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern Division of the Southern District of California; Benjamin F. Bledsoe, Judge.

Suit by T. F. Turner against Kate J. Wells and another. From an adverse decree, plaintiff appeals. Affirmed.

This is a suit to recover a two-thirds interest in certain mining claims alleged to have been located under a grubstake contract. The complaint alleged that in March, 1907, the plaintiff, J. F. Creel, and A. W. Wells entered into a contract, under the terms of which the plaintiff and Creel did furnish Wells a prospecting outfit, consisting of a team of mules, wagon, a mining outfit, tools, supplies, provisions, and money, and Wells agreed to furnish his time and labor in prospecting for lodes and mineral deposits, and to locate and record the same in the names of the three parties as equal owners, and that in carrying out said contract Wells did locate certain designated mining claims, upon all of which Wells made the discoveries and wrote the location notices and performed all the preliminary acts of location; that Kate J. Wells, the appellee, was the wife of A. W. Wells, and Burgess Robinson and Harold E. Robinson were her sons, and they were all aware of the grubstake contract; that in pursuance of a conspiracy entered into between A. W. Wells and Mrs. Wells and her sons, for the purpose of defrauding the plaintiff and Creel of their rights under the contract, all said locations were made in the names of Mrs. Wells and her sons, but that this was not known to the plaintiff or Creel until February, 1912, when Wells disclosed the facts to them; that, immediately after ascertaining the facts, the plaintiff, having received an assignment of Creel's interest to himself, brought the suit. The complaint alleged that Kate J. Wells has extracted large quantities of mineral from said claims, to the value of $100,000, and the prayer was that the plaintiff be decreed to own an undivided two-thirds interest in the said claims, that the defendants other than Kate J. Wells be required to state their respective claims or demands to the mining claims, and that Kate J. Wells be required to account for the plaintiff's share of the profits and proceeds of minerals extracted from the mines. The answer of Kate J. Wells and the Ironsides Mining Reduction & Leasing Company denied knowledge of the grubstake contract, and denied that the claims located in the name of Kate J. Wells or Mrs. A. W. Wells and her sons, or any of them, were discovered or located by said A. W. Wells, or that he wrote the location notices thereof, or performed any of the preliminary acts of location, or had the location notices filed of record, and denied any conspiracy or fraud upon the part of Mrs. Wells and her sons, but alleged that all of said mining claims were discovered and located by Burgess Robinson. The court below, upon the pleadings and the evidence, found that the mines were located by Burgess Robinson, that he was not acting under any grubstake agreement with the plaintiff and Creel, and that the fact that he was in company with A. W. Wells would give the grubstakers no interest in the claims so located.

William B. Ogden and Ralph E. Esteb, both of Los Angeles, Cal., for appellant.

S. E. Vermilyea and S. L. Carpenter, both of Los Angeles, Cal., for appellees.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge (after stating the facts as above). There are certain facts that are well established by the evidence. First, it

is shown, and it is not disputed, that the appellant and Creel entered into a grubstake contract with A. W. Wells; that Wells stated that he did not wish to go into the mountains alone; and that he wished to take Burgess Robinson, his stepson, with him. For the reason that Burgess was then a minor, the plaintiff and Creel did not include him in the grubstake contract, but it was agreed that Wells was to take Burgess with him on his own account, and to settle with Burgess out of his profits in the grubstake contract. Creel and Wells were to share equally, one-third each. Second, it is shown that all the claims in controversy were located in June, July, and August, in 1907, and all of the location certificates, with the exception of two—that of the Iron Max and that of the Golden Rule No. 1—were witnessed by A. W. Wells and were recorded at the request of A. W. Wells. The Iron Max claim was located in the name of Mrs. Wells' two sons. The Beveridge Bell claim and the Kate J. claim were located in the names of Mrs. Kate J. Wells and Burgess. The Catch-em-Mac claim, the Garnet Factor claim, the Golden Rule No. 1 claim, the Golden Rule No. 2, the Golden Rule No. 3, the Grand View claim, the Ironsides claim, and Protection No. 1 claim, were all located in the name of Mrs. A. W. Wells and Burgess. Burgess died in 1908, and A. W. Wells died in September, 1914.

The appellee Kate J. Wells testified that she and her son Burgess were in the mining district in which the claims were located, in 1906 and prior thereto, and that in 1902 she first observed the ground now known as the Ironsides claim, at which time also Burgess was with her; that in the spring of 1907 she furnished supplies to Burgess, aggregating some $340, consisting of money and an outfit of tents, stove, drills, hammers, picks, and everything pertaining to a mining outfit, to go into the district where the claims involved are situated, for the purpose of locating claims; that Burgess wrote her that Wells had told him to go with him; that she wrote back and told him to have nothing to do with Wells, and not to go with him, and warned him "not to have anything to do with the man"; that Burgess was to do work on certain mining claims not involved in this suit, and also to locate the Ironsides claim, the name of which had been selected by her when she was upon the ground. She further testified that, during the spring and summer of 1907, she never at any time had any conversation or communication with Wells, with regard to his locating claims in her name, and never at any time asked him to locate any claims for her, and that at that time she was not on friendly terms with Wells.

Taking the whole of the testimony as to the relation of Burgess to the locations made in the summer of 1907 to be true, it shows that he was acting in a dual capacity; that, while he was accompanying Wells under an agreement with him by which he was to share with Wells in any locations made under the latter's grubstake contract, he was also acting on behalf of his mother, and with the aid of supplies and outfit furnished by her; and that he had no contractual relation whatever with the appellant and Creel. We have to inquire, therefore,

what evidence there is to show that the claims in controversy were located by Wells on behalf of himself and the plaintiff and Creel, and that they were not located by Burgess on behalf of his mother and himself.

As determinative of this question, the appellant relies upon a letter written by Wells to the appellant on February 11, 1912. In that letter, after reciting the grubstake contract and the relation of Burgess thereto, the writer narrated what he and Burgess did. He wrote that, in the White Mountains, "we discovered and located" in the name of the appellant, Creel, and Wells, certain claims, seven in number (claims not involved in the present controversy); that on certain dates designated "we discovered and located" the claims in controversy; that some time in August Mrs. Wells came to their camp, and was present at the time of the location of the Kate J. claim; "that all claims were located in the names of Kate J. Wells and Burgess Robinson, my name not appearing on any of them; and that, in every instance where the name appears as Mrs. A. W. Wells, I personally wrote the location notice myself." Wells proceeded to state that his letter was written only "with the intent and purpose of putting you in a proper position to secure your rights under the agreement on the hill, to which so far you have been wrongfully detained," and that he would at any time make oath that every word he had written is true, and would appear in any court to testify to the same. It appears, however, that prior to writing that letter, Wells had written a letter to one Wilson, stating that he had paid for Burgess' share of the provisions "out of my own money. He located some very valuable claims, as I will tell later on. The first claim he located he put his name and mine as locators. Then I thought there might be complication with the parties who grubstaked me, and I told him to put my wife's name on the location in place of mine, and the balance of the claims were located in his name and the name of Mrs. A. W. Wells, so my name does not appear on any of the location notices."

[1, 2] Passing by the question whether or not Wells' letter to the appellant was admissible in evidence, and accepting it as evidence of all that it contains, we think it falls short of showing that Wells located any of the claims in controversy. There can be no question but that Burgess, supplied as he was with provisions and outfit by his mother, and acting under her directions, was free, so far as any obligation to Creel and the appellant was concerned, to make locations in his own and his mother's name, and it is not inconsistent with the record to infer that all the claims in controversy were thus discovered and located by him. Wells' letter to the appellant seems to have been written in the belief that all locations made by him or by Burgess were necessarily subject to the grubstake contract, and that belief, we think, accounts for his assumption that the appellant and Creel had been wronged. His statement that "we discovered and located" the claims is not inconsistent with the theory that he assisted Burgess in locating them. The fact that he did so assist Burgess, and wrote the location notices and witnessed and recorded the same, did not of itself subject the locations to the appellant's grubstake contract. We consider

the evidence insufficient to establish any interest of the appellant in the mining claims in controversy.

The decree of the court below is affirmed.

ROSS, Circuit Judge, dissenting.

DELAWARE, L. & W. R. CO. v. DONAHUE.

(Circuit Court of Appeals, Second Circuit. December 13, 1916.)

No. 101.

1. CARRIERS ⟸284(2)—CARRIAGE OF PASSENGERS—DECREE OF COURT—MALICIOUS ACTS.

While carriers of passengers are bound to exercise due care, from ordinary to the highest possible degree according to circumstances, they are not held to the highest degree of care to provide against malicious or criminal interference with their apparatus by strangers.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1128–1130, 1132, 1134, 1135, 1173; Dec. Dig. ⟸284(2).]

2. CARRIERS ⟸320(22)—INJURIES TO PASSENGER—EVIDENCE—NEGLIGENCE.

Where a witness for the carrier testified that he opened a switch and set the lamp so that it showed safety, which testimony, if standing alone, would require a directed verdict for defendant in an action by a passenger for injuries resulting from the derailing of the train at the switch, but a witness for plaintiff testified that he examined the switch lamp immediately after the accident and found it was not burning, the court was justified in submitting the issue of the carrier's negligence to jury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1318; Dec. Dig. ⟸320(22).].

3. CARRIERS ⟸320(22)—CARRIAGE OF PASSENGERS—QUESTION FOR JURY—USE OF SWITCH.

In an action for injuries to a passenger caused by the derailing of a train at an open switch which defendant claimed was opened maliciously, where there was evidence of the existence of a switch stand which automatically signaled if it was interfered with, but no testimony that such a stand was in use on branch lines similar to one on which the accident occurred, while defendant called expert witnesses to testify to the contrary, it was error to submit to the jury the question whether it was negligence for the carrier not to use such a stand, since such issue was one for railroad experts, not one which the ordinary juror was competent to determine from his own knowledge or experience.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 1216, 1318; Dec. Dig. ⟸320(22).]

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

Action by Elsie Donahue, an infant, by Thomas Donahue, her guardian ad litem, against the Delaware, Lackawanna & Western Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed.

F. W. Thomson and W. S. Jenney, both of New York City, for plaintiff in error.

Edward J. McCrossin, of New York City, for defendant in error.

Before COXE, WARD, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is an action by a passenger to recover damages for personal injuries resulting from the defendant's train running off the main track on an open switch to a siding, where it was derailed and wrecked. The accident happened October 17, 1914, about 5:50 p. m., on the Syracuse Division of the defendant's road, where there was but a single track over which there was comparatively little traffic. Both the engineer and fireman were killed, so that no testimony could be obtained from them. The jury gave a verdict for $10,000 for the plaintiff, to the judgment entered on which this writ of error is taken.

The apparatus controlling the switch in question was as follows: There was a vertical standard on the side of the track the lower end of which rested in a lock cavity, where it was held by a spring. The standard could not be turned until it had been lifted out of the cavity against the pressure of this spring by a foot lever. On the standard was a target consisting of two metal shields at right angles to each other, both sides of one being painted white, the safety signal, and of the other red, the danger signal. Above this target was an oil lamp with four glass eyes, two showing green for safety, corresponding with the white blades of the target, and two red for danger, corresponding with the red blades of the target. The standard after being lifted from the foot lock could be turned one-quarter of a circle by another lever; the effect being to change the color of the blades and of the lamp from safety to danger, or vice versa, showing up and down the track.

In addition to this, there was also at the side of the track a bolt lock operated by a lever which clamped the switch point tightly to the main rail when the switch was closed.

Both the lever on the switch stand and the lever on the bolt lock were kept immovable by padlocks, so that the switch could not be changed until both locks had been opened. There is a stretch of straight level track of over half a mile on each side of the switch. In order to open the switch, if it is closed, the padlocks must be unlocked, then the bolt lock lever must push the clamp out from the switch point, then the standard of the switch stand must be raised out of the foot lock by the foot lever, then the standard must be turned one-quarter of a circle by the other lever, and finally dropped back again into the foot lock.

The defense is that an insane boy, out of a desire to revenge himself on a brakeman who had put him off a train, broke both padlocks, opened the switch, and changed the lamp so as to show the safety color green up and down the track. This boy Campbell, who had been convicted of murder in the first degree and afterwards committed to the New York Asylum for Insane Criminals, was called by the defendant and testified that he did all these things and changed the lamp so that, although the switch was open, it showed the safety signal up and down the main track.

The plaintiff's witness Casey testified that he examined the lamp immediately after the accident and found that it was not burning.

[1] Although carriers of passengers are bound to exercise care from ordinary to the highest possible degree, according to circumstances, they are not held to the highest degree of care to provide against mali-

cious or criminal interference with their apparatus by strangers. Fredericks v. Northern Central R. Co., 157 Pa. St. 103, 27 Atl. 689, 22 L. R. A. 306.

[2] If Campbell's explanation of the accident had been the only one in the case, a verdict should have been directed for the defendant. Casey's testimony, however, raised a question of the defendant's negligence which justified the court in submitting the case to the jury. However, we think exceptions were taken to the charge which require a new trial.

[3] The plaintiff offered proof that there is a standard switch stand which, as soon as the switch is touched, gives an additional electric automatic caution signal at a point some distance beyond the switch itself; for instance, if there were a block system on the road, into the next block. This testimony could only be made relevant or material if followed by proof that such a switch was commonly used by railroad companies on similar stretches of track in similar country with similar traffic. No such proof was offered by the plaintiff, and the defendant called witnesses to the contrary.

The court charged:

"The plaintiff says the defendant should have had a block system; that such a system would have lessened the chances of tampering with signals so as to leave a green light showing north and south when the switch was open. If that is so, you are to consider whether such a block system was reasonably necessary in the exercise of the care required.

"You are to remember that this was a single-track road, that the switch used was a standard switch, that many of the switches in the country do not have caution lights ahead and are not a part of a block system, and it is expensive to install them. It may not be reasonable or possible to install such a system on a small branch road, nor possible or reasonable to put in such systems everywhere at once. In view of the size of the traffic of the branch road, the expense of all the conditions, it is for you to determine whether it was negligence on the part of the defendant not to have installed a different switch, or whether, if one had been installed, it would have prevented the derailing of the train by Campbell, if you find he did it. If you find he derailed the train and the switch installed was a proper one, under all the circumstances, or even if not a proper one, that the presence of the caution light would not have prevented the injury, then you are to find for the defendant. If, on the other hand, you find that the defendant should have installed, in the exercise of proper care, a caution signal, and that had it done so it would have prevented the injury, then you must find for the plaintiff, if you find that the plaintiff was injured."

The defendant excepted to the submission of these questions to the jury. Whether an additional automatic distance signal should have been installed by the defendant was a question for railroad experts. It was not a subject which the ordinary juror was competent to determine from his own knowledge or experience. It would be easy for a jury in every case to conceive of something that might have been done to make the situation safer. But the measure of the railroad company's duty is good railroad practice, and not any and every precaution which a jury may think would have prevented the accident. All the testimony on the subject being that on such a track as the one in question it was not customary to use this additional distance signal, the question wheth-

er or not the defendant was negligent in not using it should not have been submitted to the jury. New York Central R. Co. v. Banker, 224 Fed. 351, 355, 140 C. C. A. 37.

The judgment is reversed.

In re MENZIN.

In re LEWIS FRANK & SONS.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 89.

1. BANKRUPTCY ⟸405—DISCHARGE—OPPOSITION—"PARTIES IN INTEREST"—"LIQUIDATED."

Where petitioners' claim has been approved, admitted by the bankrupt, objected to by no one, and allowed by the referee, it should be regarded as "liquidated" within Bankr. Act July 1, 1898, c. 541, § 57, 30 Stat. 560 (Comp. St. 1913, § 9641), relating to proof of claims; and so petitioners are "parties in interest" within section 14 (Comp. St. 1913, § 9598), and as such are entitled to oppose the bankrupt's discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. ⟸405.

For other definitions, see Words and Phrases, First and Second Series, Interest; Liquidated.]

2. BANKRUPTCY ⟸426(1)—DISCHARGE—DEBTS DISCHARGED.

Under Bankr. Act, § 17 (2) (Comp. St. 1913, § 9601), declaring that a discharge in bankruptcy shall not release the bankrupt from liabilities for obtaining property by false pretenses, a claim for obtaining property by false pretenses, though proven against the bankrupt's estate, is not barred by his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 787, 792; Dec. Dig. ⟸426(1).]

3. BANKRUPTCY ⟸405—PROOF OF CLAIM—EFFECT.

A creditor, whose claim was based on the obtaining of goods under false pretenses, may, having proven his claim in bankruptcy, oppose the bankrupt's discharge, notwithstanding the institution of a suit on the claim in the state courts; the claim not being one dischargeable in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 709–711; Dec. Dig. ⟸405.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Abraham Menzin. Petition by Lewis Frank & Sons to revise an order of the District Court (233 Fed. 333) staying petitioners from proceeding under their specifications filed in opposition to the bankrupt's discharge, unless they discontinue an action brought by them against the state court. Order reversed.

Isidor Sachs, of New York City, for bankrupt.

Harry L. Herzog, of New York City, for petitioner.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. This is a petition to revise an order of the District Court staying the petitioners from proceeding under their specifications filed in opposition to the bankrupt's discharge, unless within five days from the entry thereof they discontinue an action brought by them against the bankrupt in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District.

November 10, 1914, Abraham Menzin was adjudicated a bankrupt, and he scheduled Lewis Frank & Sons, the petitioners, in his Schedule A(3), as merchandise creditors in the sum of $545.75.

February 4, 1915, at the first meeting of creditors, Frank & Sons filed proof of their claim in the sum of $545.75, stating at the same time that it was for goods obtained from them by the bankrupt upon false and fraudulent representations. The claim was allowed by the referee.

October 22d the bankrupt applied for a discharge, and Frank & Sons filed specifications in opposition under section 14b(3).

December 14th, Frank & Sons brought an action against the bankrupt in one of the Municipal Courts of New York City to recover $499.92 as damages sustained by them as the result of his obtaining the goods in question on credit by fraudulent representations.

May 8, 1916, the bankrupt applied for an order staying Frank & Sons from proceeding under their specifications in opposition to his discharge.

[1] The petitioners' claim for $545.75 has been proved, admitted by the bankrupt, objected to by no one, allowed by the referee, and not reconsidered on motion of the trustee. It should certainly be regarded as "liquidated" under section 57 of the Bankruptcy Act, and, if so, the petitioners are a "party in interest" entitled to oppose the bankrupt's discharge under section 14.

[2] If the indebtedness to the petitioners was incurred in obtaining property from them by false pretenses, it will not be affected by the discharge as provided in section 17(2).

The District Judge said in his opinion that the petitioners' counsel admitted at the hearing that their claim was unliquidated and as a consequence not provable. Therefore he held that they had elected not to prove their claim in contract in the bankruptcy proceedings, but to bring suit in the state court in tort on the ground that it was not dischargeable, and therefore they were not a "party in interest" entitled to oppose the discharge. Counsel says that the court misunderstood him, and the record satisfies us that this must have been the case. Therefore we need express no opinion on the question decided by the lower court.

[3] We are quite clear that the petitioners may proceed with their suit in the state court in tort notwithstanding that they first proved their claims in bankruptcy on contract. In Friend v. Talcott, 228 U. S. 27, 33 Sup. Ct. 505, 57 L. Ed. 718, the Supreme Court held that a creditor who had unsuccessfully opposed a composition and discharge in bankruptcy, and who had accepted his dividend thereunder, might still sue for the balance of his claim in the state court, on the ground that the indebtedness was fraudulently contracted and

therefore excepted by the act from the operation of the discharge. In reply to the argument that, having proved his claim on contract in bankruptcy, the creditor had elected between inconsistent remedies and waived his right to sue for the balance in tort in the state courts, Mr. Chief Justice White said, at page 38 of 228 U. S., at page 507 of 33 Sup. Ct. [57 L. Ed. 718]:

"This being the case, it is urged that an election and waiver resulted from the act of the debtor in proving his claim as on contract and thus taking advantage of the bankruptcy proceedings and thereby obtaining rights or benefits which he would not have had if he had stayed out and thus saved his right to be freed from the operation of the discharge. But this distinction is also wholly without foundation. Its error lies in assuming that the right which the bankrupt act confers upon enumerated classes of debts to be exempt from the operation of a discharge rests upon the conception that such debts are exempt because they are excluded from the act and may not participate in the distribution of assets. That is to say, the confusion lies in not distinguishing between creditors who are excluded from the bankrupt act and those who, although included therein, have had conferred upon them the benefit of an exception from the operation of the discharge. Even a superficial analysis of the text of the Bankruptcy Act will make this clear. Thus sections 63a and 63b (30 Stat. 562) enumerate the debts which may be proved and which are therefore entitled to participate in the benefits of the act and are bound by its provisions, including a discharge. Section 17 (30 Stat. 550) enumerates the debts not affected by a discharge; that is, those exempted from its operation. It is apparent that the exemptions do not rest upon any theory of the exclusion of the creditor from the bankrupt act or of deprivation of right to participate in the distribution, but solely on the ground that, although such rights are enjoyed, an exemption from the effect of the discharge is superadded. The text leaves no room for any other view, since the exceptions in terms are accorded to certain classes of debts which are provable under section 63, and therefore debts which are entitled to participate in the distribution; the language being: 'A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as,' etc."

The order staying the petitioners is reversed, with costs.

In re STATES PRINTING CO.

SCHOENBROD v. CENTRAL TRUST CO. OF ILLINOIS.

(Circuit Court of Appeals, Seventh Circuit. December 8, 1916. Rehearing Denied January 24, 1917.)

No. 2385.

1. BANKRUPTCY ⊂=166(4)—PREFERENCES—KNOWLEDGE OF INSOLVENCY.

Under Bankr. Act July 1, 1898, c. 541, § 60b, 30 Stat. 562 (Comp. St. 1913, § 9644), making void a transfer within four months before the filing of the petition in bankruptcy, if the bankrupt was then insolvent, and the transfer operated as a preference, and the person receiving it had reasonable cause to believe that it would effect a preference, it is not necessary that the creditor actually knew that the debtor was insolvent, but the preference is void if he had information sufficient to have put an ordinary business man on inquiry as to facts which would show insolvency, and his failure to make such inquiry is no excuse.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 250, 251, 256; Dec. Dig. ⊂=166(4).]

2. BANKRUPTCY ⟸303(3)—PREFERENCES—KNOWLEDGE OF INSOLVENCY—EVIDENCE.

A creditor to whom an insolvent corporation assigned an account on Sunday, two days after a judgment was recovered against it, and the day before a petition in bankruptcy was filed, *held* chargeable under the evidence with facts sufficient to put him on inquiry, which would have disclosed the insolvency.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 462; Dec. Dig. ⟸303(3).]

Mack, Circuit Judge, dissenting.

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

In the matter of the States Printing Company, bankrupt. Action by the Central Trust Company of Illinois, trustee in bankruptcy, against Maurice S. Schoenbrod, to set aside an assignment of an open account as a preference. From a decree of the District Court, reversing the order of the referee, and granting the relief asked by the trustee, the creditor appeals. Affirmed.

Action by trustee in bankruptcy to set aside an assignment of an open account of $2,359.50, executed by bankrupt to appellant on February 27, 1915, to secure a past indebtedness of $4,500. The District Court reversed the order of the referee and granted the relief asked by trustee.

The States Printing Company, engaged in job printing in Chicago, was declared a bankrupt upon petition of the creditors filed March 1, 1915. At that time its debts aggregated $67,854.15, of which $32,664.97 were secured, and of the unsecured obligations $700 were for unpaid taxes and $2,838.24 for unpaid wages. The secured indebtedness was represented by five chattel mortgages, duly recorded, covering all the bankrupt's property. Two of the five were blanket mortgages, and covered everything save four linotypes. The latter machines were covered by a chattel mortgage to the manufacturer. All accounts were assigned as fast as they arose. The business of the company was conducted by the receiver and trustee until it was sold as a going concern for the gross sum of $38,000. One of the unsecured creditors obtained a judgment for $2,000 against the bankrupt on February 26th.

Appellant is the brother-in-law of the president and manager of the bankrupt. Nathan Schoenbrod, his brother and an attorney, had an office in the suite occupied by bankrupt's regular attorneys. It was appellant's brother, and not bankrupt's regular attorney, who drew the assignment in question at the request of the bankrupt's manager, with whom he spoke about the judgment taken the day before. Appellant, a dentist, also residing in Chicago, loaned bankrupt $4,500 a little over a year previous, without taking any note, and without fixing any time for payment either for the interest or the principal. It was for "60 or 90 days, or 4 months, or whenever I need the money," as Schoenbrod expressed it. Several requests for extension of time of payment were granted, and then demands for payment were made; such demands growing more insistent. Creditor stated that he made a request, followed by a statement that "I had to have it." Bankrupt's reply was that he "could not" repay it, and further time was asked, which creditor refused. A few weeks before the adjudication in bankruptcy, appellant was still more insistent.

Schoenbrod had no distinct recollection of time, place, conversation, or circumstances surrounding the delivery of the assignment. In fact, he was not sure whether his brother or his brother-in-law gave the assignment. No conversation was held between the parties at this time, so he says. The relations between appellant and his brother-in-law, president of the bankrupt company, were friendly, and that between the appellant and his brother, the attorney who drew the assignment, were close. The families, all living in Chicago, visited back and forth.

The referee in bankruptcy in his order found "that the said Maurice S. Schoenbrod did not, at the time of the acceptance of the said assignment, have reasonable grounds to believe that the said bankrupt was insolvent."

Louis J. Blum, of Chicago, Ill., for appellant.
E. C. Tourje, of Chicago, Ill., for appellee.

Before KOHLSTAAT, MACK, and EVANS, Circuit Judges.

EVANS, Circuit Judge (after stating the facts as above). [1] The answer to the following question disposes of this case: Does the evidence justify the order of the District Judge in reversing the order of the referee, based on the finding quoted above?

In support of the referee's order it is urged that, as the referee has seen and heard the witnesses, his finding will not be disturbed, if supported by credible evidence; and it is contended that a finding "on reasonable grounds to believe," as used in section 60b of the Bankrupt Act is a finding of fact. In re Eggert, 102 Fed. 735, 43 C. C. A. 1. But it was not necessary for the court to find the creditor actually knew the bankrupt was insolvent. Nor was appellant's conclusion that he had no ground to believe the bankrupt was insolvent controlling, if an ordinary business man with the same facts would have believed the bankrupt was insolvent. Wright v. Sampter (D. C.) 152 Fed. 196; Pratt v. Columbia Bank (D. C.) 157 Fed. 137.

[2] The facts, from which the ultimate conclusion was to be drawn, were not much in dispute. The issue was a narrow one. Most of the elements necessary to constitute a preference were admitted. The assignor was admittedly insolvent in fact. The assignment admittedly operated to give the appellant a preference. The only remaining element, the issue in dispute, was over the creditor's reasonable ground for belief.

Upon the facts related we believe the ordinary business man, or the "ordinarily intelligent man," would have been put on inquiry to make the investigation, which, if made, would have spelled insolvency. No ordinary business man, with $4,500 of unsecured, past-due indebtedness, unable to force the payment of even a part of it, would have received an assignment from his brother-in-law on a Sunday morning, the day before a petition in bankruptcy was filed, two days after a judgment was taken, without making inquiry, either by an examination of the records, or by questioning the officer, then and there present, and ready and able and willing to give him the information that would have established beyond a doubt the insolvency of the assignor. A creditor is chargeable with certain information though he may have no actual knowledge thereof. Failure actually to investigate will afford no excuse, where the creditor's information was sufficient to have put the ordinary business man upon inquiry. In re McDonald & Sons (D. C.) 178 Fed. 487; Rogers v. Page, 140 Fed. 596, 72 C. C. A. 164; McElvain v. Hardesty, 169 Fed. 31, 94 C. C. A. 399; Huttig Mfg. Co. v. Edwards, 160 Fed. 619, 87 C. C. A. 521.

We cannot escape the conclusion that the answer to the determining question put in the first paragraph must be in the affirmative and

that the District Court was correct in reversing the order of the referee.

The decree is affirmed.

MACK, Circuit Judge (dissenting). The referee saw the witnesses; the conclusions of the District Judge and of this court are based entirely upon the transcript of testimony heard by the referee; I am not prepared to say that the evidence irresistibly points to but one conclusion, that the creditor had reasonable ground to believe this debtor insolvent at the time of the transfer.

NEW YORK CENT. & H. R. R. CO. v. SALKAUKUS.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 39.

1. MASTER AND SERVANT ⟸203(3)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

   Employés engaged in unloading car wheels from a railroad car do not, where the wheels were not loaded in accordance with the established practice, assume the risk of injury as an ordinary risk of the business.

   [Ed. Note.—For other cases, see Master and Servent, Cent. Dig. § 543; Dec. Dig. ⟸203(3).]

2. MASTER AND SERVANT ⟸217(25)—INJURIES TO SERVANT—ASSUMPTION OF RISK.

   A servant assumes extraordinary risks which are obvious and the danger of which he appreciates.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 593, 594, 598; Dec. Dig. ⟸217(25).]

3. MASTER AND SERVANT ⟸288(6)—INJURIES TO SERVANT—ASSUMPTION OF RISK—JURY QUESTION.

   Though a railroad employé, unloading from a railroad car wheels which were not piled in the usual way, noticed that the wheels were in an upright position, such employé will not, as a matter of law, be deemed to have assumed the risk that they might fall, where he testified he did not appreciate the danger and the question is properly left to the jury.

   [Ed. Note.—For other cases, see Master and Servant, Cent. Dig. §§ 1010, 1021; Dec. Dig. ⟸288(6).]

Hough, Circuit Judge, dissenting.

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

Action by Peter Salkaukus against the New York Central & Hudson River Railroad Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

A. S. Lyman, of New York City, for plaintiff in error.

B. S. Yankaus, of New York City, for defendant in error.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

WARD, Circuit Judge. The plaintiff brought this action at common law against his master to recover for personal injuries on the ground

that the master did not use ordinary care to give him a safe place in which to work.

[1-3] A manufacturer of car wheels at Albany, N. Y., loaded an open car with wheels, which subsequently arrived at the defendant's yard at Mott Haven, New York City. The practice in loading is to lay down wheels three deep flat on the floor in three piles across one end of the car, and then to stand up the rest of the wheels on their edges in three rows lengthwise of the car but slanting toward the flat wheels. This obviously gives a position of stability. The wheels weigh from 625 to 675 pounds each. When the car arrived at the yard at Mott Haven, it stood north and south, and the unloading began at the south end, where some of the wheels had fallen down. These were removed, and then the plaintiff with his mate began to move the wheels that were standing up. The practice in unloading is for one man to put a stick into the axle hole and hold the wheel up while his mate rolls it to the end of the car, where it is lifted out by a hoist. When the plaintiff and his mate had moved about 20 wheels and one-third of the car was clear, the plaintiff put his stick into the axle hole of the outside wheel in the center row, and his mate rolled it some two or three feet the plaintiff holding the stick and turning with the wheel toward the south end of the car. At this moment six of the outside wheels on the westerly row fell forward, one of which struck and injured the plaintiff's left foot. The wheels were standing upright, and, as the result showed, in a dangerous position. Considering their weight, it can hardly be assumed that they were jolted into this position on their journey. The fair supposition is that they were improperly loaded by the shipper. This, however, makes no difference, because it is quite clear that they made the place unsafe to work in. There is no evidence that the plaintiff or his mate did anything to contribute to the fall of the wheels, so that the only question is, Did he assume the risk? As the loading was not in accordance with the established practice, the risk was not assumed by the plaintiff as an ordinary risk of the business. But the servant also assumes extraordinary risks which are obvious and the danger of which he appreciates. The plaintiff admitted that he saw these wheels were standing upright, but said that he did not appreciate the danger. Though the question whether he was not bound to do so was a very close one, Judge Veeder declined to decide it as matter of law, and submitted it to the jury. We are not disposed to differ with him.

The judgment is affirmed.

HOUGH, Circuit Judge (dissenting). With the statement of facts contained in the opinion of the court I entirely agree.

The rule of law was stated by this court in New York, etc., R. R. v. Vizvari, 210 Fed. 127, 126 C. C. A. 632, L. R. A. 1915C, 9, that, "where the facts are clearly established and the conclusion to be drawn from the facts is a matter which cannot reasonably be the subject of any doubt," the question is for the court. The further statement on the same page that it is radically unsound to view as one of law a claim of negligence on undisputed facts must be regarded as obiter. Thus in

many litigations it is for the court to fix the standard of reason. This court has often done so; compare Lindsay v. New York, etc., Co., 112 Fed. 384, 50 C. C. A. 298; Terry v. Schmidt, 116 Fed. 627, 54 C. C. A. 83; Brown v. Hitritz, 192 Fed. 528, 113 C. C. A. 84, with the Vizvari Case, and the present opinion.

To say, in effect, that a man does not assume the risk of a danger simple, obvious, known to him, and revealed by his own labors is not, in my judgment, reasonable. Therefore I dissent.

FRED GRETSCH MFG. CO. v. SCHOENING et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 55.

CUSTOMS DUTIES ⇐22—PROHIBITION OF IMPORTATION—GOODS WHICH "COPY OR SIMULATE" REGISTERED TRADE-MARK.

The object of Act Feb. 20, 1905, c. 592, § 27, 33 Stat. 730 (Comp. St. 1913, § 9513), prohibiting the entry of imported merchandise which shall "copy or simulate" a trade-mark registered under it, is to protect the public against spurious goods identified by trade-mark as genuine, and does not protect the owner of a registered trade-mark against the importation by third persons of the genuine article under that trade-mark.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 18; Dec. Dig. ⇐22.]

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

Suit by the Fred Gretsch Manufacturing Company against Michael E. Schoening and another. From an adverse order, defendants appeal. Affirmed.

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

H. Snowden Marshall, U. S. Atty., of New York City, for appellant Malone.

Isaac B. Owens, of New York City, for appellee.

Before COXE, WARD, and ROGERS, Circuit Judges.

WARD, Circuit Judge. This is an appeal from an order of Judge Hough granting a preliminary injunction requiring the defendant Schoening to withdraw his notice of ownership of the trade-mark "Eternelle" filed with the Department of the Treasury under section 27 of the Act of February 20, 1905, so far as it applies to violin strings manufactured under that name by C. A. Mueller in Germany, and enjoining the defendant Malone, collector of the Port of New York, from longer detaining the violin strings manufactured by Mueller under the name "Eternelle," consigned to the complainant, and requiring him to deliver the same to the complainant.

It appears that for many years past C. A. Mueller of Unterwiesenthal, Saxony, Germany, has manufactured and sold violin strings identified by the trade-mark "Eternelle." Defendant Schoening manufac-

tures no strings, but has the exclusive agency for the sale of Mueller's strings in the United States, and on or about July 14, 1908, with Mueller's approval, registered the word "Eternelle" as a trade-mark belonging to him in the United States Patent Office, which registration he filed with the Department of the Treasury.

July 7, 1915, the complainant purchased a package of Mueller's genuine "Eternelle" violin strings in Germany, which are the strings consigned to him now in the possession of the defendant Malone and which he as collector of the port refuses to permit to be entered.

It is said that there is no proof that the strings in question were made by Mueller, but under all the circumstances of the case we think it is sufficiently established.

Section 27 of the act of 1905 is as follows:

"That no article of imported merchandise which shall copy or simulate the name of any domestic manufacture, or manufacturer or trader, or of any manufacturer or trader located in any foreign country which, by treaty, convention, or law affords similar privileges to citizens of the United States, or which shall copy or simulate a trade-mark registered in accordance with the provisions of this act, or shall bear a name or mark calculated to induce the public to believe that the article is manufactured in the United States, or that it is manufactured in any foreign country or locality other than the country or locality in which it is in fact manufactured, shall be admitted to entry at any custom house of the United States; and, in order to aid the officers of the customs in enforcing this prohibition, any domestic manufacturer or trader, and any foreign manufacturer or trader, who is entitled under the provisions of a treaty, convention, declaration, or agreement between the United States and any foreign country to the advantages afforded by law to citizens of the United States in respect to trade-marks and commercial names, may require his name and residence, and the name of the locality in which his goods are manufactured, and a copy of the certificate of registration of his trade-mark, issued in accordance with the provisions of this act, to be recorded in books which shall be kept for this purpose in the Department of the Treasury, under such regulations as the Secretary of the Treasury shall prescribe, and may furnish to the Department fac similes of his name, the name of the locality in which his goods are manufactured, or of his registered trade-mark; and thereupon the Secretary of the Treasury shall cause one or more copies of the same to be transmitted to each collector or other proper officer of customs."

Before the passage of this act, it was the law of this circuit that it was not an infringement of a trade-mark to sell the genuine goods identified by the mark so marked. Exactly that thing was held by Judge Wallace in Appollinaris Co. v. Scherer (C. C.) 27 Fed. 18. The company had the sole agency for the sale of Saxlehner's Hunyadi Janos water in the United States and registered the name as a trade-mark in the Patent Office. Scherer, the defendant, bought the genuine water in Europe, imported it to the United States and sold it under that name. This was held not to be an infringement of the company's rights. So, in Russia Cement Co. v. Frauenhar, 133 Fed. 518, 66 C. C. A. 500, the defendant bought the complainant's glue in barrels and then bottled it with a label describing it as the complainant's glue bottled by the defendant. This was held to be fair competition. The rationale of both decisions is that the defendant in each case was selling the genuine article identified by the trade-mark and the public was not misled, but was getting exactly what it paid for. These deci-

sions, however, were made before the act in question was passed. Assuming that Congress could protect the owner of a registered trade-mark against the importation by third parties of the genuine article under that trade-mark, has it done so? We think not. The act prohibits the entry of imported merchandise which shall "copy or simulate" a trade-mark registered under it. The obvious purpose is to protect the public and to prevent any one from importing goods identified by their registered trade-mark which are not genuine. In this case, however, the imported goods were the genuine articles identified by the trade-mark. We assume that Schoening has a valid trade-mark, even if he does not manufacture the strings, Menendez v. Holt, 128 U. S. 514, 9 Sup. Ct. 143, 32 L. Ed. 526, applying to the whole of the United States, and still are of opinion that it is not infringed by one who buys in Germany the genuine article identified by the trade-mark, imports it into the United States, and sells it so marked here.

The order is affirmed.

EDWARD HINES LUMBER CO. et al. v. BOWERS.

(Circuit Court of Appeals, Fifth Circuit. January 19, 1917.)

No. 2907.

TRIAL ⊂=11(3)—TRANSFER FROM EQUITY TO LAW—ADEQUATE REMEDY AT LAW—ATTORNEY'S FEES.

A bill by an attorney to recover his fees by attachment on lands of the defendants within the state, which shows that the defendants were foreign corporations, but does not negative that they were doing business within the state, having an agent there on whom process could be served so as to bring them personally within the jurisdiction of the court, does not show that the remedy at law was inadequate, and therefore, after removal to the federal court, it should have been transferred to the law docket under Judicial Code, § 38 (Act March 3, 1911, c. 231, 36 Stat. 1098 [Comp. St. 1913, § 1020]), providing that the District Court shall proceed in suits removed to it the same as if the suit had been originally commenced therein, and Equity Rule 22 (33 Sup. Ct. xxiv), providing that if it appear at any time that any suit in equity should have been brought as a suit in law, it shall be forthwith transferred to the law side.

[Ed. Note.—For other cases, see Trial, Cent. Dig. § 30; Dec. Dig. ⊂=11(3).]

Appeal from and in Error to the District Court of the United States for the Southern District of Mississippi; Henry C. Niles, Judge.

Suit by E. J. Bowers against the Edward Hines Lumber Company and others, originally begun in the state court and removed to the United States District Court. Decree for the plaintiff after defendants' motion to transfer to the law side of the court had been denied, and defendants appeal and bring error. Reversed and remanded, with instructions to transfer the cause to the law docket, and writ of error dismissed.

The record shows that appellee and defendant in error filed his bill of complaint in the chancery court of Harrison county, Miss., against the appellants and plaintiffs in error on the ground that they were nonresidents of

Mississippi, alleging that appellants and plaintiffs in error were due him the sum of $10,000 for services alleged in said bill of complaint, having employed him as attorney to defend said appellants and plaintiffs in error in a certain suit filed in the chancery court of Pearl River county, Miss., wherein the state of Mississippi had sued them for the purpose of confiscating certain lands owned by them in the state of Mississippi because the quantity of land owned by said appellants and plaintiffs in error in Mississippi was in excess of the amount allowed by law for them to hold.

At the February term, 1915, of the chancery court of Harrison county, Miss., petition was filed by appellants and plaintiffs in error for the removal of said cause to the District Court of the United States for the Southern Division of the Southern District of Mississippi.

On the 10th day of February, 1915, order of removal of said cause to the said federal court was granted by the chancery court of Harrison county, Miss.

On March 6, 1915, the appellants and plaintiffs in error filed their answer in said federal court to the bill of complaint of appellee and defendant in error in this cause, admitting his employment by them, and setting up that the sum of $10,000, as a fee for the services rendered by him in the suit stated was exorbitant, and stating that they were ready, willing, and able, and always had been, to pay appellee and defendant in error a reasonable fee for his services in said suit.

On August 4, 1915, the appellants and plaintiffs in error filed a motion in the federal court to transfer the instant cause from the equity side of the court, where it was then docketed, to the law side of said court for the following reasons: (1) It is a suit for quantum meruit only. (2) It is not a suit in equity, but is a common-law action. (3) The bill of complaint shows on its face that it is not an equity suit, but a common-law action. (4) Equity is without jurisdiction in this case, and complainant has a complete and adequate remedy at law. (5) That the state chancery court would have no jurisdiction of this case had it not been for the statute of Mississippi, authorizing attachment in cases where defendants are nonresidents of Mississippi, which practice cannot affect the practice in United States courts. (6) And for other reasons to be assigned on the hearing. Said motion was, on the 16th day of August, 1915, taken under advisement by the court until the February term, 1916, of said court.

On Monday, the 21st day of February, 1916, the court convened its regular February term, and on said day overruled the motion of appellants and plaintiffs in error which it had under advisement to transfer the cause from the equity side to the law side of the court. The cause then proceeded to trial. Appellee and defendant in error introduced a number of witnesses, who testified that a fee of $10,000 was reasonable. Appellants and plaintiffs in error introduced no evidence as to the amount of the fee.

The court, after hearing all of the evidence in the case, rendered a judgment for $11,150 in favor of the appellee and defendant in error, which was the $10,000 sued for, with interest thereon from the 23d day of March, 1914, at 6 per cent., to the 23d day of February, 1916, making $1,150, both principal and interest amounting to $11,150, from which decree the appellants and plaintiffs in error have brought the record to this court, both by appeal and writ of error.

J. H. Mize, of Gulfport, Miss., for appellants and plaintiffs in error.

W. A. White and E. J. Bowers, both of Gulfport, Miss., for appellee and defendant in error.

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

PARDEE, Circuit Judge (after stating the facts as above). [1] It was contended in argument by the counsel for the appellee that, without regard to any statute giving a remedy by attachment, the suit was

maintainable in a court of equity to enforce the payment of the plaintiff's demand out of property of the defendants situated in Mississippi because of the lack of an adequate legal remedy, in that the defendants were beyond the territorial jurisdiction of the court and out of reach of legal process. The state of facts relied on to support the claim of equitable jurisdiction is not shown by the averments of the bill. As to the corporation defendants it was averred that each of them is a corporation of the state of Illinois, having its domicile in that state. It is not negatived that each of them, at the time the suit was brought, was doing business in the state of Mississippi, having an agent or agents there, upon whom in person process against the corporation could have been effectively served. The absence or inadequacy of a legal remedy to enforce the plaintiff's demand is not shown.

By the record this is an action to recover a moneyed judgment for breach and nonperformance of a simple contract. It is well settled that such an action cannot be prosecuted on the equity side of the courts of the United States. Scott v. Neely, 140 U. S. 106–110, 11 Sup. Ct. 712, 35 L. Ed. 358; Cates v. Allen, 149 U. S. 451, 13 Sup. Ct. 883, 977, 37 L. Ed. 804; and see McConnell v. Provident Savings Life Assurance Co., 69 Fed. 113, 16 C. C. A. 172. Section 38 of the Judicial Code provides:

"Sec. 38. The District Court of the United States shall, in all suits removed under the provisions of this chapter, proceed therein as if the suit had been originally commenced in said District Court, and the same proceedings had been taken in such suit in said District Court as shall have been had therein in said state court prior to its removal."

Rule 22 (33 Sup. Ct. xxiv) Equity Rules of the Supreme Court provides:

"If at any time it appear that a suit commenced in equity should have been brought as an action on the law side of the court, it shall be forthwith transferred to the law side, and be there proceeded with, with only such alteration in the pleadings as shall be essential."

It follows that there was reversible error in overruling the motion to transfer this action to the law docket for trial as an action at law.

The decree appealed from is reversed, and the cause is remanded, with instructions to transfer the same to the law docket, and thereafter proceed according to law, the costs of appeal to be paid by the appellee.

The writ of error sued out is dismissed, at the cost of plaintiffs in error.

In re A. D. MATTHEWS' SONS, Inc.

In re KUHN.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 82.

1. BANKRUPTCY ⟸303(1)—TRUST FUNDS—CLAIMANT.
Complainant conducted a department in the store of the bankrupts, disposing of its goods under an agreement that the bankrupts should make collections and should account for such sums monthly. After bankruptcy, claimant asserted rights in the funds received by the trustee on the ground that the bankrupts had agreed to keep all moneys received from the sale of claimant's goods in a separate fund in trust for claimant. *Held*, that claimant had the burden of clearly tracing the proceeds of the sales of its goods into some specific fund or property in the hands of the trustee, and, where the evidence leaves the matter in doubt, it must be resolved in favor of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 458, 459; Dec. Dig. ⟸303(1).]

2. BANKRUPTCY ⟸140(3)—TRUSTEES—RIGHTS OF—TRUST FUNDS.
Where the bankrupts dissipated trust funds so received by withdrawing them from the account in which they were deposited, subsequent deposits to the credit of the same account cannot as against the trustee be considered as restoring the trust funds.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

3. BANKRUPTCY ⟸140(3)—TRUSTEES—RIGHTS OF.
In such case, where claimant failed to show that the trust funds received by the bankrupts were deposited in any special account, being able only to show that such moneys were either deposited or kept as store cash, and there was no showing that any such funds passed to the trustee, claimant is not entitled to relief; cash not being traced by showing that it went into the general estate of the bankrupts.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⟸140(3).]

Petition to Revise Order of the District Court of the United States for the Eastern District of New York.

In the matter of the bankruptcy of A. D. Matthews' Sons, Incorporated. Petition by John J. Kuhn, trustee, to revise an order of the District Court. Order reversed.

The bankrupts kept a department store wherein the Standard Fashion Company conducted a "department." The fashion company paid rent for floor space in the bankrupts' premises, and there sold its own goods, by its own clerks. The purchasing public bought (so far as it was informed) from the bankrupts. Cash sales went into the general funds of Matthews Company, if the sale price was C. O. D. the bankrupts collected, goods were charged to those who kept accounts with the bankrupts, and the latter received payment as for their own goods.

This relation lasted for some time, and there was evidence that until about three months before failure the bankrupts settled an account monthly with the fashion company, crediting sales and collections and charging rent and advances and expenses of various kinds—principally the wages of the clerks or salesmen working for the fashion company in the department so as aforesaid conducted in the bankrupts' store.

After adjudication the fashion company petitioned for an order on the trustee directing him to pay, out of the funds received by him from the bankrupts, the amount of sales by petitioner's department during the three months aforesaid (less usual rent and charges) upon the ground that (as pleaded) bankrupts had agreed "to keep all moneys received (from sale of petitioner's goods) in a separate fund in trust for the benefit of your petitioner (and) to account to your petitioner for all moneys received by" them.

An order was entered directing the trustee to make the payment prayed for; this proceeding was brought to review that order.

Jacob J. Lesser, of New York City, for trustee in bankruptcy.

James B. Sheehan, of New York City, for Standard Fashion Co.

Before WARD, ROGERS, and HOUGH, Circuit Judges.

HOUGH, Circuit Judge (after stating the facts as above). That Matthews & Co. agreed to keep the proceeds of fashion company's sales "in trust" for the latter's benefit we shall assume, but not decide.

[1] With such assumption made, the burden of proof was upon the fashion company to clearly trace the proceeds of said sales into "some specific fund or property" in the hands of the trustee in bankruptcy (In re McIntyre, 185 Fed. 96, 108 C. C. A. 543; In re Ennis, 187 Fed. 728, 109 C. C. A. 476; In re Brown, 193 Fed. 24, 113 C. C. A. 348, affirmed as Schuyler v. Littlefield, 232 U. S. 707, 34 Sup. Ct. 466, 58 L. Ed. 806; In re See, 209 Fed. 174, 126 C. C. A. 120); and if petitioner did not succeed in carrying that burden of identification, if the evidence left the matter in doubt, such doubt must be resolved in favor of the trustee (Schuyler v. Littlefield, supra, 232 U. S. at page 713, 34 Sup. Ct. 466, 58 L. Ed. 806).

The petitioner sought recovery of proceeds of all sales after January 31, 1915, and until April 26th, when bankruptcy supervened, and to that end alleged that all cash from sales in Matthews' store had been deposited in the Columbia Bank, though bankrupts had also an account with the Mechanics' Bank for the collection of checks. The proof was that cash received went to one of the two banks, or was kept in the store; and used for current expenses.

[2] On April 5th the account in Columbia Bank was overdrawn, and on March 10th the Mechanics' Bank had but $145.05 of bankrupts' money. If there had been any trust funds in either bank, they had therefore been dissipated except as to $145.05, nor can subsequent deposits to the credit of the same account be considered (per se) as restoring the trust. Schuyler v. Littlefield, supra; American Can Co. v. Williams, 178 Fed. 420, 101 C. C. A. 634.

[3] This reduces the petitioner's demand to such sale proceeds as went into the bank account after April 5th and March 10th, respectively, plus $145.05 in Mechanics' Bank. There is no proof whatever that any specific amounts of petitioner's money were kept in "store cash," much less that any such amounts passed into the trustee's possession.

But further there is no proof as to what bank or fund received any of petitioner's money; for all that appears it may all have been kept in the store, or all put in either bank. In other words, the most that petitioner can do toward bearing the burden of proof is to show that its

money was put in three funds, or some one or more of them; but when or in what proportions cannot be spelled out. Such evidence amounts to no more than showing that somewhere there was in bankrupts' possession or under its control, at all the times complained of, more cash or credits than petitioner now claims. This is not identification at all, nor is it tracing, for cash is never traced by showing that it went into the general estate; and the proof here goes no further. Let the order under review be reversed, with costs of this court.

In re HOLLINS et al. In re EVERETT. In re HILLQUIT et al.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 41.

BANKRUPTCY ⟸387—COMPOSITION WITH CREDITORS—EFFECT.

Bankr. Act July 1, 1898, c. 541, § 70f, 30 Stat. 565 (Comp. St. 1913, § 9654), declares that upon confirmation of a composition offered by a bankrupt the title to his property shall thereupon revest in him, while section 21g (section 9605) provides that a certified copy of an order confirming a composition shall constitute evidence of the revesting of title to his property in the bankrupt. A composition offered by a bankrupt was confirmed. Thereafter stocks and bonds or other property which the bankrupt had pledged was delivered by the pledgee to the receiver in bankruptcy, and claims were asserted to such stocks and bonds. *Held* that, as none of the property was in the hands of the receiver before confirmation of the composition, the bankruptcy court was without jurisdiction to entertain claims to such property; the pledgee having no right to deliver it to the receiver in bankruptcy.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 603–605, 607–616; Dec. Dig. ⟸387.]

Petition to Revise Order of the District Court of the United States for the Southern District of New York.

In the matter of the bankruptcy of Harry B. Hollins and others. Petition by A. Leo Everett, as receiver, to revise an order of the District Court (230 Fed. 920), made on application of Morris Hillquit and others. Order reversed and set aside.

See, also, 230 Fed. 917.

Beekman, Menken & Griscom, of New York City (S. Stanwood Menken and William C. Armstrong, both of New York City, of counsel), for alleged bankrupts.

Lexow, Mackellar & Wells, of New York City (T. Tileston Wells, of New York City, of counsel), for receiver.

Hillquit & Levene, of New York City (Alexander Levene, of New York City, of counsel), for Morris Hillquit.

Before COXE, WARD, and ROGERS, Circuit Judges.

ROGERS, Circuit Judge. The order involved was made in the Bankruptcy Court after a composition offer had been accepted. The composition was confirmed on June 29, 1914. The order referred

to directed the special master to take proof of claims to stocks, bonds, or other property which the alleged bankrupts had pledged to the Hanover National Bank of the City of New York, and which had been turned over by the bank to the receiver in bankruptcy in November, 1915, which was much more than a year after the composition had been confirmed, and which several individuals alleged they were entitled to receive. The bank delivered to the receiver 62 shares of the common stock of Burns Bros. of the par value of $100 each, and $50,000 par value Grand Valley Irrigation 6 per cent. bonds, and the sum of $125 in cash; the latter representing a dividend on this stock of Burns Bros., which had been collected by the bank. The special master to whom these claims were referred reported that in his opinion the decision of this court in Re Hollins, 229 Fed. 349, 143 C. C. A. 469, which had been handed down on January 11, 1916, and after the matter had been referred to him by the District Judge, ousted him and the District Court sitting in bankruptcy of jurisdiction of the claims filed. On the coming in of this report, the District Judge filed an opinion in which he declared that the facts in the two cases were distinguishable. He said:

"It seems to me that this case is distinguishable from In re Hollins & Co., Ex parte Hollins & Co. (The Chase National Bank Fund) [230 Fed. 917], because several of the claimants here are also creditors whose claims as such were reserved in the order of confirmation for future liquidation. This court, under section 12e [Comp. St. 1913, § 9596], has power to distribute the consideration, and it cannot do this without liquidating the claims. It cannot liquidate the claims until the fund is effectually distributed, since the fund measures the amount left over of the customers' securities, and it is for the value of those securities that they claim to be creditors. If the court had no custody of the fund, this would be a difficulty, perhaps insuperable; but it has, and, having the fund, it has a duty towards its distribution."

He thereupon vacated and set aside the report of the special master and referred the matter back for the further taking of testimony and the making of a further report, entering an order to that effect. It is this order which the petitioner is now asking to have revised.

The Bankruptcy Act, § 70f (Comp. St. 1913, § 9654), declares that:

"Upon the confirmation of a composition offered by a bankrupt, the title to his property shall thereupon revest in him."

And section 21g of the act (section 9605) provides that:

"A certified copy of an order confirming a composition shall constitute evidence of the revesting of the title of his property in the bankrupt, and if recorded shall impart the same notice that a deed from the trustee to the bankrupt if recorded would impart."

But this court, in Re Hollins, supra, in passing on these provisions of the act said:

"So in the case at bar the composition restored the estate to the bankrupt and revested the title thereto in H. B. Hollins & Co. That being so, there was no authority in the District Court to exercise jurisdiction of the claim which these petitioners assumed to bring before it by the petition filed on April 21, 1915. The parties cannot by consent invest a court with jurisdiction or power not authorized by law or conferred upon it by the Constitution. The fact that the respondents obtained the securities from the Chase National Bank at a time when the District Court as a court of bankruptcy had the estate of

H. B. Hollins & Co. in its custody, and that the receiver in bankruptcy, acting under the court's order, made no objection to the delivery by the Chase National Bank of the securities to the respondents upon the payment by the latter of the debt due from H. B. Hollins & Co. to the bank, can make no difference. At the time the court confirmed the composition, the property now sought to be recovered was not in the custody and control of the court. It is true that, where jurisdiction has attached and the cause of action or subject-matter is legally and properly within the power and cognizance of a court, it may proceed upon consent or stipulation with reference to the matters before it. 11 Cyc. 675. But at the time this proceeding was begun the cause of action or subject-matter was not legally and properly within the power and cognizance of the District Court."

This court is unable to distinguish the facts of this case from the facts in the former case. In each case the property involved reached the hands of the receiver after the confirmation of the composition. At the time confirmation was had, none of the property here involved was in the custody or control of the bankruptcy court, but all of it was on deposit in the Hanover National Bank.

We have no doubt of the correctness of our former decision. The Bankruptcy Act in express terms declares that upon confirmation of a composition the title of the bankrupt to his property "shall thereupon revest in him." After the composition was confirmed, the receiver had no right to receive any property as the property of the bankrupt, and the bank had no right to turn over the stocks, bonds, and cash to him, and the bankruptcy court as such was without jurisdiction to pass upon claims made by third parties to the property thereafter turned over.

The order of the District Court is reversed, vacated, and set aside.

YAZOO & M. V. R. CO. v. ZEMURRAY.

(Circuit Court of Appeals, Fifth Circuit. January 16, 1917. Rehearing Denied February 27, 1917.)

No. 2909.

1. CARRIERS ⟸194—COLLECTION OF FREIGHT CHARGES—LIABILITY OF CONSIGNOR—ELECTION BY CARRIER.

Though the carrier can, notwithstanding the usual clause of the bill of lading as to delivery to the consignees on payment of the freight, and regardless of the ownership of the goods, waive its lien and recover the freight from the consignor, where the carrier attempted to collect from the consignee but through error collected only part of the amount due, and could thereafter have collected the balance from the consignee who owned the goods, from other goods in its possession, it will be bound by its election to collect from the consignee and not permitted to sue the consignor for the balance.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 870–872; Dec. Dig. ⟸194.]

2. COURTS ⟸289—JURISDICTION—FEDERAL QUESTION.

An ordinary action by a carrier to collect a freight bill from the consignor after it failed through error to collect the full amount from the

consignee involves no action under Elkins Act (Act Feb. 19, 1903, c. 708, 32 Stat. 847 [Comp. St. 1913, §§ 8597–8599]), or any other interstate commerce laws, and therefore does not give the federal court jurisdiction where the amount involved is less than $3,000.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 830; Dec. Dig. ⊂=289.]

3. LIMITATION OF ACTIONS ⊂=21(4) — THREE-YEAR STATUTE — ACTION FOR FREIGHT.

Where a shipment was legal in all respects, an action by the carrier to collect the portion of the freight which it omitted to collect through mistake was barred in three years under the Louisiana law.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. § 95; Dec. Dig. ⊂=21(4).]

In Error to the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

Action by the Yazoo & Mississippi Valley Railroad Company against Samuel Zemurray. Judgment for defendant, and plaintiff brings error. Affirmed.

Gustave Lemle, of New Orleans, La., for plaintiff in error.

Solomon Wolff, of New Orleans, La., for defendant in error.

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

PARDEE, Circuit Judge. [1] The facts of this case and the reasons for judgment in the District Court are fully stated in the opinion of the court overruling the motion for a new trial, as follows:

"In this case the plaintiff sues for $36 freight on a shipment from New Orleans, La., to Natchez, Miss. The jury was waived, and the case tried in open court on the pleadings, admissions of counsel, and some evidence. The facts are not in dispute, and are as follows: Zemurray sold a carload of ripe bananas to A. Pegano at Natchez, Miss., terms f. o. b. New Orleans, La., but before shipping them required the purchaser to deposit the price in a bank in Natchez subject to his draft. The car was shipped consigned to Pegano, and the railroad issued its bill of lading in the usual form. The proper amount of freight was $45, but the railroad made delivery to Pegano and by error collected only $9. Thereafter demand was made on Pegano for the balance. He did not pay. The attorneys for the railroad wrote him several letters, but did not sue him. The railroad made demand on Zemurray. He advised it of his method of making the sale, declined to pay the difference in freight, and subsequently advised the railroad of other shipments made to Pegano that might have been reached by process. It is not shown that Pegano was insolvent, and he was doing business at the time this suit was entered. There was judgment in favor of the defendant, and plaintiff has applied for a new trial.

"The plaintiff contends that a carrier may waive its lien and deliver the freight and hold either the consignee or consignor, and this regardless of the usual clauses in bills of lading as to delivery to the consignees, he paying freight, and regardless of the ownership of the goods. Many cases have been cited, and the rule contended for seems to be supported by the weight of authority.

"However, in deciding the case against the plaintiff, I did so because I was satisfied the railroad could have collected from the consignee, if it had sued him; that having elected to collect the freight from the consignee, who was the owner of the fruit and bound to pay the freight ultimately, it would be inequitable to permit the carrier to change its base and proceed against

the consignor, who was only technically liable. Conceding that Zemurray was primarily liable to the railroad because of having made the contract, the mode of shipment was prima facie notice to the carrier that the shipper had parted with ownership on delivery of the goods to it and that the shipment was for account of the consignee. Before suit, the railroad was advised of the actual facts, and property of the consignee subject to execution pointed out. Considering all this, I see no reason to change my opinion.

"The motion for a new trial will be denied."

We might rest our decision upon the facts and reasons as given by Judge Foster, but we deem it proper to go further.

[2] On the facts stated, we doubt the jurisdiction of the court on the ground that the amount involved is less than $3,000. It appears to be a case of ordinary collection of a freight bill wherein the carrier through error and neglect failed to collect the stipulated freight from the consignee, and now sues the consignor.

We find no question in this case involving the Elkins law, or any other interstate commerce laws.

[3] Since the shipment was regular in all respects and the only thing complained of is the failure of parties responsible to pay the freight, we are also of opinion that even on the case made the plaintiff in error delayed too long to bring suit, and his claim is prescribed under Louisiana law by three years as pleaded in the case.

Waiving, however, the question of jurisdiction, we find no reversible error in the proceedings of the District Court.

Judgment affirmed, with costs.

PEOPLE'S BANK OF PLAQUEMINE v. ERWIN, Undercurator, et al. (two cases).

In re L. DANOS PLANTING & MFG. CO.

(Circuit Court of Appeals, Fifth Circuit. January 8, 1917. Rehearing Denied February 27, 1917.)

Nos. 2975, 3003.

1. MORTGAGES ⟸298(3)—DISCHARGE—EFFECT.
Where notes secured by a mortgage came into the possession of the maker, such notes and pro tanto the mortgage securing them were thereby extinguished as to third persons, no matter what would be the effect of a reissue of the notes between the maker and a second holder.
[Ed. Note.—For other cases, see Mortgages, Cent. Dig. §§ 841, 843–846, 864; Dec. Dig. ⟸298(3).]

2. BANKS AND BANKING ⟸161(1)—AUTHORITY OF BANKS—COLLECTION.
Where a bank received notes for collection only, it was without authority to extend the maturity of the notes or sell them, in the absence of express authority.
[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 554, 558–561, 564; Dec. Dig. ⟸161(1).]

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3. BANKS AND BANKING ⊂⊃161(1)—COLLECTIONS—SALE OF NOTES—AUTHORITY—PROOF.

Notes secured by a mortgage were deposited with a bank for collection only. The bank disposed of the notes to third persons, and they came into the possession of the maker, who pledged them with the bank. Thereafter the maker became bankrupt, and on bankruptcy sale the bank bought in the property mortgaged to secure the notes, tendering such notes in payment. *Held*, that as it was to the disadvantage of the holder of the notes, who deposited them with the bank, for such notes to be negotiated, instead of paid, he holding other notes, as the value of the security would have been increased by such payment, the bank could not use such notes in defraying the purchase price, without proving its authority to sell the notes.

[Ed. Note.—For other cases, see Banks and Banking, Cent. Dig. §§ 554, 558–561, 564; Dec. Dig. ⊂⊃161(1).]

Petition to Superintend and Revise and Appeal from the District Court of the United States for the Eastern District of Louisiana; Rufus E. Foster, Judge.

In the matter of the bankruptcy of the L. Danos Planting & Manufacturing Company. Proceeding between William L. Erwin, undercurator, and the People's Bank of Plaquemine and others, with Emile Hirsch as intervener. Petition by the Bank to superintend and revise the decree. Decree affirmed, and petition denied.

The following is the opinion of the trial court by Foster, District Judge:

In this matter the material facts as found by the master may be briefly stated as follows: Milly plantation was owned in equal indivision by Louis Danos and Samuel O. Le Blanc. Danos purchased the half interest of Le Blanc for $75,000 entirely on credit and gave his 31 notes, of various denominations, maturing in from one to six years, and secured by the hypothecation of the whole plantation. Thereafter the Louis Danos Planting & Manufacturing Company, the bankrupt herein, was organized and acquired the plantation, assuming as part of the purchase price $60,000 of the said notes then outstanding. This same plantation was surrendered by the bankrupt and sold in these proceedings free of liens. By the settlement of the community in a suit for divorce, Mrs. Samuel O. Le Blanc, now Mrs. Harvey, acquired $50,000 of these notes and deposited them with the People's Bank for safekeeping and collection. At different times the People's Bank sold some of these notes, the whole amounting to $20,000, and finally these same notes got back into the possession of Louis Danos, their maker, who was still liable to third holders. Louis Danos in turn pledged the notes to the People's Bank. The bank purchased Milly plantation at the bankruptcy sale for $59,075, and now tenders in part payment of the purchase price these same notes.

The master considered that the notes in question were acquired by the bank from Louis Danos, the maker, after maturity and with notice; that therefore they are not entitled to compete with other notes held by innocent third persons, and recommended a decree in accordance. The People's Bank excepted to the master's conclusions of law, but not to any finding of fact. Mrs. Harvey and Emile Hirsch, holders of others of the notes, have excepted to the master's finding of facts that the notes had been sold by the bank, instead of having been paid, and also say the master should have found that the notes had been surrendered to the bankrupt in payment of stock in that company. Considering the ultimate conclusions of the master, the last exception is unimportant.

[1-3] As to the first exception, of course, they, and pro tanto the mortgage securing them, were extinguished as to third persons, no matter what would be the effect of a reissue of the notes as between the maker and the second

holder. The bank received the notes for collection only, and therefore was not the agent of Mrs. Le Blanc, now Mrs. Harvey, to either extend the maturity of the notes or sell them in the absence of express authority. Cheney v. Libby, 134 U. S. 82, 10 Sup. Ct. 498, 33 L. Ed. 818. Mr. Dunlap, the president of the bank, testified that he had sold the notes, and that he must have been authorized to do so, or he would not have so acted. He testified that he had no letter of authorization, and it is in evidence that his principal was at that time out of the state of Louisiana, so that verbal authority would have been impossible. With regard to some of the notes, a letter of Mrs. Harvey is produced and relied upon as authority to sell; but it is not sufficient. It was to the advantage of Mrs. Harvey that the notes be paid at maturity, as the security for her remaining notes was thereby increased. It must be presumed that an agent would do nothing against the interest of his principal. Considering that the interests of the bank are opposed to its former principal, the burden was on it to show clearly it had the authority to sell the notes, and that burden has not been sustained. The exception therefore will be maintained. Furthermore, I must agree with the master in his ultimate conclusion that the bank could not tender the notes because it received them after maturity from the maker with knowledge.

There will be a decree requiring the People's Bank as purchaser of the plantation to pay the entire purchase price in cash, and denying it a recovery on the said mortgage notes held by it out of the fund to the prejudice of the other holders of the outstanding mortgage notes, but reserving its rights to participate in the distribution of the estate as an ordinary creditor.

J. H. Pugh, of Plaquemine, La., and Edw. N. Pugh and Walter Lemann, both of Donaldsonville, La., for petitioner and appellant.

J. H. Morrison, of New Roads, La., and Paul G. Borron, of Plaquemine, La., opposed.

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

PER CURIAM. On careful consideration of the involved facts and circumstances shown by the record, we conclude that the reasons given by the District Judge fully support the decree rendered.

The decree appealed from is affirmed, and the petition to superintend and revise is denied.

BALDWIN v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. January 22, 1917.)

No. 2923.

1. CRIMINAL LAW ⟸753(2)—TRIAL—DIRECTING ACQUITTAL—SINGLE COUNT.
The refusal of a charge requested by accused, directing the jury to find him not guilty under one count contained in the indictment, is not error, though the evidence did not sustain a conviction under that count, since the court need not require a finding on each count specifically, and the giving of that charge would tend to confuse and mislead the jury.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 1727, 1729; Dec. Dig. ⟸753(2).]

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2. CRIMINAL LAW ⊜1167(2)—APPEAL—HARMLESS ERROR—ERROR AFFECTING ONE COUNT.

Where the evidence abundantly supported more than one of the five counts charging the defendant with violating Drug Registration Act Dec. 17, 1914, c. 1, 38 Stat. 785, and the sentence imposed was such as could have been imposed under section 9 of that act for a single offense, the judgment will not be reversed for errors affecting only one count.

[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 3101; Dec. Dig. ⊜1167(2).]

In Error to the District Court of the United States for the Northern District of Texas; Edward R. Meek, Judge.

J. E. Baldwin was convicted of violating the Drug Registration Act of December 17, 1914, and he brings error. Affirmed.

A. S. Baskett, of Dallas, Tex., for plaintiff in error.

Jas. C. Wilson, U. S. Atty., and Wm. E. Allen, Asst. U. S. Atty., both of Dallas, Tex.

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

PER CURIAM. This case was submitted to the jury on the first, second, seventh, eighth, and ninth counts of the indictment, each of which undertook to charge the commission by the defendant of an offense denounced by the Drug Registration Act of December 17, 1914. 38 Stat. L. 785. We must treat that statute as a valid revenue measure. United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061. We are not of opinion that either of the counts mentioned was subject to be quashed on the grounds stated in the motion made to that end by the defendant. The ninth count sufficiently charged that the defendant did, on or about the 5th day of August, A. D. 1915, unlawfully and knowingly sell, barter, exchange, and give away to one Thelma Jones—

"about 60 grains of morphine, the exact amount being to the grand jurors unknown, and the same being then and there a derivative of opium, and without theretofore having registered and paid the special tax, as is required by an act of Congress, approved December 17, A. D. 1914, of any and all persons so dealing in, selling, bartering, and giving away such narcotic drugs, as aforesaid."

[1] An exceptioin was reserved to the refusal of the court to give the following written charge, requested by the defendant:

"Under the ninth count in the indictment you are charged that said count charges that the acts and things therein complained of were done by the defendant without having registered and paid the special tax required by the Harrison Anti-Narcotic Act of Congress, and the undisputed evidence shows that at said time the defendant had duly registered and paid said special tax. You will therefore find the defendant 'not guilty' under said ninth count in the indictment."

The form of this charge is such that it was calculated to convey to the jury the idea that it was incumbent on them to make and return a separate finding on the count mentioned. Where there are several counts before the jury, it is not incumbent on the court to require a

finding on one of the counts specifically. A proper verdict of guilty on any count on which the case goes to the jury would sustain a judgment of conviction, though no mention of any other count is made in the verdict. Assuming that the evidence was such as to entitle the defendant to an instruction, if requested, against finding him guilty on the count mentioned, yet as the instruction asked was so expressed as to have a tendency to mislead and confuse, and to call for explanation, the refusal to give it was not reversible error. Mobile & Ohio R. Co. v. George, 94 Ala. 199, 10 South. 145; Louisville & Nashville R. Co. v. Sandlin, 125 Ala. 585, 28 South. 40.

[2] There was a verdict of "guilty as charged in the first, second, eighth, and ninth counts of the indictment." Neither of the grounds stated in the defendant's motion in arrest of judgment was a tenable one. On the verdict rendered there was a judgment of conviction, sentencing the defendant to imprisonment in the penitentiary for the term and period of two years. A proper conviction on any one of the five counts was enough to support this judgment, as the punishment adjudged was such as could be imposed on a conviction of a single offense. Section 9 of the act; Claassen v. United States, 142 U. S. 140, 12 Sup. Ct. 169, 35 L. Ed. 966. The evidence adduced abundantly supported more than one of the five counts which were submitted to the jury. Our conclusion is that the record does not show the commission of any reversible error.

The judgment is affirmed.

GEORGIA COAST & P. R. CO. v. LOWENTHAL.

(Circuit Court of Appeals, Fifth Circuit. January 13, 1917. Rehearing Denied February 9, 1917.)

No. 2986.

COURTS ⊜311—JURISDICTION—DIVERSITY OF CITIZENSHIP—REALIGNMENT OF PARTIES—TRUSTEE FOR BONDHOLDERS.

In a suit by a minority bondholder for the appointment of a receiver, after the refusal of the trustee for the bondholder to act because the affairs of the corporation were in charge of a committee of the bondholders, the trustee, if a necessary party, would be, by reason of his interests, aligned with plaintiff, and therefore the fact that it was a citizen and resident of the same state of plaintiff does not defeat the jurisdiction of the federal court.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 858; Dec. Dig. ⊜311.]

Appeal from the District Court of the United States for the Southern District of Georgia; Emory Speer, Judge.

Suit by David Lowenthal against the Georgia Coast & Piedmont Railroad Company, asking for the appointment of a receiver after the trustee for the bondholders had refused to institute such suit because a committee of the bondholders was in charge of the property. From

an interlocutory order appointing the receiver (233 Fed. 1016), the defendant appeals. Affirmed.

See, also, 233 Fed. 1010.

Robert M. Hitch, Remer L. Denmark, and Samuel B. Adams, all of Savannah, Ga., for appellant.

Alex. C. King, of Atlanta, Ga., Max Isaac, of Brunswick, Ga., and C. Henry Cohen, of Augusta, Ga., for appellee.

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

PER CURIAM. This is an appeal from an interlocutory order appointing a receiver. The errors assigned cover the propositions that the court is without jurisdiction:

First. Because the amount involved is less than $3,000, exclusive of interest and costs;

Second. Because in the showing made by the bill the Columbia Trust Company, trustee in the mortgage covering the whole property including the bonds of complainant, is an indispensable party defendant, and if made a party defendant the court would be without jurisdiction to hear and determine the cause, for the reason that the said plaintiff and the Columbia Trust Company are both citizens and residents of the state of New York, and the requisite diversity of citizenship necessary to give the court jurisdiction would not exist.

Third. That on the facts stated in the bill and the showing made by the parties there was no case made calling for the appointment of a receiver.

On the question of jurisdiction, the District Judge handed down an elaborate opinion in the case, maintaining the jurisdiction of the court in both aspects as presented. While not prepared to concur fully in all of the reasons given by the learned judge, a majority of the judges of this court concur with him in his conclusions. In our opinion, if the said trustee is an indispensable party, and should hereafter appear or be made a party, the said trustee will necessarily, by reason of interest, be aligned with the plaintiff. Under the showing made by the bill and by evidence before the court, there seems to be no question that, if the court retains jurisdiction, the appointment of the receiver was not only proper, but necessary.

The decree appealed from is affirmed.

WALKER, Circuit Judge, not concurring.

In re BERTHOUD.

In re FARMERS' LOAN & TRUST CO.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 54.

BANKRUPTCY ⊂=444, 461—PREMATURE APPEAL AND PETITION TO REVISE.

Where to petition in involuntary bankruptcy by alleged creditors, setting forth a general assignment for creditors as an act of bankruptcy, an alleged creditor filed an answer suggesting legal reasons for invalidity of the whole proceeding, and denying every material fact of the petition, whereupon petitioners moved for adjudication, and order was entered merely declaring the "points of law raised by the answer" overruled, and directing a trial on the "issues raised by said answer," appeal and petition to review are premature; the order, considered as a mandate, doing no more than directing a trial of the issues, as was proper, and it being necessary that they be tried and adjudication granted or refused, before the case can be brought to the Circuit Court of Appeals.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 920–927; Dec. Dig. ⊂=444, 461.]

Petition to Revise and Appeal from Order of the District Court of the United States for the Southern District of New York.

In the matter of Alfred Edward Berthoud, trading as Coulon, Berthoud & Co., alleged bankrupt. The Farmers' Loan & Trust Company, an answering alleged creditor, appeals from, and petitions to revise, an order. Dismissed.

For opinion below, see 231 Fed. 529.

Edward H. Blanc, of New York City, for appellant and petitioner Farmers' Loan & Trust Co.

James N. Rosenberg, of New York City, for petitioning creditors.

Before COXE, WARD, and HOUGH, Circuit Judges.

PER CURIAM. The practice pursued herein has presented to this court nothing for judicial action. Certain persons alleging themselves to be creditors of Berthoud filed against him a petition in involuntary bankruptcy, setting forth a general assignment for the benefit of creditors as the act of bankruptcy. The Farmers' Loan & Trust Company, asserting itself to be a creditor, filed an answer, suggesting some legal reasons for the invalidity of the whole proceeding, and denying every material fact of the petition; e. g., that petitioners were creditors at all. Thereupon the petitioning creditors, or some of them, moved for adjudication. On these pleadings it is not seen how the motion could prevail, nor did it; but neither was adjudication refused, for the order entered, and now complained of, declared only that the "points of law raised by the answer" were overruled, and directed that a trial be had upon the "issues raised by said answer."

It is not easy to assign this order to any recognized class of judicial mandates; if it is anything more than an expression of opinion, it sustains a species of demurrer to part of an answer. Clearly no appeal

lies at present, yet as plainly, if and when adjudication is entered, appeal will lie; and the assignments of error then pressed may be substantially identical with those now before us. No present expression of our opinion can prevent the exercise of that legal right. It is true we have authority to "revise in matters of law, the proceedings" in this or any other bankruptcy arising in the circuit. But such "proceeding" means some formal exercise of judicial power affecting asserted rights of a party, and the order complained of, considered as a mandate, does no more than direct a trial of the issues, as was proper. As the issues raised by the pleadings must be tried as the District Court directed, they should be tried, and adjudication granted or refused, before bringing the case here.

It follows that the present appeal and petition are premature, and they are accordingly dismissed, without prejudice to past or future proceedings in the case, and without costs.

In re WETTENGEL et al.

Appeal of GEORGE.

(Circuit Court of Appeals, Third Circuit. December 22, 1916. Rehearing Denied February 9, 1917.)

No. 2144.

BANKRUPTCY ⊂=140(3)—PROPERTY ACQUIRED BY TRUSTEE—MONEY DELIVERED TO BROKER—"WASHED SALE."

The trustee in bankruptcy of a brokerage firm acquires no right to money in the possession of the firm, which can be identified as money delivered to it shortly before the bankruptcy, to be applied on the payment for stock to be purchased by the firm under a contract providing that actual delivery was contemplated, where the firm merely ordered another broker to purchase the stock, and the following day ordered that broker to sell an equal amount of the same stock short, which order was filled by selling that stock, so that the firm never secured the stock, but was to settle with the other broker at the money difference; the transaction being what is known as a "washed sale."

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 225; Dec. Dig. ⊂=140(3).

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

Appeal from the District Court of the United States for the Western District of Pennsylvania; Chas. P. Orr, Judge.

In the matter of A. T. Wettengel and another, individually and as partners trading as Wettengel & Co., bankrupts. The petition of Robert S. George, in behalf of G. L. Kolb, praying that the trustee be directed to pay petitioner certain money alleged to belong to said Kolb, was denied, and petitioner appeals. Decree vacated, and record remanded, with directions.

William D. Stewart, of Pittsburgh, Pa., for petitioner.
Simon Sher, of Pittsburgh, Pa., for trustee.

Before BUFFINGTON, McPHERSON, and WOOLLEY, Circuit Judges.

BUFFINGTON, Circuit Judge. In the court below, Robert S. George, acting on behalf of G. L. Kolb, presented a petition in the bankruptcy of Wettengel & Co., praying that their trustee be directed to pay petitioner a certain $1,500 alleged to be the money of said Kolb. The trustee answered, admitting the identity of the fund, denied it belonged to Kolb, and alleged it was the property of the bankrupts. The matter was referred to the referee, who took testimony, found the ownership of the fund was in Kolb, and made report to the court, recommending the trustee be directed to pay the fund to him. Exceptions having been taken to such report, the court below sustained them, and entered an order dismissing the petition. Thereupon the petitioner, George, took this appeal.

The proofs fall within a narrow compass. On October 26, 1915, George directed Wettengel & Co., a brokerage firm, to buy for Kolb 100 shares of La Belle Iron Company common stock at $56 per share. On receipt of such order the firm on the same day instructed another brokerage firm to buy for it such an amount of stock. On October 27th George, having received notice from Wettengel & Co. that his stock had been purchased, paid them the $1,500 here in dispute, and received from them a statement of price, with credit for money paid, which recited:

"It is agreed between broker and customer that all orders for the purchase or sale of any article are received and executed with the distinct understanding that actual delivery is contemplated."

On November 28, 1915, the $1,500 was deposited by Wettengel & Co. in bank, where it remained when that firm went into bankruptcy the day following. From the proofs it appears that no stock was ever bought or held by Wettengel & Co. for George. What was done was this: Having on November 27th given an order to the second brokerage firm to buy 100 shares of La Belle Iron Company common stock, and that firm having on said day bought the same and having received bills of sale therefor, but having made no delivery to Wettengel & Co., the latter on the next day ordered the second firm to sell short for it the same number of shares of La Belle Iron Company common stock. Thereupon the second firm used the stock bought the 27th for Wettengel & Co. to fill the short order given by that firm on the 28th. The result was that no stock ever passed to Wettengel & Co., but the firms settled at the money difference. In other words, the transaction was what is known as a "washed sale."

It will thus be seen that what was contracted for by the parties when the $1,500 was received, namely, "the distinct understanding that actual delivery is contemplated," was not carried out by Wettengel & Co.; they never bought any stock for delivery to Kolb, and were never in position to deliver. In that respect the uncontradicted proof by a member of the bankrupt firm is: "If he [Kolb] came and

wanted that stock, we would either have to borrow it, or buy it in." The case, therefore, resolves itself into the simple proposition: A client furnishes a broker with funds on the agreement by the latter to buy certain shares of stock for him and apply the payment made to the purchase. He does not buy the stock, but has the money earmarked in his possession when he goes into bankruptcy. It is clear that before the broker went into bankruptcy, and until a purchase was made, the broker was bound to return the money on request of his customer. Such being the situation before the broker went into bankruptcy, it is clear that no right to retain such money was created by his going into bankruptcy, and consequently no right passed to the broker's trustee.

The order of the referee met the exact justice of the case, and should be sustained. The decree below is therefore vacated, and the record remanded, with directions to dismiss the exceptions to, and confirm, the referee's report.

FRIEDLEY-VOSHARDT CO. v. RELIANCE METAL SPINNING CO.

(District Court, S. D. New York. July 26, 1916.)

1. PATENTS ⟸328—VALIDITY AND INFRINGEMENT—DESIGN FOR SHOWER PAN.
The Holton design patent, No. 47,244, for a design for a gas and electric fixture known as a shower pan, discloses patentable invention; also, *held* valid as against the claim that it was not the invention of the patentee and infringed.

2. PATENTS ⟸81—VALIDITY—DEFENSE OF PRIOR USE.
A defense of a prior use, when introduced to invalidate an existing patent, must be established by the most convincing evidence.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 104; Dec. Dig. ⟸81.]

3. PATENTS ⟸80—VALIDITY—PRIOR SALE AND USE.
A patent is not invalidated by the public sale and use of the patented article at any time within two years before the application was filed, unless abandonment is shown.
[Ed. Note.—For other cases, see Patents, Cent. Dig. §§ 102, 103; Dec. Dig. ⟸80.]

In Equity. Suit by the Friedley-Voshardt Company against the Reliance Metal Spinning Company. On final hearing. Decree for complainant.

Walter H. Pumphrey, of New York City, and Zell G. Roe, of Des Moines, Iowa (Harry Lea Dodson, of Chicago, Ill., of counsel), for complainant.

Munn & Munn, of New York City (T. Hart Anderson, of New York City, of counsel), for defendant.

AUGUSTUS N. HAND, District Judge. [1] This is a suit to restrain the defendant from infringing design letters patent No. 47,244 to Holton issued on the 20th day of April, 1915. There is no doubt that a design patent, like every other, requires invention,

and, if the design in question for a gas and electric fixture known as a shower pan is a mere aggregation of well-known elements which could be assembled without ingenuity or artistic skill, it cannot be regarded as one showing invention. It is to be remembered that ornaments resulting from the varied juxtaposition of curves and angles, like the musical combinations resulting from the sequence of notes and chords, all contain certain intervals—ornaments intervals of space, music intervals of sound—which are traditional and well known. It is difficult, if not impossible, after years of development, to imagine any article of ornament or any production of music of which this is not true. It is in the arrangement, or, to use the technical term of the patent law, the combination, of elements, and probably at this late day in that alone, that originality and æsthetic skill may be evidenced. Mr. Ainsworth, the designer of Caldwell & Co., well expressed this idea when he said in his testimony at the trial:

"* * * All motives are old. We have inherited them, and we combine them in such a way as to produce an artistic result and a new result; combining them in such a way as to make proper intervals in the spacing of ornaments and the proper emphasis of different ornaments, and to keep the play of light and shade so as to make on the whole a pleasing design, and its merit would depend a great deal on how thoughtful and how different it was from the stereotyped combinations."

Now coming to the design under consideration, it is very difficult to put in words a description which so differentiates it from the prior art as to convey any vivid impression to one reading this opinion. This is largely due to the inherent difficulty of describing visual impressions in words, which is, of course, heightened where the person attempting it is without technical training in drawing or art. The nearest resemblance to the shower pan in suit is found in the so-called canopy No. 20,650 of Fensterer & Ruhe. This, from some points of view, is not dissimilar to the Holton design which the complainant sues to protect. When, however, the Holton shower pan is looked at, not from a side view, but directly, as would be the case if it were suspended as a shower pan, the difference between the two is very apparent and the superiority of the Holton design quite manifest. This is, I think, due to the concave portion of the shower pan next to the outer beading. The ribbed or melon effect of the convex portion is common, and the beading is common; but the prior designs have in a general way a plane surface mounting toward the apex of the melon, while in the Holton design it is broken by the circular trough.

Mr. Ainsworth has, I think, truly said:

"In holding that up, we get a shadow inside here, and then a high light, and then we get shadows again. It gives more play of light and shadow, whereas on this canopy the light strikes it full on this side."

If the Fensterer & Ruhe canopy had been an attractive design for shower pans, it would doubtless have been popular. As a matter of fact, however, the Holton pan has met with great commercial success and been sold by both complainant defendant and their customers in large numbers, while the Fensterer & Ruhe design has apparently

never been put out as a shower pan. This consideration is by no means controlling, but the commercial success of the Holton pan certainly tends to confirm my judgment that the design is novel and pleasing.

To quote from Mr. Ainsworth again:

"* * * That is the function of a design, from an artistic line, pleasing both to the eye, the intellect, and if possible pleasing to the emotions, and to make a pleasant impression."

Chief Justice Fuller said, in the case of Smith v. Whitman Saddle Co., 148 U. S. 679, 13 Sup. Ct. 770, 37 L. Ed. 606:

"If * * * the selection and adaptation of an existing form is more than the exercise of the imitative faculty and the result is in effect a new creation, the design may be patentable."

Judge Grosscup remarked, in the case of Pelouze Scale Mfg. Co. v. American Cutlery Co., 102 Fed. at page 916, 43 C. C. A. 52:

"'Design,' in the view of the patent law, is that characteristic of a physical substance which, by means of lines, images, configuration, and the like, taken as a whole, makes an impression, through the eye, upon the mind of the observer. The essence of a design resides, not in the elements individually, nor in their method of arrangement, but in the tout ensemble—in that indefinable whole that awakens some sensation in the observer's mind. * * * But whatever the impression, there is attached in the mind of the observer, to the object observed, a sense of uniqueness and character."

It is, however, principally urged that Holton was not the inventor of the shower pan, because the Reliance Metal Spinning Company was given a rough sketch of a similar shower pan not drawn to scale by some customer early in 1913, and that from this sketch a plaster model was made in March, 1913; whereas, Holton's drawings were not made until May of that year.

In reply to my questions at the trial, the defendant's witness Samuel Shapiro said that he could not testify where he got the design, or who gave it to him, so that the defendant does not now claim to have itself originated it, yet Shapiro, in his affidavit to oppose the preliminary injunction in this suit, said:

"We have in our employ a designer who is constantly engaged in originating and contriving new and ornamental designs for the parts manufactured by us."

And further deposed:

"With regard to the particular design known as the Adams shower pan here at issue and shown in the cut attached thereto, that design was made by us as early as December, 1913."

[2] Furthermore, no shower pans were put on the market by the defendant until December, 1913, while the complainant put out some of them in June and July of that year. These fixtures of the complainant may have contained the design before the beading was changed, but that is, I think, unimportant. I am not satisfied with the defendant's explanation of its delay from the spring of 1913 to December of that year in putting out this new shower pan which has proved so successful commercially, and I am inclined to the belief

that the dies were not made until a much later date than some of the defendant's testimony would indicate. The defendant produced a number of witnesses who swore to the making of the plaster pattern and dies in the spring of 1913, but I do not think this testimony will bear a close scrutiny. It is to be borne in mind that a defense of a prior use, when introduced to invalidate an existing patent, must be established by the most convincing evidence. As the Supreme Court has said in the Barbed Wire Patent Case, 143 U. S. 284, 12 Sup. Ct. 447, 36 L. Ed. 154:

"* * * Courts have not only imposed upon defendants the burden of proving such devices, but have required that the proof shall be clear, satisfactory, and beyond a reasonable doubt."

Now, the strongest pieces of evidence which the defendant has offered, to corroborate the testimony of Samuel Shapiro that a plaster cast was made from the rough pencil sketch of the shower pan in March, 1913, and that a die was cast therefrom by the Fulton Foundry Company in April, 1913, were the testimony of the witness Baker, and the books of the foundry company. Baker picked out the die in court, and I think I saw on the plaster cast the indistinct number M 5779, which is the same number that appears in the books of the foundry company as applicable to a die pattern received by it from the defendant on April 8, 1913. Baker testified that he sold a hydraulic press to the defendant on March 21, 1913, and was within a month thereafter consulted because the die he identified in court was not producing satisfactory results when the press was applied to it.

Bazeel, one of defendant's witnesses, testified that he went back to work for the Reliance Metal Spinning Company "the last days of April," that he was "positively sure" of that date, and that he saw Cerveny make the plaster model. If this was true, it was not the plaster model sent to the foundry company on April 8, 1913. Moreover, Cerveny, who made the plaster die, said it was the second pattern he ever made for the Reliance Metal Spinning Company, and that it was a 16-inch pattern; whereas, he said the first one was an 18-inch Sheffield design. The books of the foundry company show that the plaster cast received April 8, 1913, was for an 18-inch die. It is difficult therefore to imagine that the die which Mr. Baker saw was for an Adam pan, and it was doubtless of the Sheffield design. The apparent number on the plaster cast for the Adam shower pan was so indistinct and irregular that it seems hard to reconcile such markings with any businesslike system which might have been adopted by the foundry company to identify the casts from which its dies are made.

Furthermore, Samuel Shapiro, and other witnesses, testified that the die which Baker says was giving trouble was so faulty that it was necessary to cut out the complete center and recast the piece so that it would give a proper impression; but Cerveny, who made the plaster cast, testified that the only trouble with the die was a small hole which he stopped with copper rivets and zinc, and that it always worked satisfactorily thereafter.

I think the facts to which I have adverted make it highly improbable, if not impossible, that the die which Baker examined was for an Adam shower pan. Mr. Baker doubtless intended to give a correct version of the facts, but his story is involved in so many inconsistencies with other testimony that I have reached the conclusion that the die he was consulted about was not for an Adam pan, but probably was for a Sheffield design. It is much easier for me to believe that the recollection of a man admittedly having no experience with matters of the kind in question was after three years mistaken as to the design he saw, than to reconcile the numerous contradictions which are involved in an acceptance of his story. The failure of Shapiro to remember where he secured the design, his attempt on the motion for a preliminary injunction to lead the court to believe that it was the invention of a designer of the defendant, and the further circumstance that the latter waited until eight or nine months after the die was made before putting the shower pan on the market, are all facts which discredit Shapiro's story.

But most of all does it seem unlikely that two designs could have been such exact counterparts of one another without deliberate copying. The fact that the beading on complainant's shower pan was changed some time after Holton's drawings were made because the original form of beading did not make a good impression upon the brass, and that defendant's shower pan is exactly like complainant's completed design after the beading was changed, makes it probable that the copying was done by the defendant from the Holton design. If the complainant had done the copying, the beading would not have been changed by it, for the defendant's design was never changed and also had the same beading as in complainant's final structure. Moreover, it is impossible to believe that the rough pencil sketch not drawn to scale which Shapiro says he received from some unknown customer should result in a shower pan resembling so exactly in every detail the final completed fixture of the complainant.

The questions of fact are difficult to resolve; but, after careful consideration, I have thought that the defendant has not sustained the burden of proof, and that Holton was the inventor of the design in suit.

[3] But the defendant further insists that the complainant is estopped to obtain either an injunction or damages because it did not follow up the Holton invention by applying promptly for a patent, but allowed more than a year to elapse after the defendant was putting out its shower pans without making its application. The statute "allows a patent to be granted only for an invention which was not in public use or on sale for more than two years prior to the application for the patent subject to the defense of abandonment within such two years. * * *" Andrews v. Hovey, 123 U. S. 275, 8 Sup. Ct. 101, 31 L. Ed. 160.

"But the use and sale of the invention within two years before the application for the patent was filed was not sufficient to establish an abandonment of the invention, because * * * Congress expressly authorizes the issue of a patent notwithstanding such use and sale." Mast, Foos & Co. v. Dempster Mill Mfg. Co., 82 Fed. 327, 27 C. C. A. 191.

The Supreme Court said, in the case of Bates v. Coe, 98 U. S. at page 46, 25 L. Ed. 68:

"Congress * * * interfered, and provided that no patent shall be held to be invalid by means of such purchase, sale, or use prior to the application of a patent, except on proof of abandonment to the public, or that such purchase, sale, or prior use has been for more than two years prior to such application."

In the case at bar the complainant did not at first know about the provision of law requiring it to apply for a patent within two years after public sale or use. When the provision was known, complainant applied for a patent and took steps to warn the trade. The law allowed two years within which to apply unless the invention was abandoned, and I think it clear that abandonment, which is a question of fact, never took place here. The defense of estoppel, therefore, cannot be sustained.

Last of all, the defendant asserts that the complainant has attempted to influence the testimony of Holton and to prevent him from being called by the defendant as a witness and should not prevail because it does not come into equity with clean hands. The letter of one of the complainant's officers to Holton, in which it is said, "* * * Please don't let them lead you off into space, etc., just say, 'I don't know,' or words to that effect," is certainly open to possible criticism. On the other hand, it can be construed as a caution to a witness on whom the complainant relied to prove its case not to be making ill-considered statements in regard to matters which happened three years before and of which the witness might not be certain without refreshing his recollection and referring to documents in the hands of the complainant. This litigation has been extremely bitter, and each party apparently became greatly excited. All this has tended to cause mutual distrust and promote the sort of thing which is now criticized. I cannot see, however, that the complainant secured, nor do I believe it attempted to secure, false testimony from Mr. Holton. The defendant doubtless knew that this court would not, by requiring answers to the usual interrogatories, compel the complainant to disclose the date of its invention, at least unless the defendant was required simultaneously to give similar information to the complainant. The defendant to secure the information which it could not get through interrogatories proceeded to examine Holton under section 863 of the Revised Statutes (Comp. St. 1913, § 1472), and the complainant thereupon became most anxious to prevent its adversary from securing the advantage of learning in advance of the trial the date when Holton claimed to have made his design. I am not satisfied that the letters to Holton disclose more than a desire to go over the documentary evidence and other facts with him before he should be called upon to testify, to warn him against volunteering information carelessly, and to have him avoid testifying until lawfully subpœnaed. The views of defendant's officers as to what was in law a valid subpœna, like the views of many laymen, were more prompted by self-interest than knowledge and are not to be taken seriously. In short, while the tone of the letters which are criticized does not in some respects commend itself, I think these letters were

the result of the excitement and zeal of an unusually bitter litigation, and not of any conscious desire to thwart justice, and I do not find that the complainant has acted so inequitably as to deprive it of the protection by a court of equity of the legal rights to which it became entitled as the owner of the patent in suit.

A decree is granted to the complainant, with costs, providing for an injunction and an accounting.

MINER v. T. H. SYMINGTON CO.

(District Court, W. D. New York. October 24, 1916.)

No. 127.

1. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—DRAFT RIGGING.
The Miner patent, No. 668,655, for a draft rigging for railroad cars, while in an old art, is for a combination not anticipated, and covers a patentable improvement; claims 4 and 5 *held* infringed.

2. PATENTS ⊂⊃165—CONSTRUCTION—LIMITATION OF CLAIMS.
A limitation expressed in one claim of a patent cannot be read into another claim from which it is omitted.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 241; Dec. Dig. ⊂⊃165.]

3. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—DRAFT RIGGING.
The Miner patent, No. 668,656, for a draft rigging for railroad cars, claim 8, *held* not anticipated, valid, and infringed; claim 2 *held* void for lack of novelty.

4. PATENTS ⊂⊃157(2)—CONSTRUCTION—CONSTRUCTION TO GIVE VALIDITY.
The claims of a patent must be read in the light of the description, and if the evidence indicates different constructions, that construction governs which will sustain the patent, rather than the one which will defeat it.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 231; Dec. Dig. ⊂⊃157(2).]

5. PATENTS ⊂⊃328—VALIDITY AND INFRINGEMENT—DRAFT RIGGING.
The O'Connor patent, No. 829,728, for a draft rigging, was not anticipated, and discloses invention. Claims 5, 6, and 7 also *held* infringed.

In Equity. Suit by William H. Miner against the T. H. Symington Company. On final hearing. Decree for complainant.

E. W. Hatch, of New York City, Louis Desbecker, of Buffalo, N. Y., and George I. Haight and Joseph Harris, both of Chicago, Ill., for plaintiff.

Gilbert P. Ritter, of Washington, D. C., W. S. Symington, Jr., of Baltimore, Md., and Gibbons & Pottle, of Buffalo, N. Y., for defendant.

HAZEL, District Judge. Infringement by the defendant, the T. H. Symington Company, is alleged in the bill as to three letters patent, No. 668,655 and No. 668,656, both dated February 26, 1901, to William H. Miner, and No. 829,728, dated August 28, 1906, to John F. O'Connor, all relating to improvements in draft rigging by which

railroad cars are coupled together, of a type generally known as tandem spring draft rigging. Structures of this character comprise a drawbar and yoke, with a U-shaped pocket strap, followers, stops, and cheek plates bolted to the inner sides of the sills for engaging the spring or shock-absorbing instrumentalities; the device being attached to the under frame of the car.

Tandem spring draft rigging was familiar to the art at the date of the inventions in suit; indeed, various types of draft rigging were old, namely, the single spring, the twin spring, and the tandem spring —the latter the type with which we are herein concerned. This type is provided with two spring or compression members, one arranged behind the other, each having a follower at its ends, while the connection between the gear and draft sills of the cars is effected through stops; the middle stop, in the patents in suit, being deeper than the end stops, and each follower being simultantously and independently operated.

As increasing railroad traffic from time to time demanded heavier cars, improvements in draft rigging and shock absorbers were necessary, in order to withstand the increasing shocks and blows to which the heavier cars were constantly subjected. The improvements, therefore, related principally to details of construction of one or more elements of the original combination, and tended towards increasing their strength and durability. All improvements or modifications had to conform to the standard dimensions specified by the Master Car Builders' Association, so that they could be used interchangeably on different cars; such dimensions being 12⅞ inches in width, and 34½ inches in depth. Therefore any alteration or modification, however slight, by which strength and durability were increased, would seem to require the skill and ingenuity of an inventor.

[1] The bill alleges that the defendant's draft rigging is an infringement of claims 4 and 5 of Miner patent, No. 668,655, and as claim 4 is fairly descriptive of the structure, it will be unnecessary to set forth claim 5. Claim 4 reads as follows:

"4. The combination with the drawbar, pocket strap, tandem arranged springs, and followers, of a pair of flanged steel draft beams, a pair of stop castings secured thereto, and each furnished with three stops and upper guide flange, a lower guide plate for the followers and the draft rigging to rest upon, extending between said draft beams and secured thereto by bolts passing through the lower flanges thereof, the upper guide flanges of said stop castings each tapering from the middle toward both ends to form a fulcrum for the pocket strap to swing upon, substantially as specified."

Claim 5 has substantially the same wording, save that it includes the phrase:

"Said guide plate having a central longitudinal channel for the lower member of the pocket strap."

In addition to the subject-matter, claim 4 specifies the following elements in combination: (1) A pair of stop castings; (2) a lower guide plate. The stop castings are secured to the draft beams, each being furnished with stops and having an upper guide flange "tapering from the middle toward both ends to form a fulcrum for the pocket

strap to swing upon." The lower guide plate element for the followers is extended between the draft beams by bolts, and has a central longitudinal channel for the lower member of the pocket strap, while the guide flange is made to taper from the middle towards both ends.

The involved claims are for a combination of old and new elements, and I think the patentee made a patentable improvement in the art by introducing as new elements the features of tapering the upper guide flange of the stop castings and of channeling the lower guide plate for the support of the followers.

The defenses are limitation of claims and noninfringement. Several prior patents were cited to illustrate the state of the art at the date of the invention, but not to anticipate it, and it is contended that a strict construction only of the disputed claims is warranted. In none of the prior patents however—patents to Miner, Nos. 570,038 (see model SX) and 549,207 (see model RX), to Roosevelt, to Perry, to Stark, to Brown, and to Jansen—is contained either the combination of the said claims or a near approach to the idea of the inventor, which obviously was to provide better means for withstanding the greater strains and shocks. While some of the elements of the claim are contained separately in one or more of the prior patents, they do not suggest the combination described in the Miner patents under discussion.

[2] Although the drawing attached to the patent illustrates a guide plate extending the whole length of the draft gear, the claims contain no limitation to the use of either a long or short guide plate. Besides, claim 2, not in issue, refers to a "lower guide plate extending from the front to the rear follower"—an obvious limitation, which, however, is excluded by claim 4, and cannot be read into it. Cadillac Motor Car Co. v. Austin, 225 Fed. 983, 141 C. C. A. 105.

The specification, speaking of the function of the middle stop, states that:

"Owing to the inclined inner edges d^4 of the guide flange d^3 of the stop casting and the greater depth of the middle stop d^1 over that of the end stops d^2, a fulcrum is formed at the angle of said inclined edges for the drawbar pocket strap to swing or turn upon, as required when the train is passing around curves."

Counsel for defendant contends that claims 4 and 5 must also be limited to this description of the guide flanges, and that, as defendant does not utilize in its draft rigging a stop casting which forms a fulcrum for the pocket strap at the angle of the edges of the drawbar, infringement is avoided; but defendant in its construction uses a center post with a flat bearing face, which I consider merely a colorable modification, as substantially the same result was attained as by complainant's fulcrum. Nor was infringement of claim 5 avoided by shortening the lower guide plate, which retained the lengthwise channel, so that it extended under only one of the followers, as the same result was secured thereby as in complainant's patent.

[3] Claims 2 and 8 of Miner patent, No. 668,656 read as follows:

"2. In a draft rigging, the combination with the draft timbers, and sill and body bolster, of a pair of draw bar stop castings fitting between and se-

cured at their backs to the draft timbers and abutting at one end against the end sill and at the other against the body bolster, substantially as specified."

"8. In a draft rigging, the combination with the drawbar, pocket strap, tandem arranged springs, and followers at both ends of both springs, of a pair of stop castings having each three stops for the followers to abut against; the middle stop at its portions above and below the follower guides being deeper than the end stops to form pivots for the drawbar and pocket strap to swing or turn laterally upon, substantially as specified."

As shown by claim 2, it was evidently the intention of the patentee to add strength to the castings by fitting them between the draft sills and riveting or bolting them thereto at their backs, so as to cause them to abut at one end against the end sill and at the other against the body bolster. But in my opinion there was no novelty at the date of the invention in thus attaching the cheek plates, as evidenced by the Car Builders' Dictionary, wherein it is stated:

"The castings for the drawbar stop are sometimes made long enough to bear against the body bolster, or a filling block interposed between it and the drawbar, thus relieving the lugs and bolts of strain."

Aside from this, the Roosevelt patent, No. 542,110, dated July 2, 1895, and the Ronemus patent, No. 545,096, dated August 27, 1895, and the Tomlinson patent, No. 545,555, dated September 3, 1895, contain descriptions of such an abutting arrangement. In the Tomlinson patent the draft sheets are firmly bolted to the center or draft sills and also to the sills *C* and the bolster *D*, if desired, and the MacKenzie patent, No. 569,218, dated October 13, 1896, speaks of abutting the sections *a'* of the plates at their respective ends against the body bolster *C* and the end sill *B*. The Perry patent also specifies that the draft iron *E* is made of such length as to connect the end sill *C* and the bolster *D*. Hence, the defendant's construction, which does not abut at the ends of the castings, but has a space between the bolster and the end of the casting, is not an infringement of claim 2.

Claim 8 specifies a combination with front and rear pockets separated by a yoke thimble; a connection between the gear and draft beams of the car being effected through the medium of three stops, of which the central stop, upon which the yoke swings, is the deepest. The upper guide flange for bracing the middle stop, though tapering therefrom, to which form claim 4 is limited, is not specifically mentioned in claim 8; but such claim requires the middle stop to be made deeper than the end stops, both above and below the follower guide, to form a pivot for the drawbar and pocket strap to swing and turn upon.

[4] Defendant criticizes the claim for lack of clearness. The drawing, it is true, omitted certain reference numbers from the stops; but the specification in its entirety makes fairly clear that the portions g^{10} g^{10} are above and below the follower guides which are associated with the stop casting. The rule of law is that the claims of patents must be read in the light of the description, and if the evidence indicates different constructions, that construction governs which will sustain the patent rather than the one which will defeat it. McClain v. Ortmayer, 141 U. S. 419, 12 Sup. Ct. 76, 35 L. Ed. 800.

There is nothing found in Miner patent, No. 570,038, to invalidate said claim, although a lug or projection g^8 is shown at the middle of the casting, which was very much lighter than the present casting; but it was not a part of the central stop, nor was it deeper than the end stops, and such casting, having been built for a lighter car, was incapable of withstanding the increased shocks and strains. There are other important differences, but they need not be dwelt upon, inasmuch as I think that the patentee, in making the middle stop deeper than the end stops at its portions above and below the follower guides to form a pivot, strengthened the structure as a whole at a point where impacts and pulling were most severe. In the Weiss patent, No. 569,696, it is true, there are deeper stops, that is, deeper end stops; but such end stops were incapable of functioning to limit the swinging or turning movement of the yoke. The defendant's structure embodies the feature of a middle post deeper than the end posts in combination with the elements of claims 4 and 5 of Miner patent, No. 668,655.

[5] In the specification of the O'Connor patent its object is stated as follows:

"To provide a railway draft rigging side plate or stop casting of a simple, strong, efficient, safe, and reliable construction, and capable of successfully withstanding the enormous shocks or blows to which the draft rigging is subjected in actual and practical use."

It is shown that prior to such invention draft rigging had a tendency to break or give way at the side plates or castings, or at other points, and in this connection the specification says:

"Heretofore draft rigging side plates or stop castings have always been made of plates or webs of unequal thickness at different points, and especially at the intersection of the stop shoulders with the main plate or web of the stop casting, and I have observed that the breakage is most apt to occur apparently at those intersections or points where the metal is thicker."

To obviate these difficulties the patentee made a very much lighter casting than any prior castings, using less metal, distributing it evenly, and producing at the same time a stronger casting than had been produced before. He also introduced in his patent a stop casting without any T-sections—a feature not herein involved. The claims relied upon are the fifth, sixth, and seventh. The fifth claim is for the combination of elements, while the sixth relates to a side plate or stop casting, and does not embody the combination. Claim 7 differs from claim 6 in its inclusion of the words "further upright convolutions." Claim 6, which is typical, reads as follows:

"6. In a railway draft rigging side plate or stop casting, consisting of a cast web of substantially uniform thickness throughout, furnished with a series of upright convolutions therein forming stops or shoulders for the followers to abut against, and furnished with horizontal or longitudinal convolutions therein forming longitudinal strengthening ribs or flanges, said horizontal convolutions extending between, but not across, said upright convolutions, substantially as specified."

Not only did the patentee make the castings of substantially uniform thickness throughout, but he embodied in his invention certain bends or convolutions, extending them vertically to form the required stop shoulders for the followers to contact, and thus securing greater strength

in the stops affected by the blows and jars of the cars. He avoided substantially thickening the castings where the upright convolutions were caused to adjoin the other parts of the castings. Complainant concedes that upright convolutions were not new, but contends that the additional element of the O'Connor claims, the horizontal bends or convolutions for longitudinal strengthening of the flanges, was new. Defendant concedes that the shoulders forming the contacts with which the follower co-operates were the convolutions in the web, but argues that the claims, properly construed, eliminate from stop castings the increased thickness due to the intersection of one web with another web.

Are the claims limited by the patents to Hinson, No. 636,431, to Jansen, No. 708,481, and to Miner, No. 754,669? There is nothing in the Hinson patent in the nature of a horizontal convolution or bend. There the back plate was straight, and lacked the strengthening means of the O'Connor patent, and besides it was not formed of relatively thin metal uniform throughout, which at the same time maintained the appearance of great thickness. The Jansen patent is a close approach to the O'Connor patent, and there is similarity between it and defendant's cheek plate; but an inspection of defendant's Exhibit BX will disclose that the Jansen patent lacks a substantial uniformity of thickness of metal throughout, being noticeably thicker at the end stops near the followers. There is also another important difference, namely, the plainness of the Jansen plate on the back; the horizontal bends or convolutions of O'Connor, to strengthen the ribs of flanges, being absent. Neither does the Miner patent, No. 754,669 describe a web of uniform thickness or a casting containing a horizontal bend or convolution to strengthen the rib or flange. There is nothing in the prior art patents to warrant a close scanning of the claims in suit, or a construction limiting them to a mere removal of thicknesses of the web at points of intersection with another web.

The appearance of complainant's and defendant's castings is somewhat different, yet the defendant in my view employs the series of horizontal bends or convolutions, as well as the vertical convolutions forming the stops. It makes no difference that in defendant's structure a portion of one of the vertical convolutions ceases at the middle post, inasmuch as an additional horizontal convolution takes its place. The defendant secures the same beneficial result by its adaptation and appropriation as does the complainant. While claims 5 and 6 are limited to horizontal bends or convolutions "extending between, but not across," the upright convolutions, claim 7 contains no limiting language. It was further urged that the effect of the horizontal convolutions and the vertical convolutions was to form flanges. There is no point to the claim that the main stops in defendant's structure are flanges, and not convolutions of one type or another.

In view of the foregoing, it is unnecessary for me to pass upon complainant's allegation and testimony that the defendant procured skilled labor from the manufacturer of complainant's structure for the purpose of facilitating acts of infringement.

Complainant may have a decree, with costs, holding claims 4 and 5 of Miner patent, No. 668,655, claim 8 of Miner patent, No. 668,656,

and claims 5, 6, and 7, of O'Connor patent, No. 829,728, valid and infringed, and claim 2 of Miner patent, No. 668,656, invalid for want of novelty.

GUARANTY TRUST CO. OF NEW YORK et al. v. MISSOURI PAC. RY. CO.

(District Court, E. D. Missouri, E. D. November 28, 1916.)

No. 4540.

1. RAILROADS ⟸195(1)—RECEIVERSHIP—REORGANIZATION.

Courts have come to recognize that modern railroad receiverships are in many cases but instruments for consummating plans of reorganization, and so far as properly can be the judicial proceeding is conducted in harmony with the plan; but the court has and will exercise authority to see that all equitable rights in or connected with the property are secured, and this duty becomes specific and imperative upon the complaint of an interested party.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656, 658, 660; Dec. Dig. ⟸195(1).]

2. RAILROADS ⟸195(1)—RECEIVERSHIP—OBJECTIONS TO PLAN OF REORGANIZATION.

Where a plan for reorganization of a railroad company whose property in the hands of a receiver is submitted to bondholders for their individual acceptance or rejection, they are not represented in such matter by the trustee of the mortgage securing their bonds, but may appear individually or by a committee to object to the plan; and they are not required to wait before intervention until after a decree of foreclosure has been entered and carried out by a sale of the property, and the time limited for acceptance of the reorganization has expired, but should more properly come in while such matters are pending and undisposed of.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656, 658, 660; Dec. Dig. ⟸195(1).]

3. RAILROADS ⟸195(1)—REORGANIZATION OF SYSTEM—INCLUSION OR EXCLUSION OF BRANCH LINES.

On reorganization of a railroad system, the advisability of including or excluding a particular subsidiary line, and the terms in which it may be included, depending on its relation and value to the system as a whole and the necessities of the reorganization, present questions which must be left largely to the business judgment of those in charge, and the court should not interfere, unless in an exceptional instance of fraud or grossly inequitable discrimination.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656, 658, 660; Dec. Dig. ⟸195(1).]

4. RAILROADS ⟸195(1)—REORGANIZATION OF SYSTEM—EQUITIES OF BONDHOLDERS OF SUBSIDIARY LINE.

On reorganization of a railroad system, first mortgage bondholders of a subsidiary line, whose bonds were also assumed by the principal company on its purchase of the line, occupy a dual position: First, as mortgagees of the particular line; and, second, as general creditors of the purchasing company; and their rights should be recognized in both relations, by giving them the benefit of their security, its value to be agreed on or determined by a foreclosure and sale, and by giving them the status of general creditors as to any deficiency.

[Ed. Note.—For other cases, see Railroads, Cent. Dig. §§ 656, 658, 660; Dec. Dig. ⟸195(1).]

In Equity. Suit by the Guaranty Trust Company of New York and Benjamin F. Edwards, as trustees, against the Missouri Pacific Railway Company. On motion of complainants to strike from the files the intervening petition of the Boisot committee of bondholders, objecting to the plan of reorganization. Motion denied.

Nagel & Kirby, of St. Louis, Mo., and Stetson, Jennings & Russell, of New York City, for the motion.

Winston, Payne, Strawn & Shaw, of Chicago, Ill., for the Boisot committee.

HOOK, Circuit Judge. This is a suit to foreclose a mortgage upon the Missouri Pacific Railroad. The present matter for consideration is a motion of the plaintiffs to strike from the files or dismiss the intervening petition of the Boisot committee, which attacks the plan of reorganization as inequitable.

The Boisot committee represents a large majority of the $1,024,000 of first mortgage bonds, series A, of the Kansas City Northwestern Railroad Company. The bonds are a first lien upon 161.65 miles of road extending northwestward from a connection with the Missouri Pacific at Kansas City, Kan., with a branch into Nebraska. The road has been owned and operated for quite a number of years as part of the Missouri Pacific system. In the deed by which the Missouri Pacific Company acquired the road it assumed and agreed to pay as part of the consideration the above-mentioned series A bonds, and also series B of the same issue, aggregating $2,983,000 and secured by the same mortgage. The series B bonds, not involved here, were held by the Missouri Pacific Company, and were subsequently deposited by it under the mortgage to the plaintiff trustees now being foreclosed in this suit. The plan of reorganization tenders to the holders of Kansas City Northwestern series A bonds preferred stock of a company through which the reorganization is to be worked out, and which for convenience may be called the New Company. The Boisot committee complains that this is inequitable and discriminating.

A brief statement of the outline of the proposed reorganization is essential to an understanding of the complaint. The plan contemplates the amalgamation of the Missouri Pacific and the St. Louis, Iron Mountain & Southern Railroads, and, excepting certain underlying bonds that will remain undisturbed, a readjustment of their entire debt and outstanding stock, with the following result:

Old obligations of both companies to remain undisturbed.....	$128,458,620
New first and refunding 5 per cent. bonds.....	46,923,150
New general mortgage 4 per cent. bonds.....	44,399,292
Total funded debt.....	$219,781,062
New preferred stock, 5 per cent., cumulative from June 30, 1918	$ 76,751,635
New common stock.....	$ 82,839,585

The mortgage to secure the new 5 per cent. bonds will be open to a maximum limit of three times the amount of the stock, or approximately $250,000,000, to take care of future needs. The amounts of

the new bonds and stocks to be issued as above shown are estimated, because of certain options given to holders of old securities, a convertible feature of the preferred stock, and the authority of those in charge to make changes in the plan. But the figures set forth show in a substantial and general way the structure and arrangement of the proposed reorganization. The unsecured debt of the old companies, not paid by the receiver, is estimated as not exceeding $1,000,000. For the principal of this unsecured debt new preferred stock at par is offered, subject to the approval of the court. In this connection the court takes notice that, in addition to the above amount, the receiver has paid and discharged a substantial amount of unsecured debts and liabilities of the old companies from funds in his hands. There is but $45,135 of stock of the Iron Mountain Company in the hands of the public. For it the plan tenders preferred stock of the New Company at par. The existing stock of the Missouri Pacific Company in the hands of the public amounts to $82,839,585. The plan tenders the holders of it an equal amount of common stock of the New Company at par, upon payment of $50 per share of their respective holdings, and for the $50 per share so paid they will be given an equal amount of new 4 per cent. bonds. The cash amount realized from the payments upon the exchange of common stock (including those by underwriters, who take the place of nonparticipating old stockholders) will be $41,419,792. This money will be used as follows: (a) To pay Missouri Pacific Company extended gold notes, $24,773,000; (b) to pay certain equipment trust obligations of both old companies, $2,270,000; leaving (c) $14,376,792 for various minor liabilities, working capital for the New Company, new equipment, immediate improvements, reorganization costs, etc.

[1] At the threshold lies the question of the relation of a court which appoints receivers of a railroad to a reorganization thereof by the security holders. There is no doubt but that bondholders have a right, upon default, to a strict foreclosure and sale according to the terms of their mortgages and the applicable statutes, and to leave the holders of junior securities, unsecured creditors, and stockholders to protect themselves as best they can. But in practice, on a large scale, and except in cases of utter insolvency, that is rarely done in these days. If the financial difficulties resulting in receivership are not mortal, but are mere embarrassments, which may be relieved by time and readjustment, the custom is a reorganization, embodying a recognition of all interests—bonds and other lien debts, general debts, and stocks—as far down the scale of preference as the value of the property and sound business judgment reasonably justify. As was said in Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674, 683, 19 Sup. Ct. 827, 830 (43 L. Ed. 1130):

"We must therefore recognize the fact, for it is a fact of common knowledge, that, whatever the legal rights of the parties may be, ordinarily foreclosures of railroad mortgages mean, not the destruction of all interest of the mortgagor and a transfer to the mortgagee alone of the full title, but that such proceedings are carried on in the interests of all parties who have any rights in the mortgaged property, whether as mortgagee, creditor, or mortgagor."

The considerations which have led to such reorganizations in place of strict insistence upon contractual and legal rights are not important here. It has sometimes been claimed that plans of reorganization formulated by bondholders and stockholders of a railroad in the hands of receivers are exclusively of private concern, free from judicial action or interference. But for various reasons the view cannot be sustained in principle. After all that can be said from the standpoint of theory and strict right, the fact remains that many railroad receiverships, and the one here is typical of them, are but instruments for consummating plans of reorganization, and courts have come to realize that such use of their jurisdiction and processes entails a correlative duty to those affected by the result. Generally, in such cases, the principal parties to the suits are adversary only in name, and the existence of the collateral agreement or understanding sought to be consummated is suggested by the face of the pleadings. The relation between the receivership which ensues and the plan of reorganization agreed upon is close and intimate. So far as properly can be, the judicial proceeding is conducted in harmony with the plan, and the success of the agreed readjustment is promoted by the orders of the court and the acts of its receivers. Generally the judicial course would not be different if the court were carrying out a plan of reorganization of its own making or one affirmatively adopted by judicial order or decree. It is not meant by this that a court should insist on engaging with the security holders in formulating the terms of readjustment, but that the plan put out by them may and usually does have such relation to and dependence upon its judicial action that it is its duty to take cognizance of it and act accordingly. While it is the settled doctrine that reorganizations will be encouraged, yet, on the other hand, a court of equity will not lend its aid to one that is inequitable or oppressive. In the Louisville Case, supra, the court said:

"We may observe that a court, assuming in foreclosure proceedings the charge of railroad property by a receiver, can never rightfully become the mere silent registrar of the agreements of mortgagee and mortgagor. It cannot say that a foreclosure is a purely technical matter between the mortgagee and mortgagor, and so enter any order or decree to which the two parties assent without further inquiry. No such receivership can be initiated and carried on unless absolutely subject to the independent judgment of the court appointing the receiver; and that court in the administration of such receivership is not limited simply to inquiry as to the rights of mortgagee and mortgagor, bondholder, and stockholder, but considering the public interests in the property, the peculiar circumstances which attend large railroad mortgages, must see to it that all equitable rights in or connected with the property are secured."

An additional reason for the duty of a court was given in Northern Pacific Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931. There the Supreme Court referred to the rule that a private contract between bondholders and stockholders, whereby the corporate property was transferred to a new company having the same shareholders, was void in equity as to a nonassenting creditor, and also to the doubt that once existed whether a court could permit a foreclosure sale which left any interest in the stockholders. And it said

that it is now settled that, since those who invoke the aid of a court of equity must do equity, a reorganization relying on a judicial decree to subject the property may bind creditors who do not accept fair terms. Still another consideration was expressed by the Circuit Court of Appeals of this circuit in Western Union Telegraph Co. v. United States & M. T. Co., 221 Fed. 545, 137 C. C. A. 113. It said:

"The property of an insolvent railroad corporation in the custody of a court in a suit to foreclose a mortgage upon it is charged with a trust for the benefit, first, of the holders of preferential claims superior in equity to the lien of the mortgage; second, of the holders of the lien of the mortgage and of other such liens in their order of priority; third, of the unsecured or general creditors of the mortgagor; and, fourth, of its stockholders."

The conclusion is manifest that the general duty of a court in a railroad foreclosure suit to take cognizance of a plan of reorganization by the bondholders and stockholders which is to be aided by its decree, and to protect the equitable rights of all, becomes specific and imperative upon the complaint of an interested party.

[2] It is urged in support of the motion that the objection to the plan of reorganization should have been made by the trustee of the mortgage securing the series A bonds in question, and not by the bondholders or their committee. But, as is the practice, the offer of the plan is to the bondholders individually for their several acceptance or rejection. It does not call for the performance of a duty or the exercise of a power vested exclusively in the trustee. The acceptance or rejection of the plan affects the personnel of the bondholders, like a sale of their holdings in the market, rather than an action under their mortgage. Besides, the tender of the plan involves the assumed obligation of the Missouri Pacific Company to pay the bonds, which, so far as appears, was subsequent to and independent of the mortgage.

It is also contended that the intervention is premature; that it should not have been made before decree in the main case, or before the sale in foreclosure and motion to confirm. It is argued in this connection that objecting creditors must either accept the offer made them in the plan or stay out until the time above mentioned and risk their rights. The effect of the contention is that objections to the fairness of a plan of reorganization cannot be made until about the end of the proceedings in court, and if the court should then decide the offer was a fair one, the objectors not having accepted it would lose their right, if in the meantime the period limited in the plan for acceptance had expired. In the case here the time expired after the intervening petition was filed. No considerations of convenience in reorganization can justify a rule that would work that way. In most of the reported cases the objections by creditors were presented at or after the normal end of the court proceedings. Louisville Trust Co. v. Louisville, etc., Ry., 174 U. S. 674, 19 Sup. Ct. 827, 43 L. Ed. 1130; Northern Pacific Ry. v. Boyd, 228 U. S. 482, 33 Sup. Ct. 554, 57 L. Ed. 931; Id., 177 Fed. 804, 101 C. C. A. 18; Kansas City Southern Ry. v. Guardian Trust Co., 240 U. S. 166, 36 Sup. Ct. 334, 60 L. Ed. 579; Central Improvement Co. v. Cambria Steel Co., 210

Fed. 696, 127 C. C. A. 184; Id., 201 Fed. 811, 120 C. C. A. 121; Western Union Telegraph Co. v. United States & M. T. Co., 221 Fed. 545, 137 C. C. A. 118. But that was a casual or adventitious circumstance, and not according to a settled rule of practice. On the contrary, the rule that has been settled requires a diligent assertion of objections, and it is for the protection of the reorganization and those participating in it against belated attacks.

There are several points of similarity between the Louisville Case, supra, and the case at bar. There a single creditor objected; here a committee representing creditors. There the creditor held bonds which the principal railroad company had guaranteed; here the creditors hold bonds which the Missouri Pacific Company assumed and agreed to pay. There, as here, there was first a creditors' bill in harmony with the interests of the debtor company, a receiver was appointed, bills to foreclose mortgages were filed, and an order of consolidation entered. There, as here, the intervening creditor charged the formation of a plan of reorganization by bondholders and stockholders pursuant to which the railroad was to be purchased at foreclosure sale. In that case the creditor applied for and was given leave to intervene the day the decree of foreclosure was entered. The intervening petition was filed about a month later, but before the sale. Of a defense of laches the Supreme Court observed:

> "It is said by the appellee that the Louisville Trust Company [the creditor] was dilatory, and that by reason thereof it was not entitled to consideration in a court of equity. There is some foundation for this contention, and yet there was not such delay as justified the court in refusing to enter upon an inquiry."

One of the reasons given was that the original creditors' bill was instituted for the benefit of all creditors "according to their due equities and priorities," and the creditor in question might well have awaited some notice for it to come in. The conclusion of the court is quite inconsistent with the contention made here that the intervention of an objecting creditor before decree or sale and confirmation is premature, and should be dismissed.

Finally, it is said that the right of the plaintiffs to a decree is not affected by the intervention. That might be so in a pure case of foreclosure by the bondholders, but it necessarily follows from what has been said that, where the proceedings in court are but means to effect a reorganization in which interests of stockholders are recognized and preserved, the right to a decree is not absolute, but is subject to the same considerations as attend the foreclosure sale or its confirmation. But as the duty of the court may as well be performed later, no useful purpose will be subserved in delaying the decree.

We come to the objections of the Boisot committee to the plan of reorganization. Complaint is made of the offer of new preferred stock for the series A bonds in comparison with the offer to the old stockholders. Passing for the time the mortgage security back of those bonds, and regarding them as general indebtedness of the Missouri Pacific Company, because of its assumption and agreement to pay, no inequitable discrimination in favor of the old stockholders is per-

ceived. The normal relation between the two, general creditor and stockholder, is preserved. The common stockholder is always last in the scale. Here the general creditor is just before him, and his priority is preserved by preferred stock of the New Company. In this, as in most cases of the kind, the success of the reorganization and the future of the New Company depend upon the conversion of more or less of the indebtedness into income bonds, preferred stock, or common stock, and a consequent lessening of fixed charges. The acceptance of such new securities is a just and necessary concession to prior lien holders, who refrain from strictly enforcing their rights. In this case the old stockholders are required to pay in cash 50 per cent. of the par of their holdings. They will receive for their cash payments new 4 per cent. bonds at par. In order, these bonds will come just ahead of the preferred stock. They will be inferior to all the other bonded indebtedness, and their subordinate position in that respect, and their rate of interest, taken together, make it doubtful that they will soon, if ever, be worth par. This will operate as an assessment upon the common stock to the amount of the discount. That the stockholders will be given such bonds for their cash payments is not inequitable to general creditors. They will pay more than they will get in value; but if they paid nothing, and received no bonds, still the relation between them and general creditors would not be disturbed. Besides, the raising of money from some source is imperative, and that raised from the stockholders will be for the benefit of the enterprise as a whole.

[3] Complaint is also made that the holders of the bonds on four other branch or subsidiary lines are offered the same or better terms, and comparisons are made between those lines and the Kansas City Northwestern as regards values of the properties and amounts of incumbrance. But there are other considerations than those. The relation of a particular railroad to the system as a whole, its value to the system on that account, and the advisability of including or excluding it, in view of the necessities of the reorganization, enter into the problem. A court cannot well review such matters, but must leave them largely to the business judgment of those in charge. It would, perhaps, be going too far to say a court should never interfere on a complaint of that kind; but clearly it should not do so unless in an exceptional instance of fraud or grossly inequitable discrimination. Generally the objection to a plan of reorganization should involve a definite principle, and not require a long complicated investigation of values, properties, etc. As to this an analogy may be found in the opinion of the Supreme Court on a phase of the Boyd Case.

Objections are also made to the proposed disposition of the money realized from payments on the exchange of common stock, shown by divisions (a) and (c) above mentioned. What has already been said sufficiently disposes of them. But in the case of the extended gold notes of the Missouri Pacific Company it may be added that they matured during the receivership and the court found that the equity in the deposited collateral was so substantial and valuable that it author-

ized the receiver to preserve it by securing an extension of the notes upon terms which included additional security.

[4] The above are all the objections to the plan of reorganization specifically set forth in the intervening petition, and, were nothing else to be said, the petition should be dismissed. But another question arises from the face of the petition, the attached copy of the plan, and the intervener's prayers for relief. As was said in the Louisville Case, it is the duty of the court to "see to it that all equitable rights in or connected with the property are secured." The question was referred to at the argument, and unless disposed of now it will return to affect the reorganization. As already indicated, the holders of the series A bonds occupy a dual position. First, they have a first mortgage lien upon the Kansas City Northwestern Railroad at the rate of $6,347 per mile. It is averred that the mortgage covers valuable terminals and team tracks in Kansas City, Kan., in regular use by the Missouri Pacific Company, and a railroad bridge across the Kansas river, also used by it and by the Chicago Great Western Railroad Company, its lessee. Second, they hold the independent contract of the Missouri Pacific Company to pay the bonds, which undoubtedly was intended and has been regarded as an additional and valuable security. But the plan is so framed that, if they insist upon their mortgage security, they lose their rights as creditors under the contract. In other words, the tender of preferred stock would not in that case be open to them for any part of their demands. On the other hand, if they accept the offer of preferred stock, they must abandon their mortgage. In that case they would get no more than a general creditor with no security whatever. These bondholders became creditors of the Missouri Pacific Company by virtue of its contract, irrespective of the Kansas City Northwestern mortgage, and, as such, their rights were equal to those of all general creditors, and superior to those of the stockholders. It does not seem equitable that, to maintain that parity and priority, they should be required to abandon their mortgage. Other general creditors, to whom preferred stock is offered, have nothing and give up nothing of security, but their proper relation to the old stockholders is fairly recognized.

The situation reduces itself to this: Whether those conducting the plan of reorganization decide to include the Kansas City Northwestern Railroad in the new system or to exclude it, consideration should be given to the mortgage securing the series A bonds, and after the application of the value or proceeds of the mortgaged property determined by agreement or by foreclosure and sale the deficiency should have equitable recognition in the plan as a general debt. The position of the intervening bondholders is a hard one. It is said the rolling stock on hand when their mortgage was given has been used up and that the railroad is now practically without equipment. Being investors, not operators of railroads, naturally they do not want it. On the other hand, the undecided purpose of those in charge of the reorganization hampers them in making the most advantageous disposition of their interest to some other railroad company. The par-

ties may be able to reach an amicable, equitable adjustment, so there is no need to go further at this time.

The motion to strike from the files or dismiss the intervening petition will be denied.

RICHMOND CEDAR WORKS v. PITTSBURG LAND & LUMBER CO. et al.

(District Court, E. D. North Carolina. December 11, 1916.)

No. 342.

1. ADVERSE POSSESSION ⇐79(4)—EXCLUSIVE CHARACTER—COLOR OF TITLE—TAX DEED.

By the laws of North Carolina in force in 1801, a nonresident owner of a tract of land lying in two or more counties was permitted to list the entire tract for taxation in either county. In that year such a tract was sold for taxes by the sheriff of one of the counties in which it lay, was conveyed to the Governor of the state, and the title conveyed became vested by operation of law in the Board of the Literary Fund, which held it for the benefit of the public schools. The board subsequently took possession of the land, and from 1837 to 1847 exercised acts of ownership by warning off trespassers, laying out roads, constructing drainage canals, and selling portions of the tract. *Held* that, whether or not the sheriff had legal authority to sell that portion of the tract which lay outside of his own county, his deed constituted color of title, and when followed by entry and adverse possession for more than seven years vested the board with perfect title as against grantees of one who then claimed to be the owner and whose claim was denied by the board.

[Ed. Note.—For other cases, see Adverse Possession, Cent. Dig. § 462; Dec. Dig. ⇐79(4).]

2. QUIETING TITLE ⇐10(2)—PERSONS ENTITLED TO RELIEF—STATE AND SPECULATIVE CLAIMS.

In 1795 the state of North Carolina made a grant of a tract of land containing 194,840 acres, the boundaries of which were described. During 100 years thereafter, neither the grantee nor any of his successors in interest paid any taxes on the land, and in 1801 it was sold for taxes, and the title thus conveyed passed to the state for the benefit of its school fund. From 1837 to 1847 the board having charge of such property was in actual possession, making improvements and claiming exclusive title, which claim the board and its grantees have ever since asserted, and have been in actual possession of portions of the tract. About 1840 a claim of ownership was made by one claiming under the original grantee, which was denied by the state, and no further claim adverse to the state was asserted until 1906, when one claiming under the original grant conveyed her interest for $250, and her grantee conveyed the portion in suit, valued at $8,000, to the complainant for a consideration of $75. Complainant went upon the land, built a small cabin, and employed a man to reside therein, and brought the present suit to quiet its title. *Held* that, aside from the question of title, complainants' claim was stale, and its interest speculative, and that it was not entitled to relief in a court of equity.

[Ed. Note.—For other cases, see Quieting Title, Cent. Dig. §§ 37, 40, 42; Dec. Dig. ⇐10(2).]

In Equity. Suit by the Richmond Cedar Works against the Pittsburg Land & Lumber Company and others. Decree for defendants.

Winston & Biggs, of Raleigh, N. C., and W. W. Starke, of Norfolk, Va., for plaintiff.

E. F. Aydlett, of Elizabeth City, N. C., and Mark Majette, of Columbia, N. C., for defendants.

CONNOR, District Judge. [1] Plaintiff alleges that it is the owner and in possession of a tract of land, situate in Tyrrell county, N. C., a particular description whereof is set out in the bill; that defendants hold a deed covering the land, and claim to be the owners thereof. The prayer is for a decree adjudging that defendants' claim is invalid, and for other and further relief. Defendants deny that plaintiff is the owner of the land, admit that they have a deed therefor, and aver that, by virtue of said deed, they have a good and valid title to the land and are the owners thereof. The jurisdictional averments are admitted.

The land in controversy is a portion of a large body of swamp land, covered by grant No. 317, issued by the state of North Carolina, January 2, 1795, to John Hall for "one hundred and ninety-four thousand, eight hundred and forty acres of land in our county of Hyde," etc. This language is followed by a specific description calling for corners and lines of older grants and natural objects—rivers, lakes, etc. It appears that, while that portion of the land claimed by plaintiff is within the boundaries called for by the grant, it is situate in Tyrrell county, which county was established prior to January 2, 1795.

On September 21, 1800, John Hall, residing at Philadelphia, Pa., executed his last will and testament, which was upon his death, January 30, 1801, admitted to probate by the court of that city, having jurisdiction to take probate of wills, and duly recorded in the office in said city, as provided by the statute of Pennsylvania. The will was not then admitted to probate in North Carolina. On November 20, 1906, upon the affidavit of A. D. Ward, Esq., attorney for the University of North Carolina, a certified copy of the will was admitted to probate by the clerk of the superior court of Tyrrell county and recorded in the registry of wills of said county. John Hall devised to his son, Baynard Hall, "one moiety of a tract of land in North Carolina, containing 22,400 acres," and to John Wyatt "the other moiety of the 22,400 acres of land in North Carolina." He directed that:

"The remainder of my lands and all my debts be appropriated in discharging my debts and, after this is done, I wish the residue to be equally divided between Baynard Hall, John Wyatt and Harriett Hankins."

The will contains no other reference to land in this state. The evidence tends to show that Baynard Hall was, at the date of his father's death, an infant of tender years. Baynard Hall married Mary A. Hall, and upon his death such estate and title as he had in the lands vested in his wife, Mary A. Hall, who executed a last will and testament October 13, 1864. She devised to her sister, Martha M. Young:

"My house and lot situated at 252 Cumberland street, Brooklyn, Long Island," her personal estate, and "all my right, title and interest being a one-third interest in the house and lot known as 202 North Fifth street, in the city of Philadelphia and state of Pennsylvania."

There is no reference to any land in North Carolina, nor is there any residuary clause disposing of land. The will contains a residuary clause giving to her sister, Martha M. Young, "all the personal effects and estate whatsoever of which I may die seized."

Martha M. Young executed her last will and testament, October 21, 1865, devising to Sarah M. F. Scott "all my property, real and personal, of which I am now possessed, or shall be seized at the period of my death." This will was duly admitted to probate in the Surrogate's Court, Kings county, N. Y., January 8, 1867. A copy of the will of Mary A. Hall and Martha M. Young were certified and ordered to be recorded in the book of wills of Hyde county, N. C., October 15, 1906. Sarah M. F. Scott married Hadden, and on April 2, 1906, in consideration of $250 conveyed to H. T. Greenleaf:

"All of her right, title, and interest in and to a certain tract of land, situated in the state of North Carolina and in the counties of Hyde and Beaufort, patented by the state of North Carolina to John Hall and numbered 317, and dated January 2, 1875."

The only other description contained in this deed is by reference to the record in the Secretary of State's office and the office of the register of deeds of Hyde county, N. C., Book 1, page 428, and also in Grant Book, page 351, and—

"the said lands descended from John Hall, the ancestor of Baynard R. Hall, and was thereafter inherited by one Mary Ann Hall, who devised by will to one Martha M. Young, who devised to Sarah M. F. Hadden, formerly Sarah M. F. Scott; said Martha M. Young being the sister and only devisee and heir at law of said Mary Ann Hall."

This deed was recorded in Tyrrell county August 17, 1908.

On January 9, 1906, H. T. Greenleaf, in consideration of the sum of $75, conveyed to the Richmond Cedar Works "that portion of the John Hall patent, No. 317, dated January 2, 1795, containing 195,840 acres." Following this language is a specific description of the land described in plaintiff's bill. This deed was recorded in Tyrrell county February 21, 1908. It does not appear that John Hall, or any person claiming under him, through whom plaintiff claims, was ever in possession of any portion of the land in controversy. A short time before this suit was instituted, and for the purpose of instituting the suit, the plaintiff's employés built a small cabin, 8 by 10 feet, on the land and employed a man to reside therein.

Passing, for the present, several questions presented upon the plaintiff's paper title, for the purpose of considering the defendants' title, it may be conceded that the deeds, wills, etc., introduced, show a connected chain of title from John Hall to plaintiff, unless there is a break in the chain prior to the date of plaintiff's deed.

Defendant, for the purpose of taking title out of Baynard R. Hall, introduced a certified copy of a deed, executed by said Baynard and his wife, bearing date October 21, 1841, conveying to John Vaughan, Robert Porter, James Dandas, and Benjamin Rugler all of his right, title, and interest in the lands granted by the state of North Carolina to John Hall, by grant No. 317, bearing date January 2, 1795, and to lands covered by several other grants. A specific description of grant

No. 317, in the words in the grant, is given in the deed. The land is conveyed to the grantees in trust for the use and benefit of the North Carolina Land Company, a corporation formed under the laws of the state of Pennsylvania. This deed was recorded in Hyde county January 11, 1848, and in Tyrrell county April 29, 1915.

It appears that on February 20, 1801, James Watson, sheriff of Hyde county, sold the lands covered by the John Hall patent 317 for taxes to Edward Harriss, who conveyed to William Orr March 7, 1801, who conveyed to the state (Governor). William Orr also devised the land to W. A. Blount, who conveyed to the Literary Fund November 28, 1840. Certified copies of the proceedings of the Board of the Literary Fund of North Carolina show that, during the years 1837 to 1847, the board, acting under and pursuant to acts of the General Assembly, was engaged in surveying, draining, and reclaiming the lands covered by the John Hall grant. Canals were cut, roads laid out, trespassers warned off, sales made, and other acts of ownership exercised over and in regard to these lands. In the report of the engineer, who was in charge of the survey of the lands, specific reference is made to the "Hall patent," to which the board was claiming title. While it is not practicable to refer to all of the acts of the board, reference to a few will indicate the character and extent of the claim and assertion of ownership:

On March 17, 1838, a resolution was adopted referring to a tract of some 56,000 acres lying on the east of Pungo river, sold by James Watson, sheriff, as the property of William Orr, and conveyed to Benjamin Williams, Governor, September 1, 1801, as being the property of the state and capable of being reclaimed, and "from the facilities which it offers for draining demands the first attention of the board, the same is hereby selected for their first operations." The engineer is directed "to make particular survey of this tract and lay out the route for such canals as he may deem proper and essential." A large sum of money was appropriated for, and spent, in draining and reclaiming these lands. It appears from the record of proceedings of the board that Mr. Hawkes, attorney for the American Land Company, "set up" title to a portion of the lands drained and claimed by the Literary Board. They claimed title through the heirs of "one Hall" and offered to negotiate with the board, which offer was declined. On December 4, 1841, the board entered into a contract with A. C. Dickinson for "executing tributaries to Alligator Canal," for protecting the lands of the board from intruders and testing its productiveness by experiments. The contract is set forth in the minutes of the board. Payments were made Dickinson for "getting out stumps in front of the canal, for building three bridges," etc. In a report made by the board to the General Assembly, December 4, 1846, among much other interesting information, I find the following, indicating the extent of the activities of the board in regard to these lands:

"The board regret that accidental circumstances prevented them from visiting the swamp lands belonging to the school fund, which have heretofore been drained in the autumn of last year. A member of the board residing in the town of Washington is their agent to overlook these lands, and receive proposals to purchase any part thereof. No sale has, as yet, been effected, but

good policy seems to require that some portions of the drained lands shall be disposed of to promote culture and settlement in that region. * * * Since the adjournment of the last Legislature, an agent of certain persons in Pennsylvania, styling themselves the North American Land Company, have submitted to the board claims of title to a large portion of these lands. The board were not satisfied with the validity of these titles, and could, in no manner, recognize them, the more especially as it was manifest that the claimants had full knowledge of the state's operation in draining these lands while they were in progress and contributed nothing thereto."

The board further say that since the commencement of the session of the Legislature—

"information has been received that two individuals have entered on these drained lands and are now pretending to be occupants thereof. The board will take prompt measures to have them removed or punished."

On April 1, 1847, Governor Graham, president of the board, directed a letter to the sheriff of Hyde county, in accordance with the act of the General Assembly, requiring him to give notice to trespassers to get off these lands, etc. On May 15, 1847, the members of the board went to the lands to attend a sale of portions which had been advertised, and, upon claim being made by Mr. Whitehead for some land company, determined to warrant and defend the state's title. The relevancy of this evidence of possession of these lands by the Board of the Literary Fund is found in the fact that, by various acts of the General Assembly, in accordance with the educational policy of the state, the title to the swamp lands was vested in the board and dedicated to the purpose of educating the children of the state. The evidence consists of certified copies of the proceedings of the board and is to be found in the very valuable work of Chas. L. Coon, Esq., "Public Education in North Carolina—Documentary History—2 Vol. —Publication N. C. Historical Commission." Its import is found in the contention that the portion of the John Hall patent, No. 317, in controversy, is situate in Tyrrell county, whereas James Watson, sheriff of Hyde county, sold the entire tract.

The explanation of this is found in the act of the General Assembly, which permitted a person, who did not reside in the state, but owned a tract of land lying in two or more counties, to list the entire tract in either county. 1 Martin's Compilation, 205. The statute did not specifically authorize the sheriff of the county in which the land was listed for taxation to sell any portion of the tract lying in other counties. It appears, from evidence in this and other cases which have come before me, that sheriffs construed the statute as authorizing a sale for taxes of the entire tract, as was done in the instant case. In the last years of the eighteenth century the record discovers that very large tracts of land in the eastern and western sections of the state were patented by persons, many of whom resided in other states. The boundaries of these lands were indefinite, as were the boundaries of many of the counties. The grantees did not take possession of their large holdings, and frequently failed to pay taxes on them. The Supreme Court Reports and legislative records throw an interesting light upon the effect which this condition created upon the title to our swamp and mountain lands. It was the evident purpose of the Legis-

lature to enable these nonresident grantees to list their lands, which overlapped county lines, in either county.

It is doubtful whether the act extended to sheriffs power to sell, for nonpayment of taxes, any other portion of such tracts than that lying in their counties. However this may be, I think it clear that the deed of the sheriff conveying the entire tract, including portions thereof, situate in Tyrrell county, was color of title, and when followed by entry and adverse possession of the board entering and claiming under such deed, continuing for seven years, ripens into a perfect title. In addition to the public records cited, the oral evidence taken in this case shows that the canals or "tributaries," as they are called, are now on the land. (See evidence of Mr. Makely and J. H. Wahab.) The evidence shows that, for more than seven years, the board was in possession, exercising acts of ownership—dominion over these lands. The character of this possession was manifestly adverse to all persons and especially to the American Land Company claiming under Baynard R. Hall.

So far as appears from the evidence, the representative of this company abandoned any further claim to the land. Between 1848 and 1870, four years of war and five years of disorganization of the educational work of the state, no action seems to have been taken by the board or its successor, the State Board of Education in regard to the swamp lands. It appears that, at the session of 1870 (Rev. St. N. C. 1873, c. 68, § 25), the General Assembly passed a statute authorizing the Board of Education to make sale of the lands owned and held by the board lying in the counties of Hyde, Tyrrell, and Washington for the sum of $50,000. Pursuant to the act, the board entered into a contract with Samuel T. Carrow and D. P. Bible for the sale of the entire body of swamp lands in the counties named in the statute for the sum authorized. A portion of the purchase price was paid and note executed for the balance. There is evidence that a number of persons settled upon portions of the lands—but none on the part in controversy—under Carrow and Bible. They remained there many years, built houses, and lived in them—some as long as ten years.

Carrow and Bible having failed to pay the balance of the purchase price the State Board of Education, on October 20, 1883, instituted an action in the superior court of Hyde county against them for the purpose of subjecting the lands to sale for the payment of the balance due on the notes. At the fall term, 1884, a decree was passed directing a sale of the land, appointing L. C. Latham commissioner to make the sale. At the fall term, 1886, the commissioner reported that he had sold the lands in accordance with the terms of the decree, and that the State Board of Education had bought them for the sum of $35,000. The sale was at the same term confirmed, and the commissioner directed to make title to the Board of Education. This was done, and the board thereafter conveyed to the Real Estate Investment Company, and this company, on April 12, 1902, conveyed to James and William Sprunt. The evidence tends to show that the Sprunts sent a man by the name of Russell to the lands purchased by them; that he built a house, stables, etc. on a portion of the land, not

the part in controversy. He built wire fences around several hundred acres and put a large number of cattle to "run" upon it—one witness says so many as a thousand head. It does not very clearly appear that the fences were around the part of the land in controversy, but it does appear that this land was covered by the deeds as a part of the large boundary. The land was low, wet, with but little timber on it. Within two or three years the cattle died, the experiment being a failure, and the fences remained until the posts rotted. (See testimony of Wahab and Makely.) Sprunt conveyed to Makely, Makely conveyed to Tarrault L. & L. Company, and that company on May 3, 1909, conveyed to defendant. The land in controversy was not cut off or described as separate from the patent until Greenleaf conveyed to Richmond Cedar Works, January 9, 1908. A plat is attached to his deed.

Assuming, therefore, that John Hall's title vested in his son Baynard, although this is doubtful, under the terms of his will, it would seem that Baynard parted with such title as he had by his deed to trustees for the American Land Company in 1841. If, however, this is not so, it is doubtful whether, under the wills in evidence, such title as Baynard had vested in Sarah M. F. Hadden, who undertook to convey to Greenleaf. If, passing these difficulties, it is found that plaintiff has the paper title, it is manifest that, beginning with the deed of Watson, sheriff, which was, in any aspect, color of title, followed up by the entry and unequivocal assertion of title by the Board of the Literary Fund, in which, by legislative enactment and the deeds in evidence, the title to these lands vested, and the subsequent acts of its successor, the State Board of Education, I am of the opinion that such title as plaintiff's grantor may have had was divested. The possession of the board and its grantees of the entire tract, claiming under deeds covering it, of course, extended to the boundaries called for by the deeds and included the land in controversy.

[2] Whatever may be the legal status of the title, it would seem that plaintiff's position in a court of equity does not appeal to the court. It savors of being "stale" and speculative. The representatives of John Hall paid no taxes, asserted no title, except by the deed of Baynard, 1841, for quite 100 years. With a singularly attenuated claim in 1906, Mrs. Hadden conveys to Greenleaf for $250 a tract of land containing 195,840 acres, worth many thousand dollars. Greenleaf, in consideration of $75, conveys a portion of the tract, valued at $8,000, to plaintiff; not a dollar of taxes has, so far as appears, been paid to the state by these claimants. During this time the state's representatives have, by all possible means, endeavored to make the only use of this land of which it was capable, for the purpose of promoting the education of her children. While the plaintiff brought its bill soon after getting a deed, its grantee, and those under whom she claimed, have, for more than 50 years, during a large part of which period the Board of the Literary Fund and its successors were constantly, and in many ways, publicly proclaiming and asserting ownership of the land, slept upon their supposed rights, and failed to list the land, or pay tax thereon. Equity responds to the call of the vigilant—the diligent—those who have, in good faith, asserted their rights and

taken the burdens which such rights impose. The plaintiff can scarcely be termed a purchaser for value, and is clearly not a purchaser without notice; it knew when it purchased that it was buying a doubtful, disputed title. Equity will not encourage speculation in such titles, but leave those who indulge in the purchase of them to the courts of law. Naylor v. Foreman Blades Co. (D. C.) 230 Fed. 658.

The bill will be dismissed, and the cost taxed against plaintiff. A decree may be drawn accordingly.

MASTERS v. CITY OF RAINIER.

(District Court, D. Oregon. January 8, 1917.)

No. 7186.

1. MUNICIPAL CORPORATIONS ⟸374(1)—PUBLIC IMPROVEMENTS—LIABILITY OF CITY—VOID CONTRACT.

The Oregon rule that a municipality which fails to observe the requirements of its charter in making assessments for street improvements, or unreasonably delays enforcing them, is liable ex delicto to the contractor for the amount of the contract price, though it could not have contracted to pay such amount, does not apply so as to make the city liable for the contract price of such improvements, where it has no power to make such contract except on petition of a majority of the property owners and by ordinance adopted in compliance with certain requirements and there was no sufficient petition or ordinance.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 905, 910; Dec. Dig. ⟸374(1).]

2. PRINCIPAL AND SURETY ⟸187—JUDGMENT—CONCLUSIVENESS—PARTIES.

A suit by a city against a street contractor and his surety to recover for the contractor's default in performance of the contract is essentially against the contractor, or at least against him as well as against the surety, so that the judgment therein was between the same parties as were parties to a subsequent suit by the contractor against the city to recover on the contract.

[Ed. Note.—For other cases, see Principal and Surety, Cent. Dig. §§ 554–556; Dec. Dig. ⟸187.]

3. JUDGMENT ⟸738—CONCLUSIVENESS—MATTERS CONCLUDED—VALIDITY OF CONTRACT.

In that suit the validity of the contract under which the work was performed was necessarily in issue, though admitted by the contractor, so that the judgment therein was conclusive against the city as to the validity of the contract in a subsequent action by the contractor to recover the balance due under the contract.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. § 1266; Dec. Dig. ⟸738.]

4. JUDGMENT ⟸713(2)—CONCLUSIVENESS—MATTERS CONCLUDED—UNCONTROVERTED ISSUES.

In an action upon the same claim and between the same parties, a former judgment is conclusive as to any admissible matter which might have been offered to sustain or defeat the claim; but, if the latter action is on a different demand, the previous judgment estops only matters actually in issue or controverted.

[Ed. Note.—For other cases, see Judgment, Cent. Dig. §§ 1063, 1066, 1099, 1241; Dec. Dig. ⟸713(2).]

Action by Charles Masters against the City of Rainier. On demurrer to the replies to defendant's answers. Demurrer sustained to first reply and overruled to second reply.

Robert C. Wright and Beach, Simon & Nelson, all of Portland, Or., for plaintiff.

Fred W. Herman, City Atty., of Rainier, Or., and Norblad & Hesse, of Astoria, Or., for defendant.

WOLVERTON, District Judge. This is an action to recover on five counts against the city of Rainier. Counts 1 and 3 are based upon separate contracts with the city to construct certain street improvements, for which, it is alleged, as respects the first count, the city agreed to pay Masters the sum of $26,452.40, and as to count 3, $7,064.40, all of which has been paid in warrants except $2,865 under the first contract and $1,692.40 under the second; the balance in each case being the amount sought to be recovered.

The second and fourth counts are predicated upon the same contracts, and it is thereby alleged that the city agreed to pay plaintiff for extra materials furnished and extra work done in connection with the improvements contracted to be constructed. The amount claimed to be due under the second count is $2,385.15, and under the fourth $2,352.85.

The fifth count is for certain work done and performed at the request of the defendant amounting to the sum of $346.

In connection with the first four counts, plaintiff has set forth the judgment of the circuit court of the state of Oregon for Multnomah county, heretofore made and rendered in the case of the city of Rainier against Charles Masters, the plaintiff herein, and the United States Fidelity & Guaranty Company, his surety for fulfillment of the contract, as a bar by way of res judicata to defendant's now controverting plaintiff's demands. The case went to the Supreme Court of the state on appeal, was there affirmed, and its mandate sent down and entered in the circuit court.

The defendant, for a further and separate answer to plaintiff's first and second causes of action, sets forth that the petition for the improvement was not made or subscribed by the owners of a majority of all property abutting upon the streets or portions thereof sought to be improved; that said petition was not immediately published as required by section 5, c. 10, of the charter of the city of Rainier, and was not published until March 22, 1909, the said petition having been filed March 15, 1909; that Ordinance No. 118, requiring the police judge to advertise for bids for the improvement, and declaring the expense thereof a charge and lien upon the abutting property, was not passed as required by section 6 of chapter 7 of the city charter, in that the said ordinance was introduced, read a first, second, and third time, and passed all at the same meeting of the common council. The same objection is made to Ordinance No. 133, which authorized the mayor, in behalf of the city, to enter into contract with Masters for making the improvements.

Other matters are alleged, respecting the narrowing of the streets upon which the improvements were made, and the disposition of the warrants issued in payment for the work; but with these we have nothing to do so far as the present controversy is concerned.

For a further and separate answer to plaintiff's third and fourth causes of action, the defendant admits the sufficiency of the petition for making the improvements, but complains that Ordinance No. 119, authorizing the police judge to advertise for bids for making such improvement, and declaring the cost of the improvement to be a lien upon the abutting property, was introduced, read a first, second, and third time, and passed all at one and the same meeting of the common council; and the same is alleged respecting Ordinance No. 133, authorizing the mayor to enter into a contract for making such improvements with Masters. It is further alleged that the common council did not cause immediate notice of the petition to begin, and not until the 22d day of March, 1909, the petition having been filed April 6, 1908.

The same allegations are made in this as in the previous further and separate answer respecting the manner of narrowing the streets and disposing of the warrants issued in payment for the improvement.

The plaintiff, for a reply to the defendant's further and separate answers to plaintiff's first, second, third, and fourth causes of action, sets up: First, that plaintiff was induced to enter into said contracts with the city through representations by the city that the petitions for the improvements in the first instance were sufficient and regular, that the signatures affixed thereto were duly authorized, real, and bona fide, and that the ordinances putting the same into effect were all duly and properly adopted, and that by reason thereof the defendant is now estopped to deny their validity. For a further reply, plaintiff sets up again the judgment made and rendered in the circuit court of the state of Oregon for Multnomah county, in the case of the city against Masters and his surety, and claims that defendant is also estopped to controvert plaintiff's demand as set forth in the first four counts by reason of such judgment. The defendant has interposed a demurrer to these replies, challenging their sufficiency, and the sole questions for decision arise upon the demurrer.

Two questions arise for disposal: One, whether the city is estopped to controvert plaintiff's demands by reason of its having induced the plaintiff to enter into the contracts through its representations that the proceedings of the common council authorizing the contracts were regularly had and duly authorized by charter and ordinance regulations; and, the other, whether the judgment rendered in the case of the city against Masters and his surety constitutes an estoppel or bar to insisting now upon the defenses invoked.

[1] It is settled doctrine of the Supreme Court of Oregon that, where the expense for street improvements is to be paid through assessments upon abutting property, and the municipality fails to observe the requirements of its charter in making the assessments, or is guilty of unreasonable delay in enforcing essential provisions with reference thereto, or in collecting or paying over the funds, the contractor has a right of action against the municipality arising, ex delicto, for the dam-

ages sustained, wherein the amount due under his contract, with interest, is the measure of recovery; and this notwithstanding a provision in the contract that he shall look for payment only to the particular fund to be raised through the special assessments. Jones v. City of Portland, 35 Or. 512, 517, 58 Pac. 657; North Pacific L. & M. Co. v. East Portland, 14 Or. 3, 6, 12 Pac. 4; Commercial National Bank v. City of Portland, 24 Or. 188, 33 Pac. 532, 41 Am. St. Rep. 854; Little v. City of Portland, 26 Or. 235, 37 Pac. 911; O'Neil v. City of Portland, 59 Or. 84, 113 Pac. 655.

The Supreme Court of Iowa is committed to a like doctrine. Ft. D. E. L. & P. Co. v. City of Ft. D., 115 Iowa, 568, 89 N. W. 7.

The defendant insists, however, that, if the contract for doing the work is invalid for failure of the city through its common council to comply with the provisions of the charter touching the making of street improvements, then no duty to make assessments arises, and the contractor cannot recover by reason of the city's neglect or failure to make such assessments, and thereby to collect the funds with which to pay the contractor.

The proposition seems persuasive, and it extends to the power of the city to act at all. Thus it is complained in the one instance that the owners of a majority of all abutting property had not petitioned for the improvement, and in both instances that the common council had failed to pass properly any ordinances establishing the street districts, or authorizing advertisements for bids for letting the contracts, or authorizing the city to enter into contracts with the contractor for doing the work. The charter inhibits the common council from placing on final passage any ordinance until its next regular or adjourned meeting after the meeting at which the ordinance is introduced. In other words, it inhibits the putting of an ordinance on its final passage at the same meeting of the common council at which it is introduced. And it is averred that the ordinances complained of were introduced, read a first, second, and third time, and passed all at the same meeting. In this respect, the mode becomes the measure of the city's power to do anything by ordinance.

It would seem that the city was wholly without power to act at all in the one instance, if it be true, as alleged in the answer, that the owners of a majority of all abutting property had not signed the petition; for it is not claimed that the city has general power to make such improvements. The city was also without power to enter into the contracts unless through valid ordinance passed in manner prescribed by its charter. Grafton v. City of Sellwood, 24 Or. 118, 32 Pac. 1026; City of Astoria v. American La France Fire Engine Co., 225 Fed. 21, 139 C. C. A. 80. The contracts themselves are therefore nullities by reason of the lack of power in the city to consummate them, including the manner of their consummation.

There is a clear distinction between cases where the contract between the city and the contractor is a nullity, and cases where the contract is good but the city fails or neglects to take some steps under the contract itself which it has, expressly or impliedly, undertaken to take. It was so held in Iowa, in the case of Citizens' Bank v. City of Spencer,

126 Iowa, 101, 101 N. W. 643, a well-considered case. There the ordinance passed for doing the work was held invalid because a sufficient number of councilmen did not vote in its favor, or did not vote for a suspension of the rules, which was treated as the same thing. Hence it was held that the contract was void ab initio. The cause proceeds upon the principle that all persons are bound to take notice of the want of power in the common council to act. This want of power is just as patent to any person dealing with the city as it is to the city itself, and in such a case a contract made with the city acting in excess of its power does not estop the city from denying its validity. Not so where the city has undertaken by valid contract to do something which it fails to perform, for in such event it violates the contract by not performing, and the contractor has a right to rely upon the city's fulfillment of its obligation.

I have been solicitous to ascertain whether, in the Oregon cases above cited, there was presented under the facts a question of want of power by the municipality to act in the first instance. From a careful examination of the facts in each case, I find no such question presented, or at least it is not apparent from the facts stated in any one of them. The holding of these cases is therefore not in conflict with the doctrine of the Iowa case, the principle of which appeals to me as sound, and it is not so considered by the Iowa Supreme Court. I am impelled to the conclusion that the city is not estopped to deny liability under the contract.

The plaintiff controverts this conclusion, and insists that, where a municipality contracts respecting a subject within its general powers and not forbidden it, and defects appear in the petition for or the passage of the ordinances, the municipality will not be permitted to allege its errors thus appearing as a basis for evading payment for work done in good faith, the benefits of which it has received and appropriated, citing as his leading cases in support thereof Bill v. City of Denver (C. C.) 29 Fed. 344; Hitchcock v. Galveston, 96 U. S. 341, 24 L. Ed. 659; and Ward v. Forest Grove, 20 Or. 355; 25 Pac. 1020.

In the City of Denver Case, the learned judge who rendered the decision was careful to premise that the city had the power, under the general provisions of its ordinances, to make a direct contract with the plaintiff for his services, by which contract the city would primarily have been bound. Such is not the case here. I have been cited to no general powers of the city to make street improvements of the nature of those contracted to be made. Its powers in that respect were limited, restricted, and specially defined, and it had no power to act beyond these restrictions. This distinguishes the Denver Case from this one.

So in Hitchcock v. Galveston, the court declared, after referring to certain sections of the charter, that Galveston had plenary authority to construct the sidewalks and to do whatsoever was necessary to that end, and it was in pursuance of that power that it authorized its mayor and chairman of the committee on streets and alleys to enter into the contract in its behalf. But the principal question for decision was whether the contract was rendered wholly void by reason of

its providing that the work done should be paid for in bonds of the city, the issue whereof was not authorized by law. The court held that it was not, and that the other terms of the contract should be enforced, notwithstanding this one provision was void. There is no conflict, therefore, in the doctrine of this case with that of the Iowa case and the conclusion at which I have arrived. Indeed, the case is cited in the Iowa case as supporting the principle there announced.

So in the Ward Case, the city had plenary power in the premises, and the controversy was touching the regularity with which it effectuated the employment of the plaintiff.

The demurrer to the first further and separate reply should be sustained.

[2] The next question presented is whether the judgment rendered in the case of the city of Rainier against Masters and his surety is an estoppel and bar to the present action.

I am unable to agree with defendant's counsel that the action was essentially against the surety only. It was against Masters as principal and his surety jointly. No judgment could have been rendered against the surety except upon default of the principal. One of the pertinent issues in the case was whether Masters had so defaulted, and the judgment of the court was against the city, plaintiff. The action therefore was essentially against Masters, rather than against the surety company. At any rate, it was against Masters as well as his surety. So that cause was between the same parties as are litigating in this.

[3] It may properly be inquired whether this action is upon the same claim or demand as the one litigated in that action. It is not upon the same claim, but the former action so arose as to involve the identical issues for adjudication that are involved in this, except as to the matter of recovery. In that case, the city attempted to recover for default on the part of Masters in his performance of the same contract as it is now sought to recover upon by reason of default on the part of the city. That one cause of action may be said to arise ex contractu, and the other ex delicto, can make no difference as to the principle involved. In either case relief is or was sought upon the contract, and by reason of its breach by one party or the other concerned. Furthermore, the validity of the contract is and was at issue in each case. Whether contested or not in the former case, the fact remains that its validity was at issue, for otherwise judgment could not have been passed upon the contract.

[4] The rule as to what judgments are a bar or estoppel to the prosecution of another action is very clearly stated in Cromwell v. County of Sac, 94 U. S. 351, 352, 24 L. Ed. 195. In an action upon the same claim or demand, and between the same parties or their privies, the former judgment bars the action, not only as to every matter which was offered and received to sustain or defeat the claim, but as to any other admissible matter which might have been offered for that purpose; but, if the latter action be upon a different claim or demand, the previous judgment estops only as to those matters in

issue or points controverted, upon the determination of which the finding or verdict was rendered.

The principle has been so declared by the Oregon Supreme Court. Glenn v. Savage, 14 Or. 567, 13 Pac. 442; La Follett v. Mitchell, 42 Or. 465, 69 Pac. 916, 95 Am. St. Rep. 780.

Another principle is well stated in Burlen v. Shannon, 99 Mass. 200, 203 (96 Am. Dec. 733), as follows:

"The estoppel is not confined to the judgment, but extends to all facts involved in it as necessary steps or the groundwork upon which it must have been founded. It is allowable to reason back from a judgment to the basis on which it stands, 'upon the obvious principle that, where a conclusion is indisputable and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion.'"

So, "a judgment by default is just as conclusive an adjudication between the parties of whatever is essential to support the judgment as one rendered after answer and contest." Last Chance Min. Co. v. Tyler Min. Co., 157 U. S. 683, 691, 15 Sup. Ct. 733, 39 L. Ed. 859.

And in the same case it is further said:

"A failure to answer is taken as an admission of the truth of the facts stated in the complaint, and the court may properly base its determination on such admission."

Now, one of the issues presented in the action of the city against Masters and surety was whether the contract was regularly made and entered into, which involved its validity. This was admitted by Masters. But whether admitted or contested, the court could not pass judgment without its determination; therefore the judgment becomes res judicata, although the claim, technically speaking, was not the same. Van Valkenburgh v. City of Milwaukee, 43 Wis. 574. It arose, however, out of the same contract, and the validity of that contract was essential to the support of either.

All the principles involved in this case are substantially and ably treated in the case of Board of Com'rs v. Platt, 79 Fed. 567, 25 C. C. A. 87, and the reasoning there applied is manifestly decisive of this. See, also, Caseday v. Lindstrom, 44 Or. 309, 75 Pac. 222.

The case of Savage v. City of Tacoma, 61 Wash. 1, 112 Pac. 78, it seems to me, is without application.

There is this further to be said: The defendant is now assuming a different and inconsistent position from the one it assumed in the former case. Suppose that it had prevailed in the former case, and recovered judgment against Masters and his surety for some part or the whole of the damages demanded, and Masters had paid, then could the city have now been heard to deny the validity of the contract? Assuredly not. But does the case stand in any better light for the city in that Masters was successful? I am inclined to think not. Plaintiff was put to his trial, and incurred the expense of litigation, and for the city now to assume an inconsistent position in this action to defeat Masters' claim under the contract would seem to savor of injustice. There must be an end of litigation, and, unless judgments bind when solemnly declared, it could never be finally determined. It would seem that the city is precluded from insisting that

such judgment is not a bar to the present action, under the doctrine of quasi estoppel.

But this aside, I hold that the city is barred by estoppel of record.

The motion going to the second further and separate reply will be denied.

BALTIMORE TRUST CO. v. SCREVEN COUNTY et al.

MERCANTILE TRUST & DEPOSIT CO. OF BALTIMORE v. SAME.

(District Court, S. D. Georgia. December 14, 1916.)

COURTS ⊕=312(5)—JURISDICTION OF FEDERAL COURTS—SUIT BY ASSIGNEE.

The provision of Judicial Code (Act March 3, 1911, c. 231) § 24(1), 36 Stat. 1091 (Comp. St. 1913, § 991 [1]) that, with certain exceptions, no District Court shall have cognizance of any suit to recover upon any promissory note in favor of any assignee or subsequent holder, unless such suit might have been prosecuted in such court if no assignment had been made, does not apply to the indorsement and transfer by a payee of notes which were made to him merely that he might, as agent for the maker, negotiate them with third persons, and who never had any beneficial interest in the notes, nor right of action thereon.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 871; Dec. Dig. ⊕=312(5).]

At Law. Actions by the Baltimore Trust Company and by the Mercantile Trust & Deposit Company of Baltimore against the County of Screven and others. On demurrers and motions to dismiss for want of jurisdiction. Motions overruled.

O'Byrne, Hartridge & Wright, of Savannah, Ga., for plaintiffs.

John C. Hollingsworth, of Sylvania, Ga., and Anderson, Cann, Cann & Walsh, of Savannah, Ga., for defendant Screven County.

Saussy & Saussy, of Savannah, Ga., for other defendants.

LAMBDIN, District Judge. The Baltimore Trust Company, a corporation and citizen of the state of Maryland, filed a suit in this court against the county of Screven, a corporation and one of the counties of the state of Georgia, as maker, and 15 citizens of said county, as guarantors, upon three notes for $10,000 each; and the Mercantile Trust & Deposit Company of Baltimore, a corporation and citizen of the state of Maryland, filed a similar suit against said county of Screven, as maker, and 14 citizens of said county, as guarantors, on a note for $10,000. The Citizens' & Screven County Bank, a Georgia corporation, was the payee and indorser of all these notes. The defendants in each of the causes duly filed their demurrers and motions to dismiss said suits for the want of jurisdiction. Thereupon the plaintiffs filed an amendment to their respective petitions, in which the following allegation was made:

"That the payee and transferror of said notes, to wit, the Citizens' & Screven County Bank, at the times herein mentioned, was and still is a corporation created and existing under the laws of Georgia, having its principal place of business in the county of Screven, state of Georgia; that it, the said Citizens' & Screven County Bank, at the time said notes were made, undertook to negotiate the same with petitioner; that said Citizens' & Screven County Bank, at the time when said notes were delivered to it by the county of Screven, paid

no consideration for said notes, and gave no credit to said county of Screven for the same, and never at any time discounted the same or advanced any money upon the same; that said notes were negotiated by said Citizens' & Screven County Bank with your petitioner for the sole benefit of said county of Screven; and that said Citizens' & Screven County Bank never has had any beneficial interest in the said notes, but the beneficial owner of the said notes was and still is this petitioner."

Upon the filing of said amendments, the defendants renewed their demurrers and motions to dismiss said suits for the want of jurisdiction, insisting that the District Court of the United States had no jurisdiction, but that jurisdiction was exclusively in the state court, because it appeared from the face of the petitions as amended that the original payee of the notes in question, which assigned same to the plaintiffs, to wit, the Citizens' & Screven County Bank, was a corporation organized and existing under the laws of the state of Georgia and a citizen of this state, and that, inasmuch as said bank could not have brought suit on said notes in the United States court for want of diversity of citizenship, the assignees of the bank could not bring suit in this court. The defendants base their motions upon the latter part of the first division of section 24 of the Judicial Code, which is as follows:

"No District Court shall have cognizance of any suit (except upon foreign bills of exchange) to recover upon any promissory note or other chose in action in favor of any assignee, or of any subsequent holder if such instrument be payable to bearer and be not made by any corporation, unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

This limitation on the jurisdiction of the United States courts has with some changes been in continuous force since the Judiciary Act of 1789. The history of this provision is set forth in the opinion of the Supreme Court of the United States in the case of New Orleans v. Quinlan, 173 U. S. 191, 19 Sup. Ct. 329, 43 L. Ed. 664; the three acts governing the matter before the enactment of the new Judicial Code being section 11 of the Judiciary Act of 1789, the act of March 3, 1875, and the act of March 3, 1887, as corrected by the act of August 13, 1888. The purpose of this provision of the law seems to have been twofold: First, to narrow the jurisdiction of the District Court, as granted in the immediately preceding portion of the first subdivision of section 24 of the Judicial Code, over suits between citizens of different states and between citizens of a state and foreign states, citizens, or subjects; and, second, to prevent the creation of jurisdiction in the District Courts by assignment made for the purpose of bringing about an apparent diversity of citizenship. Under the provisions of the law above quoted an assignee is not allowed to bring a suit in the District Court of the United States, unless such suit might have been prosecuted in such court if no assignment had been made, and the exceptions permitting the assignee to bring a suit in this court are: First, suits upon foreign bills of exchange; second, suits upon choses in action made by a corporation payable to bearer; and, third, suits that might have been prosecuted in the District Court if no assignment had been made.

The defendants contend that the notes were made in the first instance to the Citizens' & Screven County Bank, a citizen of Georgia, and that the Baltimore banks derived title to these notes by assignment from the Georgia bank, and that, since the Georgia bank cannot invoke the jurisdiction of the United States court, its assignees, under the plain provisions of the law governing the matter, cannot do so. The Baltimore banks, however, contend, on the other hand, that the Georgia bank was only a nominal party, and not a real party, to the notes; that the notes were made to the Georgia bank, so that it could negotiate same for the county of Screven; that the Georgia bank did not discount the notes itself, or advance any money upon them, or have any beneficial interest in them whatever, but that it merely acted as agent for the county of Screven in the matter, and negotiated the notes for the sole benefit of the county.

There is no direct adjudication upon the precise point here involved by the Supreme Court of the United States. The court, however, is of the opinion that the point is ruled in principle in favor of the plaintiffs by the United States Supreme Court in the case of Holmes v. Goldsmith, in 147 U. S. 150, 13 Sup. Ct. 288, 37 L. Ed. 118. In that case the makers of a promissory note and the payee were citizens of the same state, and the makers signed it entirely for the benefit and accommodation of the payee, who indorsed the note to a citizen of another state, who paid him full consideration for same. The Supreme Court in that case held that the Circuit Court of the United States had jurisdiction, notwithstanding the provision of Act Aug. 13, 1888, 25 Stat. 433, 434, c. 866, now embodied in the above-quoted provision of the twenty-fourth section of the Judicial Code. The Supreme Court in that case held that the true relation of the parties to a written instrument may always be shown by parol evidence, and that the true meaning of the limitation in question upon the jurisdiction of the United States court was not violated by permitting the plaintiffs in that case to "show that, notwithstanding the terms of the note, the payee was really a maker or original promisor, and did not by his indorsement assign or transfer any right of action held by him against the accommodation makers." Mr. Justice Shiras, in delivering the opinion of the court, stated that "the purpose of the restriction as to suits by assignees was to prevent the making of assignments of choses in action for the purpose of giving jurisdiction to the federal court," and that the language of the statute is to be interpreted in accordance with the purpose to be effected and the mischief to be prevented. Mr. Justice Shiras went on to quote the language of Chief Justice Chase in the case of Bushnell v. Kennedy, 9 Wall. 387, 391, 19 L. Ed. 736, as follows:

"It may be observed that the denial of jurisdiction of suits by assignees has never been taken in an absolutely literal sense. It has been held that suits upon notes payable to a particular individual or to bearer may be maintained by the holder, without any allegation of citizenship of the original payee, though it is not to be doubted that the holder's title to the note could only be derived through transfer or assignment. So, too, it has been decided, where the assignment was by will, that the restriction is not applicable to the representative of the decedent. And it has also been determined that the assignee of a

chose in action may maintain a suit in the Circuit Court to recover possession of the specific thing, or damages for its wrongful caption or detention, though the court would have no jurisdiction of the suit if brought by the assignors."

As above stated, I think that the decision of the Supreme Court in this case in principle controls the cases at bar. Under the allegations of the petitions as amended, which must for the purpose of these motions be accepted as true, the payee was only a nominal party to the notes. It had no beneficial interest whatever in same, but merely acted as agent for the maker in negotiating these notes to the Baltimore banks; the payee had no right of action on these notes itself, but merely acted as an intermediary between the county of Screven and the Baltimore banks, which furnished the money to the county, and these Baltimore banks were thus the first real owners of the notes in question respectively. It would seem, also, that this same principle is recognized by the Supreme Court of the United States in the case of Blair v. City of Chicago, 201 U. S. 400, at page 447, 26 Sup. Ct. 427, 50 L. Ed. 801.

The Circuit Court of Appeals of the Fourth Circuit had the identical question before it in the case of Kirven v. Virginia-Carolina Chemical Company, 145 Fed. 288, 76 C. C. A. 172, 7 Ann. Cas. 219, in which that court, citing and following the case of Holmes v. Goldsmith, supra, made the following statement:

"It is well settled that the original beneficial owner can sue in the federal courts upon a note, although an original, but nominal, payee, by reason of citizenship, could have no such right."

The Circuit Court of the Northern District of Iowa had the same question before it in the case of Wachusett National Bank v. Sioux City Stove Works (C. C.) 56 Fed. 321, and that court, citing the case of Holmes v. Goldsmith, supra, held that the provision of the federal statute in question, limiting the jurisdiction of the United States courts, "does not apply to the indorsement and transfer by the payee of notes which were made to him merely that he might, as agent of the maker, raise money for the maker by negotiating them with third persons." In that case the Sioux City Stove Works, a corporation of Iowa, executed its notes to the Union Loan & Trust Company, a corporation of the same state, and the trust company negotiated the notes to the Wachusett National Bank, a corporation of the state of Massachusetts. Judge Shiras held that the District Court of the United States for the Northern District of Iowa had jurisdiction of this suit. As the language used by Judge Shiras is peculiarly applicable to the case at bar, I make the following quotation from his opinion in that case:

"From the averments of fact contained in the petition, and which are admitted by the demurrer, it appears that the Union Loan & Trust Company never held any cause of action, evidenced by the notes sued on, against the defendant company. There never was a time when the trust company could have maintained an action on the notes against the maker thereof, for it never advanced any money thereon, nor did it ever agree or promise so to do, nor were the notes executed as evidence of an indebtedness arising out of any past transactions. The facts show that the trust company was only a nominal payee, and the delivery of the notes to it did not create any indebtedness on part of

the defendant, nor vest in the trust company a right of action against the defendant. The notes were delivered to the trust company, not as evidence of an existing debt, but for the purpose of having the trust company negotiate the same with third parties, and if the trust company had failed to negotiate the same the notes would not have represented any actual indebtedness on part of the defendant, nor could the trust company have maintained an action thereon. It was the payment of the money by the Wachusett Bank that created a right of action against the defendant, but this right of action never belonged to the trust company, and did not pass by assignment from it to the plaintiff bank."

As opposed to the above-stated views, counsel for the defendants cite the case of State National Bank of Denison v. Eureka Springs Water Company et al., 174 Fed. 827, decided by the Circuit Court of the Western District of Arkansas on November 5, 1909. The facts stated in that case are somewhat similar to the facts in the cases at bar, and that case may therefore be a physical precedent in favor of the contentions of the defendants in this case, yet the precise question here involved was not discussed by the court in that case. The court in that case based its decision upon the plain provision of the law that, inasmuch as the maker and the payee of the notes resided in the same state, an assignee could not invoke the jurisdiction of the United States court in a suit upon the notes, and the distinction pointed out in the case of Holmes v. Goldsmith, and in the other cases above mentioned, was not adverted to. The question as to whether this provision of the law was changed by the fact that the payee was a nominal party and had no beneficial interest in the notes was not discussed by the court. Other cases cited by counsel for the defendants are the cases of Small v. King (1850) Fed. Cas. No. 12,960, Noell v. Mitchell (1869) Fed. Cas. No. 10,287, and Shuford v. Cain (1869) Fed. Cas. No. 12,823. These cases, however, were decided before the case of Holmes v. Goldsmith, supra, which was decided in 1893, and therefore must yield to the reasoning of the Supreme Court in that case.

Another case cited by counsel for defendants is the case of Kolze v. Hoadley, 200 U. S. 76, 26 Sup. Ct. 220, 50 L. Ed. 377. Yet I think that the last-named case is clearly distinguishable from the case of Holmes v. Goldsmith, or the case at bar. It appears in the Hoadley Case that one Kolze sold and conveyed certain real estate to one Day, and that Day executed his notes for the purchase price of same, and to secure such notes executed three trust deeds to one Stade, as trustee, covering the real estate in question. Kolz thereupon intrusted the notes and trust deeds to Stade, nephew, in whom he seemed to have great confidence; the notes being executed by Day to his own order and by him indorsed in blank. Stade took the notes and trust deeds securing the same and pledged them to one Hoadley as collateral security to his own notes, upon which Hoadley advanced a large sum of money. Afterwards Day reconveyed the premises to Kolze, and Stade, as trustee, fraudulently released the three trust deeds on the property. Afterwards Kolze and his wife conveyed the premises to their daughter, and the daughter mortgaged the premises to some one else. Subsequently Stade failed to pay his notes to Hoadley, and the notes and trust deeds of Day were sold in accord-

ance with the terms of the collateral note, and were all bought in by Hoadley. Hoadley filed a bill in the Circuit Court of the United States for the Northern District of Illinois, praying that the release deed executed by Stade to Kolze be declared fraudulent and void, that the rights of all the defendants be declared subject to those of plaintiff under the notes and deeds held by her, that an accounting be had and the defendants be decreed to pay whatever was due under the notes and trust deeds, and that the premises be sold, etc. Judge Kohlsaat, in the Circuit Court of the United States for the Northern District of Illinois, in 128 Fed. 302, held that the United States court had jurisdiction of this case. The Supreme Court of the United States reversed the court below, and held that the case should have been dismissed for the want of jurisdiction. Mr. Justice Brown, speaking for the court (200 U. S. at page 84, 26 Sup. Ct. 222, 50 L. Ed. 377), said:

"The suit is in substance a bill to foreclose the trust deeds and to remove the release as a cloud upon the title"

—and distinguished that case from the case of Holmes v. Goldsmith. In the Hoadley Case there were no accommodation makers or indorsers, or nominal parties. Day bought real estate from Kolze, and gave his notes for same, and executed trust deeds to secure the notes. Kolze intrusted these notes and trust deeds to Stade, who violated his trust and pledged them to Hoadley for a loan to himself individually. Hoadley, on the nonpayment of the note, sold the notes and trust deeds in accordance with the terms of the collateral note and bought same in. The deeds of trust were made to Stade as trustee. Hoadley became the owner of the notes in question and of the deeds of trust by virtue of assignments executed by Stade. Stade did not attempt to make these transfers and assignments for the benefit of Day, the maker of the notes, or even for the benefit of Kolze, but in violation of his trust assigned same as security for his own debt to Hoadley. None of the parties here in this matter were nominal parties, but they were all real parties at interest, and the title taken by Hoadley was derived entirely by an assignment of notes and deeds which had become complete contracts before she became the owner of same through such assignment. I think, therefore, that the case is clearly distinguishable from those at bar.

The foregoing reasoning is applicable, not only to the contentions of the county of Screven, the maker of the notes in question, but also to the contentions of the guarantors, whose guaranty followed the indorsement made on the notes by the Citizens' & Screven County Bank. I think it is plainly inferable, from the allegations of the petitions as amended and from the face of the notes themselves, that these notes were not valid obligations in the hands of the Georgia bank, but first obtained their vitality when they came into the hands of the Baltimore banks, as contemplated by all the parties to the notes. The guaranty signed by the citizens of the county were evidently for the benefit of the Baltimore banks as the original beneficial holders of the notes. According to the petitions as amended, the bank and the county of Screven and the guarantors prepared these

notes in order that they might be negotiated and the money obtained thereon for the county, and the transaction was not complete until the notes went into the hands of the Baltimore banks. These banks, therefore, became the first real owners of the notes, and a right of action on the notes first arose when the plaintiffs took same. In this view of the matter, the guarantors stand in the same position as the maker of the notes.

The court is therefore of the opinion that the suits were properly brought in the United States court, and the motions to dismiss same for the want of jurisdiction will be overruled.

UNITED STATES v. ILLINOIS SURETY CO. et al.

(District Court, E. D. North Carolina, Wilson Division. January 5, 1917.)

No. 2.

RECEIVERS ⊜174(1)—ACTION AGAINST—CONSENT OF APPOINTING COURT—ACTION ON PUBLIC CONTRACTOR'S BOND.

Act Aug. 13, 1894, c. 280, 28 Stat. 278, as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811 (Comp. St. 1913, § 6923), authorizing action in the name of the United States on the bond of a public contractor for the benefit of persons supplying him with labor and materials, by providing that it shall be brought in the District Court of the United States in the district in which the contract was to be performed, and not elsewhere, displaces, pro tanto, where the surety is in the hands of a receiver, the general rule that a receiver cannot be sued, on a cause of action against the corporation, without consent of the court which appointed him, though any judgment which may be obtained can be enforced against the corporation's property only by intervention in the court having custody thereof.

[Ed. Note.—For other cases, see Receivers, Cent. Dig. §§ 333–335; Dec. Dig. ⊜174(1).]

At Law. Action by the United States, suing for and on behalf of Ellington & Guy, Incorporated, and others, against the Illinois Surety Company and others. Demurrer to complaint overruled.

A. B. Dickinson, of Richmond, Va., H. G. Connor, Jr., of Wilson, N. C., and J. H. Pou, of Raleigh, N. C., for plaintiffs.

Mark W. Brown, of Asheville, N. C., for defendants.

CONNOR, District Judge. The complaint, as amended, discloses this case:

On July 31, 1913, defendant W. J. Brent Construction Company, of the city of Norfolk, state of Virginia, entered into a contract with the United States, whereby it undertook to construct a post office building in the town of Greenville, N. C. The Construction Company, executed a bond, as provided by the statute, with the defendant Illinois Surety Company, a corporation chartered pursuant to the laws of, and having its principal office in, the state of Illinois, surety, in the penal sum of $26,000, containing, among other conditions, the obliga-

tion to "promptly make payment to all persons supplying labor or material in the prosecution of the work contemplated by said contract." The bond was duly accepted by the United States in the manner prescribed by law. Defendant W. J. Brent Construction Company on or about October 16, 1913, contracted with the Ford-Whitehurst Manufacturing Company for material to be used in the construction of the post office building, consisting of window and door frames, doors, windows, lumber, and other mill work, for which the Construction Company promised to pay the sum of $2,360.68, of which it paid the sum of $1,050, leaving unpaid, at the time this action was instituted, and due said Manufacturing Company, the sum of $1,310.68, with interest. This indebtedness was, for value, assigned and transferred to Ellison & Guy, Incorporated. They prosecuted the claim to judgment against the Construction Company, in the law and equity court of the city of Richmond, state of Virginia. Prior to the assignment, and the rendition of the judgment, to wit, on the 17th day of January, 1916, the Ford-Whitehurst Manufacturing Company made affidavit, as required by the provisions of the act of Congress entitled "An act for the protection of persons furnishing materials and labor for the construction of public works," approved August 13, 1894 (28 Stat. 278, c. 280, 6 Fed. Stat. Ann. 125), as amended by Act Feb. 24, 1905, c. 778, 33 Stat. 811, 10 Fed. Stat. Anno. 343 (Comp. St. 1913, § 6923), and forwarded same to the Secretary of the Treasury of the United States, and in all other respects complied with the provisions of said statute, and amendments thereto, and thereby became entitled to the benefit of the provisions of said statute, and to prosecute this action against the Construction Company and the Surety Company. The post office building at Greenville, N. C., was completed and turned over to, and accepted by, the United States, and final settlement made for the construction thereof, on the 4th day of August, 1915. A period of more than six months and less than one year from the date of settlement elapsed before the institution of this action, and no suit has been instituted by the United States on its own behalf, or for the use of any other person, firm, or corporation, on account of said contract, or the bond given for securing the performance thereof. Notice has been given by Ellington & Guy, Incorporated, of the pendency of this action to all known creditors of the W. J. Brent Construction Company.

In an action pending in the superior court of Cook county, Ill., wherein H. A. Evans and others are plaintiffs, and the Illinois Surety Company is defendant, on or about April 19, 1916, Jas. S. Hopkins, of the city of Chicago, was duly appointed receiver of said Surety Company, and qualified as required by law and the orders of said court, and was, at the time of the institution of this action, acting as such receiver, having in his possession, and under his control, the assets, rights, credits, and all other property of said Surety Company, for the purpose of administering such assets in accordance with the orders and decrees of said court. Process was duly issued in this action and served as provided by the statutes in such cases made and provided.

Defendant Jas. S. Hopkins, receiver, demurs to the complaint as amended, and for cause of demurrer says that, upon the allegations contained therein, this court has no jurisdiction of the person of the defendant receiver, or the cause of action, in so far as the same relates to him, for that it is not alleged that the consent of the superior court of Cook county, Ill., wherein the action in which he was appointed receiver is now pending, was first obtained for the institution and prosecution of this action, and, further, that if plaintiff is entitled to any relief on account of the matters and things set forth in the complaint, it should be obtained in said action pending in said court, etc.

The sole question presented by the demurrer is whether the general and well-settled rule applies that a receiver, appointed by one court cannot be sued upon a cause of action against the corporation of which he is receiver, in the same court, or in another court, without the consent or permission of the court, by which he was appointed. The rule is thus stated:

"It is a general principle of equity practice that a suit cannot be brought against a receiver, in his capacity as such, to recover any property in his hands, or to recover on any debt, demand, or claim whatever, against him, unless upon previous leave duly obtained. This rule applies to suits brought either in that court, or in any other court; and, if an unauthorized suit be brought against the receiver, he may successfully plead the disability against the plaintiff." 3 Street's Fed. Eq. Practice, 2676.

This statement of the rule is sustained by the authorities. In Barton v. Barbour, 104 U. S. 126, 26 L. Ed. 672, the jurisdiction of the court, in the District of Columbia, to entertain an action brought against a receiver of a railroad company, appointed by a court in Virginia, was challenged by a plea averring that the plaintiff had not obtained leave of the Virginia court to sue its receiver. Plaintiff demurred to the plea. From a judgment overruling the demurrer, plaintiff sued out a writ of error. In the opinion of the court, affirming the judgment, Mr. Justice Woods, to the same suggestion made by counsel here, that the jurisdiction of the court was not ousted by the receivership, that the "only consequence resulting from prosecuting the suit without such leave is that the plaintiff may be restrained by injunction or attached for contempt, and that the rule applies only to cases where the suit is brought to take from the receiver property whereof he is in possession by order of the court," said: "We conceive that the rule is not so limited." The learned justice proceeds to say that if the plaintiff may, without leave of the court appointing the receiver and having, through its officer, possession of the property, prosecute his action to judgment, he may by execution, or other final process, subject the property to sale, and thereby interfere with or altogether prevent its administration by the court. It has been held by courts of high authority that the receiver cannot, by plea or demurrer, challenge the statutory jurisdiction of the court, in which the action is brought, to proceed to judgment fixing the liability of the person or corporation; that he should apply to the court appointing him for an injunction restraining the plaintiff from prosecuting the action against him, obedience to which could be enforced by attach-

ment for contempt. This view is sustained by many decisions. 23 Am. & Eng. Enc. (2d Ed.) 1125. It is held that, if plaintiff recovers judgment in his action, he must seek satisfaction by taking a transcript to the court having the control and administration of the property of his debtor—always a court of equitable power, which can declare and enforce priorities, liens, etc. However this may be, the case cited by demurrant sustains his contention that, in the federal court, the jurisdiction to entertain a suit against a receiver to recover a debt or demand against the corporation whose property is in his custody as receiver may be attacked by plea or demurrer. In Porter v. Sabin, 149 U. S. 479, 13 Sup. Ct. 1008, 37 L. Ed. 815, the jurisdiction of the court was attacked by a demurrer. The court dismissed the action. These decisions are of controlling and authoritative force.

Counsel for defendants insist that, conceding the rule claimed by demurrant, the instant case does not come within it, by reason of the express provision of the statute which confers the right of action and prescribes in what court and in what venue it must be brought. This contention presents a somewhat novel and interesting question. The statute provides that the action, given to the materialman, or laborer, upon the bond given by a contractor, may be prosecuted in the name of the United States and be brought "in the Circuit [District] Court of the United States in the district in which the contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere." This provision of the statute was passed upon and enforced in United States v. Construction Co., 222 U. S. 199, 32 Sup. Ct. 44, 56 L. Ed. 163, in which it is said:

"Considering the purpose of the statute, as manifested in these provisions, we think that the restriction respecting the place of suit was intended to apply, and does apply, to all actions brought in the name of the United States for the purpose only of securing an adjudication and enforcement of demands for labor or materials, whether instituted by the United States or by the creditors themselves."

To the suggestion made in that case that the defendants, or some of them, were inhabitants of another district, and that this fact constituted "an insuperable barrier to the maintenance of the action in the district wherein the contract was to be performed," the court said:

"This supposition is a mistaken one, for the provision restricting the place of suit operates pro tanto to displace the provision upon that subject in the general jurisdictional act, * * * and amply authorizzes the Circuit Court in the district wherein the action is required to be brought to obtain jurisdiction of the persons of the defendants through the service upon them of its process in whatever district they may be found."

It is therefore manifest that the superior court of Cook county, Ill., cannot entertain this action, nor permit its institution and prosecution therein. The jurisdiction of this court is exclusive. If the contention of the receiver is sustained, the persons in whose behalf, and for whose benefit, this highly remedial statute was enacted, find themselves, in the instant case, in the singular attitude that, with a perfect statutory remedy, conferred by an act of Congress, the power to enforce the right in the only court having jurisdiction is dependent upon the consent of the judge of the superior court of Cook county, Ill.

They cannot sue in that court, because the act which gives them the right to sue expressly restricts them to this jurisdiction. But for this provision they could, as of legal right, intervene in the court having custody of the property of the Surety Company. If the judge of that court, and this is suggested with perfect respect, refuses to give such permission, it would seem that plaintiffs would be without remedy. That the application would be addressed to the discretion of the court, and not as a demand for permission to exercise a legal statutory right, is shown by the language used in Porter v. Sabin, supra. Mr. Justice Gray says:

"It is for that court [the court appointing the receiver] in its discretion to decide whether it will determine for itself all claims of, or against, the receiver, or will allow them to be litigated elsewhere, * * * and no suit, unless expressly authorized by statute, can be brought against the receiver, without permission of the court which appointed him." 3 Street's Fed. Eq. Prac. 2679.

The contention of the receiver, therefore, comes to this: Unless the judge of the superior court of Cook county, Ill., in the exercise of his discretion, gives plaintiffs permission to bring their suit in the only court in which it can be brought, they are without remedy, and the federal statute, as to them and their right, is of no effect. The receiver suggests that plaintiffs should, before bringing this action, have made application to the state court for permission to sue in this court. This contention leads to the conclusion that the jurisdiction of this court is dependent upon the permission of the state court, but, if permission is withheld, jurisdiction attaches because of the refusal of that court to grant such permission, or that the refusal to grant permission to sue prevents this court from taking jurisdiction. If plaintiff is required, before he can sue in this court, to apply to the state court for permission to do so, and such permission is denied, and notwithstanding such denial he comes into this court, he is confronted with the danger of an attachment for contempt from that court. It would seem that there must be some way of escape from this condition, resulting in a denial of a well-defined statutory right, by reason of a rule of comity, or convenience, consistent with sound legal principle. It will not be assumed, nor the conclusion reached, unless upon irresistible reason, that Congress has done a vain thing; that in the enactment of a carefully drawn statute, highly remedial in its purpose, it has so hedged about the remedy that it may not be pursued, except by permission, based upon the exercise of the discretion, of a court of another jurisdiction. It is not allowable, unless compelled to do so, for a court to find a casus omissus, which is defined to be the omission in a statute to provide for a particular case coming clearly within its terms. 1 Burrill's Law Dict. 188. It is also an elementary rule that remedial statutes should be construed liberally to promote the remedy. It is equally well settled that:

"A general liability created by statute, without a remedy, may be enforced by an appropriate common-law action; but when the provision for the liability is coupled with a provision for a special remedy, that remedy and that alone, must be employed."

In Globe Newspaper v. Walker, 210 U. S. 356, 28 Sup. Ct. 726, 52 L. Ed. 1096, an action brought under the Copyright Act, it was held that:

"The purpose of Congress was not only to create the rights granted in the statute, but also to create the specific remedies by which alone such rights may be enforced."

So, in Middletown Bank v. Railway Co., 197 U. S. 394, 25 Sup. Ct. 462, 49 L. Ed. 803, it is said, of a statute creating a right and prescribing the forum in, and method by, which it was to be enforced:

"The statute, under such circumstances, may be said to so far provide for the liability, and to create the remedy, as to make it necessary to follow its provisions and to conform to the procedure provided for therein."

In United States v. Congressional Construction Co., supra, meeting the difficulties suggested in bringing the action in the court of the district wherein the contract was to be performed, by reason of other statutory procedural provisions, the court said:

"The provision restricting the place of suit operate pro tanto to displace the provision upon that subject in the General Jurisdictional Act."

In Texas Cement Co. v. McCord, 233 U. S. 157, 34 Sup. Ct. 550, 58 L. Ed. 893, in which the statute now under consideration was before the court, Mr. Justice Day said:

"By this statute a right of action upon the bond is created in favor of certain creditors of the contractor. The cause did not exist before, and is the creation of the statute. * * * The statute thus creates a new liability, and gives a special remedy for it, and, upon well-settled principles, the limitations upon such liability [remedy] become a part of the right conferred, and compliance with them is made essential to the assertion and benefit of the liability itself." United States v. Boomer, 183 Fed. 726, 106 C. C. A. 164.

From these decisions, illustrating the rule of interpretation upon which they are based, the conclusion is reached that, to the extent to which the rule, which requires the consent of the court appointing a receiver to be given before another court can acquire jurisdiction of an action against a receiver, conflicts with the statute, such rule is displaced, or, as sometimes said by the courts in such cases, the case is taken out of the general rule. When the difficulty arises by reason of a conflicting statute, the court will, for the purpose of saving the right and giving the remedy, hold that pro tanto the first statute is, by implication, repealed, and the last statute, for that purpose, be taken to express the latest expression of the legislative mind in that respect. If, as in this case, the supposed conflict arises out of a rule of procedure, based either upon convenience or comity, no difficulty should be found in giving effect to the statute as the expression of the law-making department of the government.

An illustration is found of the application of the principle first stated in Cook County National Bank v. United States, 107 U. S. 445, 2 Sup. Ct. 561, 27 L. Ed. 537. A statute (R. S. § 3466) gave to the United States a preference or priority over other creditors in the payment of debts due by an insolvent person, making a voluntary assignment, etc. A national bank, becoming insolvent, indebted to the United States, was placed in the hands of a receiver. The government asserted its

right, under the statute, to be paid in full out of the assets. The court held that, although the claim of the government was within the terms of the statute, the National Banking Act (Act June 20, 1874, c. 343, 18 Stat. 123), making no provision for the payment of debts due the government in preference to others, withdrew such banks from the class of insolvents included in the statute. Mr. Justice Field said:

"The provisions of that law and of the national banking law being, as applied to demands against national banks, inconsistent and repugnant, the former law must yield to the latter, and is, to the extent of the repugnancy, superseded by it. The doctrine, as to repugnant provisions of different laws, is well settled and has often been stated in this court. A law embracing an entire subject, dealing with it in all its phases, may thus withdraw the subject from the operation of a general law as effectually as though, as to such subject, the general law were in terms repealed. The question is one respecting the intention of the Legislature."

It is held that the provision in Lord Campbell's Act, re-enacted in this and many other American states, limiting to one year the time within which the action conferred or created by the statute must be brought, inheres in the remedy; it takes the action, in respect to time of institution, out of, or displaces, the general statutes of limitation. The same rule is applied in actions given by the statute for the recovery of double the amount of usurious interest paid national banks, limited to two years. The rule of construction is based upon the presumed intention of the Legislature that, in creating new legal right, it prescribes the mode of procedure, jurisdiction, venue, and time of enforcement of the right, all of which are exclusive, and takes the case out of other rules or statutes, in so far as they conflict with the provisions of the statute. It is manifest that Congress was advertent to the fact that these public buildings would be erected in different sections of the country, frequently in towns and states other than those in which surety companies had a chartered domicile; that their domicile would frequently be in the larger cities; that it was intended to remove from general statutory provisions, prescribing venue, jurisdiction, etc., actions brought for the enforcement of liability, and to make a complete and distinct code of procedure in respect to these limitations. It did not intend that other statutes, or rules of court procedure, should conflict with the enforcement of the remedy in the court —the place—and under the limitations in respect to time prescribed by the statute. Of course, such judgment as may be recorded in this action must be enforced against the property of the Illinois Surety Company, in the custody of the state court by its receiver, by intervention in that court; no mesne nor final process can issue against such property from this court. In re Tyler, 149 U. S. 164, 13 Sup. Ct. 785, 37 L. Ed. 689. The only effect of a judgment here will be to ascertain the liability and fix its amount, leaving the plaintiffs to enforce it, by an appeal to the court having the custody of the property and administering it in the interest of all persons having claims against it, according to their rights and priorities.

The demurrer is overruled. The defendant receiver will be granted a reasonable time to answer the complaint.

SOUTHERN PAC. CO. v. LOWE, Collector of Internal Revenue.

(District Court, S. D. New York. January 6, 1917.)

No. 23.

1. INTERNAL REVENUE ⟸38—INCOME TAX—ACTION TO RECOVER—BURDEN OF PROOF.
In an action to recover the income tax paid by a stockholder on dividends declared by the corporation, the burden is on plaintiff to prove that the dividends were a payment from the capital, not from income.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 83, 84; Dec. Dig. ⟸38.]

2. INTERNAL REVENUE ⟸7—INCOME TAX—DIVIDENDS ON STOCK.
Though all the stock of a corporation was owned by another corporation which handled the money of the former and kept its accounts, the surplus earned by the former was nevertheless its property, so that a dividend declared was income of the holding corporation during the year in which it was paid under Income Tax Act Oct. 3, 1913, c. 16, 38 Stat. 173.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.]

3. INTERNAL REVENUE ⟸7—INCOME TAX—"INCOME"—"GAINS"—"PROFITS."
The "income" of a corporation taxable under Act Oct. 3, 1913, does not include the increased value of the capital as such, though such increase would be "gains" or "profits," since income does not include everything that comes in, but is limited to gains and profits so as to mean only receipts which constituted an accretion to capital.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10; Dec. Dig. ⟸7.
For other definitions, see Words and Phrases, First and Second Series, Gain, Income, Profit.]

4. CORPORATIONS ⟸152—RIGHTS OF STOCKHOLDERS—SURPLUS—DIVIDENDS.
The accumulation of a surplus does not in itself entitle the stockholders to dividends the granting of which is within the discretion of the directors reviewable only for fraud.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 564–567; Dec. Dig. ⟸152.]

5. CORPORATIONS ⟸151—RIGHTS OF STOCKHOLDERS—PROFITS.
A stockholder has no interest in the profits of a corporation until a dividend has been declared.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 555–559; Dec. Dig. ⟸151.]

6. INTERNAL REVENUE ⟸7—INCOME TAX—DISTRIBUTION OF CAPITAL ASSETS.
Corporate dividends which are merely a distribution of capital assets are not taxable as income; but where the stockholder does not show that extraordinary dividends declared were not the accumulation of earnings, but were unearned values of its capital, such dividends were taxable.
[Ed. Note.—For other cases, see Internal Revenue, Cent. Dig. §§ 8–10, Dec. Dig. ⟸7.]

At Law. Action by the Southern Pacific Company against John Z. Lowe, Jr., as United States Collector of Internal Revenue for the Second District of New York. Judgment directed for defendant.

Gordon M. Buck, of New York City, for plaintiff.

H. Snowden Marshall, U. S. Atty., of New York City (Ben A. Matthews, Asst. U. S. Atty., of New York City, of counsel), for defendant.

MANTON, District Judge. The plaintiff has instituted this action alleging two causes of action, seeking to recover in the first $131,563.80 and in the second $183,882.64, taxes paid under the income tax law. By stipulation between the parties only the second cause of action was litigated, the first cause to await the outcome of the trial of the second.

This income tax was assessed against dividends received by the plaintiff during the first six months of 1914. During this period, the Central Pacific Railway Company, whose entire corporate stock was held by the plaintiff, paid to the plaintiff four several dividends aggregating $18,361,597.48. These dividends were paid as follows:

Jan. 10, 1914, 20% on preferred stock	$ 3,480,000.00
Jan. 10, 1914, 20% on common stock	13,455,100.00
Jan. 2, 1914, special dividend distributing proceeds of sale of land at Rockaway Beach sold in December, 1913..	514,000.00
Jan. 13, 1914, regular 6% dividend	912,497.48
Making a total of	$18,361,597.48

This last item represents only the portion of the dividend paid on January 13, 1914, which the plaintiff claims exceeded the net earnings of the company during the period. The plaintiff is the holder of all or the large majority of stock of a number of railroad corporations, including the Central Pacific Railway Company, and forms a unified transportation system. The earnings of the companies are kept together with the plaintiff as the banker of the system. The Central Pacific Railway Company kept no bank account, but its earnings were deposited with the bank accounts of the plaintiff. If the railway company needed money during this period for additions and betterments, the necessary funds were advanced by the plaintiff. This system was in practice prior to the declaration of the four dividends in question. In fact, the plaintiff has owned the entire capital stock of the Central Pacific Railway Company ever since the latter's incorporation, and from this it is claimed by the plaintiff that it became neither richer nor poorer by the declaration and payment of these dividends. Plaintiff further claims that the dividends in question were not earned during the period of taxation, to wit, the first six months of 1914.

It also claims that the proof warrants a finding that these dividends were paid from surplus resulting from the operations of the railway company prior to July 1, 1909, and that the net credits or debits to surplus for each of the fiscal years from 1910 to 1914, inclusive, shows no such earnings from which the dividends in question might be paid. The testimony of the plaintiff's accountants, together with its books, would indicate that the claim of the plaintiff was well founded, so that it may be assumed that the two extraordinary dividends of 20 per cent. each on the preferred and common stock of the railway company, paid in January, 1914, and the extraordinary dividends of $514,-

000 likewise paid on the preferred and common stock in January, 1914, must have been paid wholly out of the surplus accruing prior to July 1, 1909, and that at least $2,313,234.20 of the 6 per cent. dividend paid on the common stock in June, 1914, must have been paid out of the surplus accruing prior to July 1, 1909.

Exhibit H shows the surplus on June 30, 1909, and the surplus at the close of each fiscal year up to and including June 30, 1914. On June 30, 1909, the railroad company had a surplus of $25,250,361. Dividends paid during the next five fiscal years, according to the plaintiff's books of account, indicate no such amount in the profit and loss account as would permit of the payment of the dividends in question. It is therefore reasoned by the plaintiff that these moneys paid in dividends must have been paid out of the surplus which accrued prior to July 1, 1909; but how this surplus is made up, whether from earnings of the company or increase in value of land, does not appear. The learned counsel for the plaintiff claims:

"It follows therefore that all three of the extraordinary dividends must have been paid from surplus, and that all of the four dividends must have been paid from surplus except $1,727,295.80; the difference between the sum last mentioned and the amount of the dividend, or $2,313,234 is the amount which must have been paid from surplus."

[1] The burden of proof was upon the plaintiff to establish a payment from the capital, not from income as dividends. This burden it has failed to sustain.

When this tax was levied, a protest was made and a hearing had before the Treasury Department, a brief was submitted in behalf of the plaintiff, and, after an adverse ruling before the department, the plaintiff, under protest, paid the tax, and now brings this action to recover the moneys so paid.

The Act of October 3, 1913 (Act Oct. 3, 1913, c. 16, § II G [a-c], 38 Stat. 172, 173 [Comp. St. 1913, §§ 6327–6329]), provides:

"G. (a) That the normal tax hereinbefore imposed upon individuals likewise shall be levied, assessed, and paid annually upon the entire net income arising or accruing from all sources during the preceding calendar year to every corporation. * * *

"(b) Such net income shall be ascertained by deducting from the gross amount of the income of such corporation, * * * received within the year from all sources, (first) all * * * ordinary and necessary expenses paid within the year; * * * (second) all losses actually sustained within the year; * * * (third) the amount of interest accrued and paid within the year; * * * (fourth) all sums paid by it within the year for taxes. * * *

"(c) The tax herein imposed shall be computed upon its entire net income accrued within each preceding calendar year ending December 31st. * * *"

The sixteenth amendment of the Constitution gave Congress the power to lay and collect taxes on income from whatever source derived, without apportionment among the several states, without regard to any census or enumeration. This has been held to be constitutional. Brushaber v. Union Pacific, 240 U. S. 1, 36 Sup. Ct. 236, 60 L. Ed. 493; Stanton v. Baltic Mining Co., 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546. The application of this statute presents two questions: First, whether the dividends in question may properly be

considered a part of the gross income of the plaintiff; and, second, whether such dividends were received within the year.

The plaintiff advances the claim that these moneys paid in dividends came from surplus earnings, and because they were surplus they were, in fact, an addition to and a part of the capital of the railway company, and that they were in no sense income.

[2] The defendant contends that they constitute income received within the year. The plaintiff says that because of the method of bookkeeping and the manner of handling the moneys of the Central Pacific Railway Company, in truth and in fact, the money was in the actual possession of the plaintiff at all times. Be this as it may, if it was money earned by the railway company's capital, because the physical possession and books of account represented it as the plaintiff's property by reason of possession, nevertheless it does not change the ownership of the property, for legally it was the property of the railway company and that company was entitled to all the rights of ownership. Therefore, when its board of directors permitted the income to accumulate into a surplus so large that at a later day it was justified in declaring special dividends, I think it was still income for the stockholders to which they could only become entitled when the dividends were declared.

[3] I do not think that "income," as used in the statute, should be given a meaning so as to include everything that comes in. The true function of the words "gains" and "profits" is to limit the meaning of the word "income" and to show its use only in the sense of receipts which constituted an accretion to capital. So the function of the word "income" should be to limit the meaning of the words "gains" and "profits." The increased value of capital as such constitutes in one sense a gain or profit, but not income. Hence such gain or profit is not taxable, but only such profits and gains as constitute income are taxable. This in substance was what the court held in Gray v. Darlington, 15 Wall. 63, 21 L. Ed. 45, and in Gauley Mt. Coal Co. v. Hays, 230 Fed. 110, 144 C. C. A. 408.

In the early case of People v. Davenport, 30 Hun (N. Y.) 177, it was said that "income is that which capital earns remaining itself intact." This definition was recently adopted in Mitchell v. Doyle (D. C.) 225 Fed. 437.

While these moneys remained as surplus of the Central Pacific Railway Company, they were subject to legitimate use by order or direction of the board of directors of that company. They were part of the gains or profits of that company, and its business was the operation of a railroad. Although the plaintiff held the entire stock of this company, it gave it no right to the surplus or earnings. Indeed, they could only declare a dividend by order of the board of directors of the railway company, so that the plaintiff's right to possession of the moneys came only when a dividend was declared, to wit, within the taxing period, the first six months of 1914. If these dividends were not received on the dates they were declared and paid, then when were they received?

[4] The government cannot tax undistributed surplus as income to the stockholders because they were income to the stockholder when

paid and not before. While it may be that the plaintiff owning all of the capital stock of the Central Pacific Company could have begun some action to have disbursed the surplus, still it did not do so. The accumulation of surplus of itself does not entitle stockholders to dividends. N. Y. L. E. & W. R. Co. v. Nickals, 119 U. S. 296, 7 Sup. Ct. 209, 30 L. Ed. 363; Gibbons v. Mahon, 136 U. S. 549, 10 Sup. Ct. 1057, 34 L. Ed. 525; St. John v. Erie, 22 Wall. 136, 22 L. Ed. 743; Union Pacific v. Frank, 226 Fed. 906, 141 C. C. A. 510; Park v. Grant Locomotive Works, 40 N. J. Eq. 114, 3 Atl. 162.

Indeed, the granting of dividends is entirely in the discretion of the directors, and, in the absence of fraud, their action is not subject to review by the courts. Wilson v. Amer. Ice Co. (D. C.) 206 Fed. 736; Cook on Corporations (6th Ed.) § 545.

[5] A stockholder has no interest in the profit of a corporation until a dividend has been declared. Humphreys v. McKissock, 140 U. S. 304, 11 Sup. Ct. 779, 35 L. Ed. 473; U. S. Radiator Co. v. N. Y., 208 N. Y. 144, 101 N. E. 783, 46 L. R. A. (N. S.) 585.

[6] Often receipts come in which are but a change of capital investment or which represent a distribution of capital assets. In that case, there is no gain or profit. If such receipts were regarded as income, the taxpayers' capital is depleted. Such was the reasoning in the cases of Lynch v. Hornby, 236 Fed. 661, — C. C. A. — and Lynch v. Turrish, 236 Fed. 653, — C. C. A. —, decided March, 1916, in the Circuit Court of Appeals (Eighth Circuit).

From the evidence here, from all that appears, the surplus funds upon which the dividends have been declared are not shown to be other than earnings of the railway company, or gains and profits. Counsel has argued differently in his brief, but nowhere does the testimony or statements warrant a finding that this surplus is an increase to capital by a year to year enhancement of the value of the capital of the railway company and is not from any enhancement of the value of land or property of the corporation.

In Stanton v. Baltic Mining Co., 240 U. S. 103, 36 Sup. Ct. 278, 60 L. Ed. 546, the Supreme Court held a mining company obligated to pay a tax on sales of its ore.

In the case of Edwards v. Keith, 231 Fed. 111, 145 C. C. A. 298 (Second Circuit), the plaintiff was a life insurance agent employed by an insurance company under written contract to procure applications for assurance on the lives of individuals. As compensation for his services, the insurance company was obligated to pay him a certain commission on the first premium paid by the assured when the policy was issued. It was further obligated, as the assured paid subsequent renewal premiums for a certain number of years, to pay the plaintiff a stated commission on each of such renewal premiums. It was on these renewal premiums, or rather on the commission paid thereon, that a tax was levied. Judge Lacombe said:

"If, as counsel retained for the purpose, a lawyer argues a cause for a client before the Court of Appeals in October, 1915, having received a retainer in August and his work being completed with the argument, and the cause is decided in December and his client pays him in February, 1916, we cannot see why he should not include his retainer in his income returned for 1915

and the money paid him for argument in his return for 1916, although in that year (1916) he did nothing—did not even send in a bill, having done that in December, 1915."

And further illustrating, the court said:

"If as a reward for long and faithful service an industrial corporation votes to one of its employés, who retires from active work, an annual pension, we do not see why all installments of that pension paid in each calendar year are not, under the statute, income for that year."

And further:

"It may be noted that, although fully earned by work already done, there is no certainty that the sum conditionally promised for an ensuing year will ever be paid or will accrue or come due; John Doe may die within the first year, or at its expiration may refuse to renew his policy, in which event the company is not obligated to pay its agent anything beyond the amount already paid him; the obligation to pay does not arisé until John Doe actually pays his renewal premium in cash."

In the case at bar, there is no certainty when the surplus from which the dividends were paid were earned, or that such surplus would ever be distributed as dividends. Financial reverses or some other calamity might have destroyed the surplus, and the Central Pacific Company could not have distributed the earnings to the plaintiff, and the plaintiff would have no right of action against this railway company for the amount of such loss or surplus.

In Stratton's Independence v. Howbert, 231 U. S. 399, 34 Sup. Ct. 136, 58 L. Ed. 285, the court said:

"It was reasonable that Congress should fix upon gross income, without distinction as to source, as a convenient and sufficiently accurate index of the importance of the business transacted: * * * Moreover, Congress evidently intended to adopt a measure of the tax that should be easy of ascertainment and simply and readily applied in practice."

Judge Thomas, in Conn. Mutual Life Ins Co. v. Eaton (D. C.) 218 Fed. 206, held that, under the act of 1909, taxation is limited to such income as was actually received during that year, and does not include items which may have been earned or have become due but have not been collected. This case was affirmed on appeal in this Second circuit.

In Herold v. Mutual Life Ins. Co., 201 Fed. 918, 120 C. C. A. 256, Judge Cross, in the Third district, said:

"If they do not arise from income received during the tax year, but from income received during a previous year, Congress has not taxed them * * * more than once. Concededly, they have been taxed once with the other net income of the particular year during which the company actually received them in cash."

It must be remembered that the tax here is charged upon the plaintiff which received the dividends, and not the corporation which paid them. The phraseology of the statute provides for the gross amount of the income of such corporation "received within the year from all sources" and permits of deduction of: (1) All the ordinary and necessary expenses paid within the year; (2) all losses actually sustained within the year; (3) the amount of interest accrued and paid within the year; and (4) all sums paid by it within the year for taxes.

Since these dividends were received within the six months and were paid as part of the gross income to the plaintiff as the stockholder of the railroad company, and were received within the year "from all sources," I am of the opinion that the collector was right in levying this assessment and collecting this tax; and, accordingly, there must be judgment directed for the defendant on the second cause of action.

THE INDRAPURA.

(District Court, D. Oregon. December 18, 1916.)

No. 4757.

1. CUSTOMS AND USAGES ⟸15(1)—APPLICATION AND OPERATION—EXPLANATION OF CONTRACT.

While a custom or usage is never admissible to contradict, or to control or vary, the positive stipulations of a written contract, it has a proper and well-settled office and function in trade to ascertain and explain the meaning and intention of parties to contracts, whether written or parol, where this cannot be done without the aid of extrinsic evidence.

[Ed. Note.—For other cases, see Customs and Usages, Cent. Dig. §§ 30, 31, 33; Dec. Dig. ⟸15(1); Evidence, Cent. Dig. § 1946.]

2. SHIPPING ⟸125—LIABILITY FOR LOSS OF CARGO—DEVIATION—EFFECT OF CUSTOM AND USAGE.

The going into dry dock in Hong Kong of a steamship with part of a cargo on board, which had been transshipped to her under through bills of lading, where it was in accordance with the general custom of the port, was a customary incident of the voyage, and not a deviation which rendered her or her charterer liable for loss of cargo while in the dry dock.

[Ed. Note.—For other cases, see Shipping, Cent. Dig. §§ 459, 460, 466; Dec. Dig. ⟸125.]

3. INSURANCE ⟸314—MARINE INSURANCE—CAUSE OF LOSS—DEVIATION—EFFECT OF CUSTOM AND USAGE.

Such act of the vessel, being customary, and not a deviation, did not affect the right of the charterer to recover on a policy insuring its freight.

[Ed. Note.—For other cases, see Insurance, Cent. Dig. §§ 722–737; Dec. Dig. ⟸314.]

In Admiralty. Suit by the British & Foreign Marine Insurance Company, Limited, against the Portland & Asiatic Steamship Company, the steamship Indrapura, the Indrapura Steamship Company, Limited, claimant, in which the Oregon-Washington Railroad & Navigation Company intervened. Decree for respondents, and on cross-libel for the Portland & Asiatic Steamship Company against libelant.

Andros & Hengstler, of San Francisco, Cal., for libelant.

Bauer & Greene and A. H. McCurtain, all of Portland, Or., for the Indrapura and Indrapura S. S. Co.

Arthur C. Spencer and C. E. Cochran, both of Portland, Or., for Portland & Asiatic S. S. Co. and Oregon-Washington R. & Nav. Co.

WOLVERTON, District Judge. What has previously been determined on exceptions to the libel in this case I find no occasion for

amending or modifying. By averment in the libel it appears that the steamship Indrapura was put in dry dock without maritime necessity therefor. Controverting this averment, two of the respondents answer that it is true the Indrapura was put into dry dock with a partial cargo on board, but that this was done in pursuance of a usage and custom which was general as to the port of Hong Kong and the ports of the Orient and of the world, and that such usage and custom, as it respects the port of Hong Kong, has its basis upon the conditions that prevail and have prevailed for a great length of time relating to the shipment and transshipment of cargo. The sole question that now arises is, what effect such usage and custom, if it exists, has as it respects the bills of lading or the policy of insurance of freight by the British & Foreign Marine Insurance Company. This question is not dominated in the least particular by the former opinion of this court on the exceptions to the libel.

Pertaining to the question of fact as to whether the alleged usage and custom exists, I am persuaded that it does, and that it has so existed for a long period of time as it relates to the port of Hong Kong; but the proofs are inadequate to show that it exists in the Orient generally or in other ports of the world. It was the common practice in the transshipment of cargo for ships to discharge in the stream upon lighters, and then reload from the lighters into ships for carrying the cargo forward on the voyage. There are other means of discharging cargo for transshipment, namely, by discharging on wharves, or "godowns," as they are called, such cargo being taken from these places of deposit for carriage to destination; but the transshipment is generally accomplished through means and by use of lighters, as above indicated. The facilities for placing vessels in dry dock at the port are or were at the time inadequate for prompt service, and vessels were required to bide their turn when found convenient and necessary that they should go into dry dock.

Shortly prior to the docking of the Indrapura in the present instance, she had come into port from Portland with cargo. This she had unloaded. Immediately prior to going into dry dock, she took on from lighters a partial cargo, consisting of jute and gunnies, some 200 tons in weight, and some other light materials. She had been in dry dock, the third engineer says, six months before, but the captain says about February, 1902, which would have been nine months before; the charter party requiring that she be docked at least every six months. For two or three reasons it was necessary that she go into dry dock again: One, to have her hull scraped and painted; another, that her British passenger license had expired, and, according to the requirements of the British Board of Trade, a survey was necessary before issuing a new passenger certificate; and, still another, that a Lloyd's survey was required at the time for her proper classification before proceeding on her voyage back to Portland.

Although the captain objected to taking the cargo on board before docking, even to the extent of protesting, for the reason that he "did not care about accepting the responsibility of inflammable cargo being on board of the ship any longer than necessary," Mr. Allan Cameron,

the general agent for the Portland & Asiatic Steamship Company, directed him to proceed, and he did so. Cameron denies that there was definite objection on the part of the captain to taking on the partial cargo; but in this it appears he is mistaken, for the chief officer supports the captain's statement. Cameron's reasons for taking on the cargo before docking were that otherwise storage elsewhere would have been necessary, and the ship would have been subjected to charges therefor.

Now, as to the usage and custom. A number of reliable witnesses, all of whom were in position to know whereof they deposed, have testified to its existence at the port of Hong Kong at the time and for many years prior thereto. These consist of Armsden, the chief engineer of the Indrapura, Hollingsworth, the captain, and Cameron, the general agent of the Portland & Asiatic Steamship Company; also of Raphael Solomon Judah, of the Colony of Hong Kong, and head of the shipping department of David Sassoon & Co., Limited; Charles Adolphe Henri Westerburger, shipping manager in the firm of Arnhold, Karberg & Co.; Charles Montague Ede, general manager of the Union Insurance Society of Canton, Limited, and of the China Traders' Insurance Company, both marine insurance companies; Edbert Ansgar Hewett, superintendent in Hong Kong of the Peninsular & Oriental Steam Navigation Company; Douglas William Craddock, general traffic agent to the Canadian Pacific Railway Company; Frederick Joseph Halton, agent of the Pacific Mail Steamship Company; and Thomas Arthur, a member of the firm of Goddard & Douglas, marine surveyors, and surveyors to practically all the local insurance companies.

True, some of these witnesses testify respecting the practice of their own companies, such as Judah, of David Sassoon & Co., and Craddock, of the Canadian Pacific Railway Company; but their testimony is strongly corroborative of the general practice and custom prevailing at Hong Kong, as unequivocally asserted by the other witnesses. The question propounded to these witnesses as to the custom was somewhat stereotyped, and perhaps called for a conclusion, and not the fact; but subsequent questions succeeded in bringing out in a fair way the real conditions and practice prevailing at Hong Kong. The reason generally given for such dockage with partial cargo is very well exemplified by the answer of Judah, as follows:

> "It is much safer, so far as cargo is concerned, to dry-dock the vessel with so much cargo as she may happen to have on board, as much less risk of damage by breakage, loss, theft, bad handling, fire, and rain is run by following this course than if the cargo were unloaded. This course saves double handling and its attendant risks, and it also saves the great danger of open lighterage, with its great risk of damage by fire and water. Insurance companies run less risk of loss when cargo is taken into dry dock than when it is unloaded."

From all this testimony I am firmly persuaded that in November, 1902, and for many years prior thereto, a general usage and custom existed and prevailed at the port of Hong Kong for vessels to go into dry dock with partial cargo, for the purpose of survey, and for cleaning and painting the hulls, and for ascertaining whether they were seaworthy to enter upon further voyages.

[1] Custom and usage to be available for any purpose should be well defined and established by clear and convincing proofs, so that henceforth there can scarcely be a doubt of its actual existence. Such, however, I deem to be the effect of the proofs here adduced. It is never proper to resort to any usage or custom to control or vary the positive stipulations of a written contract, nor, a fortiori, in order to contradict them. The Reeside, 20 Fed. Cas. No. 11,657; De Witt v. Berry, 134 U. S. 306, 312, 10 Sup. Ct. 536, 33 L. Ed. 896.

But, while usage or custom is never admissible to subvert settled rules of law, nor to contradict, modify, or explain that which is plain and unambiguous in contracts, it nevertheless has a proper and well-settled office and function in trade, which is to ascertain and explain the meaning and intention of parties to contracts, whether written or parol, where this cannot be done without the aid of extrinsic evidence. Such evidence is admissible on the theory that the parties knew of the custom or usage when they entered into contractual relations, and presumably contracted with reference to it. Barnard v. Kellogg, 10 Wall. 383, 19 L. Ed. 987; Robinson v. United States, 13 Wall. 363, 20 L. Ed. 653. Hence it was said in Hostetter v. Park, 137 U. S. 30, 40, 11 Sup. Ct. 1, 4 (34 L. Ed. 568):

"It is well settled that parties who contract on a subject-matter concerning which known usages prevail incorporate such usages by implication into their agreements, if nothing is said to the contrary."

This case had its origin in an alleged deviation, the facts being, as found by the Circuit Court, from which the appeal was prosecuted, that the towboat Iron Mountain, having in tow several barges, among which was Ironsides No. 3, with partial cargo aboard, left Pittsburg, bound for New Orleans, and arrived safely at Mt. Vernon, Ind. At that point the towboat detached from her fleet Ironsides No. 3, and proceeded upstream to certain piles, where some corn was taken aboard. From there the barge was towed across the river, and took on corn at two landings on the Kentucky side; the second being what was known as Whitmon's Landing. While backing out from Whitmon's Landing the barge sank, with total loss of cargo. The respondents justified their action in detaching the barge and proceeding to other points on the ground that it was in accordance with the usage and custom of trade and navigation on the Ohio and Mississippi rivers. The usage and custom being proven, this was sustained as a valid defense to the deviation alleged by the libel.

The case of Marx v. National Steamship Co., 22 Fed. 680, is instructive. The steamer Euphrate took a cargo at Marseilles for New York to be transshipped at London, "in and upon the steamship called the Canada, * * * and, failing shipment by said steamer, then by other steamer, or following steamer of this line, for which the goods shall arrive in time." The Euphrate having arrived too late to meet the Canada, and there being no other ship of that line to arrive within 22 days, the cargo was forwarded by a boat of another line, aboard which it was lost. It was shown at the trial that it was usual and customary, when goods were received at London to be dispatched by a through bill of lading, to forward them by steamer of some other line

in case the goods were likely to be detained upwards of a week beyond the next usual sailing day. Judge Brown, in construing the bills of lading, did so in the light of the proven usage and custom obtaining at London, and held the respondent not liable. In the course of his opinion the learned judge has this to say:

"In construing bills of lading, as in construing other commercial instruments, it is the right and duty of the court to look, not only to the language employed, but to the subject-matter, and to the surrounding circumstances, in order to determine the proper effect of the language used, by putting itself, so far as possible, in the place of the contracting parties. It has regard, therefore, to all the prevailing usages and customs of business."

These two cases illustrate very well the true and legitimate application of usage and custom for the interpretation of contracts, and its pertinency for ascertaining and determining whether there has been a deviation in a ship's voyage. It is strongly asserted by the court, in Constable v. National Steamship Co., 154 U. S. 51, 66, 14 Sup. Ct. 1062, 1068 (38 L. Ed. 903) that:

"If such deviation be a customary incident of the voyage, and according to the known usage of trade, it neither avoids a policy of insurance, nor subjects the carrier to the responsibility of an insurer."

The court cites Oliver v. Maryland Ins. Co., 7 Cranch, 487, 3 L. Ed. 414, Columbian Ins. Co. v. Catlett, 12 Wheat. 383, 6 L. Ed. 664, and Hostetter v. Park, supra, in support of the assertion. See, also, Eddy v. Northern S. S. Co., 79 Fed. 361, and The F. J. Luckenbach, 213 Fed. 670, as to the application of proven usage and custom in the interpretation of policies of marine insurance and charter parties.

[2] Now, it is urged with strong emphasis that the bills of lading in the instant case are susceptible of clear construction without resort to the alleged usage and custom respecting dry-docking at Hong Kong, and that, if the ship desired the privilege of going into dry dock with cargo on board, it should have had an express stipulation to that effect. The bills of lading read:

"Shipped * * * on board the steamer * * * now lying in the port of Calcutta and bound for Hong Kong, to be there delivered to the agents of the Portland & Asiatic Steamship Company, to be by them transshipped to the ——— or other of that company's steamers bound for Portland, Or., * * * and being marked as per margin to be carried upon said steamer (with leave to tow and assist vessels in distress; to sail with or without pilots; to transship to any other steamers; to warehouse or lighter from steamer to steamer, and from steamer to shore; and with liberty to call at any port or ports in or out of the customary route in any order), unto the port of Portland, Oregon (acts of God * * * excepted)."

The wording takes no account of dry-docking at the port of Hong Kong, and from the reading it would seem that nothing is left for construction, especially as to the point in controversy. But when we come to consider that there is no deviation, if account is taken of the usage and custom, by placing vessels with partial cargoes in dry dock at that port, we realize that it was not essential that the bills of lading make note of the custom, by way of an exception, in order to permit the dry-docking to be done. The custom allowed it to be done, and it was only necessary to name the ports of beginning and destination of the voyage and the general route to be pursued. In view of the custom, in

so going into dry dock, there was no deviation. Such was the conclusion reached in the case of Hostetter v. Park, supra, where the barge was detached at Mt. Vernon from other barges in tow and taken across the Ohio river to take on cargo on that side; also in the case of Marx v. National Steamship Co., supra, where the cargo was shipped from London on a vessel of another line than that designated in the bills of lading. The things done were in pursuance of a custom and usage, and therefore did not constitute a deviation. Whether it be said that the usage and custom are to be read into the bills of lading, or that such contracts are to be construed with reference thereto, makes but little difference. The real condition was, in view of the custom, a thing with relation to which the parties contracted, that the voyage anticipated, if convenient, the dry-docking of the steamship Indrapura before proceeding on her journey hence from Hong Kong to Portland, Or. As to this, the parties must be considered to have been in accord, and it was not necessary to write it into the contract, because they contracted with reference to its existence. So it is there was no deviation by observing and pursuing the custom.

Some question is raised as to whether the voyage had been begun when the ship was put into dry dock. But the cargo was on its way to Portland, and had been on its way since its shipment at Calcutta; and as to the cargo, there would have been a deviation by placing the ship in dry dock with it aboard, had it not been for the custom allowing and permitting such a thing to be done at Hong Kong while on its voyage to destination.

Another question is made that the custom and usage was not general, and hence not binding on the shipper. As I construe the matter, the custom was general as to the port of Hong Kong—everybody observed it, all ships with partial cargo on board were at liberty to take dry dock in pursuance of it without incurring the irregularity of a deviation, and hence all persons shipping through the port were bound to take note of its existence. The custom was therefore binding on the shipper as well as the carrier, and this whether the shipper lived at the port or at some foreign port. See Marx v. National Steamship Co., supra.

[3] The Portland & Asiatic Steamship Company has interposed a cross-libel, whereby it seeks to recover from the British & Foreign Marine Insurance Company insurance on the freight for carriage of the goods lost. The considerations touching the alleged deviation are as applicable here in favor of the assured, if not with stronger persuasion, as they were to the shipper in the main case. The amount of loss under the policy was $1,225.80.

The decree of the court will therefore be that the libelant take nothing by its libel, and that the Portland & Asiatic Steamship Company recover from the British & Foreign Marine Insurance Company the sum of $1,225.80, and interest thereon at 6 per cent. per annum from July 25, 1903, the date of the final adjustment of general average and the apportionment of the proceeds of the cargo.

In re REICHENBURG.

(District Court, M. D. Pennsylvania. January 29, 1917.)

1. ALIENS ⟸62—NATURALIZATION—CONTINUOUS RESIDENCE—TEMPORARY ABSENCE.

That an alien, after establishing a residence in the country, is temporarily absent on business trips as a traveling salesman, does not prevent his residence being continucus, necessary, under Act June 29, 1906, c. 3592, § 4, subd. 4, 34 Stat. 598 (Comp. St. 1913, § 4352), for naturalization.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 123–125; Dec. Dig. ⟸62.]

2. ALIENS ⟸68—NATURALIZATION—WITNESSES.

The knowledge of witnesses to show continuous residence in the country for five years of an applicant for naturalization, need be only appropriate to the possibilities of the case, and it is enough that they usually saw him on his return from business trips abroad, and often while at home with his family, and corresponded with him, and visited and had personal knowledge of his life and habits during all the period.

[Ed. Note.—For other cases, see Aliens, Cent. Dig. §§ 138–145; Dec. Dig. ⟸68.]

In the matter of the application of Frank Reichenburg for admission to United States citizenship. Certificate allowed.

Paul G. Smith, of Harrisburg, Pa., for applicant.
Thos. B. Shoemaker, of Philadelphia, Pa., for the United States.

WITMER, District Judge. The applicant, Frank Reichenburg, a native of Germany, came to the United States from Mexico March 23, 1903, and resided for a time at Chattanooga, Tenn. Afterwards he came to York, Pa., and, residing there for a short interval, he came to Harrisburg. In his testimony he says:

"I lived in Harrisburg, Pa., and made that city my home from the spring of 1904 to July, 1907; then I moved to Philadelphia, renting a house and living at Fifty-Seventh street and Whitby avenue until January, 1910; then I changed my residence to No. 436 North street, Harrisburg, Pa., which city has been my residence and home ever since. At the present time I am living with my wife and two children at 1352 State street."

The applicant has, during all of this time, until recently, been in the employ of the Fredbrenner Lumber Company, of Cincinnati, Ohio, with offices at Alexandria, La., as traveling salesman, selling lumber in the United States and Europe. Concerning his travels, he says:

"In December, 1907, I was sent abroad by my firm to sell lumber in Europe. I returned from said business trip on or about April, 1908. From April, 1908, until December, 1912, at various times I was sent by my firm on business trips to Europe, always returning to my legal residence in America after my business in Europe was completed. From December, 1912, until April, 1913, I was traveling for my employers in the United States. On or about April 1, 1913, I was sent by my firm to Europe on a business trip. On or about October, 1914, having finished my business in Europe, and being in Paris, France, I endeavored to get passage home, but on account of the outbreak of the European war the French authorities would not allow me to sail. Although making every effort to get back, and calling upon the United States

Ambassador for the purpose of securing permission to come home, it was not until on or about June 16, 1915, that I was able to get back to the United States."

Since then he has been away from Harrisburg at short intervals. The two witnesses produced by the applicant testified that they have known him for more than nine years; that they were personal friends of the applicant and his wife; that they visited and saw each other frequently; that applicant's wife taught French to the children of one of the witnesses, Mr. Kitner; that the other witness, Mrs. Hardy, lived in the same house with the applicant and wife for over five years; that they saw or talked to applicant every time he came from his business trips. These witnesses also corroborated applicant as to the facts of his residence, and further testified as to his good moral character and attachment to the principles of the Constitution.

The Officer of the Naturalization Bureau opposes the granting of the citizenship on the ground that under the statute applicable thereto:

"The applicant has not established a residence for naturalization purposes, and that the witnesses produced by the applicant do not satisfy the statute as to facts of residence."

The moral character and other necessary qualifications of the applicant are not disputed.

[1] The statute provides that:

"It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least." Comp. St. 1913, § 4352.

The matter in dispute here has to do with the character of the applicant's residence in the United States, whether under the facts as developed by his witnesses and his own testimony, coupled with his conduct under the circumstances of his employment during the five years preceding his application, he has resided continuously within the United States five years at least.

As contended by the government, it may be conceded that residence does not always depend upon the party's expressed intention, yet it will not be gainsaid that it largely depends upon such, and as gathered from his acts and demeanor, attending his abiding in whatever place that may be. "The transient visit of a person for a time at a place does not make him a resident while there; something more is necessary to entitle him to that character. There must be settled, fixed abode, an intention to remain permanently at least for a time, for business or other purposes, to constitute a residence within the legal meaning of that term. Penfield v. Chesapeake Co., 134 U. S. 357, 10 Sup. Ct. 566, 33 L. Ed. 940.

That the applicant had a residence here under the showing made is easily determined in his favor, but was such residence continuous, or was it interrupted by his going away on his employer's business to Europe? Now, if the matter of residence cannot be predicated on a transient visit, or anything short of settled, fixed abode, an intention to remain permanently, surely by the same principle it cannot be lost to

him who goes abroad, like the applicant went on the business of his employer, returning from time to time as his business was transacted and his mission was concluded. Judged by whatever standard that may be applied, the only logical conclusion to be drawn for the conduct of the applicant, as disclosed by the record in this case, is that he resided continuously within the United States within the meaning of the statute.

Courts have repeatedly construed the meaning of the term "resided continuously" and have uniformly held that the term is not used literally as requiring the applicant to remain at all times physically within the jurisdiction, but that the term applies to changes of "domicile" only. Thus, in Re Schneider (C. C.) 164 Fed. 335, 336, Ward, J., said:

"The word 'continuously,' which is not found in the act of 1802, cannot be construed literally; else a resident of New York would lose his right if he paid a visit to Europe at any time during the first four years of his residence, or spent a day in Jersey City within the year immediately preceding the day of filing his petition. The use of the word may be to prevent any intermediate change of domicile during the five years. If Congress had meant that the alien must remain actually within the territory of the United States uninterruptedly during the five years, it would have used language like that of Act March 3, 1813, c. 42, § 12, 2 Stat. 811 [Comp. St. 1913, § 4360]: 'For the continued term of five years next preceding his admission as aforesaid have resided within the United States without being at any time during the said five years out of the territory of the United States.'"

The same construction is quoted with approval and followed in United States v. Rockteschell, 208 Fed. 530, 125 C. C. A. 532. In both the Schneider and the Rockteschell Cases the question was whether a sailor, after acquiring a residence or domicile in this country, abandoned the same by following his occupation and going to sea, or whether he still "resided continuously," within the meaning of the act, at his old domicile, although absent practically the whole of the five-year period on voyages.

In the Schneider Case the applicant arrived at New York from Liverpool on November 1, 1902, and took up his residence there. Subsequently he enlisted in the Navy, and while in said service took out his first papers December 26, 1905. He filed his petition for a certificate of citizenship June 3, 1908. He produced an honorable discharge for four years' service in the Navy. During this space of four years he was only home several times for brief periods on shore leave.

In the Rockteschell Case, which was a question of cancellation of certificate, the respondent only returned to his domicile at irregular intervals and for comparatively short periods of time. Here the court, after following the same line of reasoning as in the Schneider Case, further on page 533 of 208 Fed. (125 C. C. A. 332) said:

"To establish a residence there must doubtless be a concurrence of act and intent; but, when once established, temporary absences from time to time, unaccompanied by an intent to abandon or change the residence, do not operate to interrupt the continuity thereof. There is nothing in the naturalization act, other than the phrase itself, 'has resided continuously within the United States,' to indicate a purpose upon the part of Congress to require continuous physical presence, and in the practical administration of the law such a construction would entail consequences harsh in the extreme. Within reasonable limits, therefore, it is a question of fact, to be determined in the

light of all the attendant circumstances of each particular case, whether the continuity of residence has been broken by temporary absences."

Among other cases cited by counsel for the applicant, the following are in support of the conclusion reached: In re Timourian (D. C.) 225 Fed. 570; In re Deans (D. C.) 208 Fed. 1018; United States v. Cantini (D. C.) 199 Fed. 857; In re Cantini, 212 Fed. 925, 129 C. C. A. 445.

[2] As to the sufficiency of the witnesses produced by the applicant it may be said that their knowledge need only be appropriate to the possibilities of the case. Both witnesses have testified that they usually saw the applicant upon his return from his trips abroad, and often while at home with his wife and family; that they corresponded with him, visited, and had personal knowledge of his life and habits during all of the five year period. This is all that, under the circumstances of the case, should be required and more could hardly be expected. In the Schneider Case, supra, where the applicant was absent the greater part of the five-year period, returning very seldom, and then only for a short period of time on leave of absence, the court said:

"It cannot be that the witnesses must see the applicant every day and every minute of every day for five years. Their knowledge must be appropriate to the applicant's employment. In the case of a sailor, if they know that he lived here before he went to sea, while at sea returned from time to time at the termination of his voyages, and corresponded with him, they know all that in the nature of his employment a sailor can supply."

The objections raised against the application are overruled, and the certificate of citizenship is allowed.

In re SPENGLER.

(District Court, S. D. Iowa, Davenport Division. December 20, 1916.)

1. BANKRUPTCY ⊜91(2)—INVOLUNTARY PROCEEDINGS—INDEBTEDNESS.

In 1914 the alleged bankrupt and another entered into contracts by which they agreed to clear and put into crop 80 acres on each of a number of intended homesteads in Utah. The contracts provided that the work should be started as soon "as the weather permits," and that 40 acres on each tract should be put under cultivation by January 1, 1916. When the petition was filed on December 11, 1915, nothing had been done to comply with the contracts, nor at the time of the hearing several months later. The bankrupt and his associates had received payments on the contracts in excess of $4,000. *Held*, that the facts were sufficient to show a breach of the contracts, and that the bankrupt owed provable debts thereon exceeding the statutory requirement.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 138; Dec. Dig. ⊜91(2).]

2. BANKRUPTCY ⊜68—PERSONS WHO MAY BE ADJUDGED BANKRUPT—PERSONS "CHIEFLY ENGAGED IN FARMING.

A man who cultivates "about two acres" of ground, and has 35 bushels of corn, 1 horse, 4 head of cattle, and a few dollars' worth of implements, but who has various outside interests, is not "chiefly engaged in farming," within the meaning of Bankr. Act July 1, 1898, c. 541, 30 Stat. 544.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 18, 86, 87; Dec. Dig. ⊜68.]

In Bankruptcy. In the matter of William Spengler, bankrupt. On involuntary petition, and exceptions to report of special master thereon. Exceptions overruled, and order of adjudication.

Wm. Hoersch, of Davenport, Iowa, and R. W. Olmsted, of Rock Island, Ill., for bankrupt.

Isaac Petersberger, of Davenport, Iowa, and Albert Huber, of Rock Island, Ill., for creditors.

WADE, District Judge. The petition by creditors, alleging insolvency and acts of bankruptcy, was filed December 11, 1915. The answer of the alleged bankrupt was filed December 27, 1915. Nothing further was done in the matter until February 5, 1916, when it was referred to Special Master Williamson, for whom, on March 30, 1916, F. A. Cooper was substituted, and the case came on for hearing before the special master, May 22, 1916. Report of special master was filed June 23, 1916, and thereafter exceptions were filed thereto, and argued before the court. I have reviewed the evidence fully with reference to the following questions: (1) Provable debts. (2) Insolvency. (3) Whether Spengler was chiefly engaged in farming. (4) Acts of bankruptcy.

[1] First. It appears from the record that in 1914 parties with whom Spengler was in some relation associated, by advertising and other ways, induced some 14 people to enter into contracts to pay $125 each for the location of homesteads in Utah, and 13 of these persons, as I understand the record, entered into a contract with Spengler & Crawford, by which they obligated themselves "to clear off, plow, and seed to wheat 80 acres of land," which it was contemplated would be part of the homestead located as aforesaid. It was specifically provided that 40 acres "shall be cleared off, and shall be under cultivation on or before January 1, 1916; 40 acres more on or before January 1, 1917," and it was specifically provided that "second party shall start the improvement of the above said land as soon as the weather permits in San Juan county, and complete it as soon as possible." Later Crawford went into bankruptcy. Spengler wrote the parties that he would carry out the contracts, but on December 11, 1915, nothing was done, and at the time of the hearing in May, 1916, nothing appears to have been done to in any manner carry out these obligations. Each of 13 persons paid these parties, as I understand it, $325 cash, and obligated themselves to execute notes for $300 more. Whether the notes were actually executed, and, if so, what became of them in all cases, does not specifically appear; but it does appear that Spengler, or Spengler & Crawford, received $4,225 in cash, and it does appear that up to the time of the hearing nothing was given in return therefor.

It is strenuously urged that the question of whether there was any liability for repayment of the money, or damages, must be determined with reference to the specific question as to whether the contract was "breached" on December 11, 1915; and it is earnestly contended that no such breach occurred at that time, because it is contended Spengler had until January 1st, 20 days later, in which

to comply with the contracts. That this view is entirely erroneous is clearly shown by the above quotations from the contracts. It is true that it specifies that the 40 acres is to be cleared off and under cultivation on or before January 1, 1916; but it is also true that the contracts specifically provide that "second parties shall start the improvement of the above said land as soon as the weather permits in San Juan county, and complete the same as soon as possible." No contention is made that the weather did not permit the commencement of the improvement before December 11th, and no one can seriously contend that within the 20 remaining days the 40 acres could have been plowed and put under cultivation, and no one even pretends that there was any intention to do so, and from the fact that up to the time of the hearing, so far as the record shows, no steps were taken to in any manner comply with the contracts, it may be fairly inferred that Spengler did not have any intention on December 11th of attempting to comply with the contracts.

It is true that the bankruptcy proceeding is pointed out as an obstacle, but it does not appear that his property was taken out of his hands, or that any obstacle was placed in the way of the performance of these contracts, if Spengler seriously intended to perform them, and the delay in bringing the matter to trial does not indicate any purpose upon the part of Spengler to attempt the performance of these contracts; in fact, my recollection is that the appointment of the special master was upon my own motion, and not upon any request by the parties. Of course, to furnish the foundation for a claim for breach of contract, the breach must have occurred prior to December 11, 1915; but evidence as to subsequent acts and conduct is admissible to determine whether or not there had at that time been a breach, and under all the circumstances, if at that time Spengler had no intention of carrying out the contracts, there could be no question but what there was a breach. In fact, in view of the requirement that work should commence as soon as the weather would permit, there can be no question but what there was a breach, regardless of his then intention. There being a breach, the parties who paid the $4,225 certainly had claims which they would have a right to assert in court. The court cannot always determine specificially the absolute liability upon a petition in bankruptcy. That matter cannot be adjudicated as to all the parties; but I hold that, under the facts in this case, Spengler was owing provable debts, within the meaning of the law, in excess of the statutory requirement.

Second. As to solvency, the testimony of Spengler is extremely unsatisfactory. The promissory notes and obligations are apparently of small value; at least, there is no competent proof of the solvency of the parties owing them, and in some cases the alleged bankrupt does not even know where they live. Upon the evidence before the court, no broker or bank would pay for these notes and obligations, in my judgment, to exceed 10 cents on the dollar. They appear like a lot of "odds and ends," and the financial condition of Spengler during the past couple of years leads me to believe that, if these notes were collectible by legal process, most of them would

have been enforced before this time. The balance of the assets, consisting of machinery and interest in some Minnesota or Wisconsin land, is all of doubtful value. Every lawyer knows what secondhand machinery will bring at a cash sale, and the testimony as to values of Wisconsin and Minnesota lands referred to is entirely unsatisfactory. All of the assets are of such uncertain value, scattered in so many places, and mixed up with so many elements of incumbrance, that I have no hesitation in saying that Spengler has failed to prove that he was solvent.

[2] Third. Was Spengler chiefly engaged in farming? In view of the extended interests and property rights claimed to be owned by Spengler, and in view of his various activities, manifested by the facts and circumstances more than by the direct evidence, I cannot hold that Spengler was engaged chiefly in farming. Upon his own testimony, as to the amount derived from his "farm" and his garden, and fruit and eggs, and everything else, it must be apparent that he could not pay running expenses from his income from those sources. Spengler could be more properly designated as a "gardner." A man cannot be properly classed as a farmer who "farms about two acres," who had about 35 bushels of corn, one horse, a cultivator worth $5, a plow worth $8, two cows, and two heifers; a man cannot be properly classed as a farmer who buys hogs, buys the feed for them, and sells them. A man is not a farmer who depends upon small amounts derived from eggs, fruit, and vegetables. "The word 'farming' and the words 'tillage of the soil' mean the same thing." Hart Parr Co. v. Barkley et al., 231 Fed. 913, 146 C. C. A. 109. A man who "tills" but two or three acres, and has a small pasture, is not engaged in tillage of the soil, nor in farming, within the ordinary meaning of the term.

The purpose of the statute must be considered. A man's outside activities must be considered. Congress did not have the intention of excluding from the statute such persons as engage in general business aside from farming, and it is apparent, from the notes owned by Spengler, the property owned by him, and the interests which he had, scattered as they were, that these outside interests must have engaged more of his attention than did farming. It is not a question of how much time a man puts in "farming"; that is only one element. The question of his interests and his activities, and the things that engage his attention, is what makes the distinction.

Fourth. As to the acts of bankruptcy I have no doubt. The explanation of Spengler that he wanted to "protect" his wife can have no meaning than that she should have financial protection, or property protection, in case financial trouble should come. He disposed of the things which he owned, having substantial value and known location, at a time when he had assumed grave obligations to petitioners and others. It strikes me that Spengler realized that complications and obligations might arise which would involve him in financial troubles with these people, and that he was providing "protection" for himself and family, and however commendable this

spirit may be from a standpoint of family obligations, it is contrary to well settled rules of law.

Finally. This whole case impresses me with the feeling that it is a case which calls for the interposition of the relief provided for in the bankruptcy statutes. Here are a lot of people who have been led to invest their money in an enterprise which has failed, and for the failure of which Spengler may be largely responsible in damages. The assets owned by Spengler are of such a nature that the appointment of a trustee in bankruptcy cannot seriously affect their value, nor can such proceeding seriously interfere with Spengler's activities. If the notes are collectible, it will be to his advantage to have them collected. The machinery, upon which he places such great value, will not lose any of that value by being taken in charge by a trustee, and so far as the use of the machinery is concerned, pending the question of adjudication of liabilities, the trustee will be under orders of the court, and arrangements can certainly be perfected by which Spengler can have the use of the machinery on proper terms and proper security. There will be no sacrifice of anything; in fact, if Spengler is solvent, as he claims, and the property is of the value claimed, he will have no difficulty in furnishing to the trustee such security as will satisfy all creditors, and arrangements certainly can be made for his possession of his assets. All that bankruptcy will mean is that his assets will be conserved for his benefit, as well as for the benefit of creditors, and the trustee appointed will perform no acts which will in any manner deprive the bankrupt of a dollar that he owns, unless the same is necessary.

The claims against Spengler will have to be liquidated, and the manner of liquidation, if it cannot be agreed upon, will be hereafter determined. This adjudication does not determine the invalidity of the transfers of the real estate, except for bankruptcy purposes, because the proper parties are not before the court. A square deal to everybody, in my judgment, warrants this proceeding; without it, by the time these various claimants can have their claims reduced to judgment, no one can tell where these assets will be, or what they will be worth, and common justice requires that they shall be held pending the determination of the rights of all the parties.

Record entry: And now, on this 20th day of December, 1916, the above-entitled cause having been heretofore tried and submitted, the court, being now fully advised, finds that William Spengler should be, and he is, hereby declared a bankrupt, as prayed, and the case is referred to F. A. Cooper, referee, for further proceedings under the law. To which William Spengler excepts.

FERRY v. TROY LAUNDRY CO. et al.

(District Court, D. Oregon. January 2, 1917.)

No. 7106.

1. DIVORCE ⊜327—FOREIGN DIVORCE—DECREE—FULL FAITH AND CREDIT.
A decree of divorce rendered by a territorial court in a suit between nonresidents, when the territorial statute permitted only residents to sue, was a nullity, and not entitled to full faith and credit under the federal Constitution (article 4, § 1).

[Ed. Note.—For other cases, see Divorce, Cent. Dig. §§ 831–834; Dec. Dig. ⊜327.]

2. DOWER ⊜50—RIGHTS OF WIFE—ESTOPPEL.
Where neither party to a divorce suit was a resident of the territory in which it was instituted as required by the statutes thereof, but the wife, who was the original defendant, expressly admitted the allegation that her husband was a resident, and thereafter, in accordance with a stipulation which provided therefor and disposed of the property between the parties, filed a cross-complaint on which she was granted a divorce and executed deeds to the property in return for property valued at $50,000, she thereby estopped herself from attacking the validity of the divorce decree after the death of her former husband and claiming a dower interest in the property as against purchasers who had acquired title on the faith of the record as it had been constructed by her, especially where her subsequent suit in the territory to set aside the divorce decree for fraud had been dismissed and the dismissal affirmed by the Supreme Court.

[Ed. Note.—For other cases, see Dower, Cent. Dig. § 99; Dec. Dig. ⊜50.]

3. ESTOPPEL ⊜52—"EQUITABLE ESTOPPEL"—REQUISITES.
An "equitable estoppel" arises whenever one by his acts, representations, or admissions, or by his silence when he ought to speak, intentionally or through culpable negligence induces another to believe certain facts, and the other relies and acts thereon so as to be prejudiced if the former is permitted to deny the existence of that fact.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 121–125, 127; Dec. Dig. ⊜52.

For other definitions, see Words and Phrases, First and Second Series, Estoppel In Pais.]

In Equity. Suit for admeasurement of dower by Evelyn P. Ferry against the Troy Laundry Company, an Oregon corporation, and the Hibernia Savings & Loan Society, a California corporation. On motion to strike the further and separate answers. Motion granted in part and denied in part.

James G. Wilson and George B. Guthrie, both of Portland, Or. (Rockwood & Haldane, of New York City, of counsel), for complainant.

Fulton & Bowerman, of Portland, Or., for defendants.

WOLVERTON, District Judge. This is a suit for admeasurement of dower, the complainant claiming, in pursuance of the statute of Oregon, an undivided one-half interest during her natural life in and to the north half of block 8 of East Portland, in Multnomah

county, state of Oregon. Jurisdiction of this court is based upon two grounds, namely, diversity of citizenship and a federal question whereby, it is alleged, is drawn in question the full faith and credit clause of the federal Constitution. The defendants have answered, setting up that, in a suit for divorce originally commenced in the district court of the Second judicial district of Washington Territory, by Clinton P. Ferry against the complainant herein (defendant therein), the said defendant by cross-complaint procured a decree of divorce against the said Clinton P. Ferry, in which their property rights were adjusted in pursuance of a stipulation of the parties, and there was an exchange of deeds for further assurance; that thereafter, to wit, about October 2, 1893, the complainant herein instituted another suit, in the superior court of the state of Washington, in and for Pierce county, against Clinton P. Ferry, the purpose being to set aside and annul the decree of divorce and the consequent adjustment thereby of the property rights of the parties, on the grounds: First, that the court rendering the decree was without jurisdiction of the parties, neither of whom was, at the time, domiciled in the territory of Washington; and, second, that Clinton P. Ferry was guilty of fraud in concealing from complainant a large quantity of his property, thereby inducing her to enter into the stipulation for a division of their property and to execute on her part the deed for further assurance, whereby she attempted to convey to Clinton P. Ferry the property in question with other realty; that the cause was, on demurrer to the bill, decided against her; and that an appeal from the decree thus rendered was taken to the Supreme Court of the state, and there affirmed.

The facts upon which this latter cause was based are succinctly set forth by the Supreme Court (Ferry v. Ferry, 9 Wash. 239, 37 Pac. 431), and it is unnecessary that I restate them in full here. Some of them will be referred to later.

The answer further shows that, at the suit of Clinton P. Ferry, notices of lis pendens filed in the counties in Oregon, wherein Ferry was possessed of real property, were canceled.

It is claimed for this record, and the participation therein of the complainant, that it is both a bar and an estoppel to her prosecution of the present suit. The first further and separate answer sets up the bar and the second the estoppel. The answers are challenged by a motion to strike.

The question presented by the first further and separate answer is whether the decree of divorce rendered by the Washington territorial court is entitled to full faith and credit in Oregon. The complainant insists that it is not, by reason of the fact, which may be conceded, that neither of the parties was, at the time of the commencement of the suit, nor at the date of the entry of the decree, domiciled in the territory of Washington, and hence that the court was without jurisdiction to entertain the cause.

[1] By the statute of the territory as it existed at that time, any person who had been a resident of the territory for one year was entitled to sue for annulment, by decree of divorce, of his or her

marriage relation, in any county where he or she might reside. Section 2002, Washington Code for 1881 and 1883 (citation is from plaintiff's brief). Under such a statute, neither the plaintiff nor the defendant in that suit was entitled to sue in the territory for divorce. Not being so entitled to sue, it is settled by the adjudications of the United States Supreme Court that the decree was a nullity, and not entitled to full faith and credit in another state or territory under the full faith and credit clause of the Constitution, and hence the decree is not a bar to the complainant's present action here. Atherton v. Atherton, 181 U. S. 155, 21 Sup. Ct. 544, 45 L. Ed. 794; Andrews v. Andrews, 188 U. S. 14, 23 Sup. Ct. 237, 47 L. Ed. 366.

Complainant also insists that the proceedings in the Washington territorial and state courts cannot operate as an estoppel, because she had no right to claim dower until her husband's death, which occurred July 31, 1909, and the statute of limitations, which is 10 years in this state, has not yet run.

[2] Clinton P. Ferry conveyed to Phillip Buehner December 15, 1897, and Buehner and wife to the Troy Laundry Company about January 1, 1899. The defendant Hibernia Savings & Loan Society acquired by mortgage whatever right it has in the premises from the Troy Laundry Company about May 31, 1913.

It will be noticed, from the statement of the case of Ferry v. Ferry in the Washington State Supreme Court, that after the husband had instituted suit for divorce in the territorial court, complainant herein appeared, and, after negotiations between the parties, they entered into a stipulation, bearing date October 5, 1889, by the terms of which it was agreed that plaintiff should amend his complaint, modifying the charges against defendant, and that defendant should file a cross-complaint against plaintiff, alleging as cause for divorce "mild grounds to be agreed upon by counsel for both parties," and that the property questions should be settled by a complete scheme then specifically set out and adopted. It was further agreed that the parties should execute and deliver mutual deeds for the further assurance of title. These deeds were executed and placed in escrow October 15, 1889, and the decree of divorce was granted on the 21st of the same month, when the deeds were delivered to the grantees, respectively. The Supreme Court says, "The terms of the stipulation were carried out literally." Complainant received from Ferry property of the estimated value of $34,000, $10,000 in money and $6,000 in installments for support of the minor child. The court examined with great care the allegations of fraud relied upon for annulling the decree, and declared that the defendant was not entitled to relief, either for want of jurisdiction in the territorial court to render the decree, or on account of any fraud perpetrated by the plaintiff respecting his property holdings. The lis pendens was subsequently canceled by decree of the court, and the complainant has never since, so far as the record shows, asserted or claimed that she was still the lawful wife of Clinton P. Ferry until this suit was instituted.

Is the complainant estopped by this record, and her acts in connection with it, from now controverting title to these premises in the

defendants? The answer, upon principle and prompted by the clearest dictates of justice and right, should be in the affirmative. What the complainant has done and permitted to be done in connection with this record, and by which it was prompted and effectuated, ought to put the seal upon her lips to say aught against the sufficiency of the defendants' claim of title. Clinton P. Ferry in the divorce action alleged that he was, and for more than 1 year previous to the institution of the same had been, a resident and inhabitant of the territory. In her answer, complainant specifically admitted this allegation. Thereupon she entered into the stipulation for an accommodation of the property rights, in connection with which she executed her deed for further assurance, which describes, among other lands, the premises in dispute. Thereupon the divorce was granted her against her husband in accordance with the prayer of her cross-complaint, and she received property from him amounting to $50,000, including the $6,000 for the support of the minor child. The deed was delivered to her husband, and was recorded in Oregon in the county in which the land in dispute lies. Thus was consummated a record, fair and clear upon its face, and one upon which one dealing with the title in Ferry had a right to rely, and so consummated through the acts and connivance of complainant.

[3] The record, with the acts and conduct of complainant in connection with it prompting its consummation, presents all the insignia of an equitable estoppel, or an estoppel in pais against complainant, and especially in favor of the defendants as it respects the title to the premises in dispute. The defendants were in privity with Clinton P. Ferry. They purchased, relying upon the record, and it goes without saying that they were induced so to do by reason of complainant's acts in so constructing the record as to show a clear title in Ferry, and one which upon its face he had good right to convey in fee simple to whomsoever he chose, free and clear of any inchoate right of dower whatsoever in complainant. An equitable estoppel, or estoppel in pais—

"arises when one by his acts, representations or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts. It consists in holding for truth a representation acted upon, when the person who made it, or his privies, seek to deny its truth, and to deprive the party who has acted upon it of the benefit obtained." 16 Cyc. 722–724.

The doctrine has the support of adjudicated cases. Dickerson v. Colgrove, 100 U. S. 578, 25 L. Ed. 618; Leather Manufacturers' Bank v. Morgan, 117 U. S. 96, 6 Sup. Ct. 657, 29 L. Ed. 811. It is true that the doctrine will be allowed to shut out the truth only when necessary to do justice, and never where it would itself operate as a fraud, or work injustice. But its application here is manifestly calculated to promote the ends of justice, and without it such ends would be wholly and irretrievably thwarted. The attempt on the part of complainant to have annulled the decree of divorce which she herself secured resulted, in effect, in having the same approved, and

then affirmed by the Supreme Court of Washington; and the record was thus strengthened upon which defendants rely for their title.

Nor do I perceive any inconsistency in the fact that complainant may be considered to be the lawful relict of Clinton P. Ferry. She was instrumental in constructing the record, has received and appropriated the benefits derived through so doing, and has induced defendants and their predecessor to purchase and part with their consideration upon the faith of that record. I hold, therefore, that complainant is precluded by estoppel from prosecuting her present suit.

The motion should be sustained as to the first further and separate answer, and denied as to the second.

The third further and separate answer proceeds upon the theory that complainant's claim of title is stale in equity. In this I do not concur. The motion to strike will therefore be sustained.

The motion to strike the remaining two further and separate answers will be denied.

In re MIDTOWN CONTRACTING CO.

(District Court, S. D. New York. December 26, 1916.)

1. BANKRUPTCY ⟸288(1)—JURISDICTION OF COURT—SUMMARY PROCEEDINGS.
Where the right of a trustee to property in the possession of a third person depends entirely upon a question of law, the court of bankruptcy has jurisdiction to determine such right in a summary proceeding on petition of the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 447; Dec. Dig. ⟸288(1).]

2. BANKRUPTCY ⟸188(1)—PROPERTY PASSING TO TRUSTEE—MATERIALS OF BUILDING CONTRACTOR.
A provision of a building contract that in case of default on the part of the contractor the owner shall be entitled to retain and use all materials brought on the ground by the contractor is not enforceable against the trustee in bankruptcy of the contractor as to materials not owned by him or even in existence at the time the contract was made.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. §§ 286–289, 291, 293, 294; Dec. Dig. ⟸188(1).]

In Bankruptcy. In the matter of the Midtown Contracting Company, bankrupt. On review of order of referee. Reversed.

David W. Kahn, of New York City, for the motion.

Lamar Hardy, Corp. Counsel, of New York City (Joseph L. Pascal, of New York City, of counsel), opposed.

MAYER, District Judge. This is the review of an order of the referee, made on December 15, 1916, denying the petition of the trustee to require the board of education of the city of New York to turn over to him certain building materials and equipment brought on the grounds of the Evander Childs High School, in the borough of the Bronx, city of New York, by the bankrupt, or on its behalf, which materials and equipment remained on the said grounds on the date

of the filing of the petition in bankruptcy and the appointment of the present trustee as receiver.

The sole ground upon which the referee denied the trustee's petition was that the matter was not one within the summary jurisdiction of the court and that the trustee should pursue his remedy by way of plenary action or suit. The facts are as follows:

[1] The board of education and the bankrupt entered into a contract on October 13, 1914, for the general construction of the Evander Childs High School, in the borough of the Bronx, city of New York, for an estimated sum, and under this contract there was paid to the contractor in installments a certain part of this sum. Before the work called for by the contract was completed, the bankrupt defaulted thereunder. This contract contained, among others, the following clause or provision, known as "Q":

"(Q) If the work to be done under this contract shall be abandoned by the contractor, or if this contract shall be assigned, or the work sublet by him, otherwise than is herein specified, or if the contractor shall at any time refuse or neglect to supply a sufficiency of workmen and materials of the proper skill and quality, or shall fail in any respect to prosecute the work required by this contract with promptness and diligence, or shall omit to fulfill any provisions herein contained, or if at any time the superintendent of school buildings shall be of the opinion, and shall so certify in writing to the committee on buildings, that the performance of the contract is unnecessarily or unreasonably delayed, or that the contractor is willfully violating any of the conditions or covenants of this contract or specifications, or is executing the same in bad faith or not in accordance with the terms thereof, or if the work be not fully completed within the time named in the contract for its completion, the committee on buildings shall notify the contractor to discontinue all work, or any part thereof, under this contract, by a written notice, signed on behalf of said committee by its chairman or acting chairman, to be served upon the contractor, either personally or by leaving said notice at his place of residence or business, or with his agent in charge of the work, or with any employé found on the work, or by notice, letter, or other communication addressed to the contractor deposited in a post-paid wrapper in any post-paid box regularly maintained by the post office, and thereupon the contractor shall discontinue the work or such part thereof, and *the board of education shall thereupon have the power to contract for the completion of the contract in the manner prescribed by law, or to place such and so many persons as it may deem advisable, by contract or otherwise, to work at and complete the work herein described, or such part thereof, and to use such materials as he may find upon the line of the work and to procure other materials for the completion, so as to fully execute the same in every respect,* and the cost and expense thereof at the reasonable market rates shall be a charge against the contractor, who shall pay to the party of the first part the excess thereof, if any, over and above the unpaid balance of the amount to be paid under this contract; and the contractor shall have no claim or demand to such unpaid balance, or by reason of the nonpayment thereof to him, and shall forfeit all claim to any moneys retained; *and no molds, models, centers, scaffolding, planks, horses, derricks, tackle, implements, power plants, or building material of any kind belonging to or used by the contractor shall be removed so long as the same may be wanted for the work.* In case the contractor shall at any time, in the opinion of the superintendent, neglect to faithfully carry on and perform any portion of the work required by this contract, whereby safety and proper construction may be endangered or which may not be subsequently rectified, or whereby damage and injury may result to life and property, or either, then, and in every such case, the superintendent shall have the right forthwith and without notice to the contractor to enter into and upon the work, and to make good any and all imperfect work and

material and deficiencies arising by reason of such neglect; the expense and cost thereof shall be a charge against the contractor to be deducted from any payment or moneys which may be due or subsequently become due under this contract; and the opinion and decision of the superintendent of school buildings in all instances which may arise in the manner aforesaid shall be final, conclusive, and binding upon the contractor. But no action so taken by the superintendent of school buildings shall release the contractor from any and all consequences and damages which may have arisen, or may arise, owing to such neglect, whether willful or by omission; and the contractor covenants and agrees to hold the party of the first part harmless against and from any and all suits at law and all and every damages and loss whatsoever arising therefrom. Should the contractor fail to complete the contract, he shall forfeit all claim for compensation."

The procedure provided under the contract was conformed with, and appropriate resolutions were passed by the board of education, and due notices given, with the result that the board of education took possession of the materials upon the site of the work for the purposes provided for in the contract, and still has possession of the materials and claims the right to use the same for the purposes provided in the clause Q.

The petition in bankruptcy was filed on or about August 16, 1916, and a receiver appointed. Later there was an adjudication, and the receiver was selected as trustee. It was conceded before the referee, and is conceded here, that the board of education took possession of the materials in controversy prior to the filing of the petition in bankruptcy. It was also conceded that none of the materials in controversy was brought on the high school grounds before the contract of October 13, 1914, was entered into, and that none of the said materials was in existence on the date of the making of the said contract.

The trustee moved for an order restraining the board of education from interfering with the possession of the trustee, and this motion was denied on the ground that the board of education was amply solvent. The court pointed out that the trustee might sue in trover or might apply to the referee for a summary order. There was nothing in the court's brief memorandum to indicate that a summary order was not the proper remedy, if the conceded facts justified.

From what has been above outlined, it is apparent that there is no dispute of fact between the parties, and whether or not a summary order is the proper relief depends solely upon whether the question involved is one of fact or one of law. The Circuit Court of Appeals for the Second Circuit has indicated clearly that the Yorkville Coal Company Case, 211 Fed. 619, 128 C. C. A. 570, does not apply where the sole question is one of law. Matter of R. & W. Skirt Co., 222 Fed. 256, 138 C. C. A. 67.

The principle of Matter of R. & W. Skirt Company, supra, has been recently reiterated in Alco Film Corporation v. Alco Film Service of Minnesota, 234 Fed. 55, affirmed 234 Fed. 55, at page 58, —— C. C. A. ——. I am of opinion, therefore, that the referee was clearly wrong in his denial of the trustee's application, on the ground that there was not jurisdiction by way of summary proceeding.

[2] This conclusion requires a consideration on the merits of the question involved. This very clause Q was under consideration in

Titusville Iron Co. v. City of New York, 207 N. Y. 203, 100 N. E. 806. Counsel for the board of education seeks to draw some distinctions between that case and the case at bar, but there is not any distinction requiring discussion, except as to time of possession; it appearing that in the Titusville Iron Co. Case the receiver in bankruptcy obtained possession first, while in the case at bar the board of education obtained possession first.

I am unable to see that the date of possession makes any difference in principle where the chattels were not in existence or in possession of the contractor at the time the contract was made. Chief Judge Cullen, in the Titusville Iron Company Case, discussed on principle the basic propositions as to title. He said:

"At the time of the execution of the contract Hillman had no title to the property, the subject of this suit, nor does it appear even that the property was then in existence. Therefore he could create no lien thereon cognizable at law, whether by way of mortgage, pledge, or otherwise. * * * Mortgages or contracts pledging subsequently acquired property, though void at law, will nevertheless be enforced in equity as between mortgagor and mortgagee as agreements to give liens, and also as against purchasers with notice. McCaffrey v. Woodin, 65 N. Y. 459 [22 Am. Rep. 644]; Kribbs v. Alford, 120 N. Y. 519 [24 N. E. 811]. But it seems settled law, at least in this state, that they will not be enforced as against creditors. Rochester Distilling Co. v. Rasey, 142 N. Y. 570 [37 N. E. 632, 40 Am. St. Rep. 635]; Zartman v. First Nat. Bank of Waterloo, 189 N. Y. 267 [82 N. E. 127, 12 L. R. A. (N. S.) 1083]."

This opinion was concurred in by Judges Haight, Vann, and Willard Bartlett, and Judges Chase and Hiscock concurred in the result. I do not see how any other conclusion could have been arrived at after what the court had said in Zartman v. First Nat. Bank of Waterloo, 189 N. Y. 267, 82 N. E. 127, 12 L. R. A. (N. S.) 1083. The opinion in the Titusville Iron Company Case so fully sums up the law and discusses previous authorities that further comment in unnecessary.

The order of the referee is therefore reversed, and the trustee is entitled to the summary order asked for by him. Submit order on one day's notice.

In re WHITE.

(District Court, N. D. California, First Division. January 23, 1917.)

No. 8700.

1. BANKRUPTCY ⇐413(½)—DISCHARGE OF BANKRUPT—OPPOSITION.
Where, after notice of hearing of trustee's petition to oppose a bankrupt's discharge, no creditor appeared to contest or authorize such action, the referee had no authority to order the trustee to oppose the discharge.
[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⇐413(½).]

2. BANKRUPTCY ⇐413(½)—DISCHARGE OF BANKRUPT — OPPOSITION — CONSTRUCTION OF STATUTE.
The provision of Bankr. Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 (Comp. St. 1913, § 9598), that trustee shall not object to bankrupt's discharge until authorized

"at a meeting of creditors called for that purpose," means authorization by the creditors, and the referee has no right to so authorize the trustee.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃413(½).]

3. BANKRUPTCY ⊂⊃413(½)—DISCHARGE OF BANKRUPT.

Under the Bankruptcy Act, a bankrupt is entitled to his discharge, unless the creditors, either singly or collectively, oppose it, and a mere volunteer may not oppose his discharge.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃413(½).]

4. BANKRUPTCY ⊂⊃413(½)—DISCHARGE OF BANKRUPT—OPPOSITION.

Where creditors had not authorized the trustee to oppose bankrupt's discharge, the bankrupt's objection to a hearing upon objections filed by the trustee by order of the referee should have been sustained.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃413(½).]

In Bankruptcy. In the matter of H. S. White, bankrupt. On application for discharge of bankrupt. Discharge granted.

Wilder Wight, of Oakland, Cal., for bankrupt.

Clarence A. Shuey and W. Dorn, both of San Francisco, Cal., for trustee.

DOOLING, District Judge. The bankrupt regularly made application for his discharge. The trustee appeared and filed specifications in opposition thereto. The matter was then referred to the referee to hear and report on the objections. He has reported, recommending that the objections be sustained and the discharge denied. Before the referee, and at all proper times, the bankrupt has claimed that the specifications should not be considered, for the reason that the trustee was never authorized, at a meeting of creditors called for that purpose, to interpose objections to his discharge. The facts as gathered from the referee's report are as follows:

On April 27, 1915, the referee sent out the following:

"Notice to Creditors.

"To the Creditors: Take notice, that William R. Pentz, trustee herein, has filed his second account, and that at the office of the undersigned, Room 202, U. S. Courthouse and Post Office Building, San Francisco, California, on May 7, 1915, at 10 a. m., said account will be examined and passed upon, and a dividend declared; and further take notice that said trustee has filed herein a petition for an order authorizing him to oppose the discharge of said bankrupt, which will be heard at the time and place aforesaid.

"Dated April 27, 1915. Armand B. Kreft, Referee in Bankruptcy."

It does not appear that any creditors attended in response to this notice, the referee's report reciting only as follows:

"At the time set for the hearing no creditor appeared in opposition to the making of the order authorizing the trustee to oppose discharge."

[1, 2] The trustee was not authorized by the creditors to oppose the discharge, but was authorized by order of the referee only. The power to authorize an opposition to a discharge is not lodged with the referee, but with the creditors—"the parties in interest." The language of the statute (Act July 1, 1898, c. 541, § 14b, 30 Stat. 550, as amended by Act June 25, 1910, c. 412, § 6, 36 Stat. 839 [Comp. St. 1913, § 9598]) is:

"Provided, that a trustee shall not interpose objections to a bankrupt's discharge until he shall be authorized so to do at a meeting of creditors called for that purpose."

This language has been held to mean "authorized *by the creditors* at a meeting held for that purpose." If the creditors had met in pursuance to the above notice, and had at such meeting authorized the trustee to oppose the bankrupt's discharge, I would not be disposed to hold such authorization unwarranted because of any defect in the form of the notice. But it is one thing to say that the trustee "is authorized by the creditors," and another thing to say, as here, that "no creditor appeared in opposition to the making of the order authorizing the trustee to oppose the discharge." I can find no warrant anywhere for the making of such order by the referee. As above stated, it does not even appear anywhere in the record that a single creditor was present at the time and place designated in the notice. All that does appear is that there was no creditor present objecting to the making of the order by the referee. In my judgment, the appearance by the trustee in opposition to the bankrupt's discharge was absolutely without warrant, as wholly unwarranted as if he had appeared of his own motion and without an order of the referee having been made at all.

[3] It is urged, however, that the provision of the statute above quoted is for the protection of the creditors, and not for the protection of the bankrupt; that it is only a question of costs, and not of authority. I do not so read the provision. The bankrupt is entitled to his discharge unless opposed by a party in interest. It is not every volunteer that may halt his discharge. The trustee is forbidden to oppose a discharge, except when authorized so to do by the creditors. Until so authorized he is a mere volunteer, because not a party in interest. Any creditor may oppose a discharge, or the creditors acting together may authorize the trustee to do so. But unless the creditors, either singly or collectively, desire that a bankrupt's discharge be opposed, such discharge must be granted. Neither the trustee as such nor the referee as such is authorized to substitute his desire or judgment for the desire or judgment of the creditors in this regard. And it is a very material matter to the bankrupt if to those authorized by statute to oppose his discharge shall be added by construction the trustee and the referee, so that he is materially interested in seeing that his discharge shall be opposed by those only who are by statute authorized to do so. Even now, after extended hearings before the referee, and with elaborate briefs of counsel before me, I am unable to determine from the record that a single creditor is, or ever was, in favor of opposing the bankrupt's discharge.

[4] The objections of the bankrupt to any hearing upon the specifications filed by the trustee, on the ground that they were unauthorized, were opportunely made, and should have been heeded. So far as appears, there is no creditor interested in this proceeding, and for that reason the specifications will be disregarded, and the discharge granted.

UNITED STATES v. BUCHANAN.

(District Court, N. D. California, First Division. January 29, 1917.)

No. 6024.

1. ARMY AND NAVY ⊂⊃40—OFFENSES—CONVERSION OF SUBSISTENCE.
Criminal Code (Act March 4, 1909, c. 321) § 36, 35 Stat. 1096 (Comp. St. 1913, § 10200), making punishable the application to personal use or unlawful disposition of any subsistence or other property of the United States furnished to be used for the military or naval service, does not apply to one who signed an application blank for enlistment, stating that he had never applied for enlistment before, and who thereby procured subsistence and transportation, which he used for the purpose for which it was issued, to take him to the recruiting depot, where he was rejected because he had been previously dishonorably discharged from the army.
[Ed. Note.—For other cases, see Army and Navy, Cent. Dig. §§ 83–87; Dec. Dig. ⊂⊃40.]

2. CRIMINAL LAW ⊂⊃113—JURISDICTION OF OFFENSE—CONVERSION OF SUBSISTENCE—VENUE.
If he were guilty of violating that statute, the offense was committed in the division of the federal district in which he applied for enlistment and received the subsistence, not in the division in which the recruiting depot was located.
[Ed. Note.—For other cases, see Criminal Law, Cent. Dig. §§ 190, 232; Dec. Dig. ⊂⊃113.]

Arden A. Buchanan was indicted for applying to his own use subsistence and supplies furnished to be used for military services. On demurrer to the indictment. Demurrer sustained, and defendant discharged.

John W. Preston, U. S. Atty., and Casper A. Ornbaun, Asst. U. S. Atty., both of San Francisco, Cal.

James W. Ryan, of San Francisco, Cal., for defendant.

DOOLING, District Judge. The defendant is charged in the indictment filed in this court with the offense of applying to his own use certain subsistence and supplies furnished and to be used for military service. The facts as charged in the indictment are: That at Eureka, in Humboldt county (which is in the Northern division of this district), he agreed at a recruiting station that upon his being furnished with transportation and subsistence to the recruit depot at Ft. McDowell, in this (the Southern) division of the District, he would, upon passing all requirements and being accepted for enlistment, enter the service of the United States Field Artillery, and that in pursuance thereof, and upon an application blank furnished him by the recruiting officer, he declared in writing that he had had no previous service in the army, that he had never applied for enlistment before, and that he knew that if he secured enlistment by any false statement he was liable to trial for fraudulent enlistment. On the back of said blank he also signed a declaration to the effect that he fully understood that if he was accepted for enlistment, and accepted from the recruiting officer such bounties as meals, lodging, or transportation, and should thereafter decline or fail to report at the time specified without giving

a reasonable excuse, he was liable to arrest and trial in the federal court for defrauding the government by obtaining such bounties as meals, lodging, or transportation under false pretenses and applying them to his own use. That after filling out and signing said blank defendant accepted and procured from the recruiting officer board and lodging for the period of 12 days pending enlistment, and railroad transportation from Eureka to Ft. McDowell, all of the value of $30.80, for the purpose of final enlistment. That defendant had been dishonorably discharged from the United States Army prior to filling out and signing said blank, and well knew that he was a dishonorably discharged soldier of the United States, and as such was not eligible for re-enlistment without first obtaining the permission of the Adjutant General of the United States Army, which permission he had not then nor has he now obtained, and that the said transportation and subsistence was obtained by him willfully, unlawfully, knowingly and feloniously, for the purpose of defrauding the government of the United States, and the said defendant did then and there willfully and unlawfully apply to his own use the said subsistence, stores, and property of the United States.

[1] The indictment is challenged by demurrer. Section 36 of the Criminal Code (Comp. St. 1913, § 10200), which defines the offense sought to be charged in the indictment, is as follows:

"Whoever shall steal, embezzle, or knowingly apply to his own use, or unlawfully sell, convey, or dispose of, any ordnance, arms, ammunition, clothing, subsistence, stores, money, or other property of the United States, furnished or to be used for the military or naval service shall be punished," etc.

The specific charge here is that defendant applied to his own use the subsistence and transportation furnished him by the recruiting officer. This is based on the assumption that it is a violation of this section to deceive the recruiting officer as to the eligibility of the applicant for enlistment. Passing over the probability that this provision of the statute, "who shall apply to his own use," is applicable only to such persons as are intrusted by the military authorities with the disposition of the property furnished for military purposes, it does not seem to me that the section applies to one who has used the property for the very purpose for which it was given him; that is to say, who has used for the purpose of subsistence the property given him for subsistence, and has used for transportation to a designated place the property given him to be used for transportation to that place. If upon his arrival at the designated place he refuses to enlist, or for any reason is not eligible for enlistment, there probably should be some penalty provided for such refusal, or for failing to disclose the fact of his ineligibility, or for deceiving the recruiting officer by false statements as to his eligibility; but such penalty is not included in the section under discussion. It would be quite a stretch of language to say that one who applied property to the very purpose for which it was given him did so in violation of this section. If, for instance, the property were given him to pay his transportation to San Francisco, and he used it to pay transportation to Los Angeles, there might be some reason for saying that he "applied the property to his

own use." But where, as here, the property was applied to the very purposes for which the defendant received it, it does not seem to me that such application is a violation of the section simply because, having so applied it, he refuses or is unable to carry out the contract upon which it was received. The offense, if any, would be the ordinary one found in state statutes and described as obtaining money by false pretenses. But this section does not describe any such offense, and the facts set forth in the indictment do not in my opinion constitute any offense denounced therein.

[2] I have considered the indictment on the merits, although the demurrer would have to be sustained in any event, because, if any offense at all is charged, it is an offense committed in the Northern division of this district, and the defendant could be indicted therefor in this division only upon his application for a transfer of the proceedings hereto, and the order of the court directing such transfer.

The demurrer to the indictment is therefore sustained, and the defendant discharged.

TOMKINS v. PATERSON et al.

(District Court, W. D. Washington, N. D. December 15, 1916.)

No. 3402.

COURTS ⊜268—FEDERAL COURTS—PENALTIES—VENUE OF ACTION.

The venue of an action to recover the penalty provided by section 5 of the Immigration Act of February 20, 1907 (34 Stat. 900, c. 1134 [Comp. St. 1913. § 4250]), amended March 26, 1910, for the importation of a contract laborer, is governed by Rev. St. § 732, providing that all pecuniary penalties and forfeitures may be sued for either in the district where they accrue or in the district where the offender is found, and not by Judicial Code (Act March 3, 1911, c. 231) § 51, 36 Stat. 1101 (Comp. St. 1913, § 1033), providing that no person shall be arrested in one district for trial in another in any civil action, and such action may be brought against a foreign corporation in the district where the alien was to perform labor.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⊜268.]

Action by J. A. Tomkins against J. V. Paterson and another to recover a statutory penalty. On defendants' objection to the jurisdiction. Objection denied.

See, also, 239 Fed. 402.

E. N. Sears, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendants.

NETERER, District Judge. The plaintiff seeks to recover from the defendants the sum of $1,000 penalty provided by section 5 of the Immigration Act of February 20, 1907, 34 Stat. 898, amended March 26, 1910. It is alleged that the defendant corporation is incorporated under the laws of the state of Delaware, doing business in the state of Washington, and that the alien was imported into this district from British Columbia, to perform labor as a mechanical engineer in the place of business of the said corporation, in the city of Seattle.

The defendant corporation has entered a special appearance, and has objected to the jurisdiction of this court, on the ground that the said defendant is a citizen of the state of Delaware. In support of this exception, the defendant contends that by the provisions of section 5, supra, recovery is authorized as of debt in the courts of the United States; that by the provisions of section 51 of the Judicial Code "no person shall be arrested in one district for trial in another, in any civil action before a District Court," except as in the section provided, and that the defendant does not come within any of the exceptions. The plaintiff contends that this is a special proceeding under a special act, and that the provisions for general procedure have no application, and has cited the court to Van Patten v. C., M. & St. P. Ry. Co. (C. C.) 74 Fed. 981, Keasbey & Mattison Co. Petitioner, 160 U. S. 221, 16 Sup. Ct. 273, 40 L. Ed. 402, and U. S. v. Standard Oil Company of New Jersey (C. C.) 152 Fed. 290.

It is apparent that these cases have no application. U. S. v. Standard Oil Co., supra, is a proceeding under the Trade and Commerce against Unlawful Restraint and Conspiracies Act, by which it is provided, in section 5, that a court may cause to be summoned necessary parties and make them parties to the proceeding, "whether they reside in the district in which the court is held or not." The Van Patton Case, supra, is a proceeding under the Interstate Commerce Act, which act does not fix jurisdiction, and the jurisdiction necessarily was left to the general statute regulating the place of bringing suits in the courts of the United States. The act of 1875 then controlled, which provided that no civil suit should be brought against any person by original process "in any other district than that whereof the defendant is an inhabitant, and in which he may be found *at the time of serving process.* In re Keasbey & Mattison, supra, was an action under the Trade-Mark Act, in which the jurisdiction, likewise, was left open, and the court ascertained the jurisdiction from the acts regulating the jurisdiction of courts of the United States. The act of 1875 provided the procedure, which provided:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district other than that whereof he is an inhabitant, or in which he shall be found at the time of serving such process or commencing such proceeding." Act March 3, 1875, c. 137, 18 Stat. 470.

The court's attention is also called to section 732 of the Revised Statutes (3 Fed. Stat. Annot. page 94), which provides:

"All pecuniary penalties and forfeitures may be sued for and recovered either in the district where they accrue or in the district where the offender is found."

I think that this provision of the statute will dispose of the contention. The penalty, if any, accrued in Seattle, this district, where the place of business of the defendant corporation is, and it would manifestly appear as though this section was enacted to cover just such a case.

The objection to the court's jurisdiction is therefore denied.

UNITED STATES FIDELITY & GUARANTY CO. v. BURKE et al.*

(Circuit Court of Appeals, Ninth Circuit. January 8, 1917.)

No. 2744.

1. INJUNCTION ⟸236—BOND—LIABILITY OF SURETY—BREACH OF CONDITION —"FINAL DECREE."

In a suit to foreclose a mortgage on timber lands, where the mortgagor, to prevent injunction against cutting timber, had given a bond conditioned on paying any judgment rendered against it, a decree, to the form of which no objection was made in the lower court, that the mortgagee recover of the mortgagor and the surety on the bond the amount of the mortgage, and have execution against them for any deficiency after the sale of the property, was not merely an ascertainment of the amount due prior to sale, but was a "final decree" disposing of all the issues, which fixed the liability of the surety on the bond.

[Ed. Note.—For other cases, see Injunction, Dec. Dig. ⟸236.

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

2. INJUNCTION ⟸241—BOND TO PREVENT INJUNCTION—LIABILITY OF SURETY —JURISDICTION OF COURT.

In a proceeding to foreclose a mortgage on timber land, the court has jurisdiction over the surety on a bond given to prevent injunction against the cutting of timber, and can render judgment against the surety for the deficiency after notice to the surety of application for judgment, to the sufficiency of which notice no objection was made in the district court.

[Ed. Note.—For other cases, see Injunction, Cent. Dig. §§ 544–552; Dec. Dig. ⟸241.]

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

Suit by George B. Burke and another against the Mountain Timber Company for the foreclosure of a mortgage. From a decree of foreclosure, and for the recovery of a deficiency from the defendant and from the United States Fidelity & Guaranty Company as surety on a bond given to prevent injunction (224 Fed. 591), the surety appeals. Affirmed.

J. V. Beach, N. D. Simon, and R. C. Nelson, all of Portland, Or., for appellant.

A. E. Clark and M. H. Clark, both of Portland, Or., A. H. Imus, of Kalama, Wash., Coy Burnett and Edmund C. Strode, both of Portland, Or., M. J. Gordon, of Seattle, Wash., J. H. Easterday, of Tacoma, Wash., and I. E. Shrauger, of Mt. Vernon, Wash., for appellees.

Before GILBERT, ROSS, and HUNT, Circuit Judges.

HUNT, Circuit Judge. In April, 1913, Burke and Ferris, appellees, brought suit to foreclose a mortgage given by Mountain Timber Company to secure certain promissory notes executed by the Mountain Timber Company for $32,500. The mortgage covered a tract of timber land in Cowlitz county, Wash. Two notes, each for the sum of $16,250, were given. One note matured February 3, 1911, and the

other February 3, 1912. No part of the notes had been paid. By the mortgage the Timber Company agreed with D. L. Kelly and his assigns that any timber cut by the Timber Company, or its assigns, on any of the lands mortgaged, before full satisfaction and payment of the mortgage, should be paid for to Kelly, or his assigns, at or before the time of cutting the timber, at the rate of $2.50 per thousand feet, according to prescribed method of scaling, and that payment so made should apply upon the amount due upon the mortgage.

The complaint alleged, among other things, that the chief value of the premises was the merchantable timber standing thereon; that the defendant had cut quantities of timber from the premises without making payment on account thereof; and that at the time of the commencement of the suit defendant was cutting and removing timber from the land, and would continue to do so unless restrained, thus lessening and endangering the mortgage security. Temporary injunction was prayed for, and on May 5, 1913, when the motion for injunction came on to be heard before the District Court, a stipulation was entered into between the parties to the suit. After reciting the commencement of the suit and application being made for a temporary injunction, the stipulation continued as follows:

"Whereas, the defendant has on this 5th day of May, 1913, filed in this court and cause a bond in the sum of $45,000, with the United States Fidelity & Guaranty Company as surety thereon, conditioned for the payment in full of any judgment which shall be rendered in favor of the plaintiff in this action: Now, therefore, in consideration of the filing of said bond, it is hereby stipulated and agreed: First. That plaintiff's application for an injunction be and the same is hereby withdrawn. * * *"

At the same time that the stipulation was filed, a bond executed unto George B. Burke by the Mountain Timber Company, as principal, and United States Fidelity & Guaranty Company, as surety, was filed. The bond, after recital of the institution of the suit heretofore referred to, contained the following clause:

"Now, therefore, we, Mountain Timber Company, a corporation, as principal, and United States Fidelity & Guaranty Company of Baltimore, Maryland, as surety, are held and firmly bound unto George B. Burke in the penal sum of forty-five thousand dollars ($45,000.00), for the payment of which, well and truly to be made, we hereby bind ourselves, our successors or assigns: Provided, and the condition of this obligation is such that if Mountain Timber Company shall pay, or cause to be paid, in full any judgment which shall be rendered in favor of the plaintiff in the above-entitled action, then this undertaking to be null and void; otherwise, to be and remain in full force and effect."

Upon a hearing the District Court found, among other things, that at the time of the commencement of the foreclosure suit and when temporary injunction was applied for, and at the time of the execution of the bond, defendant was cutting timber from the mortgaged premises, and that in consideration of the execution of the bond plaintiff did not seek to obtain a temporary writ of injunction, and defendant was permitted to cut and remove the timber from the premises, and that since the execution of the bond it had cut timber and diminished and impaired the security of the mortgage debt in a substantial amount. The court ordered judgment against the defendants Moun-

tain Timber Company and the United States Fidelity & Guaranty Company for $32,500, with interest, attorney's fees, and costs, and that judgment for foreclosure, with direction for the sale of the property conformably to the requirements of the statutes and the rules of the court, should be granted. Appeal to this court was taken by the United States Fidelity & Guaranty Company.

On June 15, 1915, the court rendered its opinion in favor of the plaintiffs and against the defendant Mountain Timber Company. The record shows that on July 6, 1915, attorneys for the plaintiff filed in the District Court a "notice of motion for filing and entering of findings of fact and conclusions of law," etc. This notice of motion, dated July 2, 1915, was addressed to the defendant Mountain Timber Company and Coy Burnett, its attorney, and United States Fidelity & Guaranty Company, and advised these defendants that on Tuesday, July 6, 1915, at 10 o'clock, at the courtroom, Tacoma, Wash., plaintiffs would move for signing and entering of findings of fact and conclusions of law in accordance with the opinion of the court which had been rendered and filed, and in accordance with findings and decree, copies of which had theretofore been served upon the defendant in the case. The notice contained this further clause:

"And at the same time and place the plaintiffs will move for the entry of findings and decree, which, among other things, will provide that judgment and decree shall go against the defendant and United States Fidelity & Guaranty Company, surety upon the bond to stay the issuance of an injunction; execution to issue against said companies, and either thereof, and their property jointly, in the event of a deficiency."

On the cover of the notice, "due service" was accepted at Portland, Or., on July 2, 1915, by acknowledgment of receipt of a copy by Coy Burnett, "W. K. K.," of attorneys for Mountain Timber Company. There was also on the cover of the notice an affidavit by J. F. Alexander, of Portland, Or., to the effect that he was employed at the office of A. E. Clark and M. H. Clark, attorneys, in Portland; that he served the notice on the United States Fidelity & Guaranty Company by handing to, and leaving with, one Newman, a clerk in the office of D. R. Tate, statutory agent of said United States Fidelity & Guaranty Company, a duly certified copy of the notice, certified to by M. H. Clark, one of the attorneys for the plaintiff; that such service was made July 2, 1915, at the office of the company and statutory agent in the Chamber of Commerce Building, Portland, Or.

[1] The contention of the appellant is that the District Court erred in entering a decree that plaintiff should recover of the Mountain Timber Company and the United States Fidelity & Guaranty Company $32,500, with interest from February 31, 1910, and attorney's fees and costs, and have execution against the Mountain Timber Company and the United States Fidelity & Guaranty Company for any deficit remaining after the sale of the realty ordered to be sold. In the assignment of errors appellant states as follows:

"The error alleged refers only to so much of said decree as affects the United States Fidelity & Guaranty Company, and the claim of error is based on the contention that the United States Fidelity & Guaranty Company was not a party to the suit, and that the said court had no jurisdiction in said

cause to render the said judgment and decree, or any judgment or decree whatsoever against the said United States Fidelity & Guaranty Company."

The argument is that under equity practice neither deficiency judgment nor personal judgment can be entered for the full amount of indebtedness in advance of sale under foreclosure, and that, therefore, the entry of a personal judgment against the Timber Company for the recovery of money was improper, and can only be sustained by construing the decree, not as a personal judgment for the full amount due plaintiffs, but as an ascertainment of the amount due, in accordance with the procedure in equity, prior to foreclosure sale. This is, in effect, a contention that as the bond was given to guarantee the payment by the Timber Company of any judgment against it, the condition of the bond has not yet been broken. But the language of the decree demonstrates the error in the major position. The court made a direct, single decree that plaintiff in the suit should recover against the defendants Mountain Timber Company and the United States Fidelity & Guaranty Company the sum of $32,500, with interest and attorney's fees, the whole amounting to $44,128, and ordered that the mortgage be foreclosed according to law and the rules and practice of the court; that the real estate described in the complaint be sold to satisfy the amount of the judgment; that the proceeds of sale should be applied to the payment of the judgment, and that plaintiff might have general execution against any of the property of the Mountain Timber Company and the Fidelity Company for any deficiency remaining after the application upon the judgment of the proceeds of the sale; that redemption right should be preserved and that the plaintiffs might become purchasers at foreclosure sale and let into possession.

Such a decree finds the mortgage valid, the amount of the debt, orders a sale of described premises for satisfaction of the debt, directs that the sum due on the mortgage, with interest and costs, be paid over to the mortgagee out of the proceeds of the sale, and adjudges that the defendants make good any deficiency which may be found to exist after the sale. Nothing is left for adjudication; hence the decree is final and complete on the merits of the controversy, and may be appealed from as a final decree in equity. Chicago, D. & V. R. R. v. Fosdick, 106 U. S. 47, 27 L. Ed. 47. The form of the decree was not objected to in the District Court, and no application to rectify it was there made. The bond bound the appellant to pay any judgment that might be rendered against Mountain Timber Company in the cause, and when the court made a decree against the principal, the liability of the appellant was fixed.

[2] Now, as to jurisdiction over appellant. In Russell v. Farley, 105 U. S. 433, 26 L. Ed. 1060, the Supreme Court reviews the English and American authorities in determining whether, where injunction bond is given, it is proper to assess damages, if no specific provision is made either in the bond or by any statute or rule of court, and the condition of the bond is simply to pay such damages as the party enjoined may sustain by reason of the injunction, if the court finally decided that the party was not entitled thereto. The court said it was

not satisfied that the cases of Bein v. Heath, 12 How. 168, 13 L. Ed. 939, and Merryfield v. Jones, 2 Curtis, 306, Fed. Cas. No. 9,486, were authority sufficient to disaffirm the power of the court having possession of the case, in the absence of any statute to the contrary, to have the damage assessed under its own direction. Justice Bradley said:

"This is the ordinary course in the Court of Chancery in England, by whose practice the courts of the United States are governed, and seems to be in accordance with sound principle. The imposition of terms and conditions upon the parties before the court is an incident to its jurisdiction over the case; and having possession of the principal case, it is fitting that it should have power to dispose of the incidents arising therein, and thus do complete justice, and put an end to further litigation. We are inclined to think that the court has this power, and that it is an inherent power, which does not depend on any provision in the bond that the party shall abide by such order as the court may make as to damages (which is the usual formula in England), nor on the existence of an express law or rule of the court (as adopted in some of the states) that the damages may be ascertained by reference or otherwise, as the court may direct; this being a mere appendage to the principal provision requiring a bond to be taken, and not conferring the power to take one, or to deal with it after it has been taken. But whilst the court may have (we do not now undertake to decide that it has) the power to assess the damages, yet if it has that power, it is in its discretion to exercise it, or to leave the parties to an action at law. No doubt in many cases the latter course would be the more suitable and convenient one."

It is true the court found decision upon the point unnecessary, but its view of the law has now become fixed by positive and repeated decisions, in this and other appellate courts. In Tyler Mining Co. v. Last Chance Mining Co., 90 Fed. 15, 32 C. C. A. 498, on behalf of the sureties on an injunction bond it was contended that no decree could be rendered against them because they were not parties to the suit. Russell v. Farley, and the two cases of Bein v. Heath and Merryfield v. Jones, heretofore referred to, were examined by the court, and the conclusion was reached that, since the intimations in Russell v. Farley had been made, the federal courts had the power to dispose of the incidents arising in the principal case and thus put an end to further litigation. The court cited Lea v. Deakin (C. C.) 13 Fed. 514; Coosaw Mining Co. v. Farmers' Mining Co. (C. C.) 51 Fed. 107; Lehman v. McQuown (C. C.) 31 Fed. 138; and 2 Beach's Modern Equity Practice, § 770 (1894).

In Baker & Bennett Co. v. Cass Company et al., 224 Fed. 439, 140 C. C. A. 133, the Court of Appeals of the Second Circuit had this case: Suit in equity was brought for infringement of letters patent. Preliminary injunction was granted, subject to the filing of a bond by the complainant to secure the defendants. The condition of the bond was that if plaintiff should pay to the defendants enjoined such damages, not exceeding $5,000, as they might sustain by reason of the injunction if the court finally decided that the plaintiff was not entitled to injunction, then the obligation should be void; otherwise, effective. Injunction was kept alive, and finally decree was made awarding perpetual injunction, with statutory damages in the sum of $500. That decree was reversed by the Court of Appeals, and thereafter, in the District Court, the defendant petitioned for the appointment of a master to assess, under the injunction bond, dam-

ages sustained between certain dates in 1914. This petition was denied, and appeal taken by the defendants. The court quoted from Russell v. Farley, supra, and said:

"Although the foregoing observations, so far as they apply to the power of the court to dispose of the question of damages under the injunction bond as an incident to the principal case, were obiter, they are entitled to great weight. They were so treated by the Circuit Court of Appeals of the Sixth Circuit in Leslie v. Brown, 90 Fed. 171 [32 C. C. A. 556], * * * and of the Seventh Circuit in Mississippi Co. v. Watson Co., 202 Fed. 122 [120 C. C. A. 276]. * * * Both courts adopted the law as indicated by Mr. Justice Bradley, and so do we."

Another case which has bearing is Empire State-Idaho Mining & Developing Co. et al. v. Hanley, 136 Fed. 99, 69 C. C. A. 87. It was held that after an appeal had been taken to the Court of Appeals, and affirmance had been had, appellee could file in the trial court a motion to proceed containing a notice to sureties on appellee's supersedeas bond that he would apply for a summary decree on the bond. The court regarded such surety (service being admitted in that case) as a quasi party to the proceeding, and sustained authority to render summary judgment against the surety, both under the Idaho statutes and independently thereof. Tyler Mining Co. v. Last Chance Mining Co., Russell v. Farley, and Lea v. Deakin, supra, were cited. In Perry et al. v. Tacoma Mill Co., 152 Fed. 115, 81 C. C. A. 333, the court sustained the power of the District Court to enter summary judgment upon a supersedeas bond given on appeal from a decree foreclosing a mortgage on personal property for the value of such property where, after affirmance of the decree, the property was not produced.

In Cimiotti Unhairing Co. et al. v. American Fur Refining Co. et al. (C. C.) 158 Fed. 171, a temporary injunction was ordered ([C. C.] 117 Fed. 623) upon condition complainant furnish bond, which was filed and approved. Upon hearing, permanent injunction was filed and approved. (C. C.) 120 Fed. 672. The Court of Appeals of the Third Circuit reversed the decree of the District Court. 123 Fed. 869, 59 C. C. A. 357. The Supreme Court affirmed the reversal. 198 U. S. 399, 25 Sup. Ct. 697, 49 L. Ed. 1100. When the mandate went down, the Circuit Court ordered the master to take proofs and ascertain what damages the defendants had suffered. The surety on the injunction bond does not appear to have been notified of any of these proceedings. The master made his report, advising damages in an amount exceeding the penalty of the bond. Defendant asked judgment against complainants for the amount of the damages, and judgment against the surety for the amount of the bond. Judge Lanning said that he had not had the aid of counsel in discussing the question as to whether the surety company could be regarded as a party or a quasi party to the proceeding in such a sense as that an execution could be awarded against it, or whether the defendants were left to their remedy against the surety upon an action at law upon that company's undertaking. But after reference to the authorities, and in view of the fact that the undertaking of the surety company provided that the loss or injury in damages should be as-

certained as the court should direct, he concluded that defendants were entitled to such a decree. To sustain him he cites the opinion of this court in Tyler Mining Co. v. Last Chance Mining Co., supra, and Empire State-Idaho Mining & Developing Co. v. Hanley and Russell v. Farley, supra.

We need not go to the extent of holding that if no notice is given to the surety that judgment would be asked against it, judgment can go against it. Opinion upon that point is reserved. In the present case, no point of lack of notice is raised by the assignments of error, and as against the showing made of the service of notice upon the statutory agent of the surety company, no counter showing is relied upon. The notice may have been defective in form, or it may not have given as much time to the surety company to make preparation for the hearing as it desired; but the proper place to suggest any defects or to ask further time was the District Court. Our conclusion is that by signing the bond appellant made its contract to pay any judgment that might be rendered in the cause, and having had notice of intended application for judgment against it and opportunity for a hearing, the District Court had power to proceed to judgment against it.

We do not understand that there is, in the practical effect to be given to the decree, great difference between counsel for appellants and appellees. The decree directs the sale of the mortgaged property and the application of the proceeds of the sale to the payment of the expenses of the mortgage debt, and provides for issuance of execution as to any deficiency remaining after the application of the proceeds of the sale. It would seem that procedure under such a decree can only result in actually imposing upon the appellant liability for the payment of a deficiency judgment.

The decree appealed from is affirmed.

CHASE v. UNITED STATES.

(Circuit Court of Appeals, Eighth Circuit. December 12, 1916.)

No. 4613.

1. INDIANS ⇐13—LANDS—ALLOTMENTS IN SEVERALTY—CONSTRUCTION OF STATUTE.

Act Aug. 7, 1882, c. 434, 22 Stat. 341, provided for allotments in severalty from a designated part of the Omaha Indian reservation in Nebraska to each member of the tribe, and that after such allotments were made the residue of such part of the reservation should be patented to the tribe, to be held in trust for 25 years and then patented in fee. Section 8 then provided that from such residue patented to the tribe in common "allotments shall be made and patented to each Omaha child who may be born prior to the expiration" of the trust period in the same quantity and subject to the same restrictions as provided in respect to the general allotment. By Act March 3, 1893, c. 209, 27 Stat. 630, the Secretary of the Interior was "authorized," with the consent of the tribe, to make allotments in severalty from such residue held in trust to each woman and

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

child of the tribe born since the general allotment "and now living" of double the quantity of land provided for in the act of 1882, and to each allottee who received only 40 acres under the general allotment 40 acres additional. *Held*, that in view of the general policy of Congress, as shown by the treaties with the tribe in 1854 and 1865, to promote individual ownership, such act did not by implication repeal the positive provision of section 8 of the act of 1882 requiring an allotment to each child born during the trust period, although such child, if born after the passage of the later act, was not entitled to the increased allotment provided for therein.

[Ed. Note.—For other cases see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

2. INDIANS ⟸13—CONSTRUCTION OF CONGRESSIONAL ACTS RELATING TO.

Provisions of doubtful meaning in congressional enactments relating to Indians must be construed so far as possible in favor of the Indians, and not against them.

[Ed. Note.—For other cases, see Indians, Cent. Dig. § 30; Dec. Dig. ⟸13.]

3. STATUTES ⟸161(1), 225—CONSTRUCTION—STATUTES IN PARI MATERIA.

All statutes in pari materia are to be read and construed together as if they formed part of the same statute, and when there are two acts on the same subject they must stand together, if possible, and if 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.

[Ed. Note.—For other cases, see Statutes, Cent. Dig. §§ 230, 233, 234, 302, 303; Dec. Dig. ⟸161(1), 225.]

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

Suit in equity by Hiram Chase, Jr., a minor, by his next friend, Hiram Chase, Sr., against the United States. Decree for the United States, and complainant appeals. Reversed.

John Lee Webster, of Omaha, Neb. (Hiram Chase, of Pender, Neb., on the brief), for appellant.

A. W. Lane, Asst. U. S. Atty., of Lincoln, Neb., and O. C. Anderson, of West Point, Neb. (T. S. Allen, U. S. Atty., of Lincoln, Neb., on the brief), for appellee.

Before SANBORN, ADAMS, and CARLAND, Circuit Judges.

PER CURIAM. This suit was instituted under the provisions of an act of Congress approved February 6, 1901 (31 Stat. 760 [Comp. St. 1913, §§ 4214, 4215]), by Hiram Chase, Jr., by his next friend, Hiram Chase, Sr., a member of the Omaha Tribe of Indians, to secure a decree for an allotment of land in the Omaha reservation which had been denied to him by the Secretary of the Interior. He alleged in his amended bill facts which he claims entitled him to such a decree. The United States appeared in due time and moved to dismiss the bill, on the ground that its allegations were not sufficient to constitute a cause of action. This motion was sustained, and, plaintiff declining to plead further, the bill was dismissed; and he now appeals, assigning for error that the court erred in dismissing the bill, and in not holding that on the facts stated plaintiff was entitled to the decree prayed for.

A summary of the facts alleged by him is as follows:

Plaintiff was born December 3, 1895, of parents both of whom were members of the Omaha Tribe, and afterwards caused to be selected and now claims an allotment of the W. ½ of the N. W. ¼ of section 25, township 25, range 9 east of the sixth principal meridian. In 1854, by a treaty then made between the United States and the Omaha Tribe (10 Stat. 1043), that tribe, for a valuable consideration paid to it, ceded to the United States the southern portion of a tract of land then occupied by them; the northern portion thereof being reserved and set apart to the Indians for their future home. Pursuant to the obligation of the treaty they soon vacated the land so ceded to the United States, and removed to that reserved and set apart to them. In this treaty, power was conferred upon the President to cause the land reserved to the Indians to be surveyed into lots, and to assign to individual Indians, who might desire to make for themselves a permanent home, certain quantities of land for that purpose, and to issue to them patents therefor, subject, however, to certain reasonable restrictions against alienation and to other prescribed conditions.

In 1865, by treaty then made (14 Stat. 667), the Omaha Tribe ceded to the United States, for a valuable consideration, a tract of land from the northern portion of their reservation; and the Indians expressing a desire of promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they had theretofore held their lands and of securing assignments of limited quantities thereof in severalty to the individual members of the tribe, it was by article IV agreed that the remaining portion of their reservation should be set apart for those purposes, and that out of the same there should be assigned to each head of a family not exceeding 160 acres, and to each male person, 18 years of age and upwards, without a family, not exceeding 40 acres of land, and that the whole of the land, assigned or unassigned in severalty, should constitute and be known as the Omaha reservation; that such assignments, when approved by the Secretary of the Interior, should be final and conclusive; and that certificates should be issued by the Commissioner of Indian Affairs for the tracts so assigned, specifying the names of the individuals to whom the same were assigned respectively.

On August 7, 1882, Congress passed an act (22 Stat. 341), section 5 thereof authorizing the Secretary of the Interior to allot the part of the reservation lying east of the Sioux City & Nebraska Railroad, in severalty, to the members of that tribe in quantities as follows: To each head of a family, a quarter section; to each single person over 18 years of age, one-eighth of a section; to each orphan child under 18 years of age, one-eighth of a section; and to each other person under 18 years of age, one-sixteenth of a section. These allotments to be in lieu of allotments or assignments provided for in the fourth article of the treaty of 1865. Section 6 of the act provided for the issuance of patents in the names of the allottees, declaring that the United States will hold the land thus allotted for the period of 25 years in trust for the sole use and benefit of the Indians to whom such allotment shall have been made. Section 8 provided that the residue of

lands lying east of the railroad, after all allotments have been made, as in the fifth section provided, shall be patented to the Omaha Tribe of Indians, the patent to have the legal effect and declare that the United States does and will hold the land thus patented for the period of 25 years in trust for the sole use and benefit of the tribe, and at the expiration of that period the United States will convey the same by patent to the tribe in fee, discharged of the trust and free from all incumbrances whatsoever. Section 8 also provides, as will hereafter more fully appear, that from the residue of land thus patented to the tribe in common allotments should be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided the land shall be held in trust by the United States.

Allotments under this act had been made prior to July 11, 1884, to 954 members of the tribe, and these were duly approved on that date and patents issued therefor. The trust period of 25 years for such allotments would therefore expire on July 10, 1909. The United States failed to issue the patent to the tribe, as provided in section 8 of the act of 1882; but this is conceded to have been an unimportant omission of a ministerial duty only, and that the rights of the members of the tribe therein are not affected by the omission.

The act of March 3, 1893 (27 Stat. 630, c. 209), authorized the Secretary of the Interior, with the consent of the Indians of the tribe, to allot in severalty "* * * to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provisions of said act (1882), and *now living*, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, *now living*, who received only one-sixteenth of a section thereunder, an additional one-sixteenth of a section of such residue lands. * * *"

The question for decision is whether, in view of the foregoing facts and statutes, the fact that plaintiff in this case was not born until after the act of 1893 was passed, disqualified him to the allotment selected by him.

[1] While the provisions of the two acts of 1882 and 1893 furnish the main criteria by which this question must be answered, the treaties of 1854 and 1865 are relied on by plaintiff's counsel as having an important bearing on the question, their contention being that the cessions of lands to the United States by those treaties afforded a valuable and sufficient consideration for the stipulation in the first treaty empowering the President to survey the reservation, and to assign to such Indians as desired it certain specified areas of land for their permanent home, and to issue to them patents therefor, and for the stipulation in the second treaty abolishing tenure in common and providing for the assignment of the land in severalty to the members of the tribe, without limitation as to time. The contention is that the right of the individual members of the tribe, for whose benefit the treaties were made, to such allotments, was a contract right, made so by the terms of the treaty of 1865, and confirmed by the provisions of the act of 1882, of which they could not be deprived without their consent.

A critical reading and consideration of the treaties themselves fails to convince us of the merit of this contention. By the terms of the treaty of 1854 no obligation to make any assignments to individual members of the tribe was assumed or undertaken by the United States. The President was merely given discretionary power to do so, if, in his judgment, the best interests of the Indians and of all parties concerned would thereby be best promoted; and the immediate object of the treaty of 1865 was to secure a reservation or home on the northern part of the Omaha reservation for the Winnebago tribe of Indians, as we understand. Incidental to this main object an effort seems to have been made to induce the Indians to abandon their tribal customs and to take up the habits of civilized life. This appears by the recitations found in the treaty to the effect that the Indians were desirous of "promoting settled habits of industry and enterprise amongst themselves by abolishing the tenure in common by which they now hold their lands, and by assigning limited quantities thereof in severalty to the members of the tribe. * * *"

So it appears that neither of the treaties obligated the United States to abolish tenure in common or made any general scheme for the assignment of lands in severalty. It is true the treaty of 1865 made provision, as a step in the way of abolishing tenure in common and promoting the desired habits of industry and enterprise, for setting apart the remaining portion of the reservation and assigning to limited classes of persons, then in existence, certain quantities of land. But there was no such definiteness in this as to constitute a contract obligation requiring the government to make an allotment of land to the plaintiff in this case. Both treaties, however, disclose a general policy looking toward the abolishment of the tribal ownership of land and the division of it into individual holdings, and this policy, we think, has an important bearing on the construction of congressional enactments relied on by counsel.

By the act of 1882 Congress, for the first time, provided a general scheme of alloting lands lying east of the right of way of the Sioux City & Nebraska Railroad and of issuing patents therefor to the members of the tribe in severalty. Such allotments were to be in lieu of the assignments tentatively contemplated by the fourth section of the treaty of 1865. The patents thus authorized were made to declare that the United States will hold the land so allotted for a period of 25 years in trust for the sole use and benefit of the Indians to whom the allotments may have been made or in case of their death, in trust for their heirs. Section 8 of that act provides that the residue of lands lying east of that right of way, after all allotments have been made as authorized, shall be patented to the Omaha Tribe, the patent to have the legal effect and declare that the United States will hold the lands thus patented in trust for the period of 25 years for the sole use and benefit of the tribe, and at the expiration of that period that the United States will convey the lands to the tribe in fee, discharged of the trust and free from all charge and incumbrance whatsoever. Then in section 8 the following important provision is found:

"That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States, in quantity and upon the same conditions, restrictions, and limitations as are provided in section 6 of this act, touching patents to allottees therein mentioned. But such conditions, restrictions, and limitations shall not extend beyond the expiration of the time expressed in the patent herein authorized to be issued to the tribe in common: And provided further, that these patents, when issued, shall override the patent authorized to be issued to the tribe as aforesaid, and shall separate the individual allotment from the lands held in common, which proviso shall be incorporated in the patent issued to the tribe: Provided, that said Indians or any part of them may, if they shall so elect, select the land which shall be allotted to them in severalty in any part of said reservation either east or west of said right of way mentioned in the first section of this act."

If Chase had been born at any time prior to the expiration of the 25 years after the approval of the allotments provided for in the fifth section of the act (which was in 1884), that is, prior to 1909, he would have, according to the language of section 8, unaffected by subsequent legislation, been entitled to the allotment of 40 acres of the 80 acres selected by him. The only question then is whether subsequent legislation, interpreted in the light of prior treaties, deprived him of that right.

As already seen, the prior treaties contain provisions looking towards a scheme for abolishing tenures in common and substituting therefor allotments of land to individual Indians in severalty. In the execution of this general scheme the act of 1882 was passed. After providing for allotments in severalty to members of the tribe of land lying east of the railroad and for the patenting of the residue of the reservation to the tribe, it enacts as follows:

"That from the residue of lands thus patented to the tribe in common, allotments shall be made and patented to each Omaha child who may be born prior to the expiration of the time during which it is provided that said lands shall be held in trust by the United States. * * *"

This language is comprehensive and imperative. It commands that allotments shall be made to every child of the tribe who may be born within the specified period of 25 years, ending in 1909. This, we think, clearly means that so long as any lands remain unallotted out of that particular residue each child born within the specified period shall have an allotment. This, we think, would not be questioned except for the provisions of the act of 1893, upon which the United States especially relies. That act is in the following words:

Be it enacted: "That the act of Congress approved August seventh, eighteen hundred and eighty-two, entitled 'An act to provide for the sale of a part of the reservation of the Omaha Tribe of Indians in the state of Nebraska, and for other purposes,' be, and the same is hereby, amended so as to authorize the Secretary of the Interior, with the consent of the Indians of that tribe, to allot in severalty, through an allotting agent of the Interior Department, to each Indian woman and child of said tribe born since allotments of land were made in severalty to the members thereof under the provision of said act, and *now living*, one-eighth of a section of the residue lands held by that tribe in common, instead of one-sixteenth of a section, as therein provided, and to allot in severalty to each allottee under said act, *now living*, who received only one-sixteenth of a section thereunder, an additional one-sixteenth

of a section of such residue lands: Provided, that the allotments so made shall be subject to the same conditions, restrictions, and limitations provided for in sections six, seven, and eight of said act, touching allotments and patents to allottees therein mentioned: And provided, that the expenses incurred in making the allotments hereby authorized shall be defrayed out of the funds appropriated for surveying and allotting Indian reservations."

By this act Congress granted an allotment of 40 acres more to each allottee living at the time of its passage who had received but 40 acres, and it also granted to each Indian woman and to each child of the tribe born since allotments of lands had been made who was living at the passage of the act, a right to an allotment of 80 acres of land. It increased the grants to individual Indians and contained no provision for decreasing or revoking them, or any of them.

The act of 1882, in unequivocal and emphatic language, had conferred the right to an allotment upon each and every Omaha child who might be born at any time prior to the expiration of 25 years, after the approval of the allotments; that is, to any child that might be born after the year 1884 and prior to 1909. This was a right conferred in clear terms upon a clearly defined class, to be constituted in the future; and even if not an enforceable right, so far as plaintiff Chase was concerned, at the time of the passage of the act, it clearly evidences the purpose of Congress that it should be available to each constituent member as he or she might later, by birth, be incorporated into the class. Therefore, unless this act, in so far as if confers this right, was repealed by the act of 1893, it still exists in favor of the plaintiff in this case.

[2] The act of 1882 was certainly not repealed in terms, and we do not think it was repealed by implication, because, as a rule, repeals by implication are not favored, and should not be so held unless the implication is clear. In our opinion there is no such clear implication manifested in the act of 1893, for these reasons:

(1) The Congress did not say the former act or any of its provisions were repealed, but did say that the act was merely "amended."

(2) Provisions of doubtful meaning in congressional enactments, relating to Indians, must be construed so far as possible in favor of the Indians, and not against them.

The Supreme Court of the United States, in the case of Choate v. Trapp, 224 U. S. 665, 675, 32 Sup. Ct. 565, 569 (56 L. Ed. 941), in answering the contention that certain claims for exemptions there under consideration must be strictly construed, make use of this language:

"But in the government's dealings with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without exception, for more than a hundred years, and has been applied in tax cases."

In Chase v. United States, 138 C. C. A. 117, 121, 222 Fed. 593, 597, it was said by this court:

"And because, when treaties were made with them, the Indians were unfamiliar with the language in which they were written and with the exact

meaning of many of the terms used in them, they must be construed liberally, doubtful expressions must be resolved in favor of the Indians, and the treaties must be interpreted, 'not according to the technical meaning of their words, * * * but in the sense in which they would naturally be understood by the Indians.'"

[3] (3) There is no inconsistency or repugnancy between the grant of allotments of tracts of 40 acres to the plaintiff and the members of his class under the act of 1882 and the grants to the classes of Indians specified in the act of 1893, and "all statutes in pari materia are to be read and construed together as if they formed part of the same statute." Potter, Dwarris on Statutes, 145. When there are two acts on 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., 90 Fed. 222, 227, 32 C. C. A. 585, 590; City Realty Co. v. Robinson Contracting Co. (C. C.) 183 Fed. 176, 181. And the conclusion is that the grant to plaintiff by the act of 1882 of the right to his allotment of 40 acres of land has never been repealed nor revoked, and it still exists. He has selected 80 acres on the theory that the act of 1893 granted to him the right to an additional 40 acres; but the grant of that act to children was clearly and expressly limited to children living at the date of the passage of the act, and it was passed more than a year before the plaintiff was born. He does not, therefore, fall within any of the classes to which a grant was made by that act, and he is entitled to only 40 acres of land; but he may take that 40 acres out of the 80 acres he has selected for his allotment by virtue of the provisions of the act of 1882, with the same right as though he had selected the 40 acres when he selected the 80 acres.

The result is that the amended complaint sets forth facts which entitle the plaintiff to relief in equity, and that the decree which dismissed it was erroneous. Let the decree below be reversed, and let the case be remanded to the District Court, with instructions to permit the defendant to answer, if so advised; and it is so ordered.

BAKER MOTOR VEHICLE CO. et al. v. HUNTER.

(Circuit Court of Appeals, Second Circuit. December 12, 1916.)

No. 40.

BANKRUPTCY ⇐266—SALE BY RECEIVER—BOND OF PURCHASER.

R., a corporation, without consent of its creditor H., transferred its property to N., a corporation, in consideration only of N.'s agreement to pay R.'s debts, all the other creditors of R. assenting to the transfer, and taking notes of N. in payment of their claims against R. Pending action by H. against R. on his claim, bankruptcy proceedings were instituted

against N. and the court allowed N.'s receiver to sell its assets to O., a corporation (of which R. and N. were subordinate companies, organized and controlled by it), on O. giving bond conditioned that it pay, or cause to be paid, to H. such sum as he may be entitled in law to receive, out of the amount received by the receiver for distribution to creditors of N., on the claim set up in the action against R. *Held*, that the bond required payment of the whole amount of H.'s judgment against R., and not a part thereof in the proportion of the purchase price of the assets to all the claims against N.; the amount of claims, including that of H., entitled to preferential payment out of N.'s assets, in view of the agreement of R.'s other creditors with N., and the relation of O., the chief creditor, to R. and N., being less than the sale price.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂=266.]

Hough, Circuit Judge, dissenting.

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

Action by Louis R. Hunter against the Baker Motor Vehicle Company and another. Judgment for plaintiff (225 Fed. 1006), and defendants bring error. Affirmed.

This cause comes here on writ of error to the District Court for the Northern District of New York.

The plaintiffs in error will be referred to as defendants, and the defendant in error will be referred to as plaintiff.

The plaintiff has obtained a judgment in his favor for $10,790.57. The case was tried without a jury.

The action was commenced in a court of the state of New York, and was removed upon petition of the defendants into the District Court of the United States in and for the Northern District of New York.

The Baker Motor Vehicle Company is a corporation organized under the laws of the state of Ohio, and it is hereinafter called the Ohio Company. It is engaged in the business of manufacturing and selling electric motor vehicles.

The C. B. Rice Company is a corporation organized under the laws of the state of New York in December, 1906. It is hereinafter called the Rice Company. The Ohio Company caused it to be incorporated, and owned and controlled its stock, and managed, controlled, and directed its business and corporate affairs. It organized it for the purpose of conducting the business of the Ohio Company in New York in selling its automobiles and automobile parts, tools, and appliances. The amount of capital stock authorized was $75,000. The incorporators were Clarence B. Rice, Fred R. White, Robert C. Norton, Manfred L. Goss, and Nathaniel Platt.

Prior to the organization of the Rice Company the Ohio Company had maintained an agency in New York City to look after its business in that part of the country. It sent Rice, who had been in its employ as a salesman, to manage the New York business, and paid him a salary of $100 a month and 25 per cent. of the profits. Rice became the president of the Rice Company. White was the general manager and vice president of the Ohio Company, Goss was the secretary of that company, and Norton was its treasurer. Rice testified that the meeting to organize the Rice Company was held in the offices of the Ohio Company at Cleveland, or in those of its attorneys in the same city.

The New York agency maintained by the Ohio Company prior to the incorporation of the Rice Company became indebted to the Ohio Company to the extent of $85,000. So much of the stock of the Rice Company as was issued was issued to the Ohio Company. And Rice, as president of the Rice Company, submitted reports of the condition of the business regularly to the Ohio Company. Asked how often these reports were made, he answered that he did not remember, "It might have been weekly, and it was at least once a month."

In January, 1907, the Ohio Company made a written agreement with C. B. Rice to sell him all the stock of the Rice Company for $15,000 in cash and for

$50,000 in notes, retaining the stock as collateral to the notes, as well as the right to vote the stock, and as additional security the resignation of Mrs. Rice and her brother from the board of directors. The Ohio Company gave the Rice Company an agency agreement for the exclusive sale of its goods in New York, New Jersey, and in a part of Connecticut. The Ohio Company, however, reserved to itself the right to cancel the agency agreement when the management of the business was not satisfactory to it. It was also agreed that the Ohio Company should be permitted to retain 51 per cent. of the Rice Company stock so long as any of the notes remained unpaid. The notes were demand notes given for the stock, and were signed by Rice and his wife.

The Rice Company continued in business some six or seven months only. Then the Ohio Company, asserting that matters were not satisfactory to it, exercised its right to cancel the agency contract, and thus put the Rice Company in a position where it could not get electric cars or parts to sell, and under the agency agreement it could sell no other cars than those made by the Ohio Company. The latter company thereupon caused a circular to be issued to the creditors, stating that the Rice Company had lost the agency agreement and had become insolvent, and asked the creditors to agree to turn all its assets over to a new company to be formed, and which should assume all of its liabilities. It got all of the creditors with the exception of the plaintiff to assent to this arrangement.

Rice testified that just prior to this, and in July, 1907, he had a conference with the officers of the Ohio Company when he was informed that if he would retire from the Rice Company, they would form a new company to take over the assets and pay the creditors. He said there were several conversations on the subject, and a demand was made upon him that it must be done or the contract would be canceled, and that he agreed to it.

The Ohio Corporation then organized in August, 1907, the Baker Motor Vehicle Company of New York, hereinafter called the New York Company. The new company had a nominal capital stock of $20,000 with only $10,000 issued and only $500 paid in. The Rice Company, acting under the control of the Ohio Company, voted to transfer all its property to the New York Company for the sole consideration of the latter's agreement to pay the debts, and did so transfer them in August, 1907. The New York Company entered on its books the assets thus taken over as $116,657.07, and the liabilities which were assumed as $79,831.98. The New York Company also possessed the agency agreement which the Ohio Company gave to the president of the New York Company, and which he transferred to the latter to pay for all its stock that was issued, which was, as heretofore stated, $10,000.

The certificate of incorporation of the New York Company provided that the directors need not be stockholders. The number of directors was fixed at five. Fred R. White, the general manager and vice president of the Ohio Company, was one of the five. George H. Kelley of Cleveland was another. The testimony shows that he was the attorney of the Ohio Company, and was, at the time his testimony was given, the general manager of the truck department of the Ohio Company, having been appointed to that position in October, 1909. He drew the papers incorporating the Rice Company, and prior to the transfer of the assets of the Rice Company to the New York corporation he had been sent to New York by the Ohio Company with full authority to handle the matters relating to the two companies absolutely as he pleased. He spent six weeks in New York in adjusting the business. Another of the trustees was Nathaniel Platt, who had served as treasurer of the Rice Company. The other two trustees were lawyers in New York City who represented creditors of the Rice Company; James J. Allen, who does not seem to have held any stock, and James D. Lang, Jr., who held one share.

In October, 1908, one year after the assets of the Rice Company had been transferred to it, proceedings in bankruptcy were instituted against the New York Company. Prior to the institution of the proceedings Hunter had commenced an action in the New York court against the Rice Company on the paper which he held against it, and the action was on the day calendar and was about to be reached. The receiver in bankruptcy asked for an injunction staying all proceedings in Hunter's action, and it was stated in the mov-

ing papers that the transactions between the Rice Company and the New York Company (the alleged bankrupt) were such that the latter "is or may be ultimately liable in case a judgment is obtained against said C. B. Rice Company in said suit." The injunction was obtained on the ground that the receiver wished to examine into the action. Before steps could be taken to dissolve the injunction the term came to an end, and the court was adjourned to the following January.

An order was later obtained, authorizing the receiver of the New York Company to sell its assets in bulk, which he promptly did to the Ohio Company for $18,000, although a short time before, two months after the receiver had been appointed, the receiver's attorney had informed the plaintiff, who was considering buying the business, that no offer of less than $40,000 for the assets would be considered. It will be recalled that one year before the New York Company had acquired the assets of the Rice Company at a valuation of $116,657.07, subject to liabilities of $79,831.98. This sale of the assets to the Ohio Company was conditioned on the latter company's giving a surety company bond to the plaintiff herein in the sum of $15,000, which bond was to be conditioned that the Ohio Company should pay the plaintiff such sums as he might be found entitled to in his action then pending in the Supreme Court of New York against the Rice Company.

On February 4, 1909, the plaintiff obtained a judgment of $8,329.75 against the Rice Company in the above-mentioned action. An execution was taken out and returned unsatisfied, and this action was commenced on the bond.

Willard P. Jessup, of New York City (Clifton P. Williamson, of New York City, of counsel), for plaintiffs in error.

Elisha B. Powell, of Oswego, N. Y. (Robert B. Knowles, of New York City, of counsel), for defendant in error.

Before COXE, ROGERS, and HOUGH, Circuit Judges.

ROGERS, Circuit Judge (after stating the facts as above). This is an action at common law to recover on a bond given on November 25, 1908, by the Ohio Company as principal and the American Bonding Company of Baltimore as surety. The bond recites that Hunter claims to be a creditor of the New York Company in the sum of $7,500, that the company is in bankruptcy, and then continues as follows:

"That if the Baker Motor Vehicle Company (of Ohio) shall pay or cause to be paid to the said Louis R. Hunter such sum or sums as he, the said Louis R. Hunter may be entitled in law to receive, out of the amount received by James N. Rosenberg, receiver in bankruptcy of the Baker Motor Vehicle Company of New York for distribution to creditors of said Baker Motor Vehicle Company of New York, upon the said Louis R. Hunter's claim as it is set up in a certain suit now pending in the Supreme Court of the state of New York, county of Oswego, wherein the said Louis R. Hunter is plaintiff and Clarence B. Rice and the C. D. Rice Company are defendants, then this obligation to be null and void, otherwise to remain in full force and effect."

It appears in the record that after the plaintiff obtained his judgment in the New York court the attorney for the defendants the Ohio Company offered to tender to the plaintiff and his attorney the sum of $1,299.44. In making this offer it was stated that the assets of the New York Company had been sold for $18,000, and that the plaintiff's proportion of that sum was such an amount as his claims for $8,329.15 bore to the whole amount of claims against the company. The proposed tender was refused on the ground that under the bond plaintiff was entitled to recover the amount of his judgment in full. The court below has allowed him the full amount, and wheth-

er he is entitled to the full amount or only to a proportionate amount is the real question which this court has to determine. There are, however, 14 assignments of error. There were 62 propositions of fact found by the trial court, and the defendants contend that 41 of these are without evidence to support them. In a number of instances the findings are not relevant to the issues involved. But it is not necessary to review the findings in detail. Upon the essential facts we think the evidence is sufficient to support them.

The plaintiff sued in the state court upon a note made by C. B. Rice. The note was dated June 22, 1907, and was a promise to pay to the Rice Company or its order, three months from date, $9,500, with interest. It purported to be for value received, and was indorsed by the Rice Company and delivered to the plaintiff, who indorsed it, as he claimed, for the accommodation of the Rice Company. The note was then delivered to Rice, and was for value transferred to the First National Bank of Oswego, N. Y. The note was not paid when due, except that $2,000 was paid thereon, and the plaintiff as indorser paid the balance of it. The judgment against the Rice Company clearly establishes the fact that the plaintiff was a creditor of the Rice Company at the time that that company turned over its assets to the New York Company.

When the Rice Company transferred all its assets to the New York Company without any consideration other than that the latter would pay the liabilities of the former, the New York Company took the assets subject to the plaintiff's claim and quite irrespective of its express promise to pay the liabilities of the transferrer company. And as the assets received were greater than the liabilities, it was bound to pay the claim in full, irrespective of its promise. Such a transfer of the assets was a fraud upon the rights of any creditor who did not assent to it, and the plaintiff herein at no time assented to it. The transfer as against the plaintiff could not be sustained, either at law or in equity. The famous statute 13 Eliz. c. 5, declaring transfers made to hinder, delay, or defraud creditors utterly void, was, as Chancellor Kent declared in Sands v. Codwise, 4 Johns. 536, 596 (4 Am. Dec. 305), "only in affirmance of the principles of the common law." It is elementary that a corporation cannot give away its assets to the prejudice of its creditors, nor can it, as against its creditors who have not assented to it, transfer all of its assets to another corporation which guarantees the payment of the debts of the former. The express agreement to pay the debts does not constitute a novation, and the corporation, taking the property, holds it subject to a lien in favor of the creditors of the transferrer. Blair v. St. Louis, etc., R. Co. (C. C.) 24 Fed. 148; Fogg v. St. Louis, etc., R. Co. (C. C.) 17 Fed. 871, 5 McCrary, 441; Brum v. Merchants' Mutual Insurance Co. (C. C.) 16 Fed. 140, 4 Woods, 156; Heman v. Britton, 88 Mo. 549; Jefferson National Bank v. Texas Investment Co., 74 Tex. 421, 12 S. W. 101. And if the transferee corporation has agreed to assume the debts, under the principles of equity and under modern Codes of Procedure, the creditors of the transferring corporation may maintain a direct action against the transferee corporation upon the

contract. 10 Cyc. 1268. There can be no question but that the plaintiff had a valid claim which he could enforce against the assets of the Rice Company while in its possession, and against the New York Company when they were transferred to the latter.

The assets of the Rice Company at the time of their transfer to the New York Company were in excess of $100,000. All the creditors of the Rice Company assented to the transfer except the plaintiff, and took the notes of the New York Company payable in one year in payment of their claims against the Rice Company. The result of that agreement was that the New York Company took the assets of the Rice Company free from any lien arising from the claims of the Rice Company's creditors with the exception of that of the plaintiff's. As to his claim the assets continued subject to his equitable lien, and constituted a trust fund for its payment. And at the time the assets of the New York Company were turned over to the Ohio Company, the claims of the creditors of the New York Company itself amounted to about $4,000 in addition. So that all the claims to be paid out of the $18,000 of assets which the Ohio Company received amounted to about $12,000. While it is not material, the trial judge expressed the opinion that the assets which were sold to the Ohio Company for $18,000 were worth $40,000. In ascertaining the amount of claims these assets in the hands of the Ohio Company were subject to, claims due to the Ohio Company from the New York Company have not been included. The court below held that the claims of that company were only entitled to be paid out of what remained after the other claims were paid. That conclusion was reached upon the theory that the legal fiction of distinct corporate existence should be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct of another corporation. The trial court had no doubt, and this court has none, that the New York Company was nothing more than an instrumentality or adjunct of the Ohio Company which acted through it. In such cases the controlling corporation may be held liable for the debts of the subordinate company. This court called attention to this principle in Re Watertown Paper Co., 169 Fed. 252, 94 C. C. A. 528 (1909). In such cases debts due from the subordinate company to the controlling corporation, and which that corporation would accordingly be liable for, are not entitled to be paid pari passu with the other debts; but the latter are entitled to be first paid in full.

When it suited the purposes of the Ohio Corporation, having wound up the Rice Company to adopt the same course as respects the New York Corporation, the Bankruptcy Court consented that the assets should be transferred to the Ohio Company, but only upon condition that that company should give the bond already referred to, and upon which this action was brought, and by which it became bound to pay to the plaintiff such sum as he might be entitled in law to receive. The bond was substituted for the assets to be transferred, and out of those assets this plaintiff was entitled to be paid in full. It is plain in the light of what has been said in this opinion that the plaintiff's claim upon the assets turned over to the Ohio Company was one

which he was entitled to have paid him in full. And it is not to be supposed that it was the intention of the court in substituting the bond for the assets to deprive the plaintiff of the full payment of his claim. The language of the bond is that the Ohio Company "shall pay or cause to be paid to the said Louis R. Hunter such sum or sums as he, the said Louis R. Hunter, may be entitled in law to receive" and so forth. The amount which he is entitled in law to receive is the amount of the judgment which he has obtained at law in the action in the New York court. If that is not what the bond means, Hunter would have been better off without the bond than with it.

While this is an action at law upon a bond, it is quite within the right of the court to consider what the plaintiff's right in these assets was either at law or in equity at the time the bond was given. As the intention was to substitute the bond for the assets, the purpose must have been to preserve whatever rights the plaintiff had in the assets without regard to whether his rights in them were legal or equitable.

In the argument in this court counsel insisted that the trust fund doctrine had no application to the facts of this case. They insist that that doctrine applies only to cases of insolvency, and they call our attention to our decision in Re Fechheimer Fishel Co., 212 Fed. 357, 129 C. C. A. 33 (1914), where we said:

"In saying that the assets of a corporation constitute a trust fund, we are to be understood as referring to the assets of an insolvent corporation. A solvent corporation, of course, holds its property as any individual holds his. But when a corporation becomes insolvent, a trust arises in respect to the administration of its assets for the benefit of its creditors."

The statement quoted is in accordance with the law as expounded in the federal courts. But the fact that the Rice Company was a solvent company when its assets were transferred does not make the doctrine quoted inapplicable to the facts of that transfer. In saying that a solvent corporation holds its property as any individual holds his, we assumed that every one knows that if an individual, A., transfers all his property to B. without consideration, B. holds the property as a constructive trustee for the creditors of A. whether A. is solvent or insolvent at the time of the transfer.

Judgment affirmed.

HOUGH, Circuit Judge (dissenting). The first question in this and every other litigation is not whether plaintiff can recover in any form of action, but whether recovery can be had in the particular suit brought.

This action at law is not on a debt; it bears no relation to the statute of Elizabeth or any similar enactment. It is not to set aside any transfer of property, nor to enforce an equitable or other lien; it is an ordinary suit against principal and surety on a bond, and presents no issue other than the inquiry whether the condition of that instrument has been broken.

The terms of the bond are set forth in the opinion of the court; whether they mean that the Baker Company of Ohio agreed to pay or secure Hunter's claim in full, or only such dividend thereon as he

might establish in bankruptcy, is not a matter susceptible of much argument, for the signification must be extracted from few and ill-chosen words. I regard it as self-evident that the bond can only be construed into a promise to pay in full by disregarding most of the words used.

Yet the generous obligation spelled out by the court below affects not only the Baker Company of Ohio as principal, but a surety whose liability is strictissimi juris; and, in this action on the bond, there can be no recovery beyond the measure of the surety's responsibility.

The basis of judgment below and affirmance here is a substitution of the bond for certain assets in and to which plaintiff had certain rights at the time of bond given. This, of course, presupposes an intent so to substitute, yet the record is barren of evidence of any intent on the part of the surety other than to sign a certain form of words; and in those words no such substitution or intent to substitute can be discovered.

Nor did the plaintiff by his own pleading present any such contention. The complaint only alleges that among the creditors of the Baker Company of New York (the bankrupt) the plaintiff stands alone with a "first and preferred claim" against the assets of that company, and so is entitled to be paid in full in the bankruptcy proceeding; not having received such payment, this suit is brought.

Thus the test of plaintiff's right to recover on the bond is pleaded as identical with or dependent upon his right to recover in full in bankruptcy. This pleading is in complete harmony with what I regard as the obvious meaning of the condition of the bond.

It follows that plaintiff was bound by his complaint, as well as by the terms of the instrument in suit, to make out a case which would have entitled him to a judgment against the trustee in bankruptcy of the Baker Company of New York. It has never been asserted in this record that such a demand was established, and if the fact is not admitted, it is obvious.

It advances nothing to dwell on the order made by the bankruptcy court, permitting the sale of assets. That order was no more than a formal registration of creditors' consents, filed in writing with said order, and Hunter's consent is in the exact language of the bond in suit. The wording of consent and bond is not good; it may not express the intent either of Hunter or the Baker Company of Ohio; but that is immaterial in an action where the propriety of the judgment must be gauged by the surety's rights and by nothing else.

Nor is it material to assert that the transfer of assets from the Rice Company to the Baker Company of New York was not good as against Hunter. Nobody has ever asserted such validity; indeed so far from denying liability, the Baker Company of New York openly assumed all the Rice Company's obligation, including that to Hunter if he succeeded in establishing it. Therefore no one sought to make Hunter worse off after transfer than before; but why his position should be bettered thereby has never been explained.

Assuming, however, the equitable lien now said to exist in favor

of Hunter and to be a reason for entering judgment against the surety on this bond, the lien must be on some particular property, and it was incumbent on plaintiff to show the property and its worth if it had been parted with. The only proof as to the worth of what Rice Company had and Baker Company of New York got is a trial balance sheet, showing solvency in the Rice Company (unexplained and duly objected to) of a date prior to an agreement signed by the plaintiff Hunter (as president of a creditor concern), to the effect that the Rice Company was insolvent. This seems unusually insufficient.

Nor is there any evidence that what, a year later, the Baker Company turned into bankruptcy to be there sold consisted of Rice Company's assets either in whole or in part. In short, nothing is shown to which the asserted lien can attach, or ever did attach.

This hiatus in the evidence has been supplied (so to speak) by confusing an action to enforce a lien with one to obtain an accounting from a transferee in fraud of creditors. This case was really tried below on the theory of fraud, and seems to be affirmed in approbation thereof. No such case was pleaded, and if it had been, and had been proved, it has not been pointed out why the American Bonding Company is affected thereby.

For these reasons I dissent from the reasoning and conclusion of the court.

WOLF et al. v. UNITED STATES.

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

No. 1433.

1. BANKRUPTCY ⊜495—OFFENSES—CONCEALMENT OF PROPERTY—EVIDENCE.
   In a prosecution of two brothers, who were, respectively, the president and the secretary treasurer of a bankrupt mercantile corporation, evidence *held* insufficient to show that the president, notwithstanding frequent visits to the corporation's store, knew of, or participated in, the concealment from the trustee in bankruptcy of the goods of the corporation by the secretary treasurer, who managed the business.
   [Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 912; Dec. Dig. ⊜495.]

2. CRIMINAL LAW ⊜560—DEGREE OF PROOF—MORAL PROBABILITY.
   Moral probability, however strong, cannot take the place of legal evidence, and any inference of guilt which the jury may draw in a criminal prosecution must be based on facts tending to show guilt.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 1266; Dec. Dig. ⊜560.]

3. CRIMINAL LAW ⊜308—PRESUMPTION OF INNOCENCE—WEIGHT OF CIRCUMSTANCES.
   The presumption of innocence is an instrument of proof in favor of accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created, and it is not overcome by facts which are not plainly inconsistent with innocence.
   [Ed. Note.—For other cases, see Criminal Law, Cent. Dig. § 731; Dec. Dig. ⊜308.]

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4. BANKRUPTCY ⊂⊃492—OFFENSES—CONCEALMENT OF PROPERTY—OFFICERS OF CORPORATION.

Officers of a bankrupt corporation can be convicted of fraudulently concealing from the trustee the property of the corporation in violation of Bankr. Act July 1, 1898, c. 541, § 29b, 30 Stat. 554 (Comp. St. 1913, § 9613), making it punishable knowingly and fraudulently to conceal, while a bankrupt, from the trustee any of the assets of the estate.

[Ed. Note.—For other cases, see Bankruptcy, Dec. Dig. ⊂⊃492.]

Woods, Circuit Judge, dissenting.

In Error to the District Court of the United States for the Eastern District of South Carolina, at Charleston; Henry A. Middleton Smith, Judge.

Sam Wolf and Benjamin Wolf were convicted of concealing property from a trustee in bankruptcy in violation of Bankr. Act, § 29b, and they bring error. Judgment against Benjamin Wolf affirmed, and judgment against Sam Wolf reversed, with instructions to grant a new trial.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

D. S. Henderson, of Aiken, S. C., for plaintiffs in error.

J. Waties Waring, Asst. U. S. Atty., of Charleston, S. C. (Francis H. Weston, U. S. Atty., of Columbia, S. C., on the brief), for defendant in error.

KNAPP, Circuit Judge. The plaintiffs in error, Sam Wolf and Benjamin Wolf, who are brothers, were both convicted of concealing property in violation of section 29b of the Bankruptcy Act. There is no reason to doubt the guilt of Benjamin Wolf, and the only question here, assuming that demurrers to the indictments were properly overruled, is whether the evidence against Sam Wolf was sufficient to warrant submission to the jury.

The record shows these facts: For the last 11 years and upwards Sam Wolf has lived and carried on, apparently with some success, a mercantile business at Johnson's, S. C. Prior to that he was a peddler. In the early part of 1913 he started another store at Aiken, some 30 miles distant, which he conducted, with the aid of Benjamin Wolf, for about a year in his own name. He then had the business incorporated, as the Aiken Dry Goods Company, for the reason, as he says, that he was only able to run the store at Johnson's, and so turned over the Aiken store to his brother. How the capital stock was divided between them, or otherwise owned, is not disclosed; but Sam Wolf was president of the company, and Ben Wolf its secretary and treasurer. The latter, according to the proof, had entire charge of the business. He bought all the goods, attended to the sales with the help of a clerk, and generally to all appearance managed the store as though it belonged to himself. Sam Wolf came over from Johnson's more or less frequently, sometimes once a week, sometimes once a month, or at longer intervals. Many of his visits, perhaps the greater number, were made on Sunday. Upon this point his own testimony is not materially different from that of the government's witnesses. What he did when there is not shown,

nor the length of his stay on any occasion. In short, except the fact that he was president of the company and now and then visited the store, there is no evidence whatever that he knew anything about the condition of the business, or had any reason to suspect that his brother, in the fall of 1914, was secretly removing to other places a considerable portion of the stock of goods then on hand.

In January, 1915, the Aiken Dry Goods Company was adjudicated an involuntary bankrupt, and a trustee appointed in due course. It was found upon investigation that Benjamin Wolf, some two or three months before, had taken from the store large quantities of merchandise, mostly shoes and men's clothing, and concealed the same at two farmhouses in the country, each about a dozen miles away but in different directions from Aiken. The goods taken to one of these places were carried by the farmer who owned it, and he testified that he did so at the request of Ben Wolf and some time in the month of November. The goods taken to the other place were shown to have been carried there by Ben Wolf himself about the last of September or first of October. The property thus discovered was turned over to the trustee and sold by him in March, 1915. Not long afterwards both brothers were indicted.

The testimony at the trial covers nearly 60 pages of the printed record, but the bulk of it relates solely to the matters just mentioned, the finding of a quantity of merchandise at the two farmhouses, its identification as part of the stock of the Aiken store, its transfer to town and delivery to the trustee, and its appraisal and sale by him. Of proof that even tends to connect Sam Wolf in any way with the removal or concealment of this property there is not the slightest word. Indeed, so far as he is concerned, the evidence is not only unconvincing but exceedingly meager. Whilst the guilt of Ben Wolf was abundantly proven, the case against Sam Wolf appears to rest wholly upon inference and conjecture.

In saying this we do not overlook the claim that Sam Wolf on one occasion directed Powell, the clerk, to buy tickets and check three trunks to Johnson's. The fact asserted, however, is by no means established. Powell virtually denies it on the witness stand, though he seems to admit, in answer to a question including other elements, that he so told the government's representatives the night before. Without reviewing his testimony in detail, it is sufficient to note that as a witness he refuses to say that the trunks were checked at Sam Wolf's direction; nor does he concede, when the specific question is put to him, that he had so stated in the district attorney's office. On the contrary, he avers positively that Sam Wolf did not give him the money for the tickets, and adds, "I don't think he was there that day." It is also to be noted that Powell was not asked whose trunks they were, when they were brought there, from what part of the store they were taken, whether he knew anything about their contents, nor, strangely enough, to whom the checks and tickets were delivered. In short, and to say the least, the proof that Sam Wolf directed the shipment of these trunks is far from persuasive. But assuming he did, or that a jury might so find, we are quite unable to see that it indicates any wrong-

doing on his part. Powell says, and nothing appears to the contrary, that it was a common occurrence to ship trunks from this store, that drummers very often left their trunks there, that goods sold to customers were frequently sent out in trunks and boxes, and that he shipped the trunks in question "like I always did the others." In a word, taking all the testimony into account, it seems to us that the incident here considered cannot fairly be regarded as even suspicious; and this impression is confirmed by the fact that no effort appears to have been made to trace the movement of these trunks, to find out whether they were actually taken to Johnson's, and, if so, what was done with them when they got there, or to ascertain whether there were any goods in the store at that place, or elsewhere under Sam Wolf's control, which had previously been in the Aiken store. Moreover, on the government's theory that Sam Wolf was conspiring with his brother to remove and conceal a large portion of the Aiken stock, it is certainly a tax upon credulity to suppose that he would openly engage in sending by public conveyance trunks of merchandise from that stock to his own store at Johnson's. In other words, the circumstance of which so much is sought to be made is fully consistent with honest purpose; it is absurdly inconsistent with criminal intent. Granting that it happened, we are of opinion that it gives no support to the charge against Sam Wolf.

[1, 2] The case against him, then, rests wholly upon the fact that he was president of the Aiken Company and visited the store from time to time as above stated. Is this sufficient to justify the jury in finding a verdict of conviction? We are constrained, after careful study of the record, to answer this question in the negative, and our reasons for so concluding will be briefly outlined. To begin with, the testimony shows that the goods removed by Ben Wolf were carried away in trunks and packing cases, leaving the pasteboard boxes, or cartons, in which they had been kept for sale, standing on the shelves. Smoak, the trustee, says they found a great many empty boxes in sight in the store, with others having in them little or nothing of value, and he repeats the statement that if these boxes had been full of goods there would not have been any bankruptcy. The only reasonable inference from this is that the store to all appearance contained the usual stock of merchandise. That is to say, it looked just the same after the depletion as it did before. There was nothing open to the eye which would suggest what Ben Wolf had done. This being so, it is surely not impossible, even if it be improbable, that Sam Wolf was the victim of shrewd deception. That he had confidence in his brother is evidenced by the fact that he gave over to him the entire conduct of the Aiken store. On the assumption that he himself had no unlawful design, and that he trusted Ben Wolf as a brother would naturally be trusted, it seems to us quite within the bounds of belief that he remained unaware of the fraud until bankruptcy brought on exposure. Certainly, as we see it, there is no proof of anything done or said by him which warrants the inference that he had prior knowledge of Ben Wolf's misconduct. True, he was the nominal head of the concern, presumably had a large interest in the business, visited the store at varying inter-

vals, and had opportunity doubtless to find out that a considerable part of the stock had disappeared. But moral probability, however strong, cannot take the place of legal evidence, and inferences which the jury may draw in a case like this must be based upon facts which of themselves tend to establish the guilt of the accused. In our judgment, such a basis is not found in the case here presented.

[3] In the face of a situation like this, where suspicion is almost instinctive, we are liable to forget the nature and degree of that protection which the law affords by the presumption of innocence. It may therefore be profitable to recall the forceful words of Mr. Justice (now Chief Justice) White, in Coffin v. United States, 156 U. S. 458, 15 Sup. Ct. 404, 39 L. Ed. 481:

"Now the presumption of innocence is a conclusion drawn by the law in favor of the citizen, by virtue whereof, when brought to trial upon a criminal charge, he must be acquitted, unless he is proven to be guilty. In other words, this presumption is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created."

As already said, the only evidence against Sam Wolf is the fact that he was president of the company and more or less often visited the store. This might be enough in a civil proceeding to make him responsible for the acts of his brother, but it is not enough, we are persuaded, to support the inference that he committed the crime of "knowingly and fraudulently" concealing property belonging to the bankrupt estate. The "proof created by the law" is not overcome by evidence merely of facts which are not plainly inconsistent with innocence. To hold otherwise is to assume, as the government contends, that, because Sam Wolf was president and came to the store now and then, he not only might have known and ought to have known, but that he must have known, what his brother was doing. In our judgment the latter assumption is clearly unwarranted, and it therefore results that the verdict against him rests in reality upon plausible conjecture and not upon proof of incriminating facts. It may be true, as the learned district attorney asserts in his brief, that Sam Wolf is the chief culprit and most deserving of punishment because he instigated the whole fraudulent scheme; and it may also be true, as is further asserted, that his appearance on the witness stand and manner of testifying induced the belief that he was undoubtedly guilty. But this is simply begging the question, since it is plain that opinion based upon probability is wholly insufficient to overcome the legal presumption, and equally plain that a defendant is not to be convicted because the jury think that he looks like a criminal. In short, we are convinced that no case for submission was made against Sam Wolf, and therefore a verdict in his favor should have been directed.

[4] A word as to the validity of the indictments. They are alleged to be bad for the reason that the crime of concealing property, as defined by section 29b, can be committed only by a bankrupt, and therefore as the bankrupt here is the Aiken Dry Goods Company, and not either Sam Wolf or Benjamin Wolf as individuals, that they are immune from prosecution. The contention is not without merit or the support of judicial opinion. United States v. Lake (D. C.) 129 Fed.

499; Field v. United States, 137 Fed. 6, 69 C. C. A. 568. The Supreme Court, also, in United States v. Rabinowich, 238 U. S. 78, 35 Sup. Ct. 682, 59 L. Ed. 1211, said that the question "is at least doubtful," and refrained from deciding it. The contrary view is held in United States v. Young & Holland Co. (C. C.) 170 Fed. 110, where the subject is fully discussed and a number of decisions cited. See, also, Cohen v. United States, 157 Fed. 651, 85 C. C. A. 113; United States v. Freed (C. C.) 179 Fed. 236; Roukous v. United States, 195 Fed. 353, 115 C. C. A. 255; Kaufman v. United States, 212 Fed. 613, 129 C. C. A. 149, Ann. Cas. 1916C, 466; and the opinion of the learned district judge overruling the demurrers in this case. We are better satisfied with the reasoning of these later cases, and therefore disposed to follow them until the question is otherwise decided by the court of last resort. Besides, we think the indictments should be sustained, under the authorities just cited, on the counts charging the defendants with aiding and abetting the concealment of the bankrupt's property.

The conclusion we reach is that the judgment against Benjamin Wolf should be affirmed, but the judgment against Sam Wolf should be reversed, and the case as to him remanded, with instructions to grant a new trial.

Reversed.

WOODS, Circuit Judge (dissenting). I concur in the opinion of the majority in so far as it sustains the indictments. I dissent from the conclusion that the District Judge should have directed the acquittal of Sam Wolf for lack of evidence tending to prove his guilt.

The Aiken Dry Goods Company was adjudged an involuntary bankrupt on January 22, 1915. Sam Wolf, the president, and Ben Wolf, the secretary of the corporation, were convicted of fraudulently concealing the assets of the corporation. No question is made of the guilt of Ben Wolf. A short statement of the material evidence, it seems to me, will show that it tended to prove the guilt of Sam Wolf.

Owning and conducting a mercantile business at the town of Johnson's where he lived, Sam Wolf in 1913 established a similar business at Aiken, 30 miles distant. About a year afterwards he incorporated the Aiken business and put his brother Ben in charge as manager. There is no evidence that Ben contributed anything to the capital stock or that he had any interest except what might have been bestowed on him by his brother. Sam visited the store, sometimes once a week and sometimes once in two or three weeks. In the autumn of 1914, according to the testimony of Sam Wolf, the corporate assets were a stock of goods of about $3,000 and some accounts due to the corporation. After bankruptcy there was found in the store goods of the appraised value of $1,000, which brought at the sale $562. During the months of September, October, and November, five or six trunks and three or four boxes of goods were taken out of the store by Ben Wolf; and they were found concealed on the premises of two friendly farmers in the country. This concealed merchandise consisted mainly of shoes and overalls. Their estimated value was $1,400, and the proceeds of their sale $605.

Reasonable men might well refuse to believe that one-half of a small stock of goods could have been taken out of the store in such a short period of time without the knowledge of the man who had the chief, if not the sole, proprietary interest in it when he was visiting the store every week or two. It is true there were some empty boxes, but it is improbable that Ben Wolf meant to defraud his brother Sam and deceive him with empty boxes. Shoes, overalls, and trunks are bulky articles, and the abstraction of such articles to the value of $1,400 from a stock of $2,500 or $3,000 could hardly fail to attract the attention of an owner who had learned to observe and value goods by carrying them on his back as a peddler.

But aside from this, the proof is direct and strong that Sam Wolf himself, through Tom Powell, the clerk in the store, abstracted and concealed goods. Powell, although offered as a witness by the government, was strongly hostile to the prosecution and favorable to the defendants. He testified directly and positively that by direction of Sam Wolf he shipped three trunks of goods in the latter part of the year 1914 from the store in Aiken to Johnson's, where Wolf lived. It is true that he varied this statement in the manifest effort to shield the defendants, but this effort to shift only made his first statement the more important and credible. The craft of the method of shipment directed by Sam Wolf was of weight against him when taken with the other circumstances. Instead of boxing the goods and shipping them as freight, passenger tickets were purchased, and the goods were shipped in trunks checked as baggage. By this method he made it practically impossible to trace the shipment by the railroad records, since passengers who check trunks are not identified either on receipt or delivery of the trunks. It seems to me these circumstances even as they appear in the printed record support the inference of guilt on the part of Sam Wolf in the minds of reasonable men. Before the District Judge and the jury they were vitalized by the personality and the manner of the defendants and other witnesses. Whether they were convincing of guilt beyond a reasonable doubt was, of course, a question for the jury and not the court.

THE ATTUALITA.

(Circuit Court of Appeals, Fourth Circuit, October 6, 1916.) No. 1479.

1. ADMIRALTY ⟸103—APPEALABLE DECREE.
A decree in a suit in rem, which releases the vessel, leaving nothing upon which the court can take further action, is in effect a final decree, and appealable.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 712–719; Dec. Dig. ⟸103.]

2. COURTS ⟸405(5)—CIRCUIT COURT OF APPEALS—JURISDICTION.
A decree of a District Court, releasing a vessel from arrest under a libel in rem on the ground that the vessel was employed in the service of a foreign nation and for reasons of comity, does not involve a question of the jurisdiction of the court, and an appeal lies to the Circuit Court of Appeals.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 1099; Dec. Dig. ⟸405(5).]

3. ADMIRALTY ⟸5—LIABILITY OF VESSELS—TORTS—EMPLOYMENT BY FOREIGN GOVERNMENT.
A merchant vessel, which has been requisitioned by a foreign government and is employed in its service at a fixed freight but which remains under the control and management of the owner, who employs and pays the officers and crew, is not exempt from a suit in rem in a court of the United States for a maritime tort.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. ⟸5].

4. CONSTITUTIONAL LAW ⟸68(1)—JUDICIAL POWER—POLITICAL QUESTIONS.
A suggestion filed by the government of the United States in the District Court that a foreign steamship is requisitioned by and in the service of a foreign government, which does not contain a demand by the executive branch of the government that the ship should be released, does not constitute a decision by the executive department on a political question, and the District Court is entitled to go into evidence on the subject of the nature and terms of the requisition.
[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. § 125; Dec. Dig. ⟸68(1).]

5. ADMIRALTY ⟸5—DISCRETIONARY JURISDICTION—SUIT BETWEEN FOREIGN LITIGANTS.
That a vessel libeled for a tort committed on the high seas sails under a foreign flag, and that the libelant is a subject of another foreign nation, is not sufficient to require a court of admiralty of the United States to decline jurisdiction.
[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 69–85; Dec. Dig. ⟸5.]

Appeal from the District Court of the United States for the Eastern District of Virginia, at Norfolk.

Suit in admiralty by Basil George Mangakas against the Italian steamship Attualita. Order made by the District Court releasing the steamship from custody on the ground that she had been requisitioned by the Italian government. Libelant appeals. Reversed.

On the 9th of September, 1916, in the court below, the appellant filed his libel in rem against the steamship Attualita. He sought to hold it liable for the damages, estimated at $800,000, occasioned by the alleged negligent sinking, on the 29th of July in the same year, by such vessel, of the Greek steamship Mina. The collision was said to have taken place in the Mediterranean Sea, some 50 miles east of Gibraltar. Under this libel the ship was arrested.

On the 20th of September the United States attorney for the Eastern district of Virginia, acting under the direction of the Attorney General of the United States, brought to the attention of the court "that the Attorney General of the United States has received from the Secretary of State of the United States a communication, dated September 15, 1916, to the effect that the Secretary of State has been advised by the Italian ambassador that the Italian steamship Attualita, which has been libeled and attached in this proceeding, was at the time of the said attachment and is now requisitioned by the Italian government, and was at the time of said attachment and is now in the service of the Italian government." The district attorney stated he was further directed to call the attention of the court in this connection to The Luigi (D. C.) 230 Fed. 493, and concluded by stating that "in bringing this matter to the attention of the court the United States does not intervene as an interested party, nor do I appear either for the United States or for the Italian government, but I present the suggestion as amicus curiæ, as a matter of comity between the United States government and the Italian government, for such consideration as the court may deem necessary and proper." Two days later the master of the steamship intervened for the interests of its owner, an Italian corporation, for the sole purpose of filing exceptions to jurisdiction and making claim for the vessel. He objected to the jurisdiction on the ground that the vessel was requisitioned by the Italian government for the purpose of transporting military supplies.

Evidence was taken in the court below. It showed, among other things, that the vessel had been requisitioned by the Italian government; that is to say, the Italian government had required the owners to navigate the ship to and from such ports, and to carry such cargo, as the government, during the period of the requisition, should direct. For the use of the ship the government paid its owners at certain fixed rates. The owners paid all the wages of the captain and crew and the other expenses of the ship, which was navigated by the captain and crew employed by the owners. Just before the arrest the vessel had come into the port of Norfolk in ballast, and was about to proceed to Baltimore to load, according to the directions of the Italian government, a cargo of grain and rails for Italy. The learned judge below reached the conclusion that the steamship, for reasons of comity, should be released, and so ordered. In such order it was declared that the court had not in any manner dealt with the merits of the case set forth in the libel, or with the question of jurisdiction as between the libelant and the respondent shipowner, or the master, who has claimed the ship, and that the release was ordered solely on the ground that at the time of the arrest the ship was under requisition by the government of the kingdom of Italy, and was without prejudice to the merits of the case. In order that the appellant might appeal, the operation of the order was suspended for 10 days.

John M. Woolsey, of New York City, Edward R. Baird, Jr., of Norfolk, Va., and J. Parker Kirlin, of New York City, for appellant.

Robert M. Hughes, of Norfolk, Va., for appellee.

Floyd Hughes, of Norfolk, Va., and Francis Rawle, of Philadelphia, Pa. (Hughes & Vandeventer, of Norfolk, Va., and Joseph W. Henderson, of Philadelphia, Pa., on the brief), for the Italian embassy and government, as amici curiæ.

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

PER CURIAM. The appellee steamship makes five contentions:

[1] 1. The decree below is not final, and therefore not appealable. The libel in this case is in rem. The vessel by the decree below is released from arrest. This in effect terminates the proceeding as against her. Counsel upon both sides seem to be at one that, as a practical matter, if this decree remains unreversed, nothing else can be done in the court below which would be worth doing. The question whether a decree is final and appealable is not determined by the name which the court below gives it, but is to be decided by

the appellate court on consideration of the essence of what is done by the decree. Potter v. Beal et al., 50 Fed. 860, 2 C. C. A. 60.

[2] 2. The steamship says that the question involved is one of jurisdiction. The appeal should therefore have been taken to the Supreme Court. The objection which prevailed in the court below was not to the jurisdiction of the District Court of the United States as a federal court, but was an objection which went equally to the jurisdiction of any court, state or federal, and for that reason the appeal to this court was properly taken.

[3] 3. It is asserted that the steamship is immune to proceedings in any court. It is admitted that to give this immunity it will be necessary to take a step beyond that which has been taken in any decided case, although it is argued that the logic of some decisions heretofore made require that step. We are frankly reluctant to take it. There are many reasons which suggest the inexpediency and the impolicy of creating a class of vessels for which no one is in any way responsible. For actions of the public armed ships of a sovereign, and of those, whether armed or not, which are in the actual possession, custody, and control of the nation itself, and are operated by it, the nation would be morally responsible, although without her consent not answerable legally in her own or other courts. For the torts and contracts of an ordinary vessel, it and its owners are liable. But the ship in this case, and there are now apparently thousands like it, is operated by its owners, and for its actions no government is responsible, at law or in morals.

The persons in charge of the navigation of the ship remain the servants of the owners and are paid by them. The immunity granted to diplomatic representatives of a sovereignty, to its vessels of war, and under some circumstances to other property in its possession and control, can be safely accorded, because the limited numbers and the ordinarily responsible character of the diplomats or agents in charge of the property in question and the dignity and honor of the sovereignty in whose services they are, make abuse of such immunity rare. There will be no such guaranty for the conduct of the thousands of persons privately employed upon ships which at the time happen by contract or requisition to be under charter to sovereign governments.

[4] 4. The steamship says that in any event her right to immunity is a political question, which has been passed upon by the executive branch of the government. A comparison of the suggestion which was filed in The Exchange, 7 Cranch, 116, 3 L. Ed. 287, with that in this case, shows quite clearly that, while in The Exchange the executive demanded the ship's release, it has in this case carefully refrained from doing anything of the kind.

[5] 5. It is said that in the exercise of a sound discretion jurisdiction should be declined. The ship flies a foreign flag. The libelant is a subject of another foreign monarch. The tort complained of was committed upon the high seas. We think this contention foreclosed by what the Supreme Court said in The Belgenland, 114 U. S. 368, 5 Sup. Ct. 860, 29 L. Ed. 152.

For these reasons, the decree below, dismissing the vessel from arrest, must be reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Reversed.

NOTE.—The opinion of Waddill, District Judge, delivered in the court below, is as follows:

Gentlemen, we all appreciate the importance of this case, and I would like to have more time to consider it than I can have, if I dispose of it at this time. In that connection, however, I will say that it has been before me during the last two weeks several times, and has been argued on two occasions previous to this, and I think I can decide it now, which seems desirable, as anything that is to be done with respect to a war vessel, or a vessel used in connection with the war, is in its nature urgent.

The case is one, briefly, in which the libelant, as sole owner of the Greek steamship Mina, seeks to recover damages against the respondent ship, Attualita, for damages sustained in collision, on or about the 29th day of July, 1916, at approximately half past 2 o'clock in the morning, in the waters of the Mediterranean Sea, some 30 miles east of Gibraltar, during the existence of a thick fog. Libelant claims damages in the sum of $800,000, the ship and cargo having been wholly lost.

After the Attualita arrived in Hampton Roads, seizure was regularly had. Appearance was made by the Italian government, through the interposition of the Attorney General of the United States, as amicus curiæ, and also by counsel likewise appearing as amicus curiæ, and counsel also specially appearing for the owner of the Attualita.

I have examined carefully the cases submitted to me to-day. The Davis, 10 Wall. 15, 19 L. Ed. 875; The Fidelity, 16 Blatchf. 569; Fed. Cas. No. 4,758; Long v. The Tampico (D. C.) 16 Fed. 491; The Athanasios (D. C.) 228 Fed. 558; The Luigi (D. C.) 230 Fed. 493.

The Frankmere, an unreported decision of this court, is more like the present case than any other I have seen. There the government, however, did not appear, which distinguishes it materially from this case. If the Italian owner was here seeking the release of this ship, and his government did not interpose, I would not have the slightest doubt as to what should be done. The first three cases above cited, while very interesting, do not bear especially upon the question here. It will be found that they turn either upon the fact of the assertion of a claim for salvage, for saving the res involved, or that the government was not actually in possession of or had control of the property, or that the same was not devoted to public use in connection with the government's operations. In the last two cases, cited from 228 and 230 Fed., respectively, the facts of the requisitions are not fully shown, and the opinion in each case, as bearing on the questions under consideration here, apparently, is obiter dicta.

I apprehend the appearance of the Italian government, in the manner indicated, is sufficient; and the appearance of the owner is entered specially to raise the question of the jurisdiction of the court.

The first question is as to the effect of the appearance by the Italian government. Counsel insist that the appearance and claim, and assertion of sovereignty, is all that is necessary and required, and, when that is done, the court should take no further action—citing The Exchange, 7 Cranch, 116, 3 L. Ed. 287; The Parlement Belge, 4 Prob. Div. 129; Id., 5 Prob. Div. 197.

I have no doubt that, where a government owns the res, its appearance and claim is all that is necessary to end the proceeding, but that is not this case. The Italian government makes no claim of ownership to the ship, but merely that it is requisitioned for governmental purposes, entitling it to the possession thereof, thus necessarily bringing up the terms and conditions of the requisition. Hence the court should put the government to proof, to show its connection with the ship in such way as to establish its freedom from the seizure.

The effect of the requisition must be considered in the light of the use to be made of the ship. Undoubtedly, when this ship was attached, she was under the management of her owners, so far as manning and operating her were concerned. But she was at the same time under requisition by, and under the control and direction of, the Italian admiralty, taking orders therefrom, and at the time of the seizure was in this harbor under such orders, en route to Baltimore for cargo for that government.

Under these circumstances, can the libelant maintain the attachment, without depriving the Italian government of the possession and use of the ship, assuming the requisition to have been regularly made? I think that right has been established, and, that being so, this court should be very slow to interpose, especially at the instance of private litigants of another country (The Belgenland, 114 U. S. 355, 362, 5 Sup. Ct. 860, 29 L. Ed. 152), and seize the ship, and take it from the possession of the Italian government.

This is my view. It may be a great hardship on the libelants; but it is not for me to determine the course of the Italian government. It may have been necessary, in order to preserve its rights to the possession of the ship for governmental purposes, to intervene in these proceedings, and for the court of the United States to wrest the ship's possession from her would tend to disturb the international comity existing between the two nations, which are now friendly. Especially is this true when the Italian government is engaged in war.

The attachment, so far as the Italian government is concerned, will be abated, and the ship released.

HURSEY et ux. v. LANE.

In re HURSEY.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1916.)

No. 1454.

1. FRAUDULENT CONVEYANCES ⟸296—EXISTENCE OF PECUNIARY OBLIGATIONS —EVIDENCE.

Relative to H. having been under pecuniary obligations at the time of his voluntary conveyance to his wife, sought to be set aside as fraudulent, introduction of the contract for sale to H. by N. of fertilizer, entered into by H. with N.'s agent, and by its terms requiring approval by N. and notice thereof to H. in order to be operative, with the word "Approved" stamped thereon as of a date before the conveyance, and below the word "Confirmed," is at least prima facie proof of confirmation of the contract by notice to H. of its approval.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 891; Dec. Dig. ⟸296.]

2. FRAUDULENT CONVEYANCES ⟸214—EXISTING CREDITORS.

The seller to H. of fertilizer, by a contract by which it was to be charged to H. and his notes given therefor, was a creditor within the protection of the law against voluntary conveyances by a debtor.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. §§ 639, 640; Dec. Dig. ⟸214.]

3. FRAUDULENT CONVEYANCES ⟸57(3)—AMOUNT OF INDEBTEDNESS AND PROPERTY.

For a retail merchant, engaged in the hazardous business of making advances on the faith of crops to be grown by his customers, when in-

debted for 375 tons of fertilizer, and having as his other assets a stock of $3,000, lots worth $4,800, and $5,000 in bank, to convey to his wife the lots, with undertaking to build thereon a storehouse at a cost of $3,800, which he afterwards did, was not within the rule that a gift will be valid, if the donor's debt be inconsiderable relative to the whole of his property, and the property conveyed inconsiderable relative to the donor's entire assets, so that the gift will not materially increase the hazard of his creditors.

[Ed. Note.—For other cases, see Fraudulent Conveyances, Cent. Dig. § 148; Dec. Dig. ⟸57(3).]

Appeal from the District Court of the United States for the Eastern District of South Carolina, at Charleston, in Bankruptcy; Henry A. M. Smith, Judge.

Action by Joe. P. Lane, trustee in bankruptcy of John A. Hursey, bankrupt, against John A. Hursey and wife. Judgment for plaintiff, and defendants appeal. Affirmed.

W. C. Moore and W. H. Muller, both of Dillon, S. C. (Sellers & Moore and Gibson & Muller, all of Dillon, S. C., on the brief), for appellants.

Louis M. Swink, of Winston-Salem, N. C. (Mitchell & Smith, of Charleston, S. C., and G. G. McLaurin, of Dillon, S. C., on the brief), for appellee.

Before PRITCHARD, KNAPP, and WOODS, Circuit Judges.

WOODS, Circuit Judge. The defendant John A. Hursey was adjudged a bankrupt in December, 1914. His indebtedness was about $15,000 and his assets about $1,000. The trustee brought this action to set aside a conveyance from Hursey to his wife, Mattie Hursey, of five lots in the town of Dillon for the expressed consideration of $500 and love and affection. The District Court held on the evidence that there was no actual fraud in the transaction, and on this point there is no assignment of error. The appeal involves the two questions whether the District Court was right in holding: First, that there was an antecedent debt or obligation to the Navassa Guano Company; and, second, that the deed was voluntary and invalid as to that debt. At the time of the conveyance Hursey was a merchant in the town of Dillon. The evidence fails to show that he was under any pecuniary obligation at the time, either fixed or conditional, except such as may have been assumed by a contract dated January 10, 1911, for the purchase of 375 tons of fertilizers from the Navassa Guano Company. The contract was taken by the company's traveling agent and contained the stipulation that it should "be operative only after being approved by the company's home office." No fertilizer was shipped under it until February 13, 1911, after the execution and record of the deed.

[1] It is true that no obligation fell on either party to this contract until it was approved by the home office and notice given to Hursey of approval. Before approval and notice to Hursey, the paper was a mere proposal subject to withdrawal by either party Baird v. Pratt, 148 Fed. 825, 78 C. C. A. 515, 10 L. R. A. (N. S.) 1116; Mon-

eyweight Scale Co. v. Gordon Merc. Co., 102 S. C. 419, 86 S. E. 1060. But we are unable to agree that there was no evidence of approval and notice to Hursey. On the original contract introduced are stamped the words, "Contract approved Jan. 11, 1911," and below these the word "Confirmed." The only confirmation or ratification that could have been meant was notice to Hursey of approval. The paper so stamped was introduced without objection as expressing in its entirety the contract, and it furnished at least prima facie proof of the confirmation of the contract by notice to Hursey of its approval. Although Hursey was a witness, he did not deny the confirmation indicated on the face of the paper; indeed, the record of the trial indicates that the completeness of the contract was assumed. The District Judge could not have regarded the question of confirmation of the contract seriously made, since he does not allude to the point in his opinion.

[2] The contract contemplated that the fertilizer should be charged to Hursey and his notes given therefor, and this clearly shows that Hursey was the purchaser and that his liability was a primary obligation. He was so absolutely bound by the execution and confirmation of the contract that had he refused to take the goods, the fertilizer company would have had a right of action for breach of contract. The seller was therefore a creditor within the protection of the law against voluntary conveyances by a debtor. McAfee v. McAfee, 28 S. C. 188, 5 S. E. 480; Barrett v. Still, 102 S. C. 19, 86 S. E. 204.

[3] The other question is: Was the deed from Hursey to his wife voidable as a voluntary deed? It is not possible to reconcile the divergent statements of the law found even in courts of high authority on the subject. We understand the law in South Carolina to be as stated by the District Judge, as follows:

"The rule may be stated to be that slight indebtedness, such as for current expenses for a family or debts inconsiderable to the value of the donor's estate, will not generally avoid a voluntary conveyance; but, subject to this qualification, it seems to be a settled rule of law that one who is in debt cannot make a voluntary conveyance which will prevail against existing debts." Blakeney v. Kirkley, 2 Nott & McC. (S. C.) 544; McElwee v. Sutton, 2 Bailey (S. C.) 128; Izard v. Middleton, 1 Bailey, Eq. (S. C.) 228; Richardson v. Rhodus, 14 Rich. (S. C.) 95; Anderson v. Pilgram, 41 S. C. 423, 19 S. E. 1002, 20 S. E. 64; Barrett v. Still, 102 S. C. 53, 86 S. E. 204.

The rule is thus well stated in Bispham's Equity (7th Ed.) page 375:

"The true rule seems to be that the gift will be valid if the 'donor has, at the time, the pecuniary ability to withdraw the amount of the donation from his estate without the least hazard to his creditors, or in any material degree lessening their prospects for payment.' "

The consideration of $500 was not nominal, but it was altogether inadequate. The lots were worth four or five times that amount. Such inadequacy shows always either imposition, or some other consideration entering into the transaction. It is not logical to say that a conveyance made without actual fraud must be either altogether

voluntary, and therefore voidable, or altogether for value, and therefore valid. It may be, as this deed was, for value to the extent of the money paid, and voluntary to the extent that love and affection entered into it; that is, to the extent of the difference between the money paid and the known value of the property. So this deed was voluntary to the extent of the value of the property over the $500. McMeekin v. Edmonds, 1 Hill, Eq. (S. C.) 294, 26 Am. Dec. 203; Anderson v. Fuller, McMul. Eq. (S. C.) 35, 36 Am. Dec. 290; Werts v. Spearman, 22 S. C. 219. The obligation assumed to pay for the fertilizer in no view can be regarded inconsiderable in its relation to the whole of the donor's property, nor can the property conveyed be held inconsiderable in its relation to the entire assets of the donor. The debtor was engaged in the hazardous business of a retail merchant making advances on the faith of the crops made by his customers. His chief assets were a stock of goods worth $3,000, the fertilizer purchased, the lots conveyed to his wife, estimated at $4,800, and cash in bank $5,073.72. In the transaction with his wife, he undertook to build a storehouse on the property conveyed requiring an outlay, which was afterwards made, of $3,800. This mere statement of the matter shows that the donation made by Hursey to his wife, so far from being an inconsiderable depletion of his assets, effected a radical change in his business status, greatly increasing the hazard of his creditors.

The question whether equity will require repayment from the proceeds of sale of the $500 actually paid by Mrs. Hursey has not been passed on by the District Court, and it would not be proper for this court to anticipate it. Indeed, the question will disappear, should Mrs. Hursey elect to exercise the right fixed by the District Court to pay the debt of the Navassa Guano Company and retain the property.

Affirmed.

ATLANTIC COAST LINE R. CO. v. WOODS.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1916.)

No. 1468.

1. REMOVAL OF CAUSES ⊂=89(2)—RIGHT OF REMOVAL—BURDEN OF DEFENDANT.
A defendant, seeking removal of an action on the ground of diversity of citizenship, has the burden of establishing that fact.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 192–195, 197; Dec. Dig. ⊂=89(2).]

2. REMOVAL OF CAUSES ⊂=115—EFFECT OF DEFENSES.
A servant's action against a railroad company was removed to the federal court on the ground of diversity of citizenship. The complaint stated no facts bringing the action within the federal Employers' Liability Act (Act April 22, 1908, c. 149, 35 Stat. 65 [Comp. St. 1913, §§ 8657–8665]), and nothing was pleaded in the answer setting up that at the time of the injury plaintiff was engaged in any work bringing him within the statute. *Held* that, notwithstanding the removal of the action on the ground of diversity of citizenship, evidence that plaintiff was engaged in interstate commerce when injured, and for that reason the action was governed by the federal Employers' Liability Act, was admissible, for such evidence would be admissible in the state courts, had not the action been removed.
[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 245, 247, 248, 251; Dec. Dig. ⊂=115.]

3. APPEAL AND ERROR ⊂=1056(1)—REVIEW—HARMLESS ERROR.
In such case, where the state law applied allowed punitive damages, contrary to the federal Employers' Liability Act, and did not prescribe the same period of limitation for bringing the action, the exclusion of evidence tending to show that the action was governed by the federal act was prejudicial.
[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 4187, 4191, 4207; Dec. Dig. ⊂=1056(1).]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Florence; Henry A. Middleton Smith, Judge.

Action by Robert A. Woods, by his guardian ad litem, against the Atlantic Coast Line Railroad Company. There was a judgment for plaintiff, and defendant brings error. Reversed.

Lucian W. McLemore, of Sumter, S. C., and P. A. Willcox, of Florence, S. C. (Barron, McKay, Frierson & Moffatt, of Columbia, S. C., on the brief), for plaintiff in error.

William W. Hawes, of Columbia, S. C. (W. Boyd Evans, of Columbia, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The plaintiff, Robert A. Woods, a boy 17 years old, was employed in the shops of the defendant company in the city of Florence, S. C. While operating a bolt cutter or threading machine in repairing a locomotive, the plaintiff was injured, and sued to

recover damages in the state court. The injury was received in January, 1913, but the action was not commenced until November 24, 1915. The defendant removed the case to the District Court of the United States for the Eastern District of South Carolina by a petition showing diversity of citizenship. There was no allegation, either in the complaint or the answer, tending to show that the action fell under the federal employers' liability statute. On the trial in the District Court, near the close of the testimony, the defendant offered evidence to show that the plaintiff was engaged in interstate commerce, and that, therefore, its liability was to be determined under the federal statute. The ruling of the District Judge and his reasons therefor are thus stated in the bill of exceptions:

"The complainant had stated no facts stating a cause of action under the federal Employers' Liability Act, and nothing had been pleaded in the answer of the defendant setting up that at the time of the injury the plaintiff was engaged in any work which brought him within the terms of that statute; nor had anything been shown in any of the pleadings to place the plaintiff upon notice that any such defense would be introduced. Thereupon the court refused to permit the testimony, or allow it to be introduced, unless the plaintiff consented, and, the plaintiff not consenting, the testimony was excluded."

[1, 2] The plaintiff in his complaint stated a cause of action at common law. Such an action was removable to the federal court on the petition of the defendant showing diverse citizenship. The burden was on the defendant to show diversity of citizenship, but, since the plaintiff had set up a cause of action at common law, it was that cause of action, and that alone, that the defendant had to deal with. It was under no obligation to even consider what sort of defense it would set up until by petition to remove it had exercised its right of having the case brought to the federal court, and the cause of action set up by plaintiff was properly in the federal court for trial. Being properly in the federal court for trial, all evidence was admissible there that would have been admissible in the state court, had the cause not been removed. It follows that the decision in Toledo, etc., R. Co. v. Slavin, 236 U. S. 454, 35 Sup. Ct. 306, 59 L. Ed. 671, is conclusive that the defendant in the trial in the federal court had the right to introduce evidence tending to show that the plaintiff had no cause of action at common law by showing that the cause of action, if any, arose under the federal employers' liability statute. That was an action by an employé of the railroad company for damages for personal injury. Neither the complaint nor the answer contained any reference to the federal Employers' Liability Act. Over the objection of the plaintiff, evidence was admitted showing that the train on which the plaintiff was riding at the time of the injury was engaged in interstate commerce. But the jury were instructed that the cause was to be decided under the Ohio statute, which rendered unavailable the defenses of assumption of risk and contributory negligence where the injury occurred from a defect in "rail, track, or machinery." Thus the defenses of contributory negligence and assumption of risk, both of which are available under the federal statute, were excluded. The judgment in favor of the

plaintiff was affirmed by the Supreme Court of Ohio. On writ of error the Supreme Court of the United States, in reviewing the judgment, said:

"But a controlling federal question was necessarily involved; for, when the plaintiff brought suit on the state statute, the defendant was entitled to disprove liability under the Ohio act, by showing that the injury had been inflicted while Slavin was employed in interstate business, and if, without amendment, the case proceeded with the proof showing that the right of the plaintiff and the liability of the defendant had to be measured by the federal statute, it was error not to apply and enforce the provisions of that law."

St. Louis, etc., R. Co. v. Seale, 229 U. S. 156, 33 Sup. Ct. 651, 57 L. Ed. 1129, Ann. Cas. 1914C, 156, lays down the same rule.

[3] It may be that the error of rejecting the evidence would have been harmless had the law of South Carolina been the same as the federal employers' liability statute. But it differs in at least two important particulars. The law of South Carolina allows the recovery of punitive damages, and it does not impose the condition, imposed by the federal statute, that the action must be brought within two years. Atlantic, etc., R. Co. v. Burnette, 239 U. S. 199, 36 Sup. Ct. 75, 60 L. Ed. 226.

The evidence offered should have been admitted, and for its exclusion the judgment must be reversed.

Reversed.

LONG et ux. v. ATLANTIC COAST LINE R. CO.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1916.)

No. 1446.

1. CARRIERS ⟸320(24)—INJURY TO PASSENGERS—NEGLIGENCE—QUESTIONS FOR JURY.

Evidence that the conductor and brakeman had gone through the car several times while in its aisle was the suit case over which a passenger, walking through the car, was thrown by an ordinary lurch of the train, is enough to go to the jury on the issue of negligence in leaving it there after they knew, or had reasonable opportunity to know, of its presence.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1315; Dec. Dig. ⟸320(24).]

2. CARRIERS ⟸323—INJURY TO PASSENGER—CONTRIBUTORY NEGLIGENCE—WHAT LAW GOVERNS.

The law of contributory negligence of the state, where a passenger was injured while traveling between points therein, governs in an action for the injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. § 1346; Dec. Dig. ⟸323.]

3. APPEAL AND ERROR ⟸273(1)—SUFFICIENCY OF EXCEPTION.

To constitute an exception, allowing review, it is enough that the direction of the verdict for defendant was so brought to the attention of the

court and defendant's counsel at the proper time that both understood the purpose of plaintiffs' counsel to make it the basis of a writ of error.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1620–1623, 1625, 1629, 1630; Dec. Dig. ⊂⊃273(1).]

4. EXCEPTIONS, BILL OF ⊂⊃6—PROPOSED BILL—SUFFICIENCY.

The paper served as a bill of exceptions, consisting of a narrative of what occurred at the trial, including the testimony and the charge, and indicating the point made by plaintiffs on the charge which they intended to use as a basis for assignment of error, while unsatisfactory and altogether informal, did not require the judge to treat it as a nullity, but was sufficient as a proposed bill of exceptions to warrant him, in the exercise of his discretion, to receive it and put it into proper shape for settlement.

[Ed. Note.—For other cases, see Exceptions, Bill of, Cent. Dig. §§ 8, 12; Dec. Dig. ⊂⊃6.]

In Error to the District Court of the United States for the Eastern District of South Carolina, at Columbia; Henry A. Middleton Smith, Judge.

Action by J. C. Long and wife against the Atlantic Coast Line Railroad Company. Verdict was directed for defendant, and plaintiffs bring error. Reversed.

Alfred Wallace, Jr., of Columbia, S. C. (W. Boyd Evans, D. C. Ray, and Porter A. McMaster, all of Columbia, S. C., and James H. Fanning, of Springfield, S. C., on the brief), for plaintiffs in error.

Douglas McKay, of Columbia, S. C., and P. A. Willcox, of Florence, S. C. (L. W. McLemore, of Sumter, S. C., on the brief), for defendant in error.

Before KNAPP and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. [1] In this action for personal injuries the main question is whether the evidence warranted the District Judge in directing a verdict for the defendant. The evidence relied on to support the action may be thus summarized:

At Walthourville, Ga., on October 28, 1914, plaintiffs, J. C. Long and his wife, Cathleen T. Long, became passengers on defendant's train No. 58, running from Waycross to Savannah, Ga. After passing several stations, Mrs. Long went from her seat to the toilet at the other end of the car. On her way back to her seat there was a lurch or jolt of the train, which caused her to stumble over a suit case in the aisle of the car and to fall on or against a seat. The resulting injuries produced miscarriage and serious illness. There were several suit cases in the aisle when the plaintiffs boarded the train. The conductor and the brakeman passed through the car several times while the suit cases were in the aisle, and made no effort to have them removed. Mrs. Long saw the large suit case against which she stumbled, and could have walked around it if the lurch or jolt had not caused her to lose her balance. There was no evidence that the jolt or jerk was violent or unusual.

The usual jerks or jolts which seem to be incident to the operation of a railroad train are not dangerous to passengers under ordinary circumstances, and therefore proof that one occurred, with nothing more, cannot be the basis of an inference of negligence. Such slight disturbances of equilibrium as an ordinary jolt of a train produces passengers expect, and easily and unconsciously protect themselves against them. Indeed, in this case the evidence of Mrs. Long tends to show that the jolt would have been harmless, but for the presence of the suit case.

On the other hand, the railroad company also knows that such jolts occur, and that they do in some measure impair the passenger's control of his body while walking in the aisle. Hence it is the duty of the carrier to use due care to see that there is no obstruction in the aisle calculated to make jerks or jolts dangerous. Baggage left in the aisle is plainly such an obstruction. Therefore leaving suit cases or other obstructions in the aisle after the agents of the company knew or had reasonable opportunity to know of their presence is evidence of negligence. The officers of the road are charged with knowledge that a passenger walking in the aisle may, when a jerk of the train occurs, stumble over the obstruction, even when he sees it, without fault on his part.

The testimony on behalf of the plaintiff tending to show that the conductor and brakeman passed through the car several times while the suit case was in the aisle was evidence to go to the jury on the issue whether it had been there so long before the accident that in the exercise of due care they would have discovered it. This conclusion is well supported by authority. Burns v. Pennsylvania R. Co., 233 Pa. 304, 82 Atl. 246, Ann. Cas. 1913B, 811; Stimson v. Milwaukee, etc., R. Co., 75 Wis. 381, 44 N. W. 748; Pitcher v. Old Colony St. R. Co., 196 Mass. 69, 81 N. E. 876, 13 L. R. A. (N. S.) 481, 124 Am. St. Rep. 513, 12 Ann. Cas. 886; Price v. St. Louis Transit Co., 125 Mo. App. 67, 102 S. W. 626.

The question whether a passenger who stumbles over a suit case in his view with nothing to affect his control of himself is guilty of contributory negligence is not involved, and on that point we express no opinion.

[2] We think the District Judge was in error also in holding that the following statute of Georgia relating to contributory negligence was not applicable, and that the case was governed by the law of South Carolina, which does not allow any recovery to a plaintiff whose negligence has contributed to the injury:

"No person shall recover damage from a railroad company for injury to himself or his property, where the same is done by his consent, or is caused by his own negligence. If the complainant and the agents of the company are both at fault, the former may recover, but the damages shall be diminished by the jury in proportion to the amount of default attributable to him."

In Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 Sup. Ct. 581, 48 L. Ed. 900, the rule was stated as follows:

"The theory of the foreign suit is that, although the act complained of was subject to no law having force in the forum, it gave rise to an obligation, an

obligatio, which, like other obligations, follows the person, and may be enforced wherever the person may be found. * * * But as the only source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation, but equally * * * its extent. It seems to us unjust to allow a plaintiff to come here absolutely depending on the foreign law for the foundation of his case, and yet to deny the defendant the benefit of whatever limitations on his liability that law would impose."

See Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 14 Sup. Ct. 978, 38 L. Ed. 958; Dennis v. Atlantic C. L. R. Co., 70 S. C. 254, 49 S. E. 869, 106 Am. St. Rep. 746; Texas, etc., R. Co. v. Humble, 181 U. S. 57, 21 Sup. Ct. 526, 45 L. Ed. 747; Atchison, etc., R. Co. v. Sowers, 213 U. S. 55, 29 Sup. Ct. 397, 53 L. Ed. 695; Louisville, etc., R. Co. v. Whitlow, 105 Ky. 1, 43 S. W. 711, 41 L. R. A. 614.

[3] A motion was made to dismiss in this court on the ground that the plaintiffs had not excepted to the rulings of the court which this court is asked to review. Although the exceptions were taken in a very objectionable and loose way, we think that the direction of the verdict for the defendant was so brought to the attention of the court and defendant's counsel at the proper time that both clearly understood the purpose of plaintiffs' counsel to make it the basis of a writ of error. New Orleans, etc., R. Co. v. Jopes, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919.

The point as to the application of the Georgia statute was not properly made by exception taken at the time of the ruling of the District Judge, and therefore in strictness is not before us for consideration; but, since the case must go back for a new trial, we have deemed it proper to dispose of the question.

[4] The point is also made on the motion to dismiss that no true bill of exceptions was served within the time required by law. The paper served as a bill of exceptions consisted of a narrative of what occurred at the trial, including the testimony and the charge of the judge, and it indicated the point made by the plaintiffs on the charge of the District Judge which they intended to use as a basis for the assignment of errors. While this paper was unsatisfactory and altogether informal, we do not think the defects were such as to require the District Judge to treat it as a nullity. It was sufficient as a proposed bill of exceptions to warrant the District Judge in the exercise of his discretion to receive it and put it into proper shape by settlement.

Reversed.

BERNSTEIN v. UNITED STATES.

(Circuit Court of Appeals, Fourth Circuit. December 14, 1916.)

No. 1470.

1. CONSPIRACY ⟸43(12)—INDICTMENT—VARIANCE.
There is not a fatal variance between an indictment, charging both the conspiracy and the overt act in the state where the prosecution is had, and proof that only the overt act was committed there, while the conspiracy was entered into in another state, as the conspiracy is to be considered as extended into the state where the overt act is committed.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 90; Dec. Dig. ⟸43(12).]

2. CONSPIRACY ⟸43(12)—INDICTMENT—VARIANCE.
There is no fatal variance because an indictment for violation of Criminal Code (Act March 4, 1909, c. 321) § 37, 35 Stat. 1096 (Comp. St. 1913, § 10201), by conspiracy to present and prove a false claim against a bankrupt, charges the presentation of a false claim in a bankruptcy proceeding, and the proof is of its presentation in a composition; this being presentation and proof for all purposes in the bankruptcy proceedings.
[Ed. Note.—For other cases, see Conspiracy, Cent. Dig. § 90; Dec. Dig. ⟸43(12).]

In Error to the District Court of the United States for the Eastern District of Virginia, at Richmond; Edmund Waddill, Jr., Judge.

Samuel Bernstein was convicted, and brings error. Affirmed.

Robert H. Talley, of Richmond, Va., for plaintiff in error.

Richard H. Mann, U. S. Atty., of Petersburg, Va. (Hiram M. Smith, Asst. U. S. Atty., of Richmond, Va., on the brief), for the United States.

Before PRITCHARD and WOODS, Circuit Judges, and ROSE, District Judge.

WOODS, Circuit Judge. The defendant, Samuel Bernstein, was convicted under an indictment charging violation of section 37 of the Criminal Code, in that he conspired with other defendants, Lipman and Eisenstein, to present and prove a false claim against A. Eisenstein, bankrupt, and that in pursuance of this conspiracy the defendant Lipman did present the false claim under oath to the referee in bankruptcy before whom the proceeding was pending.

[1] The indictment charged both the conspiracy and the overt act in the city of Richmond. The proof was that the conspiracy was entered into in the city of Philadelphia, and that only the overt act of presenting and proving the false claim was committed in the city of Richmond. The argument is that this was a fatal variance, and that, therefore, the District Court for the Eastern District of Virginia should have directed an acquittal. The point is settled beyond dispute by Hyde v. United States, 225 U. S. 347, 32 Sup. Ct. 793, 56 L. Ed. 1114, Ann. Cas. 1914A, 614, wherein the court held in effect that a conspiracy formed in California was to be considered extended into the District of Columbia, where the overt act in pursuance of it was committed.

[2] There is nothing in the point that there was a fatal variance, in that the indictment charges the presentation of a false claim in a bankruptcy proceeding, whereas the proof was of its presentation in a composition. Even if such a refined distinction be allowed, it cannot be doubted that presentation and proof of a claim for purposes of a composition is presentation and proof for all purposes in the bankruptcy proceedings.

Affirmed.

DORRANCE v. DORRANCE.

(Circuit Court of Appeals, Third Circuit. February 23, 1917.)

No. 2106.

On petition for rehearing. Petition denied. Former opinion upheld.

For former opinion, see 238 Fed. 524, — C. C. A. —. See, also, 227 Fed. 679.

PER CURIAM. We have considered with care the motion for a rehearing, but discover nothing that has not already been presented and considered. What has been said either in the District Court or here seems to answer the chief contention of the appellant, namely:

"That the word *children* in line 8, and the word *child* in line 10, in what we have designated as the crucial clause, * * * were manifestly used in a sense which includes *issue*."

The clause is quoted above, but we quote it again, italicizing these two words:

"And in case of the death of my said son without leaving him surviving any child or children or the issue of any deceased child, then in trust for my other children share and share alike and the issue of any deceased child (such issue taking always by representation); the said net rents, profits and income to be paid to my said *children* for and during their respective natural lives, and upon the death of any such *child* his or her share of the same shall be paid to his or her child or children then living and the issue of any deceased child then living (such issue taking always by representation) until the arrival at majority of such child, or if more than one of the youngest of such children, and upon such arrival, then in trust to convey the share of its or their parent to such child or children absolutely."

The opinion heretofore delivered (238 Fed. 524, — C. C. A. —) necessarily implies, although it may not specifically express the thought, that these words should be understood in their natural and usual meaning; this meaning is consistent with the general scheme of the will, and indeed is sufficiently indicated thereby. The appellant's argument was not overlooked, but we considered it desirable to lay the principal stress on the will as a whole, and not on the particular words to which the appellant seemed to be giving too much attention. We understand it to be conceded that, if the ordinary meaning of these words is to prevail, the foundation of the present appeal is destroyed.

We adhere to the conclusion already announced.

BATDORF et al. v. SATTLEY COIN HANDLING MACH. CO.

(District Court, E. D. Michigan, S. D. November 14, 1916.)

No. 96.

1. COURTS ⟸351—DISCOVERY IN EQUITY—INTERROGATORIES.
Equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv) does not warrant the court in requiring answers to interrogatories, which would give no more than an opinion, or no more than the evidence relied on in support or defense of the cause, although, if the answer would disclose a material fact or document, it is no objection to its allowance that it would incidentally require an expression of opinion, or disclosure of some of the evidence to be relied on at the trial, or the giving of other information which, standing alone, could not be required.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924.]

2. PATENTS ⟸292—SUIT IN EQUITY—DISCOVERY—INTERROGATORIES.
Interrogatories filed by defendant in an infringement suit, requiring complainant to interpret the patent sued on, or to state what part of defendant's device infringes a particular claim of the patent or part of the patented device, are not allowable under equity rule 58.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446.]

3. PATENTS ⟸292—SUIT IN EQUITY—DISCOVERY—INTERROGATORIES.
An interrogatory by defendant in an infringement suit, requiring complainant to state, as to each claim in suit, what date of invention will be relied on, is proper, as calling for material facts.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446.]

4. COURTS ⟸351—DISCOVERY IN EQUITY—CONDITIONS TO REQUIRING ANSWERS TO INTERROGATORIES.
Under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv), the court may require the answering of an interrogatory only upon conditions imposed on the interrogating party.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 924.]

5. PATENTS ⟸292—SUIT IN EQUITY—DISCOVERY—INTERROGATORIES.
In an infringement suit, defendant may properly require complainant to state, in answer to interrogatories, where the device relied on in proof of infringement is, and whether it can be inspected, and, if not, to describe and illustrate the same.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 446.]

In Equity. Suit by Charles S. Batdorf and the Automatic Coin Wrapping Machine Company against the Sattley Coin Handling Machine Company. On exceptions to interrogatories propounded by defendant.

William M. Swan, of Detroit, Mich., and Kay, Totten & Powell, of Pittsburgh, Pa., for plaintiffs.

Whittemore, Hulbert & Whittemore, of Detroit, Mich., and Rector, Hibben, Davis & Macauley, of Chicago, Ill., for defendant.

TUTTLE, District Judge. Plaintiffs charge the defendant with infringing five patents on coin handling devices, all of which appear to be on exceedingly complicated mechanisms. Seventy-five claims are relied upon by plaintiffs in their allegations of infringement. Defendant's answer recites the usual defenses of noninfringement and in-

validity. Counsel for defendant has propounded to plaintiffs 101 interrogatories, under equity rule 58 (198 Fed. xxxiv, 115 C. C. A. xxxiv).

[1, 2] The first 72 interrogatories ask plaintiffs to point out the particular part or parts of defendant's structure that correspond to certain elements in the claims. Interrogatory No. 1 is an example of interrogatories 1 to 72, inclusive.

"Point out, as to patent No. 691,435, what part or parts of defendant's structure respond to—

"(1) 'A wrapping mechanism normally inoperative and set in operation by the registering devices,' recited in claim 1."

Under equity rule 58, either party may ask the opponent questions which, if answered, will disclose facts or documents material and pertinent to the support or defense of the cause; the object of the rule being to simplify the issues, and so far as possible to dispose of material issues in advance of the actual hearing of the case. I am in entire sympathy with the rule and the purpose of it. Equity rule 58 does not warrant the court in requiring answers which would give no more than an opinion, or no more than the evidence intended to be relied on in the support or the defense of the cause; but if the answer would disclose a material fact or document, an interrogatory should not be denied simply because it would, in disclosing the material fact or document, require an expression of opinion, the disclosure of some of the evidence on which the party interrogated would rely at the trial, or the giving of other information which, standing alone, could not be required. While the answers to the first 72 interrogatories might be helpful to the defendant in preparing its defense, and while some other rule may be broad enough to give it relief, I do not consider that the answering of such interrogatories would result in the discovery of facts within the meaning of equity rule 58. The interrogatories in reality ask for a detailed statement of plaintiffs' allegations of infringement as to those portions of the claims inquired about. The answers would be an interpretation or an opinion of the party interrogated. The first 72 interrogatories, therefore, must be denied.

[3] Interrogatories 73 to 96, inclusive, request plaintiffs to designate the particular part or parts in the patent drawings which correspond to a specified element or specified elements or certain claims. The following is an example thereof:

"Point out, by reference to the drawings of patent No. 691,435, what part or parts of the structure illustrated in the drawings of said patent respond to—

"73. 'Means for advancing the coins separately,' recited in claims 1, 2, and 8, and 'means for supplying coins separately,' recited in claims 9, 11, and 12."

Interrogatories 73 to 96, inclusive, are denied, for the same reasons given in connection with interrogatories 1 to 72, inclusive.

Interrogatory 97 reads as follows:

(97) "State, as to each claim of the patents in suit, what date of completion of invention plaintiffs will rely upon at the trial."

I consider the interrogatory a proper one, and it should be answered. I would also consider proper interrogatories asking when the

patentee first disclosed the invention to others, when, if any, a drawing or model was first made, and the date of the first full sized device made prior, if any, to the filing of the application resulting in the patent in suit. These are facts material to the defense of the cause, since they tend to better advise defendant as to the case it has to meet at the trial, and since the answers might place defendant in a position to ascertain which, if any, of its alleged defenses are immaterial. I also consider proper interrogatories requiring defendant to state the dates of any prior use, prior knowledge, or prior invention which it intends to rely upon in its defense. While it may require in the giving of these facts that the interrogated party express an opinion, as hereinbefore stated, I do not consider that as a ground for refusing interrogatories.

[4] It has been forcibly urged that the parties should not be required to disclose facts surrounding the dates of the making and completion of the invention prior to the trial; but such facts tend to make more certain the issues, and also tend to narrow them. It may be desirable to require the answering of an interrogatory only upon certain conditions being imposed upon the interrogating party, and it is not inconsistent with equity rule 58, or with the other equity rules, for a court to adopt such a procedure. If defendant interrogates plaintiffs regarding facts or documents tending to disclose the dates of the making and completion of the invention of the patent in suit, and plaintiffs interrogate defendant regarding facts or documents tending to disclose the dates of any prior knowledge, prior use, or prior invention defense, it would seem a proper procedure for this court, upon ex parte request, to require both the plaintiffs and the defendant to file the answers to such interrogatories in sealed envelopes with the clerk of this court on a day specified by the court, the sealed envelopes containing the answers to the interrogatories to be opened by the clerk the day following the date set by the court for the filing thereof. And it is here so ordered, and made a condition of the granting of defendant's prayer regarding interrogatory 97.

Interrogatories 98 and 99 are as follows:

(98) "State, as to each of the patents in suit, whether or not a device as shown in the drawings of the patent has ever been constructed, and, if so, give the date of completion of the device."

(99) "State, as to each of the patents in suit, whether or not plaintiffs have ever made, or caused to be made, devices of a different construction from that shown in the patents, and, if a device or devices have been made, illustrate and describe such device or devices, and give the date or dates of completion of such device or devices."

These two interrogatories are too indefinite, and are not material to the defense of the cause at this stage of the procedure. If these inquiries are an endeavor to ascertain the construction or constructions that went into extensive use, as alleged in the bill of complaint, they are not in proper form. Full and complete answers to the interrogatories as they are worded might mean unnecessary disclosure to the defendant of plaintiffs' machines. If interrogatory 98 was restricted to devices completed prior to the date of filing of the application which resulted

in the patent in suit, it might be a proper question, and the remarks given in connection with interrogatory 97 would be pertinent thereto.

If interrogatory 99 inquired as to devices used more than two years prior to the filing of the application that resulted in the patent sued on, it might in some cases be proper. Under some circumstances, such an interrogatory might put plaintiffs to considerable trouble and expense to answer, and if the interrogatory was objected to on this ground, a proper showing by defendant as to the necessity for the information should be required by the court. Interrogatories 98 and 99 are denied.

[5] Interrogatories 100 and 101 read as follows:

(100) "State where the device is located upon which the plaintiffs will rely in their proof of infringement, and whether or not such device can be inspected on behalf of defendant."

(101) "If the machine referred to in interrogatory 100 cannot be inspected on behalf of defendant, describe and illustrate the device sufficiently for all parts thereof to be understood."

The answer to these interrogatories would be material to the defense of the cause, since the answers would inform defendant, or enable it to be informed, not only as to the construction of the device plaintiffs will rely on in their proof of infringement, but give defendant information which in all probability would enable it to ascertain whether it had manufactured or committed any other act of infringement in connection with the device plaintiffs complain of. The answers would advise the defendant, providing it had manufactured or sold the machine, whether any change having a bearing on the question of infringement had been made after the machine had been disposed of by defendant. Interrogatories calling for facts or documents tending to definitely advise the defense of the act or acts and device or devices complained of I consider proper. Such interrogatories are not only material to the defense, but tend to narrow the issues. Plaintiffs are required to answer interrogatories 100 and 101.

Equity rule 58 has been given consideration in a number of cases: Bronk v. Scott Co., 211 Fed. 338, 128 C. C. A. 17 (C. C. A., Seventh Circuit); P. M. Co. v. Ajax Rail Anchor Co., 216 Fed. 634 (D. C., N. D. Illinois, E. D.); Luten v. Camp et al., 221 Fed. 424 (D. C., E. D. Pa.); Blast Furnace Appliances Co. v. Worth Bros. Co., 221 Fed. 430 (D. C., E. D. Pa.); J. H. Day Co. v. Mountain City Mill Co. et al., 225 Fed. 622 (D. C., E. D. Tennessee, S. D.); Window Glass Machine Co. et al. v. Brookville Glass & Tile Co., 229 Fed. 833 (D. C., W. D. Pa.); Gennert v. Burke & James, Inc., 231 Fed. 998 (D. C., S. D. New York); F. Speidel Co. v. N. Barstow Co., 232 Fed. 617 (D. C., D. Rhode Island); Rodman Chemical Co. v. E. F. Houghton Co., 233 Fed. 470 (D. C., E. D. Pa.); Union Sulphur Co. v. Freeport Texas Co., 234 Fed. 194 (D. C., D. Delaware); Dupont v. Dupont et al., 234 Fed. 459 (D. C., D. Delaware). But these decisions are not entirely in harmony. I am in favor of applying the rule in such a manner as to simplify as far as possible, not only the issues of the cause, but also the testimony either in behalf or in defense of the cause.

WIREBOUNDS PATENTS CO. et al. v. CHICAGO MILL & LUMBER CO.

(District Court, N. D. Illinois, E. D. May 23, 1916.)

No. 174.

1. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WIRE-BOUND BOX.
The Inwood & Lavenberg reissue patent, No. 12,725 (original No. 799,854), for a wire-bound box, is within the invention of the original patent, discloses patentable invention, and as covering a highly useful and successful box, which was the first of its kind, is entitled to a fair range of equivalents; also *held* infringed.

2. PATENTS ⊂=135—REISSUES—GROUNDS OF REISSUE.
The statute providing for reissues is not to be so construed as to deny a reissue, where by the inadvertent use of a limiting word the original patent does not protect the real invention.
[Ed. Note.—For other cases, see Patents, Cent. Dig. § 198.]

3. PATENTS ⊂=328—VALIDITY AND INFRINGEMENT—WIRE-BOUND BOX.
The Flora patent, No. 907,586, for a wire-bound box, is for an improvement only, and, while valid, is to be narrowly construed; as so construed, *held* not infringed.

In Equity. Suit by the Wirebounds Patents Company and the Wirebounds Corporation against the Chicago Mill & Lumber Company. On final hearing. Decree for complainants in part.

Dyrenforth, Lee, Chritton & Wiles, of Chicago, Ill. (Charles C. Linthicum, of Chicago, Ill., Laurence A. Janney, of Boston, Mass., and Dunne & Murphy, of Chicago, Ill., of counsel), for plaintiffs.

W. C. Gilbert, of Chicago, Ill. (Arthur M. Hood, of Indianapolis, Ind., and Edward Rector, of Chicago, Ill., of counsel), for defendant.

SANBORN, District Judge. Infringement suit, begun January 20, 1914, on the Inwood & Lavenberg reissued patent, No. 12,725, dated November 26, 1907, original No. 799,854, applied for October 17, 1904; also on the patent to Ellsworth E. Flora, No. 907,586, dated December 22, 1908, applied for December 4, 1905. Defenses set up are invalidity of the reissue, as broadening the original, invalidity, and noninfringement.

The controversy relates to wire-bound boxes made by complicated and elaborate machinery, and the business is a very important and rapidly growing one. Plaintiffs own 29 patents on box-making machinery and 12 on the boxes or box blanks. Plaintiffs' 36 licensees sold 60,008 boxes in 1906 and 9,652,604 in 1914. They are used mainly for shipping small packages in some 851 different industries.

Defendant is licensee of the Greenstreet Folding Box Machine Company, and there are 6 other licensees. Competition is quite active. Plaintiffs and the Greenstreet Company are the only makers of wire-bound boxes in this country.

The box material (except cleats) is thin veneer, and utilizes much material which would otherwise be wasted, and which is of inferior quality for many other purposes. The main parts of the box consist of 4 veneer blanks for the top, bottom, and sides, bound together, 8

cleats with wires attached to the blanks and cleats by staples, and of the box ends, which are fastened to the inner surfaces of the cleats. All these parts are turned out by machines. Plaintiffs' expert thus describes the boxes (except ends):

"(1) The foldable box blank is wire-bound; that is to say, the different sections of which the blank is composed are united together by binding wires, and in the completed box the ends of these binding wires are connected together, so as to circumferentially bind the whole box together, this being the significance of the wire-bound characteristic of the box.

"(2) The box blank comprises four sections, which are independent of each other, except for the uniting wires, and each of these sections comprises side sheet material and two cleats secured thereto, and in the completed box each of these four side sections has the capacity of movement longitudinally relatively to the adjacent sections, without disrupting the integrity of its own elements, consisting of the sheet material and the two cleats.

"(3) The sheet material constituting the sides of the box projects beyond the cleats sufficiently to enable the sheets to overlap each other, so as to constitute a tight box.

"(4) The sheets are straight-edged, thus not only contributing to the tight joints, but also tensioning the wires.

"(5) The tensioning of the wire thus obtained not only holds the four sides of the box closely and tightly together, but it also has the important effect of utilizing the lateral flexibility of the wire, in permitting the side sections to move relatively to each other, while at the same time utilizing the strength of the wire in resisting any distortion of the box under diagonal strains.

"The ultimate strength of the Inwood & Lavenberg box is dependent upon the wires. Owing to the tensioning of the wires at the corners of the box, this strength is utilized to its full capacity. This will be readily understood by reference to an ordinary nailed box. When such a box is subjected to diagonal strains, the tendency is to distort and disrupt the box, either by pulling out the nails or by disrupting the box material at the nail holes. This is avoided in the Inwood & Lavenberg box, because the wires themselves withstand the strains, and the box can be distorted to the breaking point without disrupting the union between the side material and the cleats, because the side sections can slip on each other, leaving the strains to be borne by the wires. Consequently the box can be materially distorted, and nevertheless, after the distorting strain has ceased, the box can resume its original shape and still be an efficient carrier for its contents. Owing to the tension of the wires at the corners, the box is stiffened in the first instance, so that ordinary strains will be withstood, without any distortion of the box; and then, if the strain is increased sufficiently to distort the box, the wires will hold the box together, and the side sections will slide without disrupting."

The box ends are fastened to the inside of the side and bottom cleats, but not to the top. The two claims in suit, one from each patent, are as follows, the word "step-mitered," in parenthesis, having been included in the original Inwood & Lavenberg patent, but omitted in the reissue.

"1. A wire-bound foldable box blank, comprising, in combination, a plurality of straight-edged sheets, wires connecting the sheets in longitudinal series and extending the full length of the series, and cleats formed with rabbeted mutually engageable ends, the wires, sheets, and cleats being stitched together, and the cleats being in end-to-end spaced relation, the whole being constructed and arranged to cause the rabbeted adjacent cleat ends, in the operation of folding the blank, to engage with each other and lock adjacent sheets against relative sliding, and cause one sheet to overlap the end of the adjacent sheet at box corners."

"1. A wire-bound foldable box blank, comprising a plurality of straight-edged sheets, wires secured to and connecting said sheets, and (step-mitered) cleats secured to said sheets to terminate short of edges of the latter a dis-

tance equal or approximately equal to the thickness of a sheet, whereby, when folded at a right angle, the end of one sheet overlaps the end of an adjacent sheet."

[1] *Validity of Inwood & Lavenberg Claim.* Aside from the question of reissue, as to this patent, like that in question in the recent case of Miner v. T. H. Symington & Co. (in this circuit) 229 Fed. 730, C. C. A. 140, there are no new elements in it, and its validity depends entirely upon the arrangement of parts. Such arrangement combines the parts in a new way. The result is beneficial and highly useful. The box is flexible, elastic, strong, light, has proved very successful, and was the first of its kind. If it did not actually create the wire-bound box industry, certainly it was a most important factor. Were the patent merely a paper one, there might be doubt of its validity; but, having been instrumental in founding a large industry, it should be sustained, and is entitled to a fair range of equivalents.

In this construction the particular shape of the four cleats at each end is not vital. In the original patent the claim required them to be step-mitered at the ends, so as to give greater strength to the box, and enable it to keep its square shape. Novelty, however, did not consist in the shape of the cleats, but the bringing together of cleats, sides, top, bottom, ends, and wires to make a practical, efficient, strong, light structure, in which the ends serve to brace it and prevent crushing, rendering the particular shape of the cleat ends where they touch each other less important in preventing perpendicular or horizontal movement of the parts upon each other. Thus there was no reason for limiting the original claim to step-mitered cleat ends, and the reissue did not change the real invention, which did not consist of the particular form of the cleats, but of the bringing together of all the elements mentioned, having the qualities referred to.

[2] The reissue is valid under Topliff v. Topliff, 145 U. S. 156, 12 Sup. Ct. 825, 36 L. Ed. 658. While the original may not have been technically inoperative or invalid by reason of the patentees having failed to claim the invention illustrated by the drawings showing the cleats in a step-mitered form, yet it was so limited as to be practically useless, while the reissue secured the real, meritorious invention. The statute providing for reissues would be lamentably incomplete, if it should be construed not to reach and relieve such a mistake as this, where the claim, by the inadvertent use of a limiting word, does not cover the real invention. Moneyweight Scale Co. v. Toledo Computing Scale Co., 187 Fed. 826, 109 C. C. A. 586.

[3] *The Flora Patent.* Since the Flora disclosure practically adds to Inwood & Lavenberg only the feature of rabbeted cleat ends designed to brace the structure, so as to prevent lateral sliding of parts, the foregoing discussion would tend to show the addition of an immaterial element only. It may, however, be narrowly sustained, though not infringed, as embodying an improved, more compact, and stronger box.

Infringement. From the exhibits of defendant's box introduced by plaintiffs, it appears that their construction differs in some respects from both patents in suit, particularly in that they employ a mortise and tenon joint at the cleat ends, instead of either step-mitered or rab-

beted forms. It also appears from these exhibits that all the sheets forming the sides, top, and bottom do not terminate "short of edges" of the cleats. Some of them do so, and some do not. It is true, however, that defendant has practically adopted the Inwood & Lavenberg construction, particularly in Exhibits 31 and 33. While the fact that an invention is meritorious and successful affords no presumption whatever that defendant uses it, and infringement must clearly appear, the proof shows that defendant makes and sells substantially the Inwood & Lavenberg box.

Both patents are held valid, and the reissue infringed. The Flora patent is not infringed. Plaintiffs should have a decree, without costs; each party to pay the disbursements incurred by them respectively.

CONNELLY v. CENTRAL R. CO. OF NEW JERSEY (two cases).

(District Court, S. D. New York. October 24, 1916.)

1. COURTS ⇐268—FEDERAL COURTS—INJURIES TO SERVANT—DISTRICT IN WHICH SUIT MAY BE BROUGHT—EMPLOYERS' LIABILITY ACT.

By the provisions of Employers' Liability Act April 22, 1908, c. 149, § 6, 35 Stat. 66, as amended by Act April 5, 1910, c. 143, § 1, 36 Stat. 291 (Comp. St. 1913, § 8662), that an action thereunder may be brought in the district of the residence of the defendant or in which the cause of action arose or in which the defendant shall be doing business, Congress has permitted plaintiff to determine in which of the districts specified he would bring his action, and this permission cannot be denied by the courts, though it may result in inconvenience.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⇐268.]

2. COURTS ⇐268—FEDERAL COURTS—INJURIES TO SERVANT—DISTRICT IN WHICH SUIT MAY BE BROUGHT—"DOING BUSINESS."

An interstate common carrier, which received for transportation and delivered after transportation a large quantity of freight at certain piers within the district, owned and maintained an office building therein, and had designated an agent on whom process could be served, is "doing business" within the district, so that it could be sued therein under Employers' Liability Act, § 6, though none of the commerce in connection with which the injured servant was employed came into the district.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 806, 807, 812; Dec. Dig. ⇐268.

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

At Law. Separate actions by James Connelly, an infant, by Margaret Connelly, his guardian ad litem, and by Margaret Connelly, against the Central Railroad Company of New Jersey. On defendant's motion to set aside the service of summons in each case because the court has not jurisdiction of defendant's person. Motion denied.

De Forest Bros., of New York City, for the motion.
Sidney A. Syme, of Mt. Vernon, N. Y., opposed.

MAYER, District Judge. This is a motion to set aside the service of the summons in each of these cases on the ground "that this court has not jurisdiction of the person of the defendant." The moving affidavits show that each plaintiff is, and was at the time of the commencement of the action, a resident of Bayonne, N. J.; that defendant is a citizen of New Jersey; and that the cause of action arose at Bayonne, N. J.

The affidavits submitted on behalf of plaintiffs set forth that the cause of action arises under the so-called federal Employers' Liability Act, section 6 of which, as amended April 5, 1910 (Comp. St. 1913, § 8662), provides in part as follows:

"Under this act an action may be brought in a Circuit Court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states."

The sole question, therefore, is whether, at the time the actions were commenced, defendant was doing business in the Southern district of New York within the meaning of the act. For convenient reference, the essential part of the affidavit of Dickerson, assistant secretary of the above-named defendant, is here set forth:

"That a summons in the above-entitled action was served upon defendant on August 31, 1916. That on said date and for a long time prior thereto the defendant was engaged in the business of interstate common carrier, and as such received for transportation and delivered after transportation a large amount of package freight at four piers on the North River and at its so-called Bronx Terminal on the Harlem River, in New York City. That it also owns and maintains an office building at No. 143 Liberty street, New York City, and that it leases to various tenants rooms in said building. That because of the ownership and operation of said building it designated, under the statutes with regard to the doing of business by a foreign corporation in the state of New York, George O. Waterman as its agent upon whom process could be served. That this action is for personal injuries received by James Connelly, who was employed as a coal handler at defendant's Port Johnson Coal Docks in the city of Bayonne, N. J. That said Connelly at the time he was injured and at all times subsequent to his employment was engaged in the transfer of coal which had been transported by this defendant to said docks and there unloaded and delivered f. o. b. boats of various consignees. That this defendant is engaged in the extensive transportation of coal to tidewater in New Jersey at Port Johnson, and that none of said coal is transported by defendant beyond said docks, but that all of the coal transported to said docks is there delivered to consignees, and that none of said business of coal transportation to Port Johnson relates in any manner whatsoever to business or transactions done and performed within the Southern district of the state of New York."

[1] This motion does not bring up the questions considered in Simon v. Southern Railway, 236 U. S. 115, 35 Sup. Ct. 255, 59 L. Ed. 492, Smolik v. Philadelphia & Reading Coal & Iron Co. (D. C.) 222 Fed. 148, or Takacs v. Philadelphia & Reading Railway Co. (D. C.) 228 Fed. 728. In those cases the courts were considering jurisdiction from the standpoint of the effect of the consent provided for by state statutes or the lack of such consent. In the case at bar there is a clear provision in the federal statute which sets forth the locus of the jurisdiction and allows a plaintiff to determine wheth-

er he should begin his action in the district where a defendant resides, where the case of action arose, or where the defendant was doing business at the time of the commencement of the action. It may well be that instances may arise where inconvenience may result from bringing the action in a district where neither party resides and where the cause of action did not arise; but questions of convenience or of the work which shall be allotted to the various districts of the United States are, within constitutional limitations, entirely questions for the legislative branch.

As the Congress has deemed it proper and desirable to confer jurisdiction as provided for in section 6 of this act, that provision is not to be defeated by an effort at refined distinction.

[2] From defendant's affidavit in each case it appears that it was doing business in the Southern district of New York at the time of the commencement of the action, and it follows, therefore, that this court has jurisdiction.

The motion is denied.

In re J. ITO TERUSAKI.

(District Court, W. D. Washington, N. D. December 29, 1916.)

No. 5578.

1. BANKRUPTCY ⊜113—APPOINTMENT OF RECEIVER—LIABILITY OF BONDSMEN.

The liability of bondsmen under Bankr. Act July 1, 1898, c. 541, § 3e, 30 Stat. 546 (Comp. St. 1913, § 9587), providing that, where property is wrongfully seized or detained in a bankruptcy proceeding, the debtor may recover such necessary counsel fees, expenses, and damages as were occasioned thereby, is limited to such costs, expenses, and damages as were incident to the taking and holding of the property, and does not include costs or expenses incurred in meeting and resisting the petition in bankruptcy taxable in the debtor's favor under General Orders in Bankruptcy, rule 34 (89 Fed. xiii, 32 C. C. A. xiii), and Rev. St. § 824 (Comp. St. 1913, § 1378).

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 150; Dec. Dig. ⊜113.]

2. BANKRUPTCY ⊜113—APPOINTMENT OF RECEIVER—LIABILITY OF BONDSMEN.

A debtor whose property was in the hands of the sheriff under state foreclosure proceedings during the pendency of involuntary proceedings in bankruptcy, so that the receiver in bankruptcy did not take possession thereof, cannot recover any damages from the petitioner's bondsmen under Bankr. Act, § 3e, allowing recovery for damages occasioned by the wrongful seizure or detention of property though the debtor might have, but did not, regain possession from the sheriff by paying the mortgage.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 150; Dec. Dig. ⊜113.]

3. BANKRUPTCY ⊜113 — INVOLUNTARY PROCEEDINGS — LIABILITY OF PETITIONER.

There is no liability for filing a petition in bankruptcy except for the usual costs, unless the petitioners acted without probable cause and ma-

liciously, in which case the remedy is an action in the nature of a suit for malicious prosecution.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 150; Dec. Dig. ⊂=113.]

In Bankruptcy. Involuntary proceedings in bankruptcy against J. Ito Terusaki, doing business under the name and style of the Asahi News Company. On motion to dismiss the petition of the alleged bankrupt for the allowance of costs, expenses, and damages. Motion granted, and petition dismissed.

D. C. Conover, of Seattle, Wash., for petitioning creditors.
Dudley G. Wooten, of Seattle, Wash., for alleged bankrupt.

NETERER, District Judge. An involuntary petition in bankruptcy was filed, and on October 24, 1916, upon the application of the petitioning creditors and the filing and approval of a bond indemnifying the alleged bankrupt, a temporary receiver was appointed by the court to take and hold the property and effects of the alleged bankrupt. The alleged bankrupt answered the petition, denying insolvency and likewise the alleged acts of bankruptcy. Upon a hearing the petition was dismissed on the ground that the petitioners were not qualified. Petition is now presented by the alleged bankrupt for allowance of costs, expenses, and damages sustained by reason of the bankruptcy proceedings, unnecessary appointment of temporary receiver, and wrongful seizure of his property, as follows: $500 for counsel fees; $100 for interpreter for use in consultations with counsel; $268 for loss of income occasioned by suspension of business; $48 for loss of rental; $80 for actual loss of time and labor; and $71.60, damages because of being prevented from paying off a chattel mortgage—or a total of $1,067.60. A motion has been made to dismiss the petition on the ground that it does not state facts sufficient to sustain recovery.

The record in this case discloses that the alleged bankrupt was engaged in publishing a newspaper, and in connection therewith operated a job printing establishment located in Seattle; that the personal property of the bankrupt consisted of a newspaper and job printing outfit and bills receivable and accounts arising out of such business; that on the 10th day of October, 1916, the sheriff of King county took possession of all of the types, printing machines, paper cutting machines, and all of the paraphernalia and effects connected with the said newspaper and job printing plant, together with all books of account. No property of any kind was ever taken possession of by the receiver. Said property, during all of the time from the 10th day of October until after the trial of the issue of bankruptcy in this court, was in the possession of the sheriff of King county, pursuant to the laws of Washington, under foreclosure instituted by the mortgagee. The record further discloses that the bankrupt has taxed the usual and necessary costs pursuant to law and the rules of this court, recoverable by a successful litigant upon issue joined in this court, such as marshal's fees for serving process, statutory attorney's fees, interpreter's fees, and fees of witnesses testifying in behalf of the successful party.

[1] A debtor successfully resisting adjudication is entitled to the

same costs that are allowed to a successful party in a suit in equity. Section 824, Rev. Stat. (Comp. St. 1913, § 1378), and rule 34, General Orders in Bankruptcy (89 Fed. xiii, 32 C. C. A. xiii); In re Wise et al., 212 Fed. 567. Section 3e of the Bankruptcy Act of 1898 provides that, where property is wrongfully seized or detained in a bankruptcy proceeding, the debtor may recover such necessary counsel fees, expenses, and damages as were occasioned thereby. In re McKenzie et al., 219 Fed. 630. The liability of bondsmen under section 3e, supra, is limited, however, to such costs, expenses, and damages as were incident to the taking and withholding of the property, and no recovery can be had as against the bondsmen for costs or expenses incurred in meeting the issue and resisting the petition in bankruptcy. Selkregg v. Hamilton Bros., 144 Fed. 557; In re Ghiglione, 93 Fed. 186; In re Morris, 115 Fed. 591.

[2] It was contended at the bar by the alleged bankrupt that, while the property had been taken by the sheriff and the business closed, the alleged bankrupt was in a position to pay the mortgage and secure the possession of the property, but for the receivership. It is sufficient to say that the bankrupt did not do so, and permitted the property to remain where he had no right to its possession and where it was prior to the appointment of the receiver, and at no time was either the bankrupt or the receiver in a position where they could demand the property, and the receiver, not having had it, therefore did not detain it, and the bankrupt cannot hope to recoup any damages from the petitioner's bondsmen. If the bankrupt has been damaged, he has a remedy; but it is not in this proceeding against the bondsmen.

[3] There is no liability for filing a petition in bankruptcy, except for the usual costs, unless the petitioners acted without probable cause and maliciously, in which case the remedy is an action in the nature of a suit for malicious prosecution. In re Moehs & Rechnitzer, 174 Fed. 165. The cases cited by the petitioner have no application to the issue here.

The motion is granted.

THE STUDENT.

(District Court, D. Maryland. September 28, 1916.)

ADMIRALTY ⊂=51—PARTIES—DEATH—ABATEMENT.

A libel for injuries to a stevedore filed in the district of Maryland, whose Code Pub. Gen. Laws 1904, art. 75, § 26, provides that no action for personal injuries shall abate by reason of the death of the plaintiff, does not abate on the death of the libelant, whether the rule that even without statute it did not abate, or the rule that a state statute against abatement would be enforced in admiralty, be correct.

[Ed. Note.—For other cases, see Admiralty, Cent. Dig. §§ 430–432; Dec. Dig. ⊂=51.]

In Admiralty. Libel by Karmier Kruszewski against the steamship Student, and Terminal Shipping Company. On motion to dismiss the libel on the ground that it had abated because of the death of the libelant. Motion denied.

Harry B. Wolf and George T. Mister, both of Baltimore, Md., for plaintiff.

George Forbes and Walter L. Clark, both of Baltimore, Md., for respondents.

ROSE, District Judge. The libelant was a stevedore, and on the 2d day of June, 1916, was engaged in loading the respondent steamship. A slingload of copper fell from the top of the hatch, fractured his skull, and broke several of his ribs. On June 7th, he libeled the steamship for the injury so occasioned. A month later he died, whereupon the steamship moves that the libel be dismissed, because, as it says, "all proceedings under it have abated."

That was unquestionably the rule of the common law, and there are authorities to the effect that it was the rule of the admiralty. Such was the opinion of Judge Sprague in Crapo v. Allen, Fed. Cas. No. 3360, and also apparently of Judge McPherson in The City of Belfast (D. C.) 135 Fed. 208. The Circuit Court of Appeals for the Second Circuit, on the other hand, holds that in the admiralty the right to enforce a lien in rem was never affected by the death of the one entitled to such lien. It was a property right, and the death of its owner did not destroy it. In re Transfer, 221 Fed. 409, 137 C. C. A. 207.

Judge McPherson, in The City of Belfast, supra, held that an admiralty court, sitting in a state which by statute had provided that no action to recover damages for injury to a person by negligence shall abate by reason of the plaintiff's death, would give effect to such statute.

Section 26 of article 75, Maryland Code, specially declares that no such action shall abate by reason of the death of the plaintiff, but the personal representatives of the deceased may be substituted as plaintiff and prosecute the suit to final judgment and satisfaction.

If the Circuit Court of Appeals of the Second Circuit is right, the action would not have abated in a court of admiralty had Maryland not legislated on the question. If Judge McPherson is right, it does not now abate in this court, because Maryland has legislated. The result would be the same whichever reason be given for it.

The motion to dismiss will therefore be overruled, and permission be given to substitute the personal representatives of the deceased as libelants.

ALEXANDER et al. v. FIDELITY TRUST CO. et al.

(District Court, E. D. Pennsylvania. March, 1915. Opinion sur Trial Hearing on Accounting. February 8, 1917.)

No. 1385.

1. WITNESSES ⊂=112—COMPETENCY—PERSONS INTERESTED IN EVENT—ASSIGNMENT OF INTEREST—"RELEASE"—"EXTINGUISHMENT."

A bona fide assignment of his interest in the subject-matter of a suit renders a witness, otherwise disqualified for interest, competent under Act Pa. May 23, 1887 (P. L. 160) § 6, which provides that an interested witness may become competent by a bona fide "release or extinguishment" of his interest.

[Ed. Note.—For other cases, see Witnesses, Cent. Dig. §§ 425–475; Dec. Dig. ⊂=112.]

2. EXECUTORS AND ADMINISTRATORS ⊂=315(6)—DISTRIBUTION DECREE—CONCLUSIVENESS.

A probate court, in the administration of an estate, is without authority to pass upon conflicting claims of title to property, where one of the titles set up is adverse to the estate, and a decree distributing as assets of an estate property claimed by another is not conclusive on the adverse claimant.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1309; Dec. Dig. ⊂=315(6).]

3. TRUSTS ⊂=365(2)—SUIT TO ENFORCE—LACHES.

The beneficiary of a trust, who did not obtain knowledge until several years after the death of the trustee of facts showing that he had in effect repudiated the trust in his lifetime, *held*, under the facts shown, not barred by laches from maintaining a suit to enforce the trust against his executor.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 571; Dec. Dig. ⊂=365(2).]

4. TRUSTS ⊂=305—ACCOUNTING BY TRUSTEE—LACHES.

The delay of beneficiaries of a trust in filing a bill against the executor of their trustee after the executor had refused to recognize the trust, and until part at least of the assets of the estate, including the trust fund, had been distributed and more than six years had elapsed from the repudiation of the trust, though it bars the beneficiaries' right to hold the executor liable individually, does not bar their right to an accounting by the executor as trustee, since laches is an equitable defense, not imposing a hard and fast limit like the statute of limitations, and one element of its application is that there must be inequity in the proceeding.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. ⊂=305.]

5. EXECUTORS AND ADMINISTRATORS ⊂=315(6)—DISTRIBUTION—DECREE—CONCLUSIVENESS.

The beneficiaries of a trust may, after the death of their trustee and the repudiation of the trust by the executor of the trustee, file their claim as a money demand against the estate; but they are not required to do so, and if they choose to file a bill for an accounting, their right thereto is not barred by a decree of the orphans' court directing a sale of the trust property and a distribution of the proceeds, though such decree limits the right of the beneficiaries to enforce the decree obtained in the accounting suit, so as to allow enforcement only against property belonging to the trustee's estate which may not have been already distributed.

[Ed. Note.—For other cases, see Executors and Administrators, Cent. Dig. § 1309; Dec. Dig. ⊂=315(6).]

6. TRUSTS ⟸305—REMEDIES OF BENEFICIARIES—ACCOUNTING—DISPOSAL OF TRUST PROPERTY.

The fact that a trustee has parted with possession of the res does not alone relieve him of his liability to a bill in equity for an accounting and compel the beneficiaries to resort to an action in assumpsit.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. ⟸305.]

7. TRUSTS ⟸294—ACCOUNTING—EXECUTORS OF TRUSTEE—LIABILITY.

The executor of a trustee, who had refused to recognize the existence of the trust and had distributed the trust property among the residuary legatees under the decree of the orphans' court, is not liable to the same extent as would be a trustee who converted the trust funds to his own use, but is liable only for what he had received, with its accretions, since he was justified in requiring, in the interest of the estate he represented, that the beneficiaries establish the trust.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. § 412; Dec. Dig. ⟸294.]

8. ESTOPPEL ⟸68(2)—INCONSISTENT POSITION—PLEADING.

Beneficiaries, who seek an accounting from the executor of the trustee and avoid the charge of laches by contending that the trust was not repudiated by the trustee in his lifetime, cannot on the accounting ask to have the executor of the trustee charged with amounts for which he would be liable only in case the trustee had converted the trust funds to his own use.

[Ed. Note.—For other cases, see Estoppel, Cent. Dig. §§ 166, 169; Dec. Dig. ⟸68(2).]

9. TRUSTS ⟸305—ACCOUNTING—DEBTS OF BENEFICIARIES.

In a suit for accounting by the beneficiaries of a trust against the executor of their trustee, where some of the beneficiaries were individuary indebted to the trustee's estate, such indebtedness does not affect the balance of the fund found due on the accounting, since such claims are not within the principles of set-off; but the indebted beneficiaries will be required to do equity by paying those debts before they receive their share under the accounting.

[Ed. Note.—For other cases, see Trusts, Cent. Dig. §§ 421–426; Dec. Dig. ⟸305.]

In Equity. Suit by John S. Alexander and others against the Fidelity Trust Company and others. Decree for complainants.

See, also, 214 Fed. 495; 215 Fed. 791.

Frank A. Harrigan, of Philadelphia, Pa., and Henry A. Wise, of New York City, for plaintiffs.

H. Gordon McCouch, of Philadelphia, Pa., for defendants.

DICKINSON, District Judge. The disposition of this case may well take the form of a discussion of the general merits of the complaint, a finding of facts in response to the requests made, and a statement of the conclusions reached. Whatever may be thought of the grounds of complaint as shown by the pleadings, those on which the case was tried and defended, and the case and defense as finally presented, may be stated as follows:

The family relations of the Alexander family were of a characteristic, and in the old days not an unusual, type. The type is not so common in these days. The transactions between the original parties

cannot be fully understood, unless this feature is kept in mind. In the light of it we get a sufficiently clear view of what was done, and why it was done, and done as it was done. There was no thought of a resort to the machinery of the law, and no thought of the possibility of a necessity to resort to it. The only tribunal to which the parties looked or thought of was the family council. Moneys had come through the payment of an insurance policy on the life of a son and brother. The legal title and right to these moneys passed under the intestate laws to the father as the surviving parent. The family council decreed that the moneys should be invested in the stock of the Corn Exchange National Bank, with which the father was connected, and that the 60 shares which figure in this litigation should be held by the father in trust for the sister and brothers of the intestate. This family council had its own forms of procedure, and adopted those of the law in effectuating the purpose above stated, by having the legal title to the stock put in the name of the father as trustee, with an entry on the books of the father which was in effect a declaration of trust in favor of the beneficiaries, and thereafter for about 20 years this ownership was recognized and followed in the distribution of the dividends. One of the beneficiaries had died, and the others were assumed as a matter of course to have succeeded to his share, and the father declared that he so held. The father, being a man of means, was regarded by the children and evidently by himself as the family purse, upon which the children, some of them rather heavily, and all of them perhaps to some extent, drew at will. The father had occasion to borrow money, and he, as he evidently felt, as the father of the family, he was at liberty to do, or because his personal responsibility was adequate protection, pledged this stock (among other shares) as collateral for loans. It may be that he also thought the children were not taking as good care of their dividends as he could take for them. At all events, whatever the occasion for it, another council was called, at which it was resolved that the father should retain the dividends and hold them, as well as the stock itself, for his children against the coming of a possible rainy day. The children all acquiesced in this. Doubtless they did it without reluctance, in filial deference to the declared wish and judgment of the father. The then situation justified them in the expectation that the property rights of all members of the family would adjust themselves, and no question over the trust arise.

A radical change in the attitude (real or made to appear) of the father with respect to this trust came about. As the evidence was presented, this change appears with startling suddenness. The father had reached the advanced age of nearly 90 years, when a deed of trust was made by which he surrendered control of his estate, and by which the trust was in effect repudiated. This deed was made to the Fidelity Trust Company. Doubtless for the reason that the Trust Company did not feel at liberty to disclose the business of those who dealt with it, or to go counter to their directions, the deed was not recorded, nor was its existence disclosed until July, 1912, years after the death of the father. Whether such was the intention, the result

had all the effect and answered all the purposes of a concealment. This deed of trust was followed by a will of like import in repudiating, or at least ignoring, the trust. Knowledge of the existence of this latter paper provoked a caveat, followed by a devisavit vel non contest, and direct notice to the Trust Company of the trust ownership of the stock. The will contest was determined adversely to the contestants. As soon as it was determined a bill was filed raising the claim of right now set up.

The Fidelity Trust Company, as executor, filed an inventory of the estate of John Alexander, deceased, thereby acknowledging to be in its hands as executor 319 shares of said bank stock, including the 60 shares in dispute. They filed a first account, showing this same stock to be included in the balance of the estate remaining in their hands. Of this stock 200 shares were sold at auction to enable the accountant to comply with the decree of distribution then made, and the remaining 119 shares were transferred in accordance with the same decree to Lucien H. Alexander. The second account, filed by the executor, and confirmed by the orphans' court, included items of charge and discharge for the moneys received for the stock thus sold and the stock sold and distributed.

Lucien H. Alexander is a party to this bill and was duly served. He has interposed no defense. No obligation or duty rests upon him, however, except such as arises (if any) out of his receipt of stock. Whether the specific stock represented by certificate No. 562, which belonged to plaintiffs, was transferred to him, or was part of the 200 shares sold, we have not been asked to find, and the fact does not appear—at least we have not been able to find any trace of it. The complainants ask (among other requests) that two facts be found: One, that John Alexander held this stock in trust for the complainants; and the other, that in May, 1877, a further trust relation was created, under which he was to keep the dividends, holding them upon a like trust. They further ask for a finding that the estate of John Alexander account for this stock and these dividends.

The first fact is found from the evidence of admissions made by John Alexander. The second fact is found, and can be found, only from the testimony of John S. Alexander. The defense urged is that all right of action, which might otherwise be in the complainants, has been lost through their laches; that John S. Alexander was incompetent to testify, and because of this there is no evidence from which a trust to hold the dividends can be found; that there is no evidence of any trust relation between the complainants and the other defendants as individuals; and that the executor is protected by the decrees of the orphans' court distributing its decedent's estate.

The question of the competency of John S. Alexander as a witness was raised at the threshold of the trial, and may be first considered. It is well, perhaps, to interpolate here, in order that the notes of testimony may be intelligible, that the defendants at first did not deny the competency of the witness under the Pennsylvania statute, but denied that competency was to be determined under the law of Pennsylvania. They afterwards conceded that the Pennsylvania law was

controlling, but denied the competency under that law. As there was no doubt upon the one point, but much doubt upon the other, the testimony was admitted, subject to the objection, and with leave to move to strike out the testimony. This motion was made, and the question of competency squarely raised. It is, of course, clear that we are bound by the Pennsylvania law. R. S. § 858, as amended by Act June 29, 1906, c. 3608, 34 Stat. 618 (Comp. St. 1913, § 1464).

[1] The law of Pennsylvania is in turn declared by the act of 1887. This act worked a complete bouleversement in the law. Before that act incompetency at common law continued until removed by statute. After the act every witness is competent unless within the excepted classes. The pertinent provision is that of section 6, which provides that an interested witness may become competent by a bona fide "release or extinguishment" of his interest. This condition is found to have been complied with so far as an assignment of his interest is a compliance. We find that he in good faith assigned all his interest to his brother. The question is, therefore, whether an assignment is within the meaning of the act. It would have been expected that this question would have been settled. The industry of counsel have not, however, brought to light any rulings which would justify (otherwise than inferentially) the statement that the law on the subject has been set at rest. The best which can be done is to rule it by a survey of the act, and to follow what seems to be the trend of the more authoritative rulings. It is well to have in mind clause "e" of section 5, to which section 6 relates. This provides for defendants in actions of ejectment who disclaim title. One of its purposes may have been to guard against a plaintiff making an important witness a defendant in order to get rid of him as a witness. The words "release or extinguishment" suggest the ending of a claim rather than its transfer. The word "assignment" presupposes the continued existence of the claim assigned. Nevertheless, the word "release" is also a word of conveyance, and when the grantee already has title or an interest in the subject-matter, it is not only an appropriate, but the accurately appropriate, word of designation of the conveyance made to him. In formal legal documents, we have the word "release" coupled with "quitclaim," and also with "enfeoff," "grant," "convey," and the like. "Assignment," however, and words of like meaning, are in very common use as expressing the idea of transfer only, and if the Legislature had the thought in mind, it suggests the inquiry why was not the word used. The aid which is afforded us by the adjudged cases is illustrated by the following among many others: Heft v. Ogle, 127 Pa. 244, 18 Atl. 19, 14 Am. St. Rep. 839; Turner v. Warren, 160 Pa. 343, 28 Atl. 781; Semple v. Callery, 184 Pa. 95, 39 Atl. 6; Cobb v. Cobb, 4 Pa. Super. Ct. 273; Cameron v. Gray, 202 Pa. 566, 52 Atl. 132; Darragh v. Stevenson, 183 Pa. 397, 39 Atl. 37; Morgan v. Lehigh, 215 Pa. 443, 64 Atl. 633; Matthews v. Matthews, 11 Pa. Super. Ct. 381.

We have not space for an analysis of these cases. Some of them would be cited for and others against competency. Some of them would be cited in support of either view. The reason for this is that

the ruling was upon some special feature not here present, and the bearing upon another point not ruled is a matter of implication or inference. Darragh v. Stevenson, for instance (and we single this out because, with Matthews v. Matthews, it is relied upon by defendants), ruled that an assignment not made in good faith would not qualify the witness. The distinction between a transfer and an extinguishment was pointed out and stated with clearness and force. This feature of good faith was referred to, however, and it was suggested that an extinguishment could scarcely be otherwise than in good faith, and that the Legislature might well be thought to have included transfers in the word "release." The court leaves this point, however, undecided and rules the question on the absence of good faith.

Words and Phrases, 2621, made a large and unwarranted draft on this case in stating it to have flatly ruled that an assignment was not within the act. The logical result might be as well argued as otherwise than incompetence. The case was ruled by finding bad faith. Why find bad faith, if no assignment would qualify? Matthews v. Matthews followed the Darragh Case, but quotes only one of the two thoughts expressed by Justice Mitchell in that case, and also finds bad faith.

On the other hand, in Semple v. Callery there was the precise point we have before us, and the witness was held competent, and the judgment affirmed by the Supreme Court. The ruling, however, is no ruling of the point, because it was there conceded that the assignment qualified the witness, if made in good faith. There was no objection to the witness, the objection was to the trial judge finding the fact of good faith, and a point was presented asking that this question be submitted to the jury. This was refused, and the refusal assigned for error. The assignment was overruled, but no view is expressed upon the other point. Any one of at least these inferences may be drawn from this silence.

In Heft v. Ogle, the witness was held competent. This case was heard on appeal in 1889. It may be the trial was before the act of 1887, although this does not appear. At all events, no reference is made to the act of 1887, beyond a general reference to legislation showing the trend of policy to be toward admitting evidence. The case may be said to have turned on the fact of interest.

Turner v. Warren, however, and Cobb v. Cobb (in each of which the witness was admitted), can be distinguished from the present case only in the fact that the first was an action of ejectment, and the grant a deed merely in defendant's chain of title, and in the Cobb Case the assignment was in form and in legal effect a release. It was, however, to all practical purposes an assignment. The assignee was both a part owner and the holder of the legal title as administrator. As administrator she received, and, as the release relieved her from accounting, she had the right to retain, what the witness had relinquished. We by no means think the question free from doubt, but on the whole we are of opinion that the act does not disqualify, and that the weight of authority favors this conclusion. Because of

the doubt, however, we have separated the findings into those made with and those made without the testimony of this witness. Different conclusions of law follow these different fact findings.

[2] Another defense interposed is the protection afforded by the decrees of the orphans' court. Here there is in the argument an apparent (although doubtless only seeming) confusion of thought. The orphans' court had undoubted authority to take into its hands the custody (through its control over the executor), the administration, and the distribution of the decedent's estate of the father. When it thus assumed jurisdiction, no other court could be induced to attempt to interfere. The decrees of the orphans' court in the exercise of this jurisdiction are conclusive upon all parties and the rem. The jurisdiction of that court, however, was only over the estate of the decedent. It was without jurisdiction, and, of course, did not attempt, to pass upon conflicting claims of title to property, where one of the titles set up was adverse to the estate. It could entertain, if submitted to it, claims of indebtedness against the estate.

The presentation of two supposititious cases analogous to the present will make this distinction clear. A man has possession of property claimed to belong to another, or claims the ownership of property in possession of another. The man dies, and his estate is to be administered and distributed. Neither of these claims could be passed upon by the orphans' court, but must be determined by the common pleas through an appropriate action, to which the legal representative of the decedent would be a party defendant or plaintiff. That is one case. The other case is that of a claim made against the estate. It might arise as a simple claim of debt, or it might be such as that the claimant might elect to treat it as a claim on an implied assumpsit. The orphans' court could pass upon such a claim if presented, or the claimant would have the right to bring his action of debt in the one case and recover judgment, or in the other, refusing to treat the decedent as a debtor, file a bill for an accounting and secure a decree. Having established his rights as against the estate, the orphans' court would then mold its decree of distribution accordingly. This judgment or decree would bind the estate and those claiming under it, and (subject to the res inter alios acta principle) would be conclusive.

If the claimant in the second supposed case elected to present his claim in the first instance at the audit as a claim of debt, the finding of the orphans' court thereon would be conclusive, and he could not have the claim again adjudicated elsewhere. Whatever decree of distribution was made by the orphans' court, after or before he obtained an adjudication of his rights in another court, would be as conclusive however as any decree affecting the rem. The claimant's protection against the possibility of the rem being awarded to some one else, before or after he had successfully asserted his rights, would be through and by a resort to the orphans' court. There is in none of these instances a conflict of jurisdiction.

In the application of the legal principles suggested to the facts of this case, we should have in mind that the Fidelity Trust Company appears in a dual character. It is an individual, and as such is acting as

executor. As executor, it has assumed certain duties and liabilities which bind it as an individual. It is also a representative character as executor, and as such it is merely a legal name for the estate. As an individual acting as executor, it is fully protected by the decrees of the orphans' court, and not answerable to any one for the disposition it made of the assets of the estate in obedience to those decrees. Any action may, however, be brought against the estate, and it, as executor, is properly named as defendant. It is also answerable in an action for anything it may have done, and it may be answerable, although what it did it assumed to do as executor.

There is nothing in evidence which would justify a finding that the trust company did anything in violation of the rights of these plaintiffs. So far, therefore, as this feature of the defense affects the proper ruling to be made, the defense is made out. What it did or omitted doing has some bearing, however, upon the next branch of the defense which affects, not it, but the estate of which it is the representative.

[3] This ground of defense is that of laches. Statutes of limitation and the equitable doctrine of laches have in principle the same policy of the law as a basis. Each recognizes that, both for the public good and in justice to private individuals, litigation over stale claims and long-forgotten transactions should be discouraged. While each has the same end in view, law and equity promote and accomplish this end by and through radically different means. The legal method is by a fixed and rigid rule, which is to be applied to all actions, and forbids the just along with the unjust. Equity inquires into the fact, and discriminates, forbidding only those proceedings, the pressing of which would in itself involve injustice, and permitting those which to forbid would work injustice. The general principle, however, remains and this good end is kept in view, and stale claims are rejected, unless both the justice of the claim and a reason (more than an excuse) for the delay in presenting it appears. Moreover, the equitable principle that the decree of a chancellor is always of grace, and never a right of the complainant, is applied, and a decree supporting a stale claim is always refused, unless its justice, not only appears by the evidence then obtainable, but unless the chancellor is further persuaded that its justice would have appeared, had the transaction been freshly presented.

This claim, if we consider only the flight of time, is stale to the point of rankness. Without the testimony of John S. Alexander, we could only know that the father (as shown by his own writings) had nearly 50 years ago declared a trust for his children, which he had recognized up to 1877, and which had, as he at least claimed, ended, and of which from then up to the time of his death (a period of almost 20 years) we hear not a word. We speak of the ending of the trust relation, because the books by which the trust was proven contain the statement "All settled." We would not be concerned with the question of whether a trustee could thus by self-serving entries make evidence for himself, because all the entries were put in evidence. From this evidence a chancellor might find a trust to have existed, and might not feel disposed to find as a fact that it had ended; but he could not deny the conviction that to charge the decedent with a continuing trust on this evi-

dence would be so fraught with at least danger of injustice that he must refuse a decree for an accounting.

The evidence, however, with the testimony of John S. Alexander, changes its whole aspect. If the facts are narrated in sincerity and truth (and of this we are fully persuaded), the whole situation is made entirely clear, for to all intents and purposes the father himself was speaking to us in the person of this witness. The witness knew all about the transactions as fully as the father did. It may without exaggeration in real fact be said that he knew the father's inmost thoughts and purposes. It is made probable, if not certain, that the entries in denial of the existence of the trust were not made until the deed of trust was executed by the father, or were made in preparation for the deed and will. This fact, or, indeed, a well-grounded suspicion of it, in the absence of any evidence of the entries having been sooner made, destroys all their evidentiary value, for this deed and what followed it bear in themselves evidence of the impress of a will other than that of the father. By the deed he surrendered all control over his property. This may have been (and we have nothing before us to justify the finding that it was not) justified. The only justification for it, however, would take away all significance from what he did as a denial of the trust, or a repudiation of it. The continuance of the trust, therefore, down to the time of the father's death, with the retention of the dividends, is not only not inconsistent, but was in pursuance of the trust and its purposes.

Nor do we think anything which has since occurred bars the action of the plaintiffs. We have already found the Trust Company to have done nothing in violation of the rights of the plaintiffs. At the same time it cannot be denied that the company laid full emphasis upon the fact that it was the representative of those who took under the will through the deed of trust, and was responsible to them alone, and repudiated the view of the plaintiffs that it was a disinterested and unpartisan custodian of the property. The bottom and underlying facts and the personalities of the parties doubtless made the proper rôle of the company a difficult one, and we are making no finding of criticism of it in what it did, or omitted doing. At the same time the unresponsive, noncommittal, and (from the plaintiff's point of view) the almost sphinxlike attitude which the Trust Company throughout felt obliged to assume has a bearing upon what the plaintiffs were bound to do to preserve their rights. In one sense it operates against the plaintiffs, because this attitude of hostility in fact and effect, however impartial and fair, or indeed benevolent, in motive and purpose, put the plaintiffs upon their mettle and called upon them to assert their rights. On the other hand, this sphinxlike reticence threw obstacles in the way of the plaintiffs in getting such a grasp of the situation as would make clear what they were bound to do, and obscured the path they ought to follow. One result is that the present case fairly bristles with more or less technical difficulties; but we do not think its substantial merits open to much doubt.

We append specific answers to the findings of fact and conclusions

of law requested in the points submitted, and the general conclusions reached. These are as follows:

(1) John Alexander, the father, held 60 shares of this bank stock, represented by certificate 562 (and the dividends received by him), for his children, who were the real owners thereof, and his estate was liable to the real owners for this property, and should have accounted therefor.

(2) The plaintiffs had a good cause of action to enforce this accounting, and this liability, if this right has not been lost through laches or otherwise.

(3) The plaintiffs have no cause of action against the Corn Exchange National Bank.

(4) The plaintiffs have no cause of action against the Fidelity Trust Company, otherwise than as representing its decedent's estate.

(5) The plaintiffs have no cause of action against Lucien H. Alexander; it not appearing that he received the 60 shares of stock represented by certificate 562.

(6) Without the testimony of John S. Alexander, plaintiffs have not established a cause of action, and are guilty of laches, and the bill should be dismissed.

(7) With the testimony of John S. Alexander, the trust is established, both for the stock and the dividends, and the plaintiffs have purged themselves of the charge of laches.

(8) The plaintiffs are entitled to a decree against the estate of John Alexander, deceased, and against the Fidelity Trust Company, executor, etc., of said decedent, for an accounting for said 60 shares of stock and dividends, with all record costs, and costs as stated below.

(9) The Corn Exchange National Bank is entitled to recover its costs.

(10) The plaintiffs are entitled to recover their costs.

The requests are answered as follows: Plaintiffs' fact findings 1 to 12 (both inclusive) are found as requested upon the testimony of John S. Alexander. Without this testimony, requests 2, 3, 4, and 5 are denied, as not established by the evidence. Requests 1 and 2 for conclusions of law are granted. Request 3 is refused as stated.

Defendants' requests for findings of fact are granted as to all except 2, 3, 5, 12, and 14. Findings 2 and 3 are not found, because of no value to us. Requests 2 and 3 are not found, because the evidence contains no reference to the fact referred to in 2, and 3 is a ruling in the Jones trust estate, which is controlling as an authoritative ruling to be cited, and not a fact to be proven. The ruling in that case, moreover, has no bearing upon the case under consideration. The ruling in the Jones case was that the court would decline to appoint a successor to a trustee where the trust had terminated. The question in the present case is whether a trustee is relieved from his liability to account merely because there were no further duties for him to perform as trustee. Finding 5 is denied as a too rhetorical statement. It is found that Archibald A. Alexander and John S. Alexander received moneys from their father and were indebted to him, and made no demand for the stock or dividends. Request 14 is

granted as to $3,500. There is no evidence upon which to find request 12.

Legal Conclusions.—First is denied. Second is also denied as written. The complainants were not bound to present their claim of title to the 60 shares of stock at the audit of the estate of John Alexander, nor to present a money claim as for a conversion, nor was the audit a finding upon the ownership of the 60 shares of stock. The orphans' court was without jurisdiction in that proceeding to determine any title to the stock as property adverse to the estate, and the claim of title by the complainants could not have been entertained, if made. The complainants might have elected to treat the retention of the stock as a conversion, and made a money demand, instead of a claim of title; but they were not bound to do so because the executor required it of them. The decree of distribution following the audit protects the executor in obeying it, but does not prevent the plaintiffs from asserting their rights otherwise as against the estate. The third request is refused. The fourth request is refused. The fifth request relates to any accounting which may be made, and will be considered when the form of the decree to be entered is settled.

A decree may be submitted embodying the findings made.

Opinion sur Trial Hearing upon Accounting.

It has already been determined that the plaintiffs are entitled to an accounting, by the executor of John Alexander, deceased, for the moneys and property in the hands of said decedent, at the time of his decease, held by him in trust for the plaintiffs. Inasmuch as no exceptional conditions existed justifying a reference to a master under equity rule 59 (198 Fed. xxxv, 115 C. C. A. xxxv) the accounting was held before the court. When such accounting is made, the plaintiffs are entitled to such form of decree prescribed in rules 7, 8 and 9 (198 Fed. xx, xxi, 115 C. C. A. xx, xxi) as may be appropriate. The facts of this case and the condition of the record are such as to make a money decree the proper one. The parties did not in form follow the procedure indicated by rule 63 (198 Fed. xxxvii, 115 C. C. A. xxxvii). The substantial situation, however, is that the plaintiffs are seeking to surcharge the estate to the amount of the sum claimed to belong to the plaintiffs. This result is sought to be reached through evidence of the value of the bank stock and the aggregate amount of the dividends thereon held by the decedent as trustee for the plaintiffs. The shares of stock having been parted with by the sale of some and the transfer of the remainder in the administration and distribution of the estate of the decedent, the accounting must from force of necessity be for the amount of the dividends and the sale or other value of the stock. The task before us might in consequence be confined (as in effect it is) to finding the principle which is the basis of the liability of the accountant, in order to determine the measure and extent of such liability and to a statement of the account on this basis. We anticipate the conclusion reached by finding that the estate must account for the dividends and the value of the stock, the benefit of which

the estate actually received. This sum is found to be $8,205. If the principle of liability be as found and the figures are correct, plaintiffs are entitled to a money decree for the payment of this sum. Any further discussion of the questions involved in the consideration of this cause would ordinarily be confined to the two points suggested, or the findings left to vindicate themselves. The discussion of them has, however, unavoidably drawn the findings already made into the argument. Moreover, counsel seem to have interpreted these former rulings in a sense different from that intended, and, as we still think, expressed in the opinion filed. We hold such measure of respect for the views of counsel that we would not wish the former ruling to be misunderstood or misinterpreted. We will therefore, so far as they bear upon the accounting features of the case, restate the findings made. This will draw out the opinion to perhaps an undue length, but we hope it will avoid any misunderstanding of what is ruled.

There is just here a phase of the original case which counsel seem to have overlooked, and, because of this, have missed the bearing point of some of the expressions in our former opinion. The bill as filed combined a demand for an accounting on behalf of, or, as we may for greater clarity express it, by, the decedent as trustee, with complaints against and demands for decrees against individuals, including the executor. To instance the latter alone, there were complaints and demands for decrees against the executor, both in its representative capacity and as an individual. This differentiation is so obvious that we did not think it necessary to make it prominent, assuming the general expressions used would be applied with this distinction in mind. As the bill has been dismissed so far as affects the individual defendants, we are no longer concerned with this feature. We do wish to refer to it, however, and to repeat and emphasize the findings made, because counsel for defendant has construed the opinion as visiting some condemnation upon the executor. Nothing could be more foreign to the thought in mind. The expressions frankly characterized by counsel for defendant as to him "vague and mystifying" had no such reference as ascribed to them. They had an entirely different use and bearing. To what these and other criticized expressions referred will be discussed later in connection with the other phases of the case. We mention them now to bring into relief the findings which were and are made. The executor did no wrong to the plaintiffs or to any one. It was clearly within its rights in refusing to recognize the trust or to admit the claimed title of the plaintiffs. It was more than right in calling upon the plaintiffs to establish their title. This involved good advice, which, if it had been accepted and acted upon by the plaintiffs, would have saved all of us the trouble and the plaintiffs the risks of the decision of questions which have grown out of their failure to sooner move. The executor was fully justified in proceeding, as it did, to administer and to have distributed the estate in its hands. This court did not and does not give to what was done the legal effect which the executor ascribes to it, but this is far from imputing blame to it for either what was done or the legal consequences of what was done. Counsel seem to have confused the defense based upon the legal effect of the proceedings in the orphans'

court with the defense of laches. There is a mingling of the two because the facts upon which is based the one are included in the facts upon which is based the other. Nevertheless they are wholly different and distinct. This will appear if laches is (arguendo) eliminated. We would have then this clearest case and proposition of law:

John Alexander, at the time of his death, had these 60 shares of bank stock and the dividends paid thereon, of all of which the executor took possession as part of the assets of his estate. The fact was that they were no part of his estate, but were held by him under a trust which was recognized and admitted by him up to the time of his decease. On demand made for the stock, the executor (as in fact it did and was justified in doing) took this position. The stock may not belong to the estate, but be, as claimed, trust stock. We, however, cannot admit this, or part with the stock, until you have established the trust. The plaintiffs thereupon filed a bill in equity against the estate, represented by the executor, for an accounting. The latter proceedings were delayed, and, in the meantime, part of the assets of the estate (including this stock) was administered and a partial distribution made through a decree of the orphans' court. The question would then arise: "Is this decree of the orphans' court a bar to a decree by the court in equity for an accounting?" That presents the one defense. Then add to the facts already stated the further fact that the plaintiffs delayed the filing of their bill, and we have the other question: "Have the plaintiffs been guilty of laches?" This separation of the defenses enables us to appraise each at its real value.

This long prelude brings us to a consideration of the defenses raised. There is some difficulty in formulating them, because they, to some extent, overlap, and some, or parts of some, are embraced in others. They may, however, be stated as follows, and repetition be avoided in the discussion by discussing them, when necessary, together:

1. The decree of the orphans' court, disposing of and distributing this stock, is a bar to the present proceedings, because such decree necessarily involved a finding that the stock belonged to decedent and was part of the assets of his estate, and thereby further finding that it was not the subject of any trust in favor of the plaintiffs who are further concluded by it.

2. The executor having brought this stock into the orphans' court to have its disposition determined, that court acquired jurisdiction of the res, and when it adjudged the res to be the property of the decedent, and thus ex vi termini not trust property, such adjudication (unless reversed) was final and conclusive upon the res and every one, and the question of any interest of the plaintiffs therein became res adjudicata.

3. The same defense above stated is reurged with the added thoughts (1) that the plaintiffs notified the executor that they would, but failed to present their claim to the orphans' court; and (2) the executor notified and warned them so to do, and when they did not, and the accounts of the executor had been audited, again notified and warned them to apply to the orphans' court to have the decree opened.

4. The facts on which the above defense is based are also included in the defense of laches, which we will separately state.

5. The claim of the plaintiffs, from and after the time when the stock passed out of the possession of the executor, was one of creditors only, and their only remedy an action at law.

6. It may not now be urged as a defense, but it had been urged upon us, and is included now, to make the statement of defenses complete, that when the executor refused to recognize the trust, the claim of the plaintiffs was that of creditors only, and their sole remedy to present it as a claim (either with or without having first reduced it to judgment) at the audit of the estate, and, having failed to do so, they are concluded by the decree following the audit, and without other remedy.

7. As the executor, neither in its representative capacity nor as an individual, has now possession of the res, it cannot be called upon to account as the representative of the deceased trustee. We do not understand the principle on which this defense is based to be pushed to the extreme limit that no trustee who has parted with the res, corpus, or subject-matter of the trust can be called upon to account, but is liable only to an action at law. We do understand, however, that under the facts of this case the proposition is that the executor of a deceased trustee, when he (the executor) has parted with the res, cannot be called upon to account on behalf of the deceased trustee.

8. Any action at law by the plaintiffs would be barred by the statute of limitations, and these proceedings are because of this likewise barred.

9. The plaintiffs have been guilty of laches.

We will, for the reason that, as before stated, the findings of the court have been apparently misunderstood by counsel, restate our findings, and will first take up the above defenses seriatim, but bunching some of them, and follow this with the consideration of the accounting features of the case, which now really alone concern us.

To make the restatement complete in itself, we will premise certain fact findings, and in doing so dispose of the defense of laches. When this cause was first presented to us, it was based upon the simple averment that the decedent held 60 shares of the stock of the Corn Exchange National Bank, the certificate of which was in his own name; but the stock was further averred to have been held in trust for the plaintiffs. The trust was admitted to be, not merely moribund, but to have been actually dead for 35 years or more before the filing of the bill. On the face of this showing we were asked to decree that this stock (which in the meantime had passed into other hands, or which, at least, did not appear to be still among the assets of the estate of the deceased trustee) was the property of the plaintiffs, and that (among other prayers) the Corn Exchange National Bank be required to account for and pay over to the plaintiffs all dividends which had been declared and paid by the bank during all these years, although it further appeared that the bank had paid the dividends to the one in whose name the stock stood, and without notice or intimation even of the claim of the plaintiffs. The court, sitting as a court of equity, refused,

of course, to entertain such a bill, and dismissed it on the ground (among others) of laches appearing on its face. It was to this bill that the phrase which is now recalled and quoted by counsel for defendant, that "the claim was stale almost to rankness," applied.

The present bill, however, put an entirely different phase on the transaction, and the evidence fully supported the main averments and prayers of the bill. We say the main prayers, because the draughtsman of the bill, as in such cases there is always a temptation to do, overshot the mark and asked (as the plaintiffs now ask) for more than that to which they are entitled. The main facts, however, were established by evidence and testimony which stamped the essential averments as not merely substantially, but literally, true. No one who was present to observe the course of the trial and the witnesses and their demeanor could doubt the true state of the facts. Indeed, there was no denial of them, or suggestion of denial. The defense contented itself with a test of the ability of plaintiffs to prove the facts. The facts themselves are not in dispute. It may be they were not established by legal evidence, because some of them appear by the testimony of a witness whose competency is in dispute, and is at least or best doubtful. This question has been fully discussed, and so far as this court is concerned has been disposed of.

These facts were that certain moneys came to this family from what may be called a family source. They were the insurance moneys on the life of a deceased brother of plaintiffs. The moneys were brought before a family council, which decided to invest them in stock of the Corn Exchange National Bank. They were put, it is true, in the name of the decedent. He owned other shares in the same bank, and these shares were put in his name, not as an individual, but as "trustee." It is again true that the certificates were afterwards changed, so as to be in the name of the decedent; but it also appeared that he at the time and at other times pledged them as collateral, and the inference is justified that this was the occasion for the change. He, however, definitely and positively, in his own handwriting and by his own books, admitted and recognized the trust and earmarked one of the certificates as representing the trust shares. He further recognized and admitted it by regularly and for years paying over the dividends to the plaintiffs.

[4] A number of years before his death a new trust relation was established and admitted and declared by him. This was that he would thereafter retain and hold in trust for the plaintiffs the dividends paid on the trust stock. Right here is, as it seems to the court, the crux of the whole case, both in respect to its real merits and the more technical question of the right of the plaintiffs to maintain this bill. With the testimony of John S. Alexander, part of the evidence in the cause, the equities of the plaintiff fully appear. Without this testimony, they have shown none. The trial judge, as before stated, entertains no doubt of the truth of the testimony, nor is any doubt thrown upon it directly by word or intimation. The competency of the witness is by no means clear. The fact, however, is that the decedent up to a short time before his death acknowledged and admitted the trust, and died without either himself or any one for him having intimated any

change of attitude towards it. The retention of the stock and the dividends was consistent with the trust and required to fulfill its purposes. The plaintiffs acquiesced in this retention and never demanded or asked for their dividends in the lifetime of the father. We have, therefore, this simple proposition: A man occupying a trust relation to others, and as such trustee having money and other property constituting the trust estate in his hands, and held by him upon an existing acknowledged trust dies in possession of the trust property. Assuming the cestuis que trustent could assert their right to that which belonged to them either by an action at law or through a bill in equity for an accounting (a question which will be next discussed), and also that the trust has existed and nothing been paid thereunder for a length of time exceeding the six years' bar of a statute of limitations; would the action or the bill be barred by the statute or by laches? It would seem to be clear that there was no time which could be found from which the statute would begin to run. Assuming, further, that the trustee had died, holding personal property under such a trust, and the executor, after his appointment, notified the cestuis que trustent that he could not recognize the trust, and that they must establish it by presenting their claim to the orphans' court, or by bringing an action at law, or filing a bill in equity, and they delayed the filing of the bill beyond the six years' limit; would their right to an accounting be barred by the statute or laches?

The legal maxims and phrases in common speech, as that "equity follows the law," and that "equity, although not bound by statutes of limitation, will follow and apply them in principle," and others of like import, are misleading unless the distinctions made are observed. One distinction between the defense of the statute at law and that of laches in equity has been already indicated in the former opinion. Laches as a doctrine is not an unyielding, arbitrary time limit obstacle to the proceeding, but is an equitable doctrine out of which a defense arises. It must have in it the element that there is an inequity in the proceeding. Where a trustee holds upon a direct and admitted trust, to hold that it could not be enforced merely because it had existed for years would be unthinkable. The ruling that an unrecognized and before unheard of trust could be unearthed by digging into a prehistoric mound would equally affront our sense of right. Hence we have the doctrine that statutes of limitations are no bar to the enforcement of an existing trust, and the other doctrine that the defense of laches can be successfully interposed to the attempt to establish a trust which is averred to have been created in the forgotten past.

The path blazed by judicial rulings by the courts of law and by chancellors is by no means a straight and undeviating one. It is nevertheless sufficiently well defined to supply a guide to our destination. The attempt to discuss them would be an interminable task. McClintock's Appeal, 29 Pa. 360, for instance, lays down, in the clear and vigorous language characteristic of the great judge who delivered the opinion in that case, that an executor could not invoke the bar of such statutes against the claim of a creditor whose claim was not barred at the time of the death of the decedent. This was followed for many years, until the principle on which it was based was modified

by the ruling in York's Appeal, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65. How far the distinction which was at one time recognized that the statute would not bar one whose remedy was exclusively in equity, but would bar one who could proceed either in equity or at law, need not be discussed. Johnstone v. Humphreys, 14 Serg. & R. (Pa.) 394; Lyon v. Marclay, 1 Watts (Pa.) 271; Seybert v. Robinson, 2 Pa. Dist. Ct. R. 403.

The case of Zacharias v. Zacharias, 23 Pa. 452, affords us an illustration of the distinction with which we are now concerned. The principle to be drawn is that a mantle of protection will be made out of statutes of limitation or out of the doctrine of laches, to be thrown about the person of any party who in the given case is found to be entitled to such protection. This distinction is of all importance in the present case, both in the consideration of that phase of the defense now being discussed and that discussed later. Its presence and application springs out of the fact that the executor warned the plaintiffs to have their rights established, and that it would proceed to make distribution of the assets in its hands. A belated proceeding, which would affect the executor in what it had done, would not be permitted. We are confining ourselves now to the defense of laches, and not considering the other feature of the protection afforded by the decree of distribution as such. This bill, therefore, so far as it sought or seemed to seek a remedy against the executor or other individuals, was dismissed. The plaintiffs have shown no equities against them. This, however, is a far cry from the other proposition that the plaintiffs are not entitled to any accounting by their trustee, and a finding of what would result from such an accounting. It may be that the remedy left to them has lost all practical value, but that is an entirely different feature, which will be adverted to later.

The point ruled is that plaintiffs are entitled to an accounting as their right. This is an already overlong discussion of the defenses enumerated as 4, 7, 8, and 9, except in so far as the proceedings in the orphans' court also enter into this branch of the defense. Of the effect of such proceedings later. There is, of course, the more technical position, which might be taken, of want of jurisdiction in equity based upon the assertion of an adequate remedy at law. No such defense has been specifically set up, and we have assumed it is not urged as a defense in itself, but only so far as involved in the other propositions that the plaintiffs were bound to go into the orphans' court, and that if the plaintiffs are barred at law the same bar may be set up in equity.

The other defenses enumerated may be considered together. Here again certain features are involved, the discussion of which we will defer until we come to discuss the measure of liability feature of the case. We will also, by way of prelude, interpolate an explanation, and, so far as called for, a correction of certain findings made which have been criticized by counsel for defendant. The finding was made that shortly before his death John Alexander had parted with control of his property by what has been throughout the case called "an irrevocable deed of trust." When the finding was formulated the trial judge was under the impression that this transfer included all his property.

This was because the deed had been characterized by counsel in the pleadings and throughout the trial as one surrendering his control over what he had. We did not then refer to the deed, and have not now easy access to it, and accept the version of it given by counsel for defendant, that it does not transfer all of the property, and the finding is so modified. It did, however, embrace these 60 shares of bank stock, or, at least, transferred some 90 shares and other property of the grantor.

There was also a finding that this deed had not been recorded, and the comments were made in the opinion filed, which counsel have characterized, as before stated, as "vague and mystifying." We think the impressions of counsel to be wholly due to a misunderstanding of the purpose of the reference to these facts. As then stated, and hereinbefore emphasized, and now again repeated, there was no criticism of the executor, expressed or intended. The fact, however, that the transfer had been made, and the other fact that its existence had not been disclosed by recording or otherwise, had a bearing upon the recognized existence of this trust, and a consequent bearing upon the equities of the bill, just as it has now a bearing (later discussed) upon the measure of liability to be applied in the accounting. It is of no importance whether the deed included other property than this bank stock, and of no real importance whether it was within the recording acts, and unless it did include the bank stock, which was the subject of this trust, of no real importance at all.

The assumption of the trial judge that it included all the property of the grantor carried the further assumption that it included real estate and was within the recording acts. The point is now made that it was confined to personalty, and is asserted not to have been within the recording acts. The only real point made is the purely technical one that it could not be recorded in the sense of being constructive notice. We agree with counsel for defendant that the trust deed is of no importance; but it was in the case, and the early stages of the litigation show it to have been practically, although perhaps not formally, forced into the case by the defendants. If the trustee, in his lifetime, had disposed of the trust property, and the plaintiffs had known of it, this would have had an important bearing upon the question of the duty of the plaintiffs to have accepted this challenge of the existence of the trust. The sole purpose of the reference to it was to make clear that the plaintiffs did not know of it, and that its existence was in effect, although not intentionally, concealed.

We are aware that more space is being given to this feature than its importance merits, but we might as well finish with it. The comments quoted by counsel had reference to this feature of the case with which the trial judge was and still is most strongly impressed. The plaintiffs and the executor have acted toward each other throughout, in the absence, we do not say of candor or frankness, because these words express too much, but without that openness of purpose and with that absence of suspicion which would have brought this controversy to a speedy decision. The echo of this attitude is still with us, because these litigants were unable to agree even upon the simple fact of what dividends the Corn Exchange Bank had paid at

different times. We hasten to acquit the executor and its counsel of all blame for this failure, and we recognize now, what we before expressed, that the temperamental element in this case made the proper rôle of the executor and its counsel a difficult one to play, and we exculpate them, as we have already several times done, of every charge of wrong to the plaintiffs.

Nevertheless the proceedings in this case furnish ample evidence that the executor looked on while counsel for the plaintiffs were groping about in the dark, hunting for such a disclosure of the facts as would enable them to make an intelligent statement of the rights of the plaintiffs, and volunteered nothing except an at least apparent insistence that the plaintiffs carry their complaint into the orphans' court. How far the executor was right in this insistence we will discuss later. We refer to it now again, not to question the right of the executor to be thus reticent, nor to question that it may have been its duty to so act, but to make the observation that, if the practical effect of it was to embarrass and hinder the plaintiffs (and this we so find), the defendant is entitled to no more than its strictly legal rights growing out of what was done, and the plaintiffs are entitled to every proper excuse for delays, to which the defendant had thus contributed, if not, indeed, caused.

[5] The other defenses referred to may be bunched as the res adjudicata defense. This brings in a discussion of the jurisdiction of the orphans' court and the rights of claimants (other than legatees or distributees of an intestate estate). It is unnecessary to go into this at length, because exhaustively discussed and most discriminatingly considered in the case of Williams' Estate, 236 Pa. 259, 84 Atl. 848. The orphans' court has undoubted jurisdiction over assets of estates brought into that court by executors or other accountants, and its decree of distribution is as binding and conclusive as that of any other court. It, moreover, has the same power as has every court worthy of the name to vindicate and assert its jurisdiction. Nevertheless there may be persons and property with which the estate is concerned, over whom and which the orphans' court has no jurisdiction. The distinction is not unlike that which pertains between the summary and plenary jurisdiction of a court of bankruptcy. If there is property belonging to an estate which is withheld from an executor without color of right, the orphans' court may compel its delivery. Williams' Estate, supra. If, however, both possession and adverse claim of title (not merely colorable, but substantial) was in another, the orphans' court would have in a proceeding adverse to the claimant no jurisdiction of either the person or the subject-matter. Paxson's Estate, 225 Pa. 206, 73 Atl. 1114.

Where a claimant can reduce a property claim to a money claim, in the form of moneys received to his use, and does so, and goes into the orphans' court to have his claim adjudged, that court can exercise jurisdiction. Cauffield's Appeal, 146 Pa. 49, 23 Atl. 163. An executor or other accountant could bring a dispute over property into the orphans' court by the simple expedient of withholding it from his account, and those interested in the estate seeking to surcharge him, and the claimant to the property resisting it.

Where property was asked to be distributed by the orphans' court, a claimant of the property by title adverse to the estate could appear and ask the court to withhold distribution until the claimant had established his right at law, and the court would have undoubted power to grant his request. By the same token, the court would have the power to decree the surrender of such property to the outside claimant. This is analagous to reclamation proceedings in bankruptcy, and was one of the points ruled in the Williams Case.

A creditor of the decedent having a simple claim of debt could, of course, go into the orphans' court, prove his claim, and secure an award. All this is clear enough. The right of such claimant, however, to pursue any other remedy he may have, is just as clear. A creditor may bring his action at law to reduce his claim to judgment. A ward or legatee, or the beneficiary of a trust, may (outside of proceedings in the decedent's estate) compel an accounting by the executor of a deceased guardian, administrator, or other trustee, or in a proper case file a bill in equity for such accounting, or an action of replevin or other appropriate proceeding might be brought. Indeed, in some classes of cases this might be required of the claimant. If the accounting involved the administration of an estate other than that being distributed by the orphans' court, the accounting must be had in the court having jurisdiction of that first estate, and in no other way could the claimant establish his claim.

There is not only no conflict of jurisdiction involved, but in cases in which the orphans' court has jurisdiction it will not always exercise it, but will send the parties into a court of law, and sometimes it is required by statute to so send them. We get out of what has been stated three thoughts: (1) That there are matters and parties of which and over whom the orphans' court has exclusive jurisdiction; (2) there are other matters and parties where the jurisdiction is concurrent; and (3) there are matters and parties where the jurisdiction is acquired by the submission of the rem and the person to the jurisdiction of the orphans' court. The third proposition must not be confused with, and must be so understood as not to be in conflict with, the other doctrine that, if a court does not have jurisdiction, the parties cannot by agreement confer it.

Just at this point we wish to clear up another misunderstanding by counsel of the ruling made in this case. We had no thought of ruling, nor do we think the language used conveys the thought, that the orphans' court would not have had jurisdiction of the present contention, if the parties had chosen to submit it in any appropriate form of claim. What was said as to adverse claims and the jurisdiction of the court was said with reference to the principle laid down in Okie's Appeal, 9 Watts & S. (Pa.) 156, and with that and kindred cases in mind. The difference between counsel and the court seems to lie in this: We do not doubt (as counsel has erroneously supposed) that the orphans' court would have had jurisdiction, had the plaintiffs submitted to it a claim of indebtedness against the estate, had such a claim been submitted; but we do refuse to find (what counsel seem to argue for) that the plaintiffs were bound to so submit their claim. We hold that neither before nor after this stock was administered and

distributed were the plaintiffs bound to forego their right to have an accounting by their trustee. On the contrary, it was their right to choose the forum. To clearly present this feature, we will discuss it with all questions of laches eliminated and as if the plaintiffs had filed their bill at once.

We hold their right to have been, inter alia, (1) to have done what the executor insisted they should do, submit their claim to the orphans' court as a money claim against the estate; (2) brought an action in assumpsit for money had and received to their use, to recover a judgment; (3) agreeing with those concerned and with the executor that the ownership of this stock should be determined by the executor formally refusing to account for the stock and the court being asked to surcharge the executor, or by equivalent proceedings indicated in Williams' Estate, supra; or (4) by filing a bill to compel the trustee (through his executor) to account for the property belonging to the estate. The legal consequence of each of these moves would have been: (1) The orphans' court would have received proofs of the plaintiff's claim and have awarded at the audit of the estate whatever was allowed; (2) the plaintiffs would have presented at the audit their judgment in proof of their claim, and this (subject to the res inter alios acta principle) would have been accepted by the orphans' court as conclusive of the amount due plaintiffs; (3) the orphans' court would have heard the evidence and made its award thereunder; and (4) the plaintiffs would submit the decree secured in the proceedings in equity (if a money decree) with the same effect as if it had been a judgment at law. If (what is not in this case) the decree of the chancellor compelled the executor to deliver up specific property, the executor would ask to be relieved from accounting for it in the orphans' court. If, pending a decision in (2) or (4), the orphans' court were asked to distribute the property, the plaintiffs could petition that court to withhold distribution. If they did not so ask, or if the court refused, plaintiffs would be confronted with the precise question which defendants now present.

The orphans' court was not applied to in this case, and the stock which constituted the corpus of this trust estate was sold and distributed by decree of the orphans' court. What is the legal effect of this decree upon the right of the plaintiffs to a decree for an accounting? If we were asked for a decree that the executor deliver this stock to the plaintiffs, inasmuch as such decree could only operate through an order upon the executor as the individual who had and was to transfer the property, the decree of the orphans' court would protect the executor, and the decree asked of this court would be denied, for reasons which we think are obvious. As, however, the decree asked for is a money decree, and a finding simply of the sum due on the accounting, we see in the decree of the orphans' court no hindrance to such a decree being entered by this court.

We have advisedly confined the question to the *legal effect* of the decree of the orphans' court because this, as before intimated, may be a different thing from the practical consequences. If the whole estate of a decedent be distributed before a creditor secures payment of his money and there is no other estate, he is in the same situation

of any plaintiff who has secured a judgment, but is unable to find any property of the defendant out of which to satisfy. The latter fact is no more reason for denying judgment in the one case than the other. If there are assets still in the hands of the executor, or after discovered assets are found, he can present the judgment as proof of his claim, and this judgment (subject to the qualification before stated) would be conclusive of the liability and the amount. There is nothing inconsistent or conflicting in the two decrees. If the decree of the orphans' court was too soon for the plaintiffs' purposes, that was due to their delays, not to the diligence of the court.

The res adjudicata principle upon which one branch of the defense is based has no application. The orphans' court never did adjudicate the question now presented, and full effect can be given to both decrees. That the orphans' court had jurisdiction to make an adjudication does not prove that they did. What it did decree was that the executor sell and transfer certain assets of the estate. This the executor has done, and what was thus decreed cannot be disturbed by the plaintiffs, or by any one, except through and by an application to that court. This decree will, however, in no way interfere with that court at a second audit of the estate, should there be one, giving full effect to any final decree of this court, and awarding the remaining assets of the estate as it may deem proper. To sum it all up: The decree of this court has no other effect and is in no wise different in this respect from a judgment which the plaintiffs might have obtained in an action at law in the common pleas, and is not otherwise affected by the decree of distribution in the orphans' court.

[6] Another branch of defense is that after the sale of this stock the executor, no longer being in possession of the res, cannot be called upon to account, and that the claim of the plaintiffs became one of a creditor only, and their only remedy that of securing a judgment in an action at law. For this are cited Thompson's Appeal, 22 Pa. 16; Lebanon Estate, 166 Pa. 622, 31 Atl. 334; Commonwealth v. Tradesman, 250 Pa. 372, 95 Atl. 574.

We see no value in this defense, and none is probably meant to be asserted beyond that of the statute of limitations, which has already been discussed. The proposition as laid down, however, is far too broad. As an assurance against an overstatement of what the position of counsel for defence is, we quote the language in which it is stated. This is that, when there is no longer possession of the specific property belonging to the trust estate, the claim of the cestuis que trustent is that "of a creditor only, and their only action one at law," and that a trustee, or at least the estate of a deceased trustee, is not "bound to account when he has not possession of the res."

There is involved in the position of counsel another one, not stated, which has merit, to wit, that if the cestuis que trustent resort to an action at law (to which, of course, they could resort, if they so elected) the statute of limitations might in a proper case be successfully pleaded, and the further position that, where the statute would be a good defense at law, the same defense in principle may be interposed in equity. This, however, is an "if" proposition, and not the one

before us. The question is, in its broadest form, whether a trustee, who has sold the trust property and converted the proceeds to his own use, is thereby relieved from his obligation to account, and is subject only to an action in assumpsit. The statement of the proposition would seem to carry with it its own refutation. It certainly would not apply to a defaulting executor, whether the executor himself, or his executor, if he were deceased, was cited to account, because the accounting there must be in the orphans' court. We think there is the same liability to account if the accountant, instead of being an executor and required to account in the orphans' court, were the kind of a trustee who could be required to account in the court of common pleas sitting either (under the Pennsylvania system) as a court of law or in equity. Here, again, the accounting might be of such a character and of such complexity as to compel a resort to equity. There might, of course, be this difference: That the obligation of the trustee was such as that the cestuis que trustent could waive their right to an account and sue in assumpsit.

The question before us is a very different one, not whether they might sue in assumpsit, but whether they were bound to do so. In other words, whether a defaulting accountant (or his executor) could deprive them of their right to an accounting. The answer would seem to be so clearly indicated as not to require statement. None of the cases cited indicate anything to the contrary. The rulings there made were based upon the physical fact (rather than upon any legal principle) that the trust property had disappeared or could not be followed.

The necessities of the case required the court to find that the cestuis que trustent could not take any specific property, but must content themselves with a money claim, and such money claim gave them no priority of payment out of general funds over other creditors. It is proverbial that "necessity knows no law." This, therefore, is a practical result finding, and not a ruling that the *legal effect* was to limit the rights of the claimants.

The ruling heretofore made by this court, which seems to be thought to have some bearing, clearly has none. The ruling was that no successor would be appointed to a trustee, where there were no duties to be performed and the trust had become a mere "dry trust," and where the property formerly held in trust had become the property of the beneficiaries. The reasons for so ruling are obvious.

[7] This brings us finally to a finding of the proper principle upon which the accounting is to proceed, or, if this were an action at law, the proper measure of damages. We have already indicated what we think to be the proper principle. We find ourselves unable to agree with the views of either party. They both seem to us to be wrong, or, in the favorite expression of a famous character in Silas Marner, to be "both right and both wrong." They are both wrong in the view in which they seem to be in accord that the act of the executor in disposing of this trust property has the same legal effect as if the trustee had himself converted it to his own use.

The plaintiffs assert that they are within the principle laid down in

Montgomery v. Reese, 26 Pa. 143. Were this an action for damages against John Alexander for the wrongful conversion by him of the property of the plaintiffs, the principle applied by counsel for plaintiffs might be invoked. Its application to this case under its facts would affront the sense of justice of any one. An illustration is afforded by the demand for "dividends plus interest and compound interest," and for stock privileges given after the stock was sold.

[8] The theory of fact upon which the plaintiffs were permitted to recover was that their father held this stock for them, and that they consented to his retaining the dividends received to be held for their use against a rainy day. He was acting solely for their good, without compensation or other profit to himself. They made no demand upon him for the money, or even suggested that they desired the arrangement made for their benefit to end or be changed in any way. Because he did this helpful act for them, the suggestion that he be mulcted for it by being required to pay to them more than what of theirs he has is a repellant thought. There would, of course, be some equity in the other thought that he should hand over what he had received with its accretions. The demand of the plaintiffs that he do more than this partakes too much of "the cake and penny too" characteristic. Had the decedent converted to his own use property which he held in trust, and attempted to keep it to himself by repudiating the trust, his cestuis que trustent could demand from such trustee the highest value of that of which he had deprived them, or the greatest possible sum he had received from its detention. The cost to the beneficiaries of the benefit of this rule would be that, the trust relations having been ended and repudiated, they must establish their rights within the time limit prescribed by the statute of limitations for actions at law and the doctrine of laches in equitable proceedings. The very familiar saying that "a party cannot blow hot and blow cold at the same time" applies to these plaintiffs. Had it been found to be the fact that the father in this case had broken faith with his children, so as to subject him to the measure of liability now asked to be applied, they would have lost out altogether, because they would have convicted themselves of laches many times over. Having been acquitted of laches on the theory that the father held for them under an acknowledged and recognized trust up to the time of his death, and that there was because of this no requirement on their part to bring an action or file a bill in equity, and in consequence no date from which a statute of limitations would begin to run or laches attach, they surely cannot now be heard to demand an accounting on the theory of an opposite state of facts.

The situation presented as a concrete case is this: Had the case been tried on the theory of a tortious conversion of trust property by the trustee, the call upon the beneficiaries to assert their rights would have begun, and they clearly would have been out of court by their failure to assert them. The case was, however, tried and ruled upon the opposite theory and finding of facts that the trust existed and was recognized and acknowledged by the trustee up to the time of his death, and hence there was no need for the cestuis que trustent, and no call upon them, to do anything to establish a trust which was not denied,

and hence no laches on their part. Having so found, we surely cannot yield to a demand that we now reverse the finding and award an accounting on the basis of an opposite finding of facts. Such a reversal, if we did so yield, would lead to a dismissal of plaintiffs' bill.

Counsel for plaintiffs seem to be strongly imbued with the thought that the executor did a wrong thing in not recognizing the existence of the trust and the ownership of the plaintiffs in these shares of stock, and that in consequence the estate must be visited with all the consequences of an attempt by a trustee to convert the trust property. In other words, he treats the estate (represented by the executor) as if it were the original trustee, and because certain accounting liabilities would have been visited upon a trustee for such bad conduct, the same consequences are visited upon the estate. The fallacy lies in ignoring the fact that there was nothing tortious or wrong in what the executor did, because it parted with the property in obedience to the decree of the orphans' court; and if the practical consequences resulted in loss to the plaintiffs, they themselves brought this about by not sooner asserting their rights.

[9] It only remains to consider the bearing which the fact of the indebtedness of John S. Alexander and of Archibald A. Alexander to the estate has upon the present decree. We have already found that indebtedness to be ———, and $3,500, respectively.

The length of this opinion is already so great that we have room only for a statement of our conclusion. They clearly have no bearing upon the accounting balance to be found, because these counterclaims are not within the well-known principles of a set-off. At the same time, none of these plaintiffs can be heard to ask that equity be done them without themselves being willing to do equity. The principle invoked, therefore, is that none of them should be permitted to take anything out of the funds of the estate until the one receiving has paid into the estate what he owes. Nothing, however, can be taken out of this estate by the plaintiffs, except through and by a decree of the orphans' court. When, therefore, further assets of the estate (if there should be any) come to be distributed, if the situation presented is that some of these claimants by this decree are shown to be entitled to a certain sum, and are shown also to be indebted to the estate, the court distributing the fund for distribution will apply the proper principle by its decree. It may, of course, turn out that there is no estate out of which the judgment now rendered can be realized. If so, the plaintiffs are in the position of having secured a judgment which they cannot collect, because they delayed the presentation of their claim so long that all the assets out of which they might have been paid have passed beyond their reach.

We therefore confine ourselves to the one matter before us, which is to find the sum which upon an accounting by the trustee or on his behalf is due the plaintiffs. This is done in the formal decree filed herewith.

Decree.

And now, February 8, 1917, this cause came on to be heard for an accounting, and to be further heard in such accounting at this term

and was argued by counsel; and thereupon, upon consideration thereof, it was ordered, adjudged, and decreed (in accordance with equity rule 71 [198 Fed. xxxviii, 115 C. C. A. xxxviii]) as follows, viz.:

1. The prayers of the bill filed in said cause for decrees against the Fidelity Trust Company (individually), Corn Exchange National Bank, and Lucien H. Alexander, three of said defendants, are denied.

2. The said bill is dismissed as against said Fidelity Trust Company as an individual defendant, with costs to said Fidelity Trust Company.

3. The said bill is dismissed as against the said Corn Exchange National Bank, one of said defendants, with costs to said Corn Exchange National Bank.

4. The said bill is dismissed against Lucien H. Alexander, one of said defendants, without costs.

5. John Alexander, in his lifetime and at the time of his decease, had and held 60 shares of the capital stock of the said Corn Exchange National Bank (represented by certificate No. 562) in trust for the plaintiffs, together with all dividends paid by said bank thereon since the dividend declared and payable in May, 1877, for which he, in his lifetime, and said Fidelity Trust Company as his executor, since his decease, was liable to account as such trustee to the plaintiffs as beneficiaries of said trust, and the prayer of said bill for an accounting by said executor is granted.

6. On said accounting so decreed there is found to be due by the estate of John Alexander, deceased, to said several plaintiffs the respective sums following:

Archibald A. Alexander, assignee of John S. Alexander	$2,735.00
Archibald A. Alexander	$2.735.00
Mary C. Alexander	$2,735.00

—or a total sum due by said estate of $8,205, together with interest on said respective sums from July 24, 1896. This decree is to operate as a decree solely for the payment of money; it being further decreed that the said plaintiffs recover of and from the estate of the said decedent the sums above mentioned, respectively, with interest.

7. The said plaintiffs are further allowed their costs, to be paid by the estate of said decedent.

WEINSTEIN v. STUDEBAKER CORP.

(District Court, E. D. Pennsylvania. December 29, 1916.)

No. 3948.

1. SALES ⊂=413—ACTION FOR BREACH—ISSUES AND PROOF.

Under a contract by defendant, a manufacturer of automobiles, to deliver cars on orders from defendant f. o. b. Detroit, to be paid for on or before such delivery, plaintiff could not recover damages for failure to deliver, without proof that it gave shipping directions, and of its readiness to make payment, or of waiver of such condition.

[Ed. Note.—For other cases, see Sales, Cent. Dig. §§ 1166–1169; Dec. Dig. ⊂=413.]

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2. APPEAL AND ERROR ⊜882(14)—INSTRUCTIONS—ISSUES AND THEORIES OF CASE.

A party cannot complain that a case was submitted to the jury on his own theory of the issues, whether such theory was or was not correct.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. § 3604; Dec. Dig. ⊜882(14).]

At Law. Action by Jacob I. Weinstein, trustee in bankruptcy of the Wallace Automobile Company, Incorporated, against the Studebaker Corporation. Sur rule for new trial. Rule discharged.

Jos. Sternberger and Fox & Rothschild, all of Philadelphia, Pa., for plaintiff.

Sheldon F. Potter and Sheldon Potter, both of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. This case affords an illustration (although it is not quite a characteristic instance) of that class of contracts in which fact and substance are wholly ignored, and fiction and form are made to do duty in their stead. In fact and substance the business proposed by the parties to be done was the manufacture of automobiles by the defendant, to be delivered to the plaintiff's bankrupt at a price, and to be sold by the latter at another price, and to be paid for on delivery. The gross profit to the bankrupt would therefore be the difference between the prices thus fixed and its net profits this difference, less freight and the expenses of selling the automobiles to the ultimate purchasers. To accomplish this an agreement was made in anticipation of the contract of sale. To secure to the manufacturer all the benefits of such a transaction, without any of its attendant risks, certain writings were made and signed. These are not with flippancy, but with earnestness, characterized by counsel for defendant, as a jumble of a contract of sale which was no sale, an agency agreement which created no agency, an order for automobiles and its acceptance, which was neither an order nor an acceptance, a contract of bailment where there was no bailment, and, to crown all, provisions were added that the agreements might be annulled, and the order, or its acceptance, canceled at will, and claims for any breaches of the contract were waived. In fact, he charges the agreements with being so one-sided, inequitable, and lacking in mutuality as to be absolutely void, and so meaningless as to be unenforceable. We may accept his characterization without the concession of the right of his client to make a hard bargain and then refuse to abide by it. Indeed, this seemingly difficult accomplishment of traveling in opposite directions at one and the same time and of attaining the unattainable was nevertheless accomplished through the simple expedient of entering into an agreement setting forth the terms and conditions upon which any orders given by the bankrupt for automobiles and accepted by the defendant were to be deemed to have been accepted. The arrangement between the parties was all embodied in writings, the only features of which now of importance to us are the following (at least, these will serve as illustrations of all which now concern us):

There are two of these writings—the preliminary paper and the order and its acceptance already mentioned. The preliminary paper was not to take effect until and unless automobiles were ordered, and the acceptance of the order automatically incorporated the preliminary agreement as a statement of the terms and conditions of acceptance. The automobiles ordered were to be delivered f. o. b. cars at Detroit, and shipped to Philadelphia, consigned to the bankrupt, but were to be paid for before or at the time they were put on the cars. There was a provision that the defendant might, at its option, ship to Philadelphia with sight drafts accompanying bill of lading; the consignee paying the freight. There was also a provision that nothing done by the defendant should be construed as a waiver of any of the benefits of the contract or estop it from thereafter insisting upon its strict fulfillment. There was the further stipulation that the defendant should not be answerable for its default, due to strikes or casualties, and should not be responsible for any failure to ship or ship promptly, due to delays in manufacture, and that the defendant might declare the agreement off at any time, and should be under no obligation to deliver any automobiles previously ordered, but as yet undelivered. The bankrupt filed with the defendant an order for 300 automobiles, and the order was accepted subject to the terms of the preliminary agreement. The order set forth the times of delivery and the number and kind of cars to be delivered at each of the times mentioned. Some cars were delivered, but none at the times called for in the original order. The order was in part canceled by the bankrupt, and this resulted in a cancellation of a further part of the order under the terms of its acceptance. The cars which were shipped came to Philadelphia, with sight drafts accompanying the bills of lading, and for some of them the defendant extended indulgence in the time and mode of payment. The bankrupt further asked and was granted the privilege of accepting deliveries of one type of car ordered and not accepting another type, the order for which was canceled. The bankrupt neither paid nor offered to pay for any cars at time of shipment.

The action is by the trustee in bankruptcy, the claim being made for the lost profits on the cars not delivered, less those the order for which was canceled, and less also cars which were to have been shipped before the date when the first cars were shipped. The reason for this latter deduction will later appear. It is clear that the transaction as arranged between the parties was in substance this:

The cars to be sold by the bankrupt to its customers had not been manufactured. The bankrupt did not know how many it could sell, nor did the defendant know how many it would be able to manufacture, nor how rapidly it could turn them out. Neither party was willing to bind itself by a hard and fast contract. Their agreement therefore was nothing more than a tentative estimate of what each expected, or at least hoped to be able to do. The defendant sought to protect itself by the reservation of at least two rights. One was to withhold deliveries unless the cars were paid for before or on delivery. The other was, if the demand for cars was accompanied with the offer of payment, to terminate the contract. If it had the cars to spare, it

was in a position to let them go. If it did not have them, it could end the contract. As long as the bankrupt was content to accept such number of cars as the defendant was able to send, the dealings could drift along.

The bankrupt was not so happily circumstanced, but it was confronted with a very practical situation. It could not expect the defendant to make an absolute agreement to deliver, unless it made an absolute agreement to pay for the cars when delivered, whether purchasers had been found or not. It therefore accepted the only agreement it could get. There was a well-founded expectation that the defendant would be as willing as itself to fill orders for all cars which could be sold. It did not attempt to force the delivery, because it knew this would result in the contract being called off. It was therefore content to plead for the cars it wanted, instead of demanding them.

The discussion of the defense took a wide range and issues of fact were presented to the jury which had no proper place among the real issues. The trial was conducted by both counsel with signal ability and earnestness. If the trial tactics employed were open to question, it was in the bringing into the defense of some extraneous matters and an over-anxiety on the part of plaintiff to meet anticipated defenses. One of these features of defense now made the subject of complaint was the charge that the defendant had been deceived and misled into making the contract by a false show of credit and financial strength on the part of the bankrupt. It is now asserted (and perhaps with truth) that this prejudiced the jury against the plaintiff. Obviously this had no bearing upon the issue of performance, except that so far as deception was admitted to have been practiced by a witness it went to his credibility. The evidence thus made of defensive value was not only in the case without objection, but was introduced, and its value first discussed and presented to the jury for appraisement, by the plaintiff himself. The introduction of this evidence could not, therefore, be permitted to disturb the verdict. To the mind of the trial judge it had no value or bearing upon the real issues, and in his opinion was best disposed of by ignoring it and directing the attention of the jury to those real issues as the only ones.

[1] With respect to the legal merits of the case as presented, and as in strictness it should have been presented, there is this to be said: The contract as written called for delivery to plaintiff f. o. b. cars at Detroit upon payment there made. The plaintiff was to pay the freight and assumed the risks of carriage. It was in consequence its right to select and name the carrier. It became, in further consequence, the first actor, and could not claim for a failure of the defendant to deliver until it gave shipping directions and stood ready to make payment accompanying delivery. Kunkle v. Mitchell, 56 Pa. 100.

Plaintiff did nothing, and in still further consequence had no right to recover anything, unless this feature of the contract was waived or changed. The best, therefore, which could be done for the plaintiff, was to submit this question of waiver. This was done, and therefore

the plaintiff has no cause to complain. Logically, if a waiver was found, the plaintiff was entitled to a verdict, and nothing remained except to assess the damages. These might have been anything from nominal to the full amount claimed. Inasmuch as the defendant fixed the selling price of the automobiles, this price might have been taken, at least prima facie, as the market value, and the damages determined on this basis.

[2] During the trial of the cause this thought was suggested by the trial judge, and presented to the plaintiff. It was met by the statement that the plaintiff's view was that its damages were on what was virtually an agent's commission basis, and it was therefore necessary to prove its ability to make sales. This it sought to do, and the trial judge accepted and presented its theory to the jury. Counsel for defendant also asserted this theory to be the correct one. If this was error (as it may be it was), it is an error of which the plaintiff cannot now complain.

The trial judge was fully justified in submitting the case on this theory, because it would have been an injustice to plaintiff for the trial judge to have jeopardized plaintiff's case by insisting upon giving instructions to the jury more favorable to the plaintiff than those for which it asked. After taking the position which was taken, it was too late to return to the other, and the court was not bound to charge otherwise than was done.

The verdict may be practically accounted for by either of two possible findings. The jury may have found no waiver, and in consequence no breach. It is practically possible they found the waiver, but no damages. In the latter event, there should have been a verdict for the plaintiff for nominal damages. It would have been well if the jury had been specifically so instructed. This was, however, the logic of the charge, which the jury must be taken to have appreciated and applied. This feature of the trial is of practical value only as affecting costs, and the error is of the too remotely possible kind to justify disturbing the verdict.

The financial ability of the bankrupt to handle business and its ability to make sales had, it must be kept in mind, a bearing upon the question of the breach of the contract, because bearing upon the question whether the nonreceipt of cars was due to the default of the defendant, or due to the fact that the bankrupt did not really want the cars delivered, either because it could not finance its business, or because it had no sale for the cars.

The real complaint of the plaintiff is voiced in the refusal of the trial judge to affirm those of its points which set forth its right as matter of law to have a verdict directed to be rendered in its favor, because it had introduced evidence, and the defendant had not, or at least to have the jury instructed that the preponderance of the proofs was in its favor. To have so charged would have been a usurpation of the functions of the jury, and to relieve the plaintiff of the burden placed upon him to prove the facts affirmatively to be established.

The rule for a new trial is discharged, and defendant may enter judgment on the verdict in its favor.

WELCH et al. v. UNION CASUALTY INS. CO.

In re O'NEIL, Ins. Com'r, et al.

(District Court, E. D. Pennsylvania. February 1, 1917.)

No. 1655.

1. COURTS ⊜493(3)—STATE AND UNITED STATES COURT—RECEIVERS—STOCKHOLDERS' SUIT—DISSOLUTION.

A bill by nonresident stockholders of an insurance company, which alleges that by reason of mismanagement and misappropriation of the corporation's funds by its former officers it had become financially embarrassed and was pressed by a number of suits by its policy holders and creditors, but was not insolvent, and if its assets and the misappropriated funds could be recovered it could pay its liabilities, including its capital stock, that it transacted business in nine different states, and had assets and liabilities therein, and praying for the appointment of a receiver, seeks relief different from that sought in statutory proceedings in the state court by the Attorney General on information of the insurance commissioner to dissolve the corporation, and the appointment of the federal receiver prior to the decree of dissolution in the state court, but after the institution of the state proceedings, will not be vacated on petition of the state insurance commissioner and Attorney General.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1349-1352; Dec. Dig. ⊜493(3).]

2. COURTS ⊜500—JURISDICTION—STATE LAWS—APPOINTMENT OF RECEIVERS.

Act Pa. April 23, 1909 (P. L. 167), providing that, whenever a receiver of a corporation is appointed by any court of the commonwealth on motion of the Attorney General at the instance of the insurance commissioner, he should forthwith supersede any receiver previously appointed by any decree of any court of the commonwealth, cannot take away the jurisdiction of the federal court under Judicial Code (Act March 3, 1911, c. 231) § 24, 36 Stat. 1091, as amended by Act Dec. 21, 1911, c. 5, 37 Stat. 46 (Comp. St. 1913, § 991), giving federal courts jurisdiction of civil suits at law or in equity between citizens of different states where more than $3,000 is involved, to maintain a receiver in possession of the property of an insurance company at the suit of a nonresident stockholder to preserve its assets and liquidate its debts, notwithstanding a state decree dissolving the corporation at the instance of the commissioner.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⊜500.]

3. COURTS ⊜500—COMITY—APPOINTMENT OF RECEIVER.

Where proceedings were instituted in a state court to dissolve an insurance company and distribute its assets before a bill was filed in the federal court by nonresident stockholders for the appointment of a receiver, but the federal receiver was appointed before the state court took the res into its possession, and there was no advantage to the creditors or stockholders in the state proceedings, while the necessity of ancillary proceedings to administer the corporation's assets and liabilities in other states gives the federal courts distinct advantages, comity does not require the federal court to vacate the appointment of its receiver and deliver the property to the state insurance commissioner.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⊜500.]

4. COURTS ⊜500—JURISDICTION—STATE AND FEDERAL COURTS—COLLUSION.

In such a case, the federal court would not retain jurisdiction, if that jurisdiction had been obtained in bad faith or through collusion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⊜500.]

5. COURTS ⟸500—JURISDICTION—STATE AND FEDERAL COURTS—COLLUSION.
Mere allegations of collusion and bad faith in the petition of an insurance commissioner to vacate the appointment by a federal court of a receiver for an insurance company which had thereafter been dissolved by the state court, which allegations were denied in the answer and not supported by any proof, do not require the federal court to vacate the appointment on the ground of collusion.

[Ed. Note.—For other cases, see Courts, Cent. Dig. §§ 1407, 1408; Dec. Dig. ⟸500.]

6. COURTS ⟸489(1)—JURISDICTION—CONCURRENT JURISDICTION OF FEDERAL COURTS—JUDICIAL CODE.
Under the Judicial Code, which omits the provision, found in earlier judicial acts, that the jurisdiction of the federal court shall be concurrent with courts of the several states, the federal court's jurisdiction at the suit of nonresident stockholders to appoint a receiver for an insurance company is not limited to cases where the state court would have similar jurisdiction.

[Ed. Note.—For other cases, see Courts, Dec. Dig. ⟸489(1).]

In Equity. Suit by Homer G. Welch and another against the Union Casualty Insurance Company. On petition of J. Denny O'Neil, Insurance Commissioner, and Francis Shunk Brown, Attorney General, of Pennsylvania, for revocation of appointment of receiver. Petition dismissed.

J. Howard Reber, of Philadelphia, Pa., for plaintiffs.

Joseph L. Kun, Deputy Atty. Gen., and Francis Shunk Brown, Atty. Gen., for the Commonwealth of Pennsylvania.

THOMPSON, District Judge. The plaintiffs, Homer G. Welch, a citizen of New Jersey, and the Consolidated Investment Company, a citizen of Delaware, filed their bill against the Union Casualty Insurance Company, of Philadelphia, a citizen of the state of Pennsylvania. The following facts are set out in the bill:

The plaintiffs are stockholders of the defendant, a corporation organized under the laws of Pennsylvania, authorized to transact a general casualty and liability insurance business, with a capital stock of $100,000, all issued and full paid, and invested in real estate in Philadelphia, the equipment of its offices, and other lawful investments. The company was incorporated in 1909 and continued its business until 1916. During that period it conducted a large business in nine different states of the United States.

In February, 1916, the management of the business was taken over by H. G. Welch, one of the plaintiffs, L. D. Wood, and other individuals, for the purpose of placing the company on a thorough working and business basis, and for that purpose a substantial amount was invested in the purchase of its capital stock. An investigation resulted in the discovery that the company's business had been grossly and fraudulently mismanaged by its former officers and managers, and its books falsified by them, for the purpose of deceiving the public and the various state insurance departments in the jurisdictions in which it was operating, by writing into its books fictitious insurance for the purpose of increasing its apparent assets from premiums

to be collected, by fictitious cancellation on the books of a large portion of its actual outstanding insurance for the purpose of decreasing its apparent reserve liability, by writing into the books fictitious excess premiums presumably due by reason of pay roll audits under its liability policies, and by suppression and concealment of a large amount of outstanding liability which had accrued under its policies.

Through the improper and fraudulent conduct of the company's business, it had become financially involved, and as soon as the condition was ascertained it stopped the issuing of additional policies, canceled a large portion of the remaining business, and within a short time thereafter reinsured and transferred to another insurance company its outstanding policies, and no new insurance has since then been written. Numerous suits have been instituted against the company and are now pending, and it is embarrassed by threatened proceedings in the different states where it has operated.

It is alleged that, if creditors who have sued and others who have threatened suit are permitted to obtain judgment and issue execution, its assets will be sacrificed, its business ruined, and its creditors and stockholders injured. It is alleged that, although the defendant has no available funds at this time to meet its obligations, it is solvent, and, if a reasonable time is permitted to liquidate its business, its creditors will receive the full amount due them, and its stockholders the full value of their holdings, and the business may be rehabilitated, but if suits are permitted to continue, and the assets disposed of through forced sale or otherwise, they will be sacrificed at but a small part of their real value. In order to preserve and administer the assets, and prevent their being sacrificed and destroyed, the bill prays for the appointment of a receiver and for general relief.

The bill was filed December 18, 1916. On the same day an answer was filed by the defendant company, admitting the allegations in the bill, and joining in the prayer for the appointment of a receiver. Thereupon, on the same day, a decree was entered appointing Samuel W. Cooper, Esq., temporary receiver, with leave to the plaintiffs to move for the appointment of a permanent receiver on January 2, 1917, upon 10 days' notice to all known creditors and parties in interest.

On December 20, 1916, J. Denny O'Neil, insurance commissioner, and Francis Shunk Brown, Attorney General, of Pennsylvania, presented a petition to vacate the appointment of the receiver, representing that on November 15, 1916, the Attorney General, at the relation of the insurance commissioner, had filed in the court of common pleas of Dauphin county his suggestion against the Union Casualty Insurance Company, giving the court to understand that the company was insolvent and that its further transaction of business would be hazardous to its policy holders, to its creditors, and to the public. Thereupon the Dauphin county court granted a rule upon the company to show cause on November 29, 1916, why the insurance commissioner should not take possession of its property, and why the court should not order the liquidation of the business of the company and the dissolution of the corporation, and enjoining the company,

its officers, agents, and employés, from transacting any business of the company or disposing of any if its property.

On November 29, 1916, the company filed an answer to the suggestion, setting forth that, since its incorporation, it had transacted a casualty insurance business in Philadelphia up to May 1, 1916, since which time it has written no new insurance in this state or elsewhere. It denied that it was insolvent, and that a further transaction of business would be hazardous to its policy holders, its creditors, and to the public, and denied any necessity for the appointment of a receiver. On November 27, 1916, the company appeared, by its counsel, in the Dauphin county court, and in open court agreed that December 19th, at 10 o'clock a. m. should be fixed as the time for a hearing.

On December 19th (the day after the entry of the decree appointing the receiver in this case), the Dauphin county court, having taken jurisdiction on November 15, 1916, proceeded to a hearing, and, after full hearing, entered, on the same day, a formal decree, in which it finds that the company is insolvent, and that its further transaction of business will be hazardous to its policy holders, its creditors, and the public, and ordered, adjudged, and decreed that the company—

"be and the same is hereby dissolved, and its corporate existence ended, and the liquidation of the business of said corporation is hereby ordered, said liquidation to be made by and under the direction of the insurance commissioner of the commonwealth and in accordance with the provisions of the act of June 1, 1911 (P. L. 599); and it is hereby further ordered that the said dissolution of said corporation shall take effect upon the entry of certified copy of this order in the office of the prothonotary of Philadelphia county."

The petition alleges that a copy of the decree of the Dauphin county court has been filed as provided by law in the prothonotary's office of Philadelphia county. The proceedings in the Dauphin county court were had and the decree entered under the provisions of the act of assembly of Pennsylvania of June 1, 1911 (P. L. 599), providing for dissolution of insurance companies and the liquidation of their assets, under the supervision of the insurance commissioner of Pennsylvania.

The petition represents that the commonwealth of Pennsylvania has established a complete system for the regulation and control of insurance companies created by it and operating under its laws, and for the liquidation of such companies, and, under the act of 1911, has vested exclusive jurisdiction for that purpose in the court of common pleas of Dauphin county, or the court of any county in which the principal office of such corporation is located. The act of April 23, 1909 (P. L. 167), provides that whenever a receiver of a corporation is appointed by any court of this commonwealth on motion of the Attorney General at the instance of the insurance commissioner, such receiver shall forthwith supersede any receiver previously appointed by the decree of any court of this commonwealth.

The petition represents that the District Court of the United States has no power or authority to decree the dissolution of a corporation created by the commonwealth of Pennsylvania, nor the right or authority to supersede and take away the control vested in the insurance commissioner of Pennsylvania, and the court of common pleas of Dauphin county, or the court where the principal office of an insur-

ance corporation is located, nor the right to wind up the affairs of a Pennsylvania corporation so created and subject to the supervision of the insurance commissioner; that, under the comity existing between the courts of the state and federal courts, this court should regard the proceedings instituted in the court of common pleas of Dauphin county in this case as a state court would be bound to regard them under the laws of the state of Pennsylvania; that the decree of the Dauphin county court, made in this case on November 29, 1916, enjoined the Union Casualty Insurance Company, its officers, agents, and employés, from transacting any of the business of the company or disposing of any of its property; and that the application made in this court in the present suit at the instance of the officers of the company, Linden D. Wood and Homer G. Welch, its principal stockholders, violated both the letter and spirit of the said injunction.

The petition further represents that the application for a receiver made to this court was made in bad faith and for the sole purpose of preventing the Dauphin county court from ordering the dissolution of said corporation and directing the insurance commissioner to wind up its affairs under the laws of Pennsylvania, and for the purpose of securing friendly receivers to be appointed, so that the methods of Linden D. Wood and Homer G. Welch, principal owners of said corporation, in conducting the affairs thereof, would not be investigated or exposed. The petition represents that the order appointing Samuel W. Cooper receiver of said corporation was improvidently made, and prays that the appointment be revoked, and the receiver directed to turn over all of the books and assets of the corporation to J. Denny O'Neil, insurance commissioner, appointed to liquidate said corporation by the Dauphin county court.

Upon the said petition, this court granted a rule to show cause, returnable January 2, 1917. To this petition and rule, Homer G. Welch and Thomas Wood, who is secretary of the Consolidated Investment Company, filed an answer denying that Welch is one of the principal owners of the Union Casualty Insurance Company, and averring that, prior to the hearing in the Dauphin county court on December 19, 1916, the Attorney General and judges of said court were given notice by service of certified copies of the appointment and qualification of Samuel W. Cooper as receiver; that, notwithstanding said notice, the Attorney General proceeded with the hearing and the court entered its decree. The answer denied exclusive jurisdiction of the Dauphin county court, or of the court of any county in which the principal office of the corporation is located, and denied that the jurisdiction conferred by the act of June 1, 1911, in any manner can affect the jurisdiction of this court.

It is pointed out that the suit in equity in this case is not a proceeding for the dissolution of the company, and therefore the act of April 23, 1909, has no application to the facts of this case, refers only to proceedings pending in different courts of the commonwealth, and has no application to a proceeding under the federal jurisdiction. It is claimed that this court has jurisdiction under the bill to appoint a receiver to administer the affairs of the corporation for the purposes

set forth in the bill in equity, and with the powers set forth in the decree in this case.

It is denied that this court should, under the comity existing between state and federal courts, regard the proceedings instituted in the Dauphin county court, and it is claimed that, under that comity, the Dauphin county court, having notice of the appointment of the receiver by this court, should have regarded the proceedings instituted in this court, and should have refused to proceed with a hearing and decree. It is denied that the application for the appointment of a receiver in this case violated the injunction of the Dauphin county court, and it is averred that the bill for the appointment of a receiver in this court was instituted by them as stockholders of the defendant corporation for the sole and exclusive purpose of having the assets and property of the defendant company preserved for the best interest of all of its creditors and stockholders. It is denied that the bill in equity for the appointment of receiver was filed in bad faith and for the purpose of preventing the court of common pleas of Dauphin county from ordering dissolution of the corporation and directing the insurance commissioner to wind up its affairs under the insurance laws of Pennsylvania. It is denied that the bill was filed for the purpose of securing friendly receivers, so that the methods of conducting its affairs should not be investigated or exposed.

It is averred that the sole purpose in filing the bill was to have the affairs of the company administered by the federal courts, thereby removing from its administration any local or factional differences, and so that there might be appointed an absolutely independent and impartial receiver to take charge of the assets, to preserve them, to conduct such investigation as the circumstances might warrant, and it is averred that, if the receiver faithfully performs the duties of his office, by conserving the assets and realizing their full value, and by the institution of legal proceedings against parties who have defrauded the stockholders, or improperly managed the business, he will realize a sum sufficient to pay all claimants of the corporation in full, to hold its stock intact for its full par value, that there will be remaining in the hands of said receiver a substantial sum in addition thereto, and that the corporation, if permitted to do so by the insurance laws of Pennsylvania, can continue as a solvent corporation and properly perform all of its functions.

It is claimed that the affairs of the company can be administered far more successfully, economically, and expeditiously by the federal courts of the United States than by the insurance department of Pennsylvania, that the defendant company's business has been conducted in nine different states in the Union, and it has liabilities and assets in all of said states. It is alleged that there is deposited with the insurance department of the state of Ohio the sum of $50,000; that the receiver appointed by this court has been appointed ancillary receiver by the federal court in Ohio, and has qualified and is now performing his duties under that appointment; that he has assumed the duties of his office, and has proceeded with the performance of the

same, and, if he were ousted from office, it would be to the great detriment of the creditors and stockholders.

The answer attacks the constitutionality of the act of June 1, 1911 (P. L. 599), upon several grounds set forth at length. The answer alleges, upon information and belief, that exceptions to the decree of the Dauphin county court of December 19, 1916, have been filed in that court, and that the decree of dissolution and liquidation is being vigorously contested by the company.

An answer was also filed by the receiver, setting forth that upon his appointment and qualification on December 18, 1916, he took possession of the assets of the company; that on the day of his appointment he was informed of the institution of the dissolution proceedings, and that a hearing would take place on the following day, December 19th, and that, prior to the hearing, he gave notice to the Attorney General and the judges of the Dauphin county court, by service of a certified copy of his appointment and qualification; that the business of the company is most complicated and intricate; that it has been in business for a period of about nine years, during which time it has written thousands of policies of casualty insurance of different classes; that he gave notice of the hearing upon the application to make the receivership permanent to approximately 3,000 creditors and possible claimants, located in nine different states; that the debts of the company consist mostly of balances due by former policy holders and brokers throughout the United States; that he has notified a large number of said debtors, endeavoring to collect the amounts due by adjustment or otherwise; that a number of attorneys throughout the country have accounts in their hands for collection, and, in certain instances, have collected the same and are deducting from the moneys in their hands certain sums due them for services; that among the assets there was deposited with the insurance department of the state of Ohio $50,000; that on December 20th he was appointed ancillary receiver by the United States District Court for the Southern District of Ohio, Eastern Division, and has qualified as such, and that proceedings are pending in Ohio to attach the fund referred to; that there are about 1,000 unadjusted claims and suits filed against the company, many of which are first formal notices, while many others are formal proofs as to the actual damages for which it is claimed the company is liable, and the receiver is of the opinion that many of them can be adjusted on very satisfactory terms; that there are numbers of suits pending against the company in Pennsylvania and elsewhere, which need immediate attention. It is further averred that at this time there are approximately 263 suits pending against policy holders in which counsel has been retained to defend the same; that these cases are on the trial list, and are to be tried at an early date; that until February, 1916, the company was operated primarily through its officers and other parties named, and that apparently during said period its affairs were conducted in an illegal and improper manner.

The receiver sets out in detail alleged illegal acts of those in prior control of its business and their misapplication of its funds. He fur-

ther charges falsification of the books of the company as alleged in the bill. He alleges that, by reason of the improper conduct of the business and the fraudulent appropriation of funds, he, as receiver, is preparing to institute legal proceedings against the parties alleged to be responsible to recover the amounts which he believes have been fraudulently taken from the company; that from the facts so far developed, if the estate is properly and carefully administered, the assets are sufficient to pay all creditors and stockholders in full; that the company is solvent, and that there is every reason to believe that its affairs may be placed in such condition as to enable the defendant company to again operate its business with the permission of the insurance department.

[1] The bill under which the receiver was appointed is a stockholder's bill, and the parties, the rights, and the remedies in this suit differ essentially from those in the proceeding brought in the Dauphin county court at the suggestion of the Attorney General. The bill sets out that, by reason of fraudulent acts of former officers of the company and the misappropriation of its assets, it has become financially embarrassed, is pressed by numerous suits at the instance of policy holders and creditors, and that, while financially embarrassed, it is not insolvent, but that its assets are sufficient to pay its debts; that the appointment of a receiver is necessary to protect the interests of the creditors and stockholders of the corporation, to recover its assets, to recover from its former officials and others moneys misappropriated, and to pay its creditors; that its business is transacted in nine different states in the Union; that it has assets and liabilities in other states than Pennsylvania, and the plaintiffs ask relief which is not similar to that asked for in the statutory proceeding had in the Dauphin county court.

As stated by Judge Gray in the case of Lyon v. McKeefrey et al., 171 Fed. 384, 96 C. C. A. 340, referring to a proceeding under the Pennsylvania Banking Act (Act Feb. 11, 1895 [P. L. 4]) similar to the statutory proceeding had in the Dauphin county court:

"The judicial proceeding is not one that may be instituted by private parties, but by the Attorney General of the state, acting on behalf of the commonwealth and in the interest of the public. Such a proceeding is not one of which a United States court can have concurrent jurisdiction. It does not involve a controversy between private parties, whether citizens of the same state or of different states."

The distinction was pointed out by Judge Wilson in his opinion adopted as the opinion of the Supreme Court in the case of Jones v. Lincoln Savings & Trust Co., 222 Pa. 325, 71 Atl. 209, in the following language:

"All of the specific reasons urged upon our attention by the Attorney General are wrapped up in the contention that, when the court in Dauphin county made its decree appointing a receiver, the bars were raised against any further proceeding by this court under the bill filed here. We are not able to agree with that view of the question, not because we think it to be of any importance who shall receive the fees or commissions that may accrue to a receiver, but because we fail to find in the statute any provision which gives to the proceedings brought in the name of the commonwealth any such exclusive force as is claimed for them. We have not been asked by the plaintiff

to do anything which the statute referred to above authorizes. We are not asked to dissolve the corporation. We are not asked to give time for making good an impaired capital, or to make a decree based upon proofs of unsafe or improper conduct of business. On the contrary, we are asked only to give a relief which is customary, and often afforded, and which has no reference whatever to the remedies of a public character that the statute affords. So far as we can see, there is nothing in any proper action which we have taken, or may hereafter take, in the case, that will interfere with the commonwealth's effecting all that ought to be done, in any interest which needs to be guarded, without impinging upon the previously acquired jurisdiction of this court."

See, also, Treat v. Penna. Mutual Life Ins. Co., 199 Pa. 326, 49 Atl. 84, 85 Am. St. Rep. 788.

The Attorney General, however, contends that the case is ruled to the contrary by the decision of Judge Gray, speaking for the Circuit Court of Appeals for this circuit in the case of Lyon v. McKeefrey, above referred to. In that case Judge Gray followed the ruling in Jones v. Lincoln Savings & Trust Co., and held that the act of 1895, creating a state banking department and providing for the winding up of corporations doing a banking business at the suit of the Attorney General, in case of insolvency or interest of the public, did not impair the jurisdiction of the federal courts to entertain a suit by nonresident creditors of a Pennsylvania corporation doing a banking business and unable to pay its debts as they matured, for the liquidation of its assets and an application thereof to its debts through the agency of a receiver, but that where, after the appointment of a receiver by the federal court, the Attorney General, under the state statute, obtained a final decree dissolving the corporation and appointing a receiver, when purposes for which the federal court's jurisdiction was invoked had been subserved by the payment in full of all of the debts of the corporation, the federal court would not then order the payment of a surplus in the hands of its receiver either to the corporation or to its stockholders, but would order it turned over to the receiver appointed in the dissolution proceedings in the state court for distribution.

[2] It is urged, however, that under the Pennsylvania act of April 23, 1909 (P. L. 167), apparently passed to overcome the effect of the decision in Jones v. Lincoln Savings & Trust Co., supra, which provides that the receiver of a corporation appointed by a state court at the instance of an individual shall be superseded by a receiver appointed at the instance of the Attorney General, this court is bound by comity to stand in the position in which it is contended a state court would stand because of the provisions of that act, and to vacate the appointment of its receiver. Even if the act of 1909 would oust the jurisdiction of a state court of common pleas in a suit like the present, because the statutory dissolution proceedings were pending and a receiver had been appointed under such proceeding, and, if the act had been in effect, it would have ousted the jurisdiction in the case of Jones v. Lincoln Savings & Trust Co., it does not follow that, where a federal court has taken jurisdiction in a suit where jurisdiction is conferred by act of Congress between citizens of different states, its jurisdiction is ousted by the provisions of the state Legislature.

The suit brought in this court comes within the provisions of section 24 of the Judicial Code, as amended by the act of December 21, 1911, providing that the District Courts shall have original jurisdiction of all suits of a civil nature, at common law or in equity, where the matter in controversy exceeds, exclusive of interest and costs, the sum or value of $3,000, and is between citizens of different states. The rights which citizens possess under the Constitution and acts of Congress to bring their suits against citizens of other states in the federal courts place a duty upon the court, where such jurisdiction clearly appears, of retaining jurisdiction unless, upon some ground of public policy, jurisdiction should be relinquished, or unless the right of jurisdiction in the state court clearly excludes the right of this court to retain jurisdiction.

"In Hyde v. Stone, 20 How. 170, 175 [15 L. Ed. 874], it is said: 'But this court has repeatedly decided that the jurisdiction of the courts of the United States over controversies between citizens of different states cannot be impaired by the laws of the states, which prescribe the modes of redress in their courts, or which regulate the distribution of their judicial power. In many cases state laws form a rule of decision for the courts of the United States, and the forms of proceeding in these courts have been assimilated to those of the states, either by legislative enactment or by their own rules. But the courts of the United States are bound to proceed to judgment and to afford redress to suitors before them in every case to which their jurisdiction extends. They cannot abdicate their authority or duty in any case in favor of another jurisdiction. Suydam v. Broadnax, 14 Pet. 67 [10 L. Ed. 357]; Union Bank v. Jolly's Administrators [Vaiden] 18 How. 503 [15 L. Ed. 472].' This principle has been steadily adhered to by this court." Chicot County v. Sherwood, 148 U. S. 534, 13 Sup. Ct. 695, 37 L. Ed. 546.

That jurisdiction, as has often been decided, is vested as a part of the judicial power of the United States in its courts by the Constitution and acts of Congress in execution thereof. Without the assent of Congress that jurisdiction cannot be impaired or diminished by the statutes of the several states regulating the practice of their own courts. McConihay v. Wright, 121 U. S. 201, 7 Sup. Ct. 940, 30 L. Ed. 932. The federal courts have jurisdiction to the same extent in all the states, and state legislation cannot affect it. Boyle v. Zacharie, 6 Pet. 648, 8 L. Ed. 532; Smith v. Railroad Co., 99 U. S. 398, 25 L. Ed. 437.

[3] The right asserted by the Attorney General to have the receiver appointed in a suit where solvency of the corporation is alleged and otherwise properly cognizable under the equity powers of this court, forthwith dismissed, and the property, which has come into his possession as an officer of this court, turned over to the receiver of the Dauphin county court, is claimed to be based upon the ground of comity. Before the bill was filed in this case, the Dauphin county court had not yet taken the res into its possession or control. The extent to which the proceeding had gone consisted only in the filing of the suggestion of the Attorney General, the granting of the

rule to show cause, and a restraining order upon the corporation to prevent its disposition of its property. There is no peculiar advantage to the stockholders or to the creditors pointed out through having the property turned over for administration by the state receiver, and, in view of the business of the corporation having been transacted in several states, the ancillary receivership of the federal court in the state of Ohio, and the probable necessity for ancillary proceedings in other federal districts, where assets are situate, the case seems to be one which peculiarly comes within the advantages of federal jurisdiction. Where the property, as in the present case, is first in the possession of this court, the rule of comity does not require it to relinquish its jurisdiction. Empire Trust Co. v. Brooks, 232 Fed. 641; Moran v. Sturges, 154 U. S. 256, 14 Sup. Ct. 1019, 38 L. Ed. 981; Heidritter v. Elizabeth Oil Cloth Co., 112 U. S. 294, 5 Sup. Ct. 135, 28 L. Ed. 729; In re Johnson, 167 U. S. 120, 17 Sup. Ct. 735, 42 L. Ed. 103; Powers v. Bluegrass B. & L. Association (C. C.) 86 Fed. 705.

[4] A state court would not, under the decision in the case of Jones v. Lincoln Savings & Trust Co., vacate the appointment upon the ground of comity, but because of the act of April 23, 1909, and this court, as has been decided, is not bound by the state statute. But this court would not retain jurisdiction, where on other grounds the jurisdiction of the Dauphin county court should be recognized as having first attached, if the jurisdiction of this court had been obtained in bad faith or through collusion.

[5] There are allegations in the petition to vacate charging that the application for a receiver in this court was made in bad faith and for the sole purpose of preventing the common pleas of Dauphin county from ordering the dissolution of the corporation and directing the insurance commissioner to wind up its affairs, and for the purpose of securing friendly receivers to be appointed, so that the methods of Wood and Welch, the principal owners, should not be investigated or exposed. The allegation of bad faith is denied in the answer of the plaintiffs, and no proof was offered to overcome the effect of that denial, and there is nothing upon the record, except the bare allegation, to show collusion or bad faith.

There is, therefore, no support to the allegation that the proceeding was brought in bad faith. There is nothing in the record of the proceedings in the Dauphin county court, attached to the Attorney General's petition, in any way connecting the plaintiffs in the present action with the proceedings in the Dauphin county court; but the court is asked to assume, because the proceeding was pending in that court, that the bill was filed in this court through collusion or bad faith. There must be something more than a mere statement to that effect to induce the court to act upon such charge. The language of Mr. Justice Peckham in the case of Metropolitan Railway Receivership, 208 U. S. 90, 28 Sup. Ct. 219, 52 L. Ed. 403, is peculiarly pertinent to the present case:

"In this case we can find no evidence of collusion, and the Circuit Court found there was none. It does appear that the parties to the suit desired that the administration of the railway affairs should be taken in hand by the Cir-

cuit Court of the United States, and to that end, when the suit was brought, the defendant admitted the averments in the bill, and united in the request for the appointment of receivers. This fact is stated by the Circuit Judge; but there is no claim made that the averments in the bill were untrue, or that the debts named in the bill as owing to the complainants did not in fact exist; nor is there any question made as to the citizenship of the complainants, and there is not the slightest evidence of any fraud practiced for the purpose of thereby creating a case to give jurisdiction to the federal court. That the parties preferred to take the subject-matter of the litigation into the federal courts, instead of proceeding in one of the courts of the state, is not wrongful. So long as no improper act was done by which the jurisdiction of the federal court attached, the motive for bringing the suit there is unimportant. Dickerman v. Northern Trust Co., 176 U. S. 181, 190 [20 Sup. Ct. 311, 44 L. Ed. 423]; South Dakota v. North Carolina, 192 U. S. 286, 311 [24 Sup. Ct. 269, 48 L. Ed. 448]; Blair v. City of Chicago, 201 U. S. 400, 448 [26 Sup. Ct. 427, 50 L. Ed. 801]; Smithers v. Smith, 204 U. S. 632, 644 [27 Sup. Ct. 297, 51 L. Ed. 656]."

The alleged purpose of obtaining the appointment of friendly receivers is denied in the answer. The allegation was made after the appointment of the receiver, and, standing unsustained by proof, constitutes an unwarranted imputation, not only upon the plaintiffs' good faith, but the good faith and, by innuendo, upon the professional integrity of a member of the bar of the highest standing. It is to be regretted that such an allegation upon the public records of the court should be made without justification. In fact, no suggestion of Mr. Cooper's name was made to the court by any one, and he was not appointed until the court was satisfied that he was not interested in the case or the parties in any manner. It may be concluded, then, that the pending suit was properly brought in this court, that this court has jurisdiction, and that no fact has been brought to the attention of the court to establish collusion or bad faith or any improper purpose in invoking the jurisdiction of this court.

[6] In Judge Gray's opinion in the case of Lyon v. McKeefrey he used certain language which it is insisted by the Attorney General means that the federal court would have had no jurisdiction to entertain the bill in the present case unless the state courts had had such jurisdiction. The language referred to is as follows:

"Assuming the right of the court below to take jurisdiction of the cause, inasmuch as the appellant concedes that right, the court was exercising a jurisdiction concurrent with the courts of the state of Pennsylvania, and it was administering the law of that state. What a state court could have done, it could do. The decision of the Supreme Court of Pennsylvania (Jones v. Lincoln Savings & Trust Co.), above referred to, sets at rest any doubt as to the jurisdiction of the court below to entertain a suit, unaffected by the proceedings in the Dauphin county court of common pleas, under the provisions of the state statute above referred to."

When that case was decided the federal courts had jurisdiction under the act of March 3, 1875, as amended 1887–1888, "concurrent with the courts of the several states." The clause in quotations is omitted from the Judicial Code of March 3, 1911, and if there is any question that the federal courts have jurisdiction under the general equity powers conferred by the Constitution and the acts of Congress, that question does not arise in this case, because of any limitation upon their powers by that clause in effect at that time, but no longer in effect.

If, in this case, the jurisdiction of the federal court were dependent upon the jurisdiction of the state courts in equity, the language, "what a state court could have done, it could do," would apply; but what Judge Gray seems to have meant was, not that the federal court is limited in its powers in equity by the jurisdiction of the state court, but that, wherever an equitable right is created by the statutes of the state, the federal court can administer that right in equity where there is jurisdiction of the parties and of the subject-matter. Clark v. Smith, 13 Pet. 195, 10 L. Ed. 123; Ex parte McNeil, 13 Wall. 236, 20 L. Ed. 624; Smith v. Railroad Co., 99 U. S. 398, 25 L. Ed. 437.

It cannot be assumed that Judge Gray meant to confine the jurisdiction of the federal court over suits like the present one to cases in which the equitable powers of the courts are derived from the powers of the state courts. Fitch v. Creighton, 65 U. S. (24 How.) 159, 16 L. Ed. 596; Hotel Co. v. Wade, 97 U. S. 13, 24 L. Ed. 917. Whenever, in the course of the present suit, the rights of the defendant corporation against its debtors in the several states of the Union in which it has done business have been finally disposed of by the receiver, its assets collected and administered, and its debts paid, if there be any surplus remaining, and the purposes of the present suit have been fully subserved, and if then it is shown that the decree of the Dauphin county court is final, it may be the proper time to invoke the doctrine of Lyon v. McKeefrey, and order the receiver of this court to pay the surplus to the statutory receiver appointed by the Dauphin county court. When the decree of the court below in that case, ordering distribution to the corporation and its stockholders by the receiver of the federal court, was entered, the functions of the receiver in the suit pending in that court had been fully performed.

In view of the conclusions reached, it is unnecessary to pass upon the constitutional questions raised. The purposes for which the bill was filed and the receiver appointed in this court not having been accomplished, the petition of the insurance commissioner and the Attorney General is dismissed, the rule to vacate the appointment of receiver is discharged, and the appointment will be made permanent.

WHITAKER et al. v. WHITAKER IRON CO. et al.

(District Court, N. D. West Virginia. December 26, 1916.)

1. COURTS ⇐347—EQUITY RULES—REQUISITES OF BILL—SUIT IN INTEREST OF OTHERS.

Where a suit in equity is brought in a federal court, not only in behalf of complainants, but also in the interest of others, under equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), the names and residences of such others should be alleged in the bill, so that there may be no question that resident interested parties may not by collusion secure jurisdiction by nonresident representation.

[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⇐347.]

2. COURTS ⊂⊃317—STOCKHOLDER'S SUIT—JURISDICTION—ALIGNMENT OF PARTIES.
In a stockholder's suit in a federal court against the corporation and others, based on a right of action primarily in the corporation, where it is shown that the officers or persons controlling the corporation are opposed to the object sought by the complaining stockholders, the corporation will be aligned with the defendant for jurisdictional purposes.
[Ed. Note.—For other cases, see Courts, Dec. Dig. ⊂⊃317.]

3. COURTS ⊂⊃347—EQUITY RULES—PLEADING—AMENDMENTS.
Under equity rule 19 (198 Fed. xxiii, 115 C. C. A. xxiii), which leaves the allowance of amendments to the discretion of the court, an amendment to a bill may be allowed, although the matter introduced was known to complainant when the original bill was filed.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊂⊃347.]

4. COURTS ⊂⊃347—EQUITY RULES—PLEADING—SUPPLEMENTAL BILL.
An allegation, inter alia, in a supplemental bill, made as a basis for relief not within the scope of the original bill, is not ground for the dismissal or striking out of the supplemental bill, and calls for no action by the court beyond refusing to grant relief based thereon.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊂⊃347.]

5. COURTS ⊂⊃347—EQUITY RULES—PLEADING—MOTION FOR FURTHER AND BETTER PARTICULARS.
In a suit by minority stockholders, attacking transfers of property by and other acts of the corporation as fraudulent by general allegations, the court may properly grant a motion by defendants, under equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv), for "further and better particulars," requiring complainants to set out the ultimate facts relating to the transfers, to the end that the merits of the suit may be more fully presented, and perhaps determined on the pleadings.
[Ed. Note.—For other cases, see Courts, Cent. Dig. § 921; Dec. Dig. ⊂⊃347.]

6. CORPORATIONS ⊂⊃211(6)—SUIT BY STOCKHOLDERS—SUFFICIENCY OF BILL.
A bill filed by complainants as stockholders under equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), against the corporation and others, considered in the light of the corporate records produced at the instance of complainants, *held* to state no cause of action, and dismissed for want of equity.
[Ed. Note.—For other cases, see Corporations, Cent. Dig. §§ 820, 821; Dec. Dig. ⊂⊃211(6).]

7. WILLS ⊂⊃746—STOCKHOLDER'S SUIT—PERSONS ENTITLED TO MAINTAIN—LEGATEES.
General legatees of a testator, who owned stock of a corporation, do not by devolution take title to such stock, which, in the absence of statute changing the common-law rule or special provision otherwise in the will, the executor has full power to dispose of, and such legatees cannot, as stockholders, maintain a suit against the corporation and others, under equity rule 27 (198 Fed. xxv, 115 C. C. A. xxv), as to transactions occurring prior to distribution of the estate.
[Ed. Note.—For other cases, see Wills, Cent. Dig. §§ 1918–1933; Dec. Dig. ⊂⊃746.]

In Equity. Suit by Martha E. Whitaker, individually and as executrix of the will of Carrie C. Updegraff, deceased, and Ruth E. Whitaker, against the Whitaker Iron Company and others. On motions to dismiss amended and supplemental bills. Motions sustained, and bills dismissed.

Martha E. Whitaker, individually and as executrix of the last will and testament of Carrie C. Updegraff, deceased, and Ruth E. Whitaker, "in their own behalf and for the benefit and in behalf of the defendant Whitaker Iron Company and its stockholders and all parties in interest in like situation with themselves," filed in this court, April 7, 1916, their bill in equity against "the Whitaker Iron Company, Whitaker-Glessner Company, Wheeling Corrugating Company, and Portsmouth Steel Company, West Virginia corporations, Alexander Glass, Albert C. Whitaker, and Sarah F. Whitaker as executors of the last will and testament of Nelson E. Whitaker, deceased, and E. C. Ewing, Alexander Glass, and Albert C. Whitaker, individually and as officers and directors of said corporations above named, "or some of them," in which they allege themselves to be citizens of New York and Delaware, respectively, and the defendants to be corporations and citizens of West Virginia; that plaintiffs at the time of the transactions complained of were and are stockholders in the Whitaker Iron Company, their stock having been held in trust during the lifetime of George P. Whitaker's widow, and the same has now reverted to them by her death; that plaintiff Martha E. Whitaker is executrix of Carrie C. Updegraff and has a life interest in her estate; that plaintiff Ruth E. Whitaker is a "legatee heir" of said decedent, and also of George P. Whitaker, deceased, and entitled to a large interest in the one-fifth share held by his estate in the Whitaker Iron Company, and entitled to distribution by reason of his widow's demise; that George P. Whitaker died in Maryland in 1890, his will was probated there, and Nelson E. Whitaker, Joseph Coudon, and another (who resigned) qualified there as "executor trustees," and his estate has not been judicially settled; that by the terms of his will settlement was suspended during the lifetime of his widow, and Coudon is sole surviving "executor trustee" (Nelson E. Whitaker having died in 1909, his will being probated in West Virginia, where the defendants Sarah F. Whitaker, Alexander Glass, and Albert C. Whitaker have qualified as executors thereunder); that the estate of George P. Whitaker comprised, inter alia, a one-fifth interest in the Whitaker Iron Company, and by his will his estate was divided into five equal parts and given to his five children and their heirs; that Carrie C. Updegraff, Ruth E. Whitaker, Martha M. Whitaker, and Porter Whitaker, as heirs of his deceased son, Henry C. Whitaker, are entitled to a one-fifth share of his estate, including a one twenty-fifth interest in the Whitaker Iron Company; that the Whitaker Iron Company was incorporated in 1875 by George P. Whitaker, the Wheeling Corrugating Company in 1890 by Nelson E. Whitaker, Alexander Glass, his son-in-law, Albert C. Whitaker, his son, and E. C. Ewing and another, the Portsmouth Steel Company in 1902 by the same parties, and the Whitaker-Glessner Company in 1903 by N. E. Whitaker, A. C. Whitaker, Alexander Glass, et al., and all these companies engaged in the manufacture of iron and steel, having an aggregate capitalization of about $15,000,000. It is then charged that Alexander Glass, Nelson E. Whitaker, E. C. Ewing, and Albert C. Whitaker were officers, directors, and controlling stockholders in all or some of these corporations, and particularly in the Whitaker Iron Company and the Wheeling Corrugating Company; that in 1892 the Wheeling Corrugating Company leased itself for 25 years to the Whitaker Iron Company, and on September 17, 1900, it sold and conveyed to the Whitaker Iron Company its plant, lands, buildings, etc., in West Virginia and Ohio for a consideration of $250,000; that the Iron Company held the Corrugating Company for some four years, during which time the profits of the latter were large and due to the Iron Company, and it had used the Iron Company's materials without payment, by reason whereof a large balance is claimed to be due from the Corrugating Company to the Iron Company; that from 1903 to June, 1904, the Corrugating Company and its "officer director controlling stockholders" conspired to defraud and deprive the Iron Company and its other stockholders of the ownership of the Corrugating Company and their right to its earnings, profits, etc., and, without knowledge and consent of other interested stockholders of the Iron Company, secretly secured the execution of a "backdated" reconveyance in 1904, from the Iron Company to the Corrugating Company of all the latter's properties, without consideration or payment, or credit to the Iron Company for its four years' operation, management, right to the

good will, earnings, profits, etc., of the Corrugating Company, and no part of said diverted properties, increases, and accretions thereon and thereto have been restored or credited to the Iron Company. It is then charged that in this retransfer the "officer director and controlling stockholder defendants," to their personal gain, defrauded secretly, and without knowledge of the plaintiffs and other stockholders, the Iron Company and its other stockholders; and the bill attempts to indicate, in six particular items, the extent of the loss and damage of the Iron Company sustained thereby. It is further alleged that the Whitaker-Glessner Company was formed in 1903 with $3,000,000 capital, and by deed of January 21, 1904, the Whitaker Iron Company conveyed to it its West Virginia properties for a consideration of 16,760 shares, of par value $1,676,000, of the new company's capital stock. It is then alleged that plaintiffs have never ratified or confirmed this scheme to defraud the Iron Company or the unjust results thereof, have made due demands by written notices and in connection with court action in other jurisdictions upon, and gave complete details to, said defendants and all stockholders of the Iron Company and the other corporate defendants and all fiduciaries, and requested and required them, all and every, to join in securing and conserving the full rights and interests of the Iron Company and its stockholders, particularly of said estate of George P. Whitaker and its heirs, but all the defendants have failed, neglected, and refused so to do, or to take any action in the premises; that "plaintiffs have commenced and prosecute this action through compulsion, on their own behalf and in behalf of the Whitaker Iron Company and its stockholders, and all persons who may be similarly situated as themselves in the premises, and more particularly to protect the interests and rights of the estate of George P. Whitaker, deceased, and its heirs, including themselves, because of the neglect, refusal, and omission of one Joseph Coudon, the sole surviving executor trustee, to take proper action in re after due notice."

The prayers of the bill are numerous, and in the alternative to the effect that the court uphold the conveyance of the Corrugating Company to the Iron Company and annul the conveyance of the latter back to the former, or that the Corrugating Company be held to hold its property in trust for the Iron Company, or require the Corrugating Company to repay to the Iron Company the purchase price paid by it, with interest, and hold the defendants liable therefor, declaring the Iron Company to have owned the property from September 17, 1900, to June 4, 1904, and entitled to all thereof, together with the good will, use, earnings, etc., therefrom, and requiring an accounting thereof; that the Corrugating Company and the Whitaker-Glessner Company, their officers, etc., make discovery and accountings for the 16,760 shares of the latter Company paid for the Whitaker Iron Company's West Virginia properties, and all dividends, rights, accretions thereon, and the same as to the Iron Company's share in the purchase price of its interest in the Portsmouth Steel Company; that defendants make complete discovery and accountings in the premises; that defendants be required to set forth a complete list and description of every date, book, account, record, and writing of whatsoever nature, relating to these matters, and deposit same in the clerk's office of this court; that the defendants be required to account individually for all their dealings and transactions in the premises; and that, pending litigation, some one be appointed to manage the affairs of the Corrugating Company, and all parties be enjoined from interference with such management.

On May 18, 1916, defendants' solicitors entered appearance to this bill, and on May 27, 1916, filed a motion on behalf of all the defendants to dismiss it for (1) failure to comply with equity rule 25; (2) failure to comply with equity rule 27; (3) want of that diversity of citizenship upon which the jurisdiction of this court is invoked, and upon which it must depend; (4) want of equity; (5) laches; (6) because of other defects apparent upon its face. On June 2, 1916, the plaintiffs filed in the clerk's office an amended bill. This amended bill, putting aside verbal and paragraph changes, and arrangements and amplifications of the charges of conspiracy to defraud, and increases in the statements of values and the sums claimed as damages, profits, etc., is but a reiteration of the original. It "prays leave to join Joseph Coudon, of Maryland, in-

dividually, as executor trustee of George P. Whitaker, deceased, and as an officer or director of the Whitaker Iron Company, also all other necessary or proper parties, if any." It further alleges that "since the filing of the bill herein, with full knowledge and notice of this pending action, the defendants herein made and recorded a further deed from said Wheeling Corrugating Company to said Whitaker-Glessner Company, apparently conveying, inter alia, to the latter company said same properties described in the aforesaid deed of September 17, 1900," and, in its prayer, asks the cancellation thereof.

On June 12, 1916, all the defendants, other than Joseph Coudon, not served, filed written motions: (a) To dismiss plaintiff's amended bill; (b) to strike said amended bill from the files; (c) for further and better particulars in writing of certain matters stated in plaintiffs' bill; and (d) for further and better particulars in writing of certain matters stated in plaintiffs' amended bill. The grounds set forth in the motion to dismiss the amended bill are: (1) Because in making "Joseph Coudon, of Maryland, individually, as executor trustee of George P. Whitaker, deceased, and as an officer or director of said Whitaker Iron Company," a defendant, plaintiffs violated equity rule 28 [198 Fed. xxvi, 115 C. C. A. xxvi], inasmuch as his interest was known to plaintiffs when their original bill was filed. (2) Because in making Joseph Coudon, of Maryland, a defendant, plaintiffs ask of this court that for which there is no law, inasmuch as he is a nonresident of this district, and there is no provision of law by which he could be summoned to appear and make defense. (3) Because by setting up the making of the deed of the Corrugating Company to the Whitaker-Glessner Company, and seeking its cancellation, plaintiffs are seeking relief upon matters arising after the filing of their original bill, and have thereby violated equity rule 19 [198 Fed. xxiii, 115 C. C. A. xxiii]; and (4) have thereby made an essential change in the character and objects of the original suit in violation of equity rules 19 [198 Fed. xxiii, 115 C. C. A. xxiii] and 34 [198 Fed. xxviii, 115 C. C. A. xxviii]; and (5) seek to assert a liability against the Whitaker-Glessner Company and Wheeling Corrugating Company only, and not against all of the material defendants to the original suit, in violation of equity rule 26 [198 Fed. xxv, 115 C. C. A. xxv]. (6) Because in their amended bill plaintiffs have not complied with equity rule 25 [198 Fed. xxv, 115 C. C. A. xxv]; nor (7) with equity rule 27 [198 Fed. xxv, 115 C. C. A. xxv]. (8) Because of want of that diversity of citizenship upon which the jurisdiction of this court in this cause is invoked, and upon which it must depend. (9) For want of equity; and (10) for laches.

The grounds alleged in support of the motion to strike from the files the amended bill are: (1) Because, after pleading filed by defendants on May 27, 1916, plaintiffs filed this amended bill without the consent of the defendants, or leave of the court or judge, whereby equity rule 28 [198 Fed. xxvi, 115 C. C. A. xxvi] was violated; and (2) because, while alleging facts occurring after the filing of plaintiffs' bill, the plaintiffs in filing their amended bill, if it be considered as supplemental pleading, violated equity rule 34 [198 Fed. xxviii, 115 C. C. A. xxviii].

The two motions for "further and better particulars in writing" of certain matters stated in plaintiffs' bill and amended bill are based upon equity rule 20 [198 Fed. xxiv, 115 C. C. A. xxiv]. They ask that plaintiffs be required to state: (1) The exact number of shares of the capital stock of the Whitaker Iron Company owned by George P. Whitaker at the date of his death, and by his estate thereafter, showing separately all dividends, cash or stock, received by said estate, and its disposition of such stock, all other receipts by the estate from said company of property and assets distributed in kind by it to its stockholders, and what each plaintiff, and those claiming under them, have received in cash or stock, and of such dividends, and out of the principal holdings of the estate, in shares of the capital stock of the Whitaker Iron Company, and in distribution of the property and assets of said company, and when and what disposition, from time to time, plaintiffs, or those claiming under them, have made of such stock, property, or assets so received; also to state when and how, and to what extent, in shares of the capital stock thereof, plaintiffs, or those claiming under them, became and continued stockholders in the Whitaker-Glessner Company, their stock being held in trust during the lifetime of

George P. Whitaker's widow, and having reverted to plaintiffs by her death as charged in the amended bill; and also so as to state in what manner and to what extent plaintiffs, through said Whitaker-Glessner Company, are interested in all of the corporate defendants, stated separately as to each corporate defendant. (2) So as to state the name and place of residence, so far as plaintiffs may be informed, of each of the heirs of George P. Whitaker, deceased, interested in the trust created by his will referred to in both bills. (3) So as to state the name and place of residence, so far as plaintiffs are informed and believe, the names of the corporators, stated separately, of the Whitaker Iron Company, the Wheeling Corrugating Company, the Portsmouth Steel Company, and Whitaker-Glessner Company. (4) So as to state, with particularity, the official position, either as officer or director, and his ownership of stock in the Whitaker Iron Company, the Wheeling Corrugating Company, and the Whitaker-Glessner Company, of Alexander Glass, Nelson E. Whitaker, E. C. Ewing, and Albert C. Whitaker, at each and all times mentioned in paragraph IX of amended bill. (5) So as to state, upon plaintiffs' information and belief, the profits of the Wheeling Corrugating Company during the four years mentioned, and so as to state the years the Corrugating Company used the Iron Company's materials without payment, and what materials are referred to. (6) Referring to paragraph XI of the amended bill and paragraph X of original bill, so as to state the facts and not the conclusion of the pleader upon the several subjects, and the times and occasions referred to, and so as to state the name of each of the "officer director controlling stockholders" of the four corporate defendants, stated separately, charged with the doing of the acts described therein, and also so as to state the entire facts about said whole proceeding mentioned therein and, according to the best of the knowledge, information, and belief of plaintiffs, giving the names of the "said official majority as individuals" as to each company on each occasion. (7) So as to state the facts, and not the conclusion of the pleader, upon the subjects mentioned in paragraph XII, amended bill, giving names of the "other interested stockholders" of the Iron Company, the names of the defendants who met, and what plans and designs they concerted; so as to state who agreed to procure the "back-dated reconveyance," when and where and who agreed to divest "other valuable rights and properties" of the Iron Company from said Company, and divide same among themselves to their individual personal profit at the corresponding loss of the Whitaker Iron Company and its other stockholders. (8) Paragraph XIII (amended bill), so as to state facts, and not conclusions of pleader, as to matters therein mentioned, and give names of defendants charged with acts set forth therein. (9) Paragraph XIV (amended bill), so as to state the entire facts relative to the transaction, the particular properties of the Iron Company included therein, with the inventoried values thereof, what disposition the Iron Company made of the 16,760 shares of Whitaker-Glessner Company stock received by it, and so as to state what of said proceeds of shares of stock Geo. P. Whitaker's estate received in partial distribution by the Iron Company of part of its property and assets in kind amongst its stockholders, and also so as to state what of that stock each plaintiff, or those claiming under them, received from said trust estate, and when, and what disposition thereof, from time to time, plaintiffs, or those claiming under them, have made. (10) Paragraph XV (amended bill), so as to state the facts, and not the conclusion of the pleader, to name each of the "officer director and controlling stockholder defendants" charged, to state what "properties and accretions thereto" of the Iron Company have not been "restored or credited to said Whitaker Iron Company" and have been wrongfully retained by the individual defendants charged, and stating the names of such individual defendants, what they received, and what they severally wrongfully retain. (11) Paragraph XVI (amended bill), so as to state the facts, and not the conclusion of the pleader, as to the matters therein mentioned, and so as to state the names of the "other stockholders" of the Iron Company without whose knowledge, consent, and authority the deed of reconveyance from the Iron Company to the Corrugating Company was made, and so as to state what alleged secret corporate meetings, agreements, consents, and resolutions are referred to, and when said corporate meetings

were held, and who participated therein. (12) Paragraph XVII (amended bill), so as to state the names of the defendants who made and recorded the "further" deed from the Corrugating Company to the Whitaker-Glessner Company, the properties described in the deed of September 17, 1900, and said "reconveyance deed," which are "apparently" conveyed by said "further" deed, so as to state the names of "said individual defendants" charged to "further profit greatly" by such "new transfer," and how and to what extent they severally profit, stated separately as to each, and wherein the Iron Company and its stockholders suffered such loss and injury, and of what such loss and injury consists as to each of such "other stockholders." (13) Paragraph XVIII (amended bill), so as to state the facts, and not the conclusion of the pleader, so as to state the name of each of the "individual defendants" thereby charged to have unlawfully and personally profited in the stock, etc., diverted from the Iron Company and its other stockholders, particularly said estate of Geo. P. Whitaker and its heirs, and stating by what stock, and the number of shares thereof, what moneys, and the amounts thereof, what properties, and what money's worth, belonging to the Iron Company, each of the "individual defendants," the Corrugating Company, the Whitaker-Glessner Company, and the Portsmouth Steel Company, stated separately, have so unlawfully profited; and so as to state with particularity whereby and wherein and to what extent said estate of George P. Whitaker and its heirs and plaintiffs suffered.

On June 20, 1916, a hearing was had upon these several motions, in chambers at Parkersburg, where arguments of counsel were heard, the plaintiffs moved for leave to file the amended bill (filed without leave of the court) nunc pro tunc, and the defendants (other than Coudon not served) filed, in support of their motions "for further and better particulars" (plaintiffs, by counsel, objecting to the filing thereof), a "statement of facts as they are and as they were known to plaintiffs and to plaintiffs' counsel before the bringing of this suit," supported by 60 exhibits—consisting of transcripts from the minutes of the Whitaker Iron Company (Nos. 1 to 14, inclusive, certified to by the president and secretary and under seal of the company); transcripts from the minutes of the Wheeling Corrugating Company (Nos. 15 to 18, inclusive, certified to by its president and secretary under its seal); financial statements, lists of stockholders, record of stock transfers, and individual stockholders' accounts of the Whitaker Iron Company and the Wheeling Corrugating Company (Nos. 19 to 38, inclusive, certified to, under seals of these companies, by the secretary of the former and the treasurer of the latter); call for and notice of special general meeting of stockholders of Whitaker-Glessner Company, dated June 18, 1913 (No. 39); alleged copy of contract, of date July 8, 1913, between Martha E. Whitaker, executrix of Carrie C. Updegraff, and Ruth E. Whitaker, of the first, and Louis Gutman, W. L. Glessner, A. C. Whitaker, E. C. Ewing, and Alex. Glass, of the second, part, whereby the parties of the first sell to the parties of the second, upon terms and conditions set forth, 282 shares held by said Martha E. Whitaker as executrix, and 94 shares held by Ruth E. Whitaker individually, of the capital stock of the Whitaker-Glessner Company (No. 40); call for and notice of a special general meeting of stockholders of the Whitaker-Glessner Company, dated March 30, 1916 (No. 41); copies of correspondence between counsel for plaintiffs, with defendant Alex. Glass and one of counsel for defendants (No. 42 to 59, inclusive); and notice given by and affidavit of counsel for plaintiffs (No. 60)—all of which exhibits appear to sustain said "statement of facts," which is as follows:

"In 1900 the Whitaker Iron Company acquired the Wheeling Corrugating Company for $250,000 in Whitaker Iron Company stock. In doing that two distinct methods were used—one by which the Wheeling Corrugating Company conveyed its property and assets to the Whitaker Iron Company, which assumed payment of the liabilities of the Wheeling Corrugating Company; and the other by which the individual stockholders of the Wheeling Corrugating Company assigned and delivered their stock to the Whitaker Iron Company and received in return $250,000 in Whitaker Iron Company stock. Thus the Whitaker Iron Company became the owner of all the property and assets,

as well as the entire capital stock, of the Wheeling Corrugating Company. From the time of that transfer in 1900 to near the close of 1904, the business of the Wheeling Corrugating Company was conducted by the Wheeling Corrugating Company in its own name, as the business had theretofore been conducted; but its entire capital stock, consisting of 2,255 shares, was owned by the Whitaker Iron Company and voted at stockholders' meetings of the Wheeling Corrugating Company by said Whitaker Iron Company, except 6 shares, which by action of that company's board of directors September 26, 1900, were transferred to six different persons, so as to qualify them to serve as directors of the Wheeling Corrugating Company.

"Toward the close of 1904 the Whitaker Iron Company, together with the Laughlin Nail Company, entered into an arrangement for the organization of the Whitaker-Glessner Company, whereby a certain plant of the Whitaker Iron Company, then an operating company, in Wheeling, was to be transferred to the Whitaker-Glessner Company, and a certain other plant of the Laughlin Nail Company, then an operating company in Martin's Ferry, Ohio, was to be transferred to the Whitaker-Glessner Company. In addition to its plant in Wheeling the Whitaker Iron Company agreed to transfer to the Whitaker-Glessner Company 2,255 shares of the capital stock of the Wheeling Corrugating Company, and to sell to the Whitaker-Glessner Company the good will of said Wheeling Corrugating Company. At that time the Whitaker Iron Company was the owner of all of the capital stock of the Wheeling Corrugating Company aside from the 6 qualifying shares mentioned, and also held the legal title to all the property and assets of the Wheeling Corrugating Company. When said property came to be appraised by the interests of the Laughlin Nail Company, the other party to the formation of the Whitaker-Glessner Company, it was noticed that the Wheeling Corrugating Company had divested itself of all its property and assets by its transfer to the Whitaker Iron Company in 1900, but that the Whitaker Iron Company was also the holder of all of the capital stock of said Wheeling Corrugating Company. Thereupon, to give to the 2,255 shares of Wheeling Corrugating Company stock the value of $1,322,900.79, and its good will the value of $255,200, at which they were being sold to the Whitaker-Glessner Company by the Whitaker Iron Company, the Whitaker Iron Company and the Wheeling Corrugating Company, by unanimous vote of their stockholders and by action of their respective boards of directors, rescinded the action whereby the Wheeling Corrugating Company conveyed its property and assets to the Whitaker Iron Company, as was done in 1900; but the acquisition of the capital stock of the Wheeling Corrugating Company by the Whitaker Iron Company, in 1900, as the other method adopted to acquire the Wheeling Corrugating Company, was ratified and confirmed, and, following such corporate action in 1904 by the two corporations interested, the Whitaker Iron Company conveyed, and the Wheeling Corrugating Company received back, the same property that had been conveyed in 1900.

"From the time in 1900 when the Whitaker Iron Company bought the Wheeling Corrugating Company for $250,000 in Whitaker Iron Company stock to the time in 1904 when the Whitaker Iron Company made the reconveyance to the Wheeling Corrugating Company the net earnings of the Wheeling Corrugating Company had been allowed to accumulate; and this caused it to come about that in the formation of the Whitaker-Glessner Company the Whitaker Iron Company received for the 2,255 shares of the capital stock of the Wheeling Corrugating Company and for the good will of the Wheeling Corrugating Company the sum of $1,676,000, which was paid to it by the Whitaker-Glessner Company in 16,760 shares of the capital stock of the Whitaker-Glessner Company, of a par value of $100 per share. The Whitaker Iron Company disposed of its 16,760 shares of Whitaker-Glessner Company stock on January 27, 1904, by ordering a distribution in kind amongst its own stockholders of shares of Whitaker-Glessner Company stock equivalent to a 300 per cent. dividend on its own $500,000 capital stock, making 15,000 shares, and delivered in pledge 1,500 other shares to Robert C. Dalzell, as trustee, as collateral to secure the bonds of the Portsmouth Steel Company, then a sub-

sidiary corporation, and retained in its own treasury 260 other shares, thus making the total of 16,760 shares.

"Pursuant to ordering the distribution to its own stockholders of the 15,000 shares of Whitaker-Glessner Company stock January 27, 1904, the Whitaker Iron Company on March 15, 1905, by action of its stockholders and directors, had the Whitaker-Glessner Company issue and deliver the 15,000 shares direct to and amongst the said stockholders of the Whitaker Iron Company, according to their respective interests, and in that distribution the estate of George P. Whitaker received 1,500 shares, that number of shares being the equivalent of a 300 per cent. dividend upon the 500 shares of Whitaker Iron Company stock the estate then owned. This holding of 1,500 shares of Whitaker-Glessner Company stock by the George P. Whitaker estate was increased 750 shares by a 50 per cent. stock dividend declared by the Whitaker-Glessner Company April 30, 1910, and thereby that estate came to own 2,250 shares of Whitaker-Glessner Company stock.

"The estate of George P. Whitaker, pursuant to a decree of the circuit court of Cecil county, Md., filed April 17, 1912, in equity cause No. 2913, made a distribution of these identical 2,250 shares of Whitaker-Glessner Company stock, and on June 12, 1912, Martha E. Whitaker, as executrix of Carrie C. Updegraff's will, received from said estate 282 shares of Whitaker-Glessner Company stock, her full distributive share, and on June 12, 1912, Ruth E. Whitaker received from said estate 94 shares of Whitaker-Glessner Company stock, likewise her full distributive share. The estate of George P. Whitaker, deceased, is now the owner of 500 shares of stock of the Whitaker Iron Company.

"Martha E. Whitaker, as executrix of the will of Carrie C. Updegraff, deceased, is entitled as one of the plaintiffs to an undivided one-tenth interest in the estate of George P. Whitaker, deceased; Ruth E. Whitaker, the other plaintiff, is entitled to an undivided one-thirtieth interest in the estate of George P. Whitaker, deceased; together plaintiffs are entitled to an undivided four-thirtieths interest in the estate of George P. Whitaker, deceased. But neither plaintiff is a stockholder in the Whitaker Iron Company, the Whitaker-Glessner Company, the Wheeling Corrugating Company, nor the Portsmouth Steel Company."

On August 1, 1916, this court entered an order, sustaining defendant's motions for further and better particulars to the extent of requiring plaintiffs to show the character and extent of the stock holdings, if any held by them, or those under whom they claim, in the Whitaker Iron Company at the time the corporate transactions complained of occurred, reserving all other questions involved in these motions, and requiring plaintiffs to file such statement in the clerk's office on or before September 5, 1916, under penalty of dismissal of the bills without further order. Reasons for this order were set forth in a written memorandum filed by the court and made part of the record.

On August 29, 1916, plaintiffs, in accord with the requirements of this order, filed a recital of particulars, to be added to paragraph V of their amended bill and taken as part thereof, in which they allege that "under equity rule 27, etc., that at all times mentioned in the (amended) bill and in this supplemental bill herein, and at the times of the transactions and happenings of which they complain, namely, from 1891 to date (amended bill V–XV), and prior to and at the commencement of this action, plaintiffs were and they now are shareholders in said defendant Whitaker Iron Company of its capital stock, or that their shares in said stock of said company had devolved on them by operation of law since said transactions and happenings and prior to the commencement of this action." This direct and unqualified allegation of stock ownership is, however, modified by subsequent statements that their stock interests arise through the will and estate of George P. Whitaker, who had five children, Caroline, Nelson E., Cecil, Edmund, and Henry, who died in Indiana in 1868; that said will leaves one-fifth of his estate to the two heirs of his son Henry, who are Carrie C. Updegraff, deceased (represented by plaintiff Martha E. Whitaker as executrix), and George P. Whitaker, Jr.; that George P. Whitaker, Jr., died intestate in Hawaii in 1898; that letters of adminis-

tration have not issued on his estate. It is alleged, however, that it is represented by plaintiff Ruth E. Whitaker as distributee and heir. On September 6, 1916, plaintiff appears to have also filed in the clerk's office of this court what purports to be a copy of the will of George P. Whitaker, deceased, although not authenticated or certified.

On October 2, 1916, defendants (other than Coudon, not served) filed in writing, in the clerk's office, their motion to dismiss the original, amended, and this supplemental statement or bill, for substantially the same reasons set forth in their former motions, and the further one that this supplemental one failed to comply with the court's order of August 1, 1916.

On October 9, 1916, plaintiffs filed in the clerk's office a notice demanding that defendants and their counsel, within eight days, serve upon their counsel at a given address a bill of particulars stating in detail how and wherein plaintiffs' supplemental bill fails to comply with the court's order of August 1, 1916, and in exactly what respects same fails to comply therewith, and giving notice that plaintiffs object to defendants' motions "re the amended bill and the bill herein as premature, cumulative, and irrelevant, the only matter before the court being the question of jurisdiction."

On October 17, 1916, at Wheeling, at the regular term, a general hearing was had upon all the several motions of plaintiffs, and defendants and the plaintiffs' objection to the consideration of the minute and stock records filed by defendants, upon oral arguments of counsel, their briefs filed, and such hearing was continued until October 21, 1916, for further argument by an absent counsel for defendant, but which on that date was waived, and court took time to consider of its judgment.

Henry A. Brann, Jr., of New York City, for plaintiffs.

George R. E. Gilchrist and John A. Howard, both of Wheeling, W. Va., for defendants.

DAYTON, District Judge (after stating the facts as above). The very earnest insistence of counsel for plaintiffs that their bills herein should be entertained, and the just as earnest contention of counsel for defendants that they should be dismissed, not alone on jurisdictional grounds, but for want of equity, has caused me to make the foregoing statement of the facts and pleadings more extended than was possibly necessary. Upon a final analysis it is clear that plaintiffs, as alleged stockholders, or persons upon whom shares of stock have devolved by operation of law, are seeking redress upon behalf of the corporation, for alleged fraudulent mismanagement, misapplication, and conversion of the corporation's property and assets, by its officers, directors, and majority holding stockholders.

The basis of fact for these serious charges practically reduces itself to this: The Wheeling Corrugating Company in 1900, 16 years ago, sold and conveyed its plant to the Whitaker Iron Company for $250,000. The Iron Company held and operated this plant, so purchased, for 4 years, and then, in 1904, by a "back-dated" deed, reconveyed it to the Corrugating Company, and in that year both companies were merged in the Whitaker-Glessner Company. Based upon these admitted facts, the charges of fraud, misapplication, and conversion are made to the effect that, during the four years' operation by the Iron Company of the Corrugating Company, the profits earned by the latter were large and were not accounted for to the Iron Company; that material of the Iron Company was used and not accounted for to it; that the conveyance back to the Corrugating Company was

without consideration; and that, by the merger with the Whitaker-Glessner Company, other profits, etc., rightly due the Iron Company, were diverted by the individual defendants or some of them.

It is clearly intended to be a "stockholder's bill," as defined by equity rule 27, and must meet its requirements. Before, however, discussing this phase of the case, I think it well to consider some of the other matters arising upon the several motions of defendants to dismiss, strike from the files, and require further and better particulars.

[1] It is insisted that none of these bills comply with new equity rule 25 (198 Fed. xxv, 115 C. C. A. xxv), which takes the place of former rules 20, 21, 22, 23, and 24. Construing this rule in State of Maine Lumber Co. v. Kingfield Co. (D. C.) 218 Fed. 902, Judge Thomas holds that, where plaintiffs set forth that they are "acting, not only in behalf of themselves, but also in behalf of such other creditors of and claimants against the defendants," without more information, without setting forth the names, citizenship, and residence of such parties, the bill violates this rule, and can be dismissed by the court on its own motion, citing Florida C. & P. R. R. Co. v. Bell, 176 U. S. 321, at page 325, 20 Sup. Ct. 399, 44 L. Ed. 486.

This cause is brought by plaintiffs "in their own behalf and for the benefit and in behalf of the defendant Whitaker Iron Company and its stockholders and all parties in interest in like situation with themselves." The Iron Company is a West Virginia corporation, and a reasonable inference may be drawn that some of its stockholders, in whose interest and behalf this suit is brought, as set forth in the above allegation of the bill, are citizens of this state. Jurisdiction in federal courts, where no federal question is raised, will never be presumed, but must be clearly shown. If the suit is brought in the interest of others, their names and residences should be alleged, so that there may be no question that resident interested parties may not by collusion secure jurisdiction by nonresident representation.

[2] Defendants' counsel go farther, and insist that want of diversity of citizenship is affirmatively shown, by reason of the fact that the suit is brought on behalf of the Iron Company, an admitted West Virginia corporation; that it should therefore be properly aligned as a plaintiff, and, if so, diversity of citizenship would be destroyed, a simple condition thereby arising of a West Virginia corporation suing its West Virginia officers and stockholders. This contention is not tenable in this case. Street, in his most excellent work on Federal Equity Practice (section 562), disposes of it in this language:

"Inasmuch as these suits are always technically based on a right of action primarily vested in the corporation itself, it has been suggested that, in theory, the corporation ought always to be treated as being in the same right with the actual plaintiff stockholder. But this is untenable. The true rule is apparently found in the proposition that in a suit in equity, instituted by a stockholder in his own name, but upon a right of action existing in his corporation, the stockholder's corporation will be aligned with the defendants whenever the officers or persons controlling the corporation are shown to be opposed to the object sought by the complaining stockholder, and when such opposition does not appear the stockholder's corporation will be aligned with the complainant in the suit. In other words, it is not so much the actual interest in the fruits of the suit that determines the alignment of the par-

ties as it is the position of the corporation as shown in the record"—citing Greenwood v. Freight Co., 105 U. S. 13, 26 L. Ed. 961; New Jersey Cent. R. Co. v. Mills, 113 U. S. 249, 5 Sup. Ct. 456, 28 L. Ed. 949; Groel v. United Electric Co. (C. C.) 132 Fed. 252; Hutton v. Joseph Bancroft & Sons Co. (C. C.) 77 Fed. 481; and De Neufville v. N. Y., etc., R. Co., 81 Fed. 10, 26 C. C. A. 306, but the last with criticism.

Defendants' counsel further insist that plaintiffs' bills do not meet the requirements of rule 27 as construed by the Supreme Court in Wathen v. Jackson Oil Co., 235 U. S. 635, 35 Sup. Ct. 225, 59 L. Ed. 395. Confining this objection solely to the verification of the bills and the allegations thereof as to plaintiffs' efforts to secure action by the corporation itself, I am inclined to hold this rule sufficiently complied with. Its requirement as regards their stock holdings I propose to consider later on.

[3] By the making of Joseph Coudon, of Maryland, individually, as "executor trustee" of George P. Whitaker, deceased, and as an officer or director of the Whitaker Iron Company, a defendant to the amended bill, it is insisted equity rule 28 has been violated, inasmuch as his (Coudon's) interest was known to plaintiffs when they filed the original bill, and Ross v. Carpenter, Fed. Cas. No. 12,072, is cited. This case, however, was construing rule 29 of the rules of 1842 (subsequently promulgated as No. 29 in the rules of 1866–1911) which provided that a bill was not amendable after replication filed, unless the plaintiff shows that "the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced." This old rule has been entirely superseded by No. 19 of the new rules, which leaves the allowance of amendment wholly to the discretion of the court. I would not be inclined to sustain a dismissal on this ground alone.

It is contended further, in this particular, that in making Coudon a party plaintiffs ask of the court that for which there is no law, as he does not reside in this district, does not appear to be within it, and there is no provision by which he can be summoned to appear and make defense. This contention is sound, but subject to this modification: That while he may not appear to be in the district, yet it does not follow that he may not be found in the district within the time that summons to appear is allowed to run before made returnable by the marshal to the clerk's office. Therefore, if I regarded Coudon as a necessary party, and the right to entertain the cause dependent upon his being served, I would not be inclined to dismiss until process had been issued and returned "not found."

[4, 5] Defendants further contend that, by setting up in the amended bill as a cause of action the making of the deed by the Corrugating Company to the Whitaker-Glessner Company, and asking its cancellation: (a) They are making an essential change in the character and object of the original suit, thereby violating rules 19 and 34; and (b) they are seeking to assert a liability against these two corporation defendants alone, and not against all of the material defendants to the original suit, in violation of rule 26. I think both of these contentions sound. I do not think the remedy, however, would extend beyond a refusal to consider such allegations and to grant relief because

thereof. So far as our American equity practice is concerned, some new and very interesting questions arise upon defendants' motion for further and better particulars, based upon rule 20, which is a new one, adopted from the English one (Order XIX, rule 7), and reads as follows:

"A further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just."

It is apparent at once that resort to this rule may very materially aid a litigant in ascertaining what case he has to meet and prevent him from being taken by surprise at the trial. It may be invoked also for the purpose of tying down the party required to give such statement to the actual case he proposes to make, stripped of all otherwise extraneous matters inferable from the general character of his pleading. But the appeal to it here is for a much broader purpose. The defendants substantially assert that plaintiffs in these bills have made general charges of fraud, while if they had stated in detail the ultimate facts, such facts would disclose: (a) That the Iron Company, in acquiring the Corrugating Company, employed two methods, one by having the plant conveyed, the other by having the stockholders sell and transfer to it their stock holdings, whereby it became the holder of the legal title to the physical plant and property of the Corrugating Company, and at the same time became the owner of all of its capital stock, and for both paid one consideration, $250,000 in issues of its own stock; (b) that for a period of four years the two companies operated independently of each other, as they had done before, and the earnings of the Corrugating Company were allowed to accumulate; (c) that when the Whitaker-Glessner Company was formed, in 1904, the Iron Company then sold to it all this capital stock of the Corrugating Company, and, to give such stock the value it was entitled to, made reconveyance to the Corrugating Company of the plant for the same consideration it had paid for it, and received from the Whitaker-Glessner Company, for this stock of the Corrugating Company, 16,760 shares, of the par value of $1,676,000, of the Whitaker-Glessner Company's stock, of which stock, so received, the Iron Company distributed to its individual stockholders 15,000 shares, of which the estate of George P. Whitaker was entitled to and received 1,500; that (d) under court proceedings, in Maryland, where the "executor trustee" of this estate qualified and resided, a distribution in kind was ordered in 1912 of these 1,500 shares, and some other shares which the estate had received, whereby plaintiff Martha E. Whitaker, as executrix, received 282 shares, and the plaintiff Ruth E. Whitaker received 94 shares, these being the full distributive share each was entitled to; and, finally, (e) that in July, 1913, both these plaintiffs sold these shares, so allotted to them, by written contract, to Louis Gutman and others.

To support these assertions, they tender the verified minutes and financial statements of these companies and a copy of the sale contract, of which two originals were executed and each side may be

presumed to possess one, to the filing of all which the plaintiffs object and move to strike out. Is the scope of this equity rule 20 broad enough to permit defendants to bring in the ultimate facts in this way, and seek a speedy dismissal of the suit as a vexatious one, or must they set up these matters in an answer, and await the delay of a regular hearing? So far as I can discover, no decisive construction of the full scope of this rule has been as yet rendered by the courts of this country. Adopted, as it has been, from the English rules, the construction given by the courts of that country must be considered as strongly persuasive. The eighth edition of the old standard English work, Daniell's Chancery Practice (volume 1, at pages 328, 329), discusses the matter, cites authorities, and strongly intimates that the scope of the rule may be as broad as here contended for, always, however, subject to the discretion of the court as to whether particulars shall precede discovery, or discovery precede particulars.

It would seem that such a conclusion is just and right; that while such a broad scope to the rule, in most cases, is not required and should not be allowed, yet in some exceptional ones it should be, in order that injury may not be done and justice may be promoted. I am constrained to believe this case to be such exceptional one, for these reasons:

First—It is to be borne in mind that this is alleged to be a stockholder's suit. The law is well settled, by a vast number of decisions, that such suit can be brought for only a few purposes; that the grievance must be clearly shown to be real and not simulated, calculated to cause irrreparable injury, and that every means of redress within the corporation itself has been exhausted, or clearly shown to be unnecessary and futile by reason of hostile control. In the absence of actual fraud, or a breach of trust or duty, courts of equity will never entertain these bills for the purpose of questioning the wisdom or lack of wisdom of sales and transfers of corporate property regularly authorized by the company's stockholders and consummated by its directors, at the instance of minority stockholders asserting that better sales could be secured or that better business policy dictated such sales should not be made. In all these cases, as said by Mr. Justice Wayne, in the leading case of Dodge v. Woolsey, 18 How. 331, 15 L. Ed. 401:

"It is obvious, from this rule, that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought"—approved in Hawes v. Oakland, 104 U. S. 450, 26 L. Ed. 827.

When it is considered what injury may, in many instances, be done to the reputation of a going and solvent corporation by reason of having its management assailed by vexatious suits of this character at the instance of minority stockholders, it seems to me to inevitably follow that, before entertaining such a bill, a chancellor should carefully and cautiously investigate the circumstances, and that this rule 20 may be beneficently given its broadest scope to enable him to promptly do so.

[6] Second—In this case the bills clearly disclose that the plaintiffs had no individual right to representation and to participate as stockholders in the corporation at the time the acts complained of were

consummated. It is admitted that whatever interest they had at that time was solely as heirs and distributees of George P. Whitaker, whose will vested all such interest in a trustee fully vested with power to represent such interest. No other stockholder, at the time the transfers were made, or for that matter since, has joined them in their complaint or signified any dissatisfaction over the actions taken. It is also clearly apparent from these bills that these plaintiffs profess to have no definite knowledge of the practical effects of the transfers complained of, or of the amounts that they charge the managing officers to have fraudulently realized therefrom. In fact, they are careful to make all these charges of fraudulent misapplication and misappropriation upon information and belief only, and they pray very specifically for discovery from the parties themselves, to the extent of asking:

"That said designated defendants, and the legal representatives thereof, be required to set forth a complete list and description of every date, book, account, record, and writing of whatsoever nature relating to or connected with the aforesaid matters, or any of them, which now are or ever were in their possession or control, or state where same can be found, if removed therefrom, and deposit the same in the office of the clerk of this court for inspection."

Now that the defendants have substantially complied with this prayer, I am not inclined either to reject or refuse to consider these records at the instance of these plaintiffs so asking their production; and in this condition of things I am constrained to believe that only a very few facts drawn from these records will be necessary to show that plaintiffs' charges are groundless and they have no standing in equity. The bill charges that the Iron Company bought the Corrugating Company on September 17, 1900, for $250,000, and that on January 21, 1904, some three years and four months thereafter, the Iron Company "conveyed its West Virginia properties to the former company (Whitaker-Glessner) for a consideration of 16,760 shares of the lattter's capital stock, par value $1,676,000." These records show the fact to be that the Iron Company sold to the Whitaker-Glessner Company the capital stock of the Corrugating Company alone for this price of 16,760 shares, par value $1,676,000, and that 15,000 of these shares were distributed in kind to Geo. P. Whitaker's estate, from which plaintiff Martha E. Whitaker, executrix, received 282 shares, and plaintiff Ruth E. Whitaker 94 shares. The contract filed shows that they have sold these shares to Gutman and his associates for $115 per share. Taking the facts admitted by the bill, and supplement them with the few above stated from these supplied records, it is apparent that these officers, directors, and controlling stockholders, so bitterly charged with fraud, mismanagement, and corruption, in fact secured by purchase for their corporation, charged to have been defrauded in the premises, the Corrugating Company for $250,000, and in less than three years and a half thereafter sold it for more than six times the price given for it, taking in payment stock at par which in fact was worth and was actually sold by these plaintiffs at an advance of $15 on the $100 par value. This purchase and sale of the Corrugating Company, it is to be borne in mind, was consummated

more than a decade ago, when there were no unusual business conditions, such as now exist, to advance prices for such properties. Comment is hardly necessary. It is reasonable to infer, I think, that a good many corporation stockholders in this country would be really delighted to be "defrauded" in this way.

Third—It is well settled that any minority stockholder seeking redress must act promptly. Laches in such matters should always put a chancellor upon guard, and cause him to more carefully ascertain the circumstances and facts before assuming jurisdiction in the premises. Here more than 16 years have elapsed since the purchase was made of the Corrugating Company, more than 12 since the "backdated reconveyance" and the sale to the Whitaker-Glessner Company was made, and more than 2 years elapsed, after plaintiffs sold their stock, before they instituted this suit.

[7] In the memorandum opinion heretofore filed, I expressed doubt as to whether plaintiffs are entitled to be considered stockholders of the Whitaker Iron Company. I then held that the determination of that question must depend largely upon the terms of George P. Whitaker's will, which was not before me, and upon whether or not plaintiffs held, by any other independent title, shares of stock in the Iron Company. For this reason, I required the supplemental bill or statement to be filed by plaintiffs touching these two points. This supplement discloses that plaintiffs hold no stock other than as distributees of George P. Whitaker's estate, which they claim has devolved by law upon them. Whether this is so or not must depend upon the construction to be given the Whitaker will. An authenticated copy of it is not yet filed in the cause, but what purports to be an unauthenticated copy of it is presented by plaintiffs, which seems to be conceded by defendants to be a true copy. From it, it is clear that testator first directed his stock in the Iron Company, and other personalty to be held in trust for the benefit of his widow and upon her death to go into his residuary estate, which residuary estate was to be divided equally between his five children, but advancements made to and debts owing from these children were to be ascertained from his books and accounted for by each in the distribution. He then adds:

"My sons Henry C. Whitaker and Cecil N. Whitaker being dead, the share of Henry C. I hereby direct to be paid and distributed to his children, Carrie Whitaker and George P. Whitaker, Jr., share and share alike."

Plaintiffs take only through Carrie Whitaker and George P. Whitaker, Jr., and then take only such sum of the whole residuary estate, now in the hands of the Maryland executor and not yet finally settled, as shall remain after the estate has been settled, this stock and other personalty has been reduced to money, and the amounts, if any, that Henry C. Whitaker may have owed his father, the testator, are charged and accounted for. I cannot see, from the terms of this will, the slightest ground for assuming that any shares of the Iron Company's stock, in kind, have or can devolve by law upon plaintiffs, unless, by agreement between them and the executor of the estate, they are transferred to and accepted by them in lieu of the money the will gives them. These plaintiffs, not having been stockholders at any

time in the Iron Company, and none of its stock having devolved on them by law, they had no right "to put the wheels of justice in motion and to proceed to the final determination of a cause upon the pleading and evidence" (Railroad Co. v. Adams, 180 U. S. 28, 34, 21 Sup. Ct. 251, 45 L. Ed. 410), show "no standing in a court of equity, no right in himself [themselves] to prosecute this suit," and the cause must therefore be dismissed, not alone on jurisdictional grounds, but finally for want of equity, under authority of Hawes v. Oakland, 104 U. S. 450, 462, 26 L. Ed. 827, Huntington v. Palmer, 104 U. S. 482, 26 L. Ed. 833, Quincy v. Steel Co., 120 U. S. 241, 7 Sup. Ct. 520, 30 L. Ed. 624, Illinois Cent. R. Co. v. Adams, 180 U. S. 28, 34, 21 Sup. Ct. 251, 45 L. Ed. 410, and Venner v. Great Northern Ry., 209 U. S. 24, 34. 28 Sup. Ct. 328, 52 L. Ed. 666.

The Supreme Court, within the last two weeks in Christopher L. Williams, as Receiver, v. John P. Cobb, 242 U. S. 307, 37 Sup. Ct. 115, 61 L. Ed. ——, says:

"At common law * * * an executor has full power, without any special provision of the will that he is administering or order of court, to sell or dispose of the personal assets of the estate, and thereby to pass good title to them. Munteith v. Rahn, 14 Wis. 210; In re Gay, 5 Mass. 419; Leitch v. Wells, 48 N. Y. 585; Perry on Trusts, §§ 225, 809. A sale by an executor, even to himself, is not void, but only voidable at the option of interested persons. Grim's Appeal, 105 Pa. St. 375; Tate v. Dalton, 41 N. C. 562. And if, after such purchase from himself, an executor sells to another, the purchaser from him acquires a good title. Cannon v. Jenkins, 16 N. C. 426."

We have, in West Virginia, no statute changing this common-law rule. It is in full force with us. It is clear, therefore, that the title to George P. Whitaker's stock in the Iron Company vested and remains in Coudon, his executor.

KELLEY v. AARONS et al.

In re GIBRALTAR INVESTMENT & HOME BLDG. CO.

(District Court, S. D. California, S. D. January 11, 1917.)

1. BANKRUPTCY ⊂⊃282—UNPAID STOCK SUBSCRIPTIONS—SUIT IN EQUITY.
Where a corporation became bankrupt although stock subscriptions to a considerable amount were unpaid, the trustee in bankruptcy may maintain a representative suit in equity against the subscribers, who numbered about 3,000, many of whom were insolvent; it appearing that a collection of the subscriptions from the solvent stockholders was necessary to discharge the corporate liabilities.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 426; Dec. Dig. ⊂⊃282.]

2. CONSTITUTIONAL LAW ⊂⊃70(1)—PROVINCE OF JUDICIARY.
It is the province of the judiciary to declare the law as it is, and not as the court deems it.

[Ed. Note.—For other cases, see Constitutional Law, Cent. Dig. §§ 129, 132, 137; Dec. Dig. ⊂⊃70(1).]

3. BANKRUPTCY ⊂⊃293(1)—TRUSTEES—RIGHTS OF—PLENARY SUIT.
Bankr. Act July 1, 1898, c. 541, § 2, cl. 7, 30 Stat. 545 (Comp. St. 1913, § 9586), declares that courts of bankruptcy shall have jurisdiction to cause

the estates of bankrupts to be collected, reduced to money, and distributed, and determine controversies in relation thereto, except as otherwise provided, while section 23b (Comp. St. 1913, § 9607) declares that suits by the trustee shall only be brought or prosecuted in the courts where the bankrupt whose estate is being administered by such trustee might have brought or instituted them if proceedings in bankruptcy had not been instituted. A corporation became a bankrupt, although subscriptions to its capital stock were unpaid. Many of the subscribers were nonresidents, and the trustee in bankruptcy sought to sue the subscribers generally by a plenary suit in the District Court of the corporation's residence, where the bankruptcy occurred. *Held* that, as the trustee could sue only where the bankrupt could sue, the District Court was without jurisdiction; for, while the bankrupt could not have maintained a suit in equity, it could have maintained actions at law for the same relief in courts having jurisdiction over the defendants.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⊂⇒293(1).]

4. BANKRUPTCY ⊂⇒293(1)—COURTS—JURISDICTION—DENIAL.

In view of the limited jurisdiction of federal District Courts under the Bankruptcy Act, jurisdiction to entertain a suit in the nature of a plenary suit must be denied, unless shown to exist.

[Ed. Note.—For other cases, see Bankruptcy, Cent. Dig. § 411; Dec. Dig. ⊂⇒293(1).]

In Equity. Suit by S. F. Kelley, trustee of the Gibraltar Investment & Home Building Company, a corporation, bankrupt, against Fredericka Aarons and about 3,000 other defendants. Motion of Thomas Gill to dismiss on the ground of want of jurisdiction sustained, and other motions held in abeyance to permit review.

William B. Ogden and Ralph E. Esteb, both of Los Angeles, Cal., for plaintiff.

A. L. Abrahams, of Los Angeles, Cal., for defendant Gill.

BLEDSOE, District Judge. A petition was filed in this court in the bankruptcy proceeding above referred to, setting forth that the above-named bankrupt was a corporation organized under the laws of the state of California, with a capital stock of $2,000,000, divided into 20,000,000 shares of the par value of 10 cents each; that from the claims on file it would be necessary to raise the sum of about $150,000 in order that all of the indebtedness of the said bankrupt and the cost of administration might be paid, and that the only property in the estate other than the unpaid subscriptions to capital stock consisted of an interest in a conditional sale contract of problematical value; that over $4,000,000 of the capital stock of the corporation had been subscribed for and purchased, but a part only of that agreed to be purchased had been paid for, and that there remained unpaid on said purchase price and long past due, according to the terms of the contracts to purchase, about the sum of $480,971.23; that a large majority of the said subscribers and purchasers of said stock are insolvent, and a great many others are nonresidents of the state of California; and that it would require the collection of the full amount remaining due on stock from solvent resident parties in order that sufficient money might be realized therefrom to satisfy the claim

of creditors and pay the cost of administration. Wherefore it was asserted that it was absolutely necessary that payment be ordered of all unpaid subscriptions.

Pursuant to such petition, an order was made, in accordance with the usual practice obtaining, for the payment to the trustee of the unpaid balances due from the various subscribers to capital stock, and, in the event of failure to pay such balances, the trustee was authorized and directed "to institute a suit in equity" to enforce the collection thereof, etc.

Such suit has been commenced in this court against the stockholders referred to, approximating 3,000 in number, in equity, and motions have been made to dismiss the bill of complaint upon various grounds, only one of which, however, will be adverted to at any length herein.

[1] Despite the able and insistent arguments of counsel for defendants, I am persuaded that the suit is properly brought on the equity side of the court. The fact that it is a proceeding to enforce the collection of a trust fund, and also because of the great number of defendants and the fact that only such an amount as will be necessary to pay the debts and expenses of administration of the bankrupt corporation can, in any event, be collected from the solvent stockholders, makes it necessary that one suit in equity should be prosecuted in order that, by an equitable collection and distribution of the assets such as is possible only in a court of equity, complete relief may be had and complete justice may be done in the premises. See Sawyer v. Hoag, 17 Wall. 610, 21 L. Ed. 731; Patterson v. Lynde, 106 U. S. 519, 1 Sup. Ct. 432, 27 L. Ed. 265; Sanger v. Upton, 91 U. S. 56, 23 L. Ed. 220.

[2] The question of the jurisdiction of this court, however, to entertain the suit at all, has given me the greatest concern. Individually, for reasons of economy, efficiency, and convenience, adverted to in Re Baudouine, 101 Fed. 576, p. 577, 41 C. C. A. 318, I have felt that the law ought to be such that this court should be vested with jurisdiction of such a suit as this. However, it is the province of this court to declare, not what the law ought to be, but what it is, as it is laid down by legislative and judicial authority. As concerns a judge, at least, neither learning nor lapse of time has sufficed to weaken Aristotle's benign admonition:

"To seek to be wiser than the laws is the very thing which is by good laws forbidden."

[3] Complainant, in support of the claim that this court has jurisdiction, cites In re Crystal Springs Co. (D. C.) 96 Fed. 945; Skillin v. Magnus (D. C.) 162 Fed. 689; In re Baudouine, supra; Murphy v. Hoffman Co., 211 U. S. 562, 29 Sup. Ct. 154, 53 L. Ed. 327; and 7 Corpus Juris, 9, 255. It will be noticed that each one of these cases was decided previously to the comprehensive and controlling decision of the United States Supreme Court in Bardes v. Hawarden Bank, 178 U. S. 524, 20 Sup. Ct. 1000, 44 L. Ed. 1175, except Skillin v. Magnus, supra, in which Judge Hough of the District Court expressly stated that he was required to follow the ruling of the Circuit Court of Appeals in the Baudouine Case. The Bardes Case holds

substantially that clause 7 of section 2 of the Bankruptcy Act is limited in its effect by the controlling language of section 23b, and that, differentiated in that respect from the Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517, except with the consent of a proposed defendant, a court of the United States has no jurisdiction to entertain a plenary suit prosecuted by the trustee, save in those instances where the bankrupt itself might have brought such suit in such court, if proceedings in bankruptcy had not been instituted. Complainant's counsel meet this situation by asserting that this is a suit brought on the equity side of the court, and therefore was not the sort or kind of a suit which the bankrupt itself could have brought as for a recovery of these unpaid subscriptions. In other words, the bankrupt would have been limited to a suit at law as against such individual delinquent subscribers, and for that reason jurisdiction of this suit in equity is not denied to the courts of the United States under section 23b, but is expressly conferred on those courts through the medium, and because of the comprehensive language of clause 7 of section 2 of the Bankruptcy Act.

I confess that at first blush I was attracted by this suggestion, but upon more mature consideration I am persuaded that it will not bear analysis. The idea seems to have been engendered in the language of the court in the Crystal Springs Case, supra, where it was said:

"Some suggestions have been made as to where suits should be brought on failure to comply with the call. According to Patterson v. Lynde, 106 U. S. 519 [1 Sup. Ct. 432, 27 L. Ed. 265], there should be one suit in equity for adjustment of the whole matter as to all within the jurisdiction. This is not such a suit as the bankrupt could have brought. Scovill v. Thayer, 105 U. S. 143 [26 L. Ed. 968]. Therefore it is not within sections 23a and 23b of the Bankrupt Act, limiting actions by the trustee to where the bankrupt could sue."

Scovill v. Thayer does not, however, go to the extent claimed for it in the contention made. It was decided in that case, not that a suit in equity was a suit which the bankrupt could not bring, but that, because of the fact that there was an agreement between the bankrupt corporation and its stockholders that there should be no liability as against the stockholders and in favor of the corporation as for unpaid subscriptions, in that particular instance, it would have been impossible for the bankrupt itself to have brought suit against the stockholders as for any such unpaid subscription. Such a situation does not exist in the present case. On the contrary, as I read the language of the complaint, and taking, as I conceive I may, judicial notice of the contents of the petition upon which the order to sue was based, there were positive agreements entered into by each of the stockholders in the case at bar with the corporation that the balances of the unpaid subscriptions should be paid at specified dates. Scovill v. Thayer, then, upon the facts, is not similar to, or authority for the proposition asserted in, this case.

In addition, in the Bardes Case the point was sought to be made (178 U. S. 537, 20 Sup. Ct. 1000, 44 L. Ed. 1175) that the federal court had jurisdiction there because, it being a suit to set aside a conveyance made in fraud of his creditors by the bankrupt, the bankrupt himself

could not have brought such a suit to set aside his conveyance voluntarily made, and that, in consequence, in virtue of the language of section 23b, the trustee was authorized to bring the suit in the federal court. In answer to this contention and in denial of the jurisdiction of the federal court, the Supreme Court said:

"But the clause concerns the jurisdiction only, and not the merits, of a case; the forum in which a case may be tried, and not the way in which it must be decided; the right to decide the case, and not the principles which must govern the decision. The bankrupt himself could have brought a suit to recover property, which he claimed as his own, against one asserting an adverse title in it; and the incapacity of the bankrupt to set aside his own fraudulent conveyance is a matter affecting the merits of such an action, and not the jurisdiction of the court to entertain and determine it."

So in this case. While it may be true that the bankrupt corporation could not have sued in equity as for the recovery of these unpaid balances, it could, admittedly, and if bankruptcy had not intervened it probably would, have sued at law to effect their recovery. The mere form in which this action is cast, assuming such form to have been either permissive or obligatory, is not, in my judgment, under the limitations prescribed in the Bardes Case, determinative of the jurisdiction of this court. The statute says that the trustee shall sue only "where the bankrupt * * * might have" sued had no bankruptcy proceedings been instituted. There is no implication to be drawn from this language that the trustee, if he sues in equity, may sue in a different court than the bankrupt, who could have sued only at law, might have employed. Under the inhibition of the statute, jurisdiction is determined by a consideration of the question as to the court where the bankrupt might have sued, not as to the form of action in which the bankrupt might have clothed its suit. So, paraphrasing the language of the court in the Bardes Case, just quoted, the clause is determinative of "the forum in which a cause may be tried," and not the form of action in which it might be brought.

I conclude therefore that the bankrupt, having no right to bring such a suit as this in this court, in any form of action, the jurisdictional essentials of this court not existing, the trustee is not authorized to bring the suit in this court merely because he clothes his action in a form not open to the bankrupt itself. The reasoning of the Bardes Case is to the effect that Congress intended, ex industria, to limit the jurisdiction of this court to controversies strictly and properly part of the proceedings in bankruptcy, and to deny jurisdiction, except upon consent, in independent suits. Mueller v. Nugent, 184 U. S. 1, 16, 22 Sup. Ct. 269, 46 L. Ed. 405. This intention of Congress, all-controlling in the premises, must not be laid out of consideration.

In re Newfoundland Syndicate (D. C.) 196 Fed. 443, cited in Corpus Juris, supra, and relied upon by the complainant herein as supporting the claim of jurisdiction of this court, expressly holds, as I read the case, that though the bankruptcy court would have complete jurisdiction to consider and determine with respect to the necessity for a call upon the stockholders for their unpaid subscriptions in aid of a liquidation of the debts of the bankrupt corporation, yet (page 447) "the enforcement of said assessment against the stockholders alleged to be lia-

ble thereto, however, is plenary in its nature, and, except with their consent, cannot be made in the bankruptcy court. Section 23b, Bankruptcy Act. In the suit to collect such assessment, the defendant is entitled to make all defenses that relate to him in his individual as distinguished from his corporate capacity, such as that he is not a stockholder, or that he has fully paid for the stock taken." This statement seems to be supported by cases cited, and is in consonance with my own view that the proceeding as against the individual stockholder upon his refusal to pay his delinquent subscription is not a mere proceeding in bankruptcy for the collection of the assets of the estate, but a suit plenary in its nature and subject to all the limitations expressed in section 23b of the Bankruptcy Act. These conclusions seem to find support in some of the text-books, viz. Collier on Bankruptcy, p. 489; Remington on Bankruptcy, § 1694, and also section 977. See also Clevenger v. Moore, 71 N. J. Law, 148, 58 Atl. 88, p. 89, where the precise point seems to have been passed upon adversely to complainant's contention herein by the Supreme Court of New Jersey.

[4] Upon the whole case, it may be said that I am not entirely free from doubt as to the question of the jurisdiction of this court. Aside from the reasons given and the authorities cited hereinabove, in the presence of such a doubt, and owing to the limited jurisdiction of this court, I should feel ordinarily that, unless its jurisdiction were shown to exist, jurisdiction should be denied. It occurs to me as not improper, however, to give the complainant in such case the benefit of such doubt in substantial fashion. The question of jurisdiction can be determined in advance of a long and perhaps expensive trial on the merits. By taking up merely one record, upon one motion, by an abbreviated record, economy both of time and of expense can be effected. Imbued with this thought, the court will therefore grant the motion to dismiss as against the complainant and in favor of one of the defendants herein and withhold a ruling upon the other motions, say, 60 days. If within that time appropriate means are taken to obtain a review of this order, a further stay will be granted until the question has been determined on appeal. If, however, at the end of such period no steps have been taken to seek such review, or within that period complainant signifies an intention not to appeal from the order now made, an appropriate order will then be entered granting each and all of the motions to dismiss.

The motion of Thomas Gill, one of the defendants, to dismiss, is granted, upon the sole ground that this court is without jurisdiction to entertain the suit. A ruling upon all other motions made by other defendants, upon various grounds enumerated, will be held in abeyance for 60 days pursuant to the suggestion hereinabove made.

UNITED STATES v. JOHN A. HEITZ, Inc.

(District Court, E. D. Pennsylvania. January 24, 1917.)

No. 4266.

1. CUSTOMS DUTIES ⟸81—ACTIONS—FRAUD.

Notwithstanding the provisions of Act June 22, 1874, c. 391, 18 Stat. 186, and Act Oct. 3, 1913, c. 16, § 3, 38 Stat. 181, that the liquidation of the amount of customs duties shall be final and conclusive, the United States can maintain an action to recover such duties where it has been defrauded of the amount actually due.

[Ed. Note.—For other cases, see Customs Duties, Cent. Dig. § 197; Dec. Dig. ⟸81.]

2. PLEADING ⟸218(1)—AFFIDAVIT OF DEFENSE—TRIAL QUESTIONS.

Under Practice Act Pa. 1915 (P. L. 486) § 20, where the questions sought to be raised on hearing on affidavit of defense may be raised as trial questions, it is better practice to do so to avoid appeals from interlocutory judgments.

[Ed. Note.—For other cases, see Pleading, Cent. Dig. §§ 549–551, 555, 556, 564; Dec. Dig. ⟸218(1).]

At Law. Action by the United States of America against John A. Heitz, Incorporated. Upon hearing on affidavit of defense. Affidavit overruled in part and sustained in part.

Francis Fisher Kane, U. S. Atty., of Philadelphia, Pa.
Conlen, Brinton & Acker, of Philadelphia, Pa., for defendant.

DICKINSON, District Judge. The questions now raised were set down for hearing under section 20 of the Pennsylvania Practice Act of May 14, 1915 (P. L. 486). They are demurrer questions. A statement of the general scope and scheme of the customs laws and regulations, with the practice thereunder, is necessary, or at least helpful, to an understanding of what the questions are and how they arise. Goods brought into the country are made subject to the payment of duties or customs taxes. The fact of entry brings in the thought of the person who brings the goods and the goods brought—the person and the res. There is a personification of the res, and a liability for the payment of the tax is imposed upon the rem and also upon the person. The amount to be paid must be determined, and to fix it requires the classification of the things imported, or a valuation of them, and sometimes both. The customs laws and regulations afford his day in court to the person liable for the tax, and name a day when the amount fixed becomes a finality. They provide also for the prevention (so far as possible) of evasions of the tax and through seizure of the rem, and forfeitures, fines, and imprisonment of the person for attempted or successful evasions. The scheme, in its broad outlines, is to have the payment to be made liquidated by an official. His action is based upon, or partly based upon, information supplied or confirmed by the person making the entry. If the sum to be paid as liquidated is acceptable to the importer, nothing more is required. If the liquidation is contested, provision is made for the adjustment of the dispute. Provision is likewise made for the finality of decision reached.

The Act of Congress of June 22, 1874 (c. 391, 18 Stat. 186), provides for cases in which the goods have been passed into the commerce of the country under a classification which admits them free of duty or so passed after an undisputed liquidation of the sum to be paid and its payment.

The Act of October 3, 1913 (c. 16, § 3, 38 Stat. 181), provides for both cases of accepted and disputed assessments of the tax.

[1] It would not, of course, be asserted that the adjudication of the amount of the tax to be paid, which these statutes declare to be final and conclusive, could be opened and a reliquidation had of the payment to be made. The only question open, therefore, is whether the instant case is within these acts.

Counsel for the United States start with the proposition that the customs laws declare what duty (subject, of course, to the ascertainment of the amount in any given case of entry) is to be paid, and lay the obligation of payment upon the person bringing in the goods. United States v. Cobb (C. C.) 11 Fed. 78. Their next proposition is that this obligation of payment continues until met, and is not released or superseded by the added remedies conferred of fines, penalties, and forfeitures. Meredith v. United States, 38 U. S. (13 Pet.) 486, 10 L. Ed. 258. The final proposition (which embraces others not necessary to formulate) is that in case of a liquidation, which is the fruit of fraud, there may be a reliquidation and the payment of the proper tax enforced, notwithstanding the above quoted provisions of the statutes. This is based in part upon the fact that the act of 1874 in terms excepts frauds, and the assertion that the act of 1913 does not embrace fraudulent adjudications. The conclusion is that the United States has a good cause of action to recover the sum of which it has been defrauded.

The denial is, in turn, based upon the proposition that the whole obligation is to make payment of the liquidated sum, and that the claim of the United States rests (if it has any basis) upon the sum reliquidated; and as Congress has made no provision for such reliquidation, but, on the contrary, has declared the liquidation as made to be final and conclusive, there is no one authorized to make a reliquidation, and, in consequence, no basis for the claim set forth in the statement. United States v. Sherman, 237 U. S. 146, 35 Sup. Ct. 520, 59 L. Ed. 883, is relied upon, or rather certain phrases in the opinion accompanying the ruling there made are relied upon to support the position taken. It is well to remind ourselves of the oft-stated caution that the language of every opinion must be read in the light of the facts and ruling in the case disposed of in order to a correct understanding of the expressions used. What, then, were the rulings made in the cited case, and what were the facts upon which the rulings were based? The latter appear in the rulings. The rulings were three:

(1) A reliquidation of the amount of duties to be paid on imported merchandise, made more than a year after a regular entry and made without protest or averment of fraud, is not conclusive upon the importer, and its validity may be attacked by him in an action against him, and he is not restricted to the remedy provided by the Customs

Administrative Acts of protest, payment of duties, reliquidation, and appeal.

(2) In a suit by the United States against an importer, a statement of claim which is based solely upon the fact of a reliquidation, made after the year and made without protest and without averment of fraud, does not disclose a good cause of action.

(3) In such a suit, a statement which merely avers that the collector had found fraud and made a reliquidation, without averring fraud as a fact or averring facts which themselves showed fraud, does not set forth a good cause of action.

After getting the clear light shed by the opinion in this case upon the propositions involved in these rulings, they now seem to be self-evident. It is just as evident that the case itself, nor anything in the opinion, is authority, nor could be authority for the contrary doctrine that an importer was released of his obligation to pay customs duties properly payable by fraudulently procuring them to be admitted, as if properly not subject to duties.

It is as clear that this case recognizes a right of action in the government, as that it denies power in the collector or other official to adjudicate the case by finding fraud, determining what is owing and enforcing payment so that the adjudication concludes the defendant and deprives him of all right to contest the findings.

An action will lie for duties which through fraud have not been paid. United States v. National Fibre Co. (D. C.) 133 Fed. 596. The case of United States v. Federal Sugar Co. (D. C.) 211 Fed. 1016 (relied upon by defendant), is itself an authority to sustain an action. It illustrates the distinction between an action based upon fraud averred as a fact and based upon the findings and decisions of the collector. This is nothing else than the distinction between an averment of fraud in fact and an averment that some one had said there was fraud.

The conclusion indicated disposes of the only question which goes to the vitals of the case. There are some which go only to the formalities of the statement of claim. As counsel for the United States have intimated a wish to avoid all such questions by amending the statement, we will not pass upon them until after such amendments are made as counsel desire to make, leave to make which is allowed. Formal disposition of the questions raised by the affidavit of defense can then be made either by its withdrawal by defendant or by order of the court.

[2] One further observation is made bearing upon the practice under the Practice Act. The thought behind section 20 is that questions of law which arise on the face of the statement of claim may be disposed of in limine. There are advantages and serious disadvantages in such a practice. Where the legal questions raised go to the whole cause of action and both parties are content to rest the case and the defense upon the disposition made of them, there is an undoubted gain in disposing of them as demurrer questions. When, however, this is not the case, then there is, or at least may be, introduced all the evils of the practice of appeals from interlocutory judgments from which the Pennsylvania practice has happily been free, except in the few statutory exceptions to the general rule of practice. When therefore the

questions sought to be raised as demurrer questions are questions which may be raised as trial questions, the better practice would seem to be to so rule them. The benefits of so doing are obvious in many cases; not apparent in some and clearly not present in others, but as a rule the advantages lie with the practice indicated. This practice we understand has the sanction of the approval of the Circuit Court of Appeals of the Third Circuit and will be followed until it is otherwise authoritatively ruled.

After the plaintiff has had an opportunity to amend the statement of claim, either side may move a formal disposition of the questions now raised.

JOHN VITTUCI CO. v. CANADIAN PAC. RY. CO.

(District Court, W. D. Washington, N. D. January 26, 1917.)

No. 3514.

1. CARRIERS ⟸62—CARRIAGE OF GOODS—CONTRACTS.
   A contract for the transportation of commodities may be oral.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 195–206½; Dec. Dig. ⟸62.]

2. EVIDENCE ⟸407(2)—PAROL EVIDENCE—CARRIAGE OF GOODS—"BILL OF LADING"—NATURE OF.
   A "bill of lading" is of twofold character, being a receipt and also a contract for the transportation of goods, which is not to be varied by parol evidence.
   [Ed. Note.—For other cases, see Evidence, Cent. Dig. § 1827; Dec. Dig. ⟸407(2).
   For other definitions, see Words and Phrases, First and Second Series, Bill of Lading.]

3. CARRIERS ⟸69(2)—CARRIAGE OF GOODS—ACTIONS—DEMURRER—BILL OF LADING.
   The complaint, which was predicated upon an oral agreement for the transportation of goods by a common carrier, after alleging that the oral agreement was made, stated that defendant issued its receipt or bill of lading for the shipment, which bill of lading was assigned to plaintiff by the shipper. *Held* that, as a bill of lading, though a receipt, is also a written contract for the carriage of goods, which cannot be varied by parol, the complaint is subject to demurrer, being based on an oral contract, which it must be presumed was superseded by the bill of lading, in the absence of allegations to negative the presumption.
   [Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 228, 232½–234; Dec. Dig. ⟸69(2).]

At Law. Action by the John Vittuci Company against the Canadian Pacific Railway Company. On demurrer to the complaint. Demurrer sustained.

Aust & Terhune, of Seattle, Wash., for plaintiff.

Bogle, Graves, Merritt & Bogle, of Seattle, Wash., for defendant.

NETERER, District Judge. [1] The plaintiff predicates his action upon an oral agreement for the transportation of commodities by the

defendant, a common carrier. A demurrer has been filed to the complaint. I think the demurrer must be sustained. While it is stated on the face of the complaint that an oral agreement for the transportation was made, it is likewise stated that the defendant issued "its receipt or bill of lading for said shipment," and that the bill of lading was assigned to the plaintiff by the shipper. An oral contract for the transportation of commodities may be made. Mobile & Montgomery Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527; The Jeannie (D. C.) 225 Fed. 178. But where it is apparent upon the face of the complaint that a bill of lading was issued for the transportation of the commodities, the presumption is that the contract was merged in the bill of lading, which must be the basis of the plaintiff's rights, unless there is some fact pleaded to negative such presumption.

[2] A bill of lading is a contract to transport and deliver the goods to the consignee upon the terms therein specified. The Supreme Court of the United States, in The Delaware, 81 U. S. (14 Wall.) 579, at page 601, 20 L. Ed. 779, speaking of a bill of lading, said:

"Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument. Beyond all doubt a bill of lading, in the usual form, is a receipt for the quantity of goods shipped and a promise to transport and deliver the same as therein stipulated."

The Circuit Court of Appeals of the Second Circuit (Vanderbilt v. Ocean S. S. Co., 215 Fed. 886, 132 C. C. A. 226), speaking through Judge Rogers, said:

"A bill of lading has a twofold character. It is a contract to transport and deliver the goods to the consignee upon the terms specified in it; and it is also a receipt as to the quantity and description of the goods shipped. So far as it embodies the terms of the contract, it is not to be varied by parol evidence."

A bill of lading is a contract for the carriage of goods reduced to writing, and is the only evidence of the contract. Aspinall's Reports of Maritime Cases, vol. 6 (N. S.) 1886–90.

[3] The plaintiff may not sue upon "a special oral agreement," where the oral agreement is merged in a written bill of lading for the shipment of the goods. His right of action must be based upon the bill of lading. Indianapolis & Cincinnati Ry. Co. v. Remmy et al., 13 Ind. 518; Sun Mutual Ins. Co. et al. v. Mississippi Valley Transportation Co. (D. C.) 14 Fed. 699. The cause of action arising from a breach of a written contract of affreightment, evidence could not be received of an oral contract or agreement. The complaint, therefore, does not state a cause of action.

The demurrer is sustained.

MEMORANDUM DECISIONS

BRADY v. SOUTH SHORE TRACTION CO. et al. (Circuit Court of Appeals, Second Circuit. January 9, 1917.) No. 142. Appeal from the District Court of the United States for the Eastern District of New York. Lamar Hardy, Corp. Counsel, Samuel J. Rosensohn, and Vincent Victory, all of New York City, for appellants. Arthur Carter Hume, of New York City, for appellee. Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Decree (233 Fed. 778) affirmed, with costs.

SUNNY BROOK ZINC & LEAD CO. v. METZLER. (Circuit Court of Appeals, Second Circuit. January 9, 1917.) No. 67. Appeal from the District Court of the United States for the Southern District of New York. Hollander & Bernheimer, of New York City (Edgar J. Bernheimer, of New York City, of counsel), for appellant. H. A. Rosenberg, of New York City (Louis B. Eppstein, of New York City, of counsel), for appellee. Before COXE, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Affirmed on the opinion of Judge Learned Hand, in 231 Fed. 304.

THE TITANIC. Appeal of ASPLUND. (Circuit Court of Appeals, Second Circuit. January 9, 1917.) No. 112. Appeal from the District Court of the United States for the Southern District of New York. Ralph J. M. Bullowa, of New York City (Lawrence E. Brown, of New York City, of counsel), for appellants. Harrington, Bigham & Englar, of New York City, for Swedish government. Before WARD, ROGERS, and HOUGH, Circuit Judges.

PER CURIAM. Carlo Asplund and two of his children, passengers on the steamship Titanic, were drowned when that steamer sank in 1912. The Swedish consul, assuming that Asplund was a citizen of Sweden, employed the firm of Harrington, Bigham & Englar to represent the claim of the widow and surviving children and also employed attorneys in England to bring suit on their behalf there. In point of fact Asplund was a naturalized American citizen and therefore the consul was wholly without authority in the premises. The widow took out letters of administration on the estates of her husband and deceased children and employed Ralph J. M. Bullowa, Esq., to represent her and her two surviving children. There is no evidence of bad faith upon the part of any one. We gather from the very imperfect record that the petitioner came to a settlement by the payment of a lump sum to a committee representing all claimants and of an additional fund for the compensation of attorneys. We infer that out of this latter sum $508.60 was awarded in connection with the Asplund claimants, but there is nothing to show the terms of the award. The District Court rightly vacated its earlier order authorizing Harrington, Bigham & Englar to represent the Asplund claimants and then went on to divide the special award of $508.60 between them and Ralph J. M. Bullowa. It is from the latter portion of the order that the Asplund claimants take this appeal. We think it perfectly clear that any award to Harrington, Bigham & Englar, as attorneys for the Asplund claimants was erroneous. The record is so meager that we cannot say what disposition, if any, the lower court should make of the sum in question, and therefore reverse this feature of the order, and remand the case for further proceedings.

END OF CASES IN VOL. 238

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